

# THE STRANGE LIFE OF *STANLEY V. ILLINOIS*: A CASE STUDY IN PARENT REPRESENTATION AND LAW REFORM

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## ABSTRACT

This Article helps describe the growth of parent representation through an analysis of *Stanley v. Illinois*—the foundational Supreme Court case that established parental fitness as the constitutional lynchpin of any child protection case. The Article begins with *Stanley*'s trial court litigation, which illustrates the importance of vigorous parental representation and an effort by the court to prevent Stanley from obtaining an attorney. It proceeds to analyze how family courts applied it (or not) in the years following the Supreme Court's decision and what factors have led to a recent resurgence of *Stanley*'s fitness focus.

Despite *Stanley*'s requirement that states prove parents unfit before taking custody of a child, several doctrines permitted states to do precisely that in the 1970s and 1980s. Those doctrines deem a fitness finding regarding one parent sufficient to deny the other parent custody, even without a hearing on their fitness. These doctrines were developed without wrestling with *Stanley* and are deeply gendered, especially because most non-resident and non-offending parents are fathers. How the law should address such parents is complicated, but *Stanley* ought to be the starting point. In contrast to doctrines ignoring *Stanley* in some child protection cases, the case had significant influence in private adoption law. One factor that explains this contrast is that adoption agencies were well-represented and had power to insist on legal reforms following *Stanley*.

Finally, this Article explores the legal, policy, and academic contexts in which *Stanley* was ignored and in which it now enjoys a resurgence. The Supreme Court decided *Stanley* at a time when academics did not widely study the role of unwed fathers, when policy-makers sought to reform the child protection system largely without reliance on constitutional law, when parents widely lacked lawyers to advocate for them in family court, and when children's lawyers generally sided with state intervention. All four of those contextual

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elements have changed in intervening years, contributing to several recent important cases featuring a resurgence of *Stanley*.

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## I.

### INTRODUCTION

This symposium celebrates the dramatic and important growth of parent representation in child protection cases. It recognizes the crucial role that parents' attorneys play—both for their clients and for the accurate, fair, and constitutional operation of the child protection system. This Article helps tell the story of the growth of parent representation through an analysis of *Stanley v. Illinois*<sup>1</sup>—the foundational Supreme Court case that established parental fitness as the constitutional lynchpin of any child protection case. This Article describes *Stanley*'s litigation, the ways in which family courts<sup>2</sup> applied it (or not) in the years following the Supreme Court's decision, and a recent resurgence of *Stanley*'s application in child protection cases, which coincides with the growth of parent representation.

In *Stanley*, the Supreme Court addressed Peter Stanley's efforts to regain custody of his children from the Illinois foster care system after the death of his partner, Joan Stanley, to whom he was not married. *Stanley* became a canonical case regarding the rights of unwed fathers, and, crucially for the child protection field, it included a broader holding that only parental fitness can justify state action to remove children from their parents' custody.<sup>3</sup> *Stanley* arose as a child protection case, pitting the power of the state against a parent whom state authorities initially alleged to be unfit. The state chose to take a shortcut, however: rather than actually proving Mr. Stanley's lack of fitness, it simply relied on a then-existing state statute rendering all children of an unwed father

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1. *Stanley v. Illinois*, 405 U.S. 645 (1972).

2. I use the phrase "family courts" to refer to the state courts with jurisdiction to decide cases alleging that parents have abused or neglected a child or that a child is otherwise dependent on the state. Some jurisdictions or scholars use the phrase "juvenile court" instead to refer to the same courts, and the two phrases are often used interchangeably in the field. I generally use the term "family court" but use "juvenile court" when referring to a particular jurisdiction whose law uses that phrase to describe its courts or when quoting other authorities' use of the phrase.

3. *Stanley*, 405 U.S. at 658.

and a deceased mother dependent.<sup>4</sup> The Supreme Court declared this shortcut unconstitutional, requiring the state to prove parents unfit before taking custody of children.<sup>5</sup>

*Stanley*'s trial court litigation illustrates the importance of parent representation and the ways that family courts historically diminished this role. *Stanley* itself would not have become a foundational Supreme Court case had Peter Stanley not retained a lawyer eager to challenge a juvenile court's unfair practices, who worked to ensure he could represent Stanley.<sup>6</sup> Stanley nearly had to represent himself. At a moment when Stanley lacked counsel, the judge asked him if he was ready to proceed. Stanley insisted on finding an attorney, telling the judge, "Gee, I would like to acquire an attorney."<sup>7</sup> The judge proceeded anyway and declared Stanley's children dependent based on the absence of a marriage between Stanley and the children's deceased mother. Stanley soon returned to court with an attorney, who pressed the appeal to the Supreme Court.<sup>8</sup>

Many family courts did not follow *Stanley*'s requirement that states prove parents unfit before taking custody of their child in cases with analogous facts. In the absence of strong parent representation<sup>9</sup> in the 1970s and 1980s, several doctrines developed that permitted state agencies to take children into foster care or otherwise change custody arrangements without granting parents the hearings on their fitness that *Stanley* required. Multiple state courts adopted the "one parent doctrine," which permitted states to take custody based only on the unfitness of one parent—even if the state did not allege or prove the other

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4. A "dependent" child is one who is dependent on the state for a home and is, therefore, subject to a family court's power to place the child in foster care. The Supreme Court thus described Stanley's case as "a dependency proceeding instituted by the State of Illinois." *Id.* at 646.

5. *Id.* at 658.

6. See PATRICK T. MURPHY, *OUR KINDLY PARENT—THE STATE 15* (The Viking Press, Inc. ed., 1974).

7. See discussion *infra* Part II.B. As explained in Part II.B, Stanley retained an attorney who moved to withdraw for an apparent conflict of interest. See Transcript of Record at 8, *In re Peter Stanley Jr. and Kimberly Stanley*, Nos. 69J004773, 69J004774 (Ill. Cir. Ct. Juv. Div. May 6, 1969) [hereinafter *Stanley* Trial Transcript] (on file with author). After the judge proceeded to his ruling despite Stanley's request for an attorney, the first attorney, Patrick Murphy, re-entered the case. *Id.* at 98–100.

8. See discussion *infra* Part II.B; see also MURPHY, *supra* note 6, at 15.

9. One widely-respected explanation of what "strong parental representation" entails can be found in the American Bar Association's standards. See STANDARDS OF PRACTICE FOR ATTORNEYS REPRESENTING PARENTS IN ABUSE AND NEGLECT CASES (AM. BAR ASS'N 2006), [http://www.americanbar.org/content/dam/aba/publications/center\\_on\\_children\\_and\\_the\\_law/parent\\_representation/ABA-Parent-Attorney-Standards.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/center_on_children_and_the_law/parent_representation/ABA-Parent-Attorney-Standards.authcheckdam.pdf) [https://perma.cc/B44V-FM M6] (including identifying, researching, and arguing viable legal claims in favor of a parent's claim to custody consistent with a parent's wishes). For purposes of this article, strong parent representation would, when a parent so desired, seek to enforce the parent's right under *Stanley* to custody absent state proof of that parent's unfitness. The ABA did not adopt its parent representation standards until 2006—a date that reflects the absence of an effective parent representation infrastructure in the decades that preceded them.

parent's unfitness.<sup>10</sup> In addition, a group of state administrators adopted rules making it difficult for non-offending parents who lived across state lines to obtain custody of their children.<sup>11</sup> These early authorities ignored *Stanley*. In at least one state, courts adopted the opposite doctrine with a different but related problem—giving custody of children immediately to non-offending parents and closing cases before the parent accused of abuse or neglect had his or her *Stanley*-required fitness hearing.<sup>12</sup>

Those doctrines ignored *Stanley* in some child protection cases—the types of cases in which *Stanley* arose. In contrast, *Stanley* had significant influence in private law disputes. *Stanley* was the first of a series of cases involving unwed fathers' rights in the private adoptions of their children and catalyzed several important statutory reforms in such cases. One factor explaining this contrast between child protection and private adoption cases is representation. Unlike parents in child protection cases, adoption agencies were well-represented and had power to insist on legal reforms following *Stanley*.

The way in which courts should address child protection cases involving non-offending parents continues to raise complicated issues. The law remains inconsistent across states, with many states denying parents fitness hearings. Moreover, these doctrines are deeply gendered. Non-offending parents are usually non-custodial, and most non-custodial parents are fathers.<sup>13</sup> The one-parent doctrine smacks of stereotypical distrust of unwed fathers, casting them not as parents entitled to custody of their children unless proven unfit, but as individuals who should be viewed as dangerous to their children. Resisting that stereotype, however, risks reinforcing another: fathers as heroes swooping in to save their children from depraved and unfit mothers, who may also be deprived of custody without hearings on their fitness. *Stanley* should be the starting point for finding a better balance in the law's approach to these difficult issues.

This Article explores the legal, policy, and academic contexts in which *Stanley* was ignored and in which it now enjoys a resurgence. The Supreme Court decided *Stanley* at a time when academics did not study the role of unwed fathers, when policy-makers sought to reform the child protection system largely heedless of constitutional law, when the children's bar largely sided with state intervention, and when parents often lacked lawyers to advocate for them in family court.<sup>14</sup> These four contextual elements have changed, sometimes radically, in intervening years, contributing to several recent decisions rejecting the one-parent doctrine and making it easier for out-of-state parents to seek custody of their children when the children are placed into foster care.<sup>15</sup> In

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10. See *infra* Parts III.B & V.B.

11. See *infra* Part V.A.

12. See *infra* Part III.C.

13. See *infra* note 68 and accompanying text.

14. See *infra* Part V.C.

15. See *infra* Part VI.B and VI.C.

contrast to their predecessors, these cases feature explicit discussion of *Stanley* and the importance of parental fitness. These cases hopefully will lead to more nuanced laws governing the relationship between maltreated children, their parents—both offending and non-offending—and the state.

This Article will proceed as follows: Part II revisits the litigation of *Stanley v. Illinois* to demonstrate, first, that *Stanley* is a child protection case with direct implications for how child protection law treats cases involving non-offending parents and, second, that *Stanley* illustrates the importance of parent representation. Part III explores how child protection law addresses non-offending parents, often in violation of *Stanley*. The remaining sections explain how the law arrived at this place after *Stanley*. Part IV explains how and why *Stanley* significantly influenced private adoption law. Part V explains how child protection cases involving non-offending parents ignored *Stanley* and analyzes why *Stanley* did not have a stronger immediate impact on those cases. Part VI describes *Stanley*'s more recent resurgence in child protection cases and analyzes why this revival is occurring now.

## II.

### STANLEY V. ILLINOIS: A FOUNDATIONAL CHILD PROTECTION CASE

*Stanley* may be best known as a case impacting private adoptions, but its underlying facts, and the Supreme Court's framing of those facts, presents it, first and foremost, as a child protection case about a legally non-offending parent. Its trial court history also reflects the importance of vigorous parent representation—both for this case and beyond. *Stanley* ultimately held that parents enjoy a substantive due process right to custody of their children and a procedural right to maintain custody unless the state proves them unfit.

#### A. Factual Background—*Stanley as a Child Protection and Non-Offending Parent Case*

As I have discussed elsewhere,<sup>16</sup> *Stanley*'s factual background reveals that, like more recent cases discussed in Part III, it arose as a child protection case but the state litigated it as a non-offending parent case. The case began with state authorities raising questions about Peter Stanley's parental fitness—questions that led to a finding that Stanley had neglected his oldest child. But these same questions were never definitively answered regarding his two younger children, because the state chose to litigate Stanley's marital status rather than his parental fitness. Avoiding the question of Stanley's fitness does not appear to have served any party to the case: it either prevented the state from protecting Stanley's children by rendering the trial court judgment suspect (if he was, in fact, unfit to

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16. See generally Josh Gupta-Kagan, *Stanley v. Illinois's Untold Story*, 24 WM. & MARY BILL RTS. J. 773 (2016).

raise them) or unnecessarily placed Stanley's children in foster care (if he was fit).<sup>17</sup>

Peter and Joan Stanley lived together in Chicago "intermittently" and had three children together.<sup>18</sup> Peter asserted that Joan was his common law spouse,<sup>19</sup> and they used a single family name.<sup>20</sup> However, for reasons not established in the record, Peter and Joan never legally married. Illinois had outlawed common-law marriage decades earlier, so their relationship had no recognized legal status.<sup>21</sup> Whatever their reasons for not formalizing their relationship, there was no doubt about Peter's paternity of their three children, Karen, Peter Jr., and Kimberly.<sup>22</sup> Peter and Joan raised all three children together.<sup>23</sup> Peter Sr. testified he was their father,<sup>24</sup> no party ever challenged his paternity,<sup>25</sup> and the state named him as the father in its petitions.<sup>26</sup> Peter, Joan, and the three children formed a family until Joan's death on September 20, 1968.<sup>27</sup>

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17. *Id.* at 774–75.

18. *Stanley v. Illinois*, 405 U.S. 645, 646 (1972).

19. Stanley's lawyer, Patrick Murphy, began his oral argument to the United States Supreme Court by stating, "For eighteen years, Peter Stanley lived with his common-law-wife." After Chief Justice Burger forced him to acknowledge that Illinois "outlawed" common-law marriage, Murphy stated, "I am using it [the phrase "common law marriage"] in the generic sense of the word. He lived with a woman for eighteen years whom he called his wife." Oral Argument at 1:14, *Stanley v. Illinois*, 405 U.S. 645 (1972) (No. 70-5014), <https://www.oyez.org/cases/1971/70-5014> [<https://perma.cc/S6RU-4MN8>]. At trial, Peter testified that Joan was his wife. *Stanley* Trial Transcript, *supra* note 7, May 6, 1969, at 19. Stanley first requested a continuance so he could produce a marriage certificate but never produced one. *Id.* at 3–4.

20. Patrick Murphy, Peter Stanley's attorney (now a Judge in the State of Illinois, 5th Municipal District, Circuit Court of Cook County Domestic Relations Division), could not recall in a 2014 interview whether Joan was born with the last name Stanley or had changed her name and said he assumed she took Peter's name. Interview with Patrick T. Murphy, counsel for Stanley (Apr. 27, 2014) [hereinafter Murphy Interview] (on file with author).

21. *Stanley*, 405 U.S. at 663–64 (Burger, C.J., dissenting).

22. Peter Jr. was born in 1966 and Kimberly was born in 1968. Karen Stanley was not party to the case that reached the Supreme Court, so the publicly available court records do not include her birth date. Testimony indicated that she was at least ten years old. A probation officer testified that she believed Peter Stanley lived with Joan and the children "for approximately ten years after she [Joan] had Karen." *Stanley* Trial Transcript, *supra* note 7, May 6, 1969, at 17.

23. The probation officer testified that she believed Peter Stanley had lived with Joan Stanley from Peter Jr. and Kimberly's birth onwards. *Id.* at 17–18.

24. *Id.* at 19.

25. At trial, the state's attorney said "we are not here attempting to state or stipulate that the father is not the natural father of these children, just that there is no legal parent surviving, and therefore, these children are dependent children under the Statute." *Stanley* Trial Transcript, *supra* note 7, May 6, 1969, at 6. The state of Illinois later argued to the Supreme Court that "in this record there has been no proof that Peter Stanley in fact is the father of these children" and opened its argument by describing the children as those "assumed to be his." Argument of Morton E. Friedman, Oral Argument, *supra* note 19, at 35:21.

26. Neglect Petition, *In re Peter Stanley Jr.*, No. 69J004773 (Ill. Cir. Ct. Juv. Div. March 21, 1969) (on file with author).

27. *Stanley* Trial Transcript, *supra* note 7, May 6, 1969, at 17–19.

State intervention soon followed. The juvenile court found that Stanley had neglected Karen and gave custody of her to the state, which placed her in a foster home.<sup>28</sup> Karen Stanley never reunited with her father during her childhood.<sup>29</sup>

Peter Stanley sent his younger two children to live with friends of his, the Ness family.<sup>30</sup> The state of Illinois then intervened regarding those children as well, filing a petition on April 1, 1969 alleging that Peter Stanley had neglected his two youngest children but without specifying how Stanley had done so.<sup>31</sup> Rather than prove this unspecified neglect, the state amended its petition to allege only that the children were dependent, because an Illinois statute did not recognize unwed fathers as having parental rights.<sup>32</sup> On this theory, the court placed the youngest children in foster care with the Ness family.<sup>33</sup>

The state's decision to avoid litigating its unfitness allegation against Stanley transformed the case. The legal issue became his and Joan Stanley's marital status; the case was now about Peter Stanley's rights as a non-offending parent objecting to the state child protection system's intervention in his family. Whether there was any evidence to support the state's initial unfitness allegation cannot be said with certainty—we do not know if whatever facts supported the adjudication that Peter Stanley had neglected Karen would have also supported a finding that he neglected his younger children or if other evidence supported the state's initial neglect allegation.

We can infer with some confidence, however, that the state's litigation decision did not serve the children it sought to protect. The state placed the children in foster care and shifted them through five foster homes.<sup>34</sup> Years after their initial placement in foster care, the state ultimately reunified them with their father.<sup>35</sup> If Peter Stanley was a fit parent, then the state's decision

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28. *Id.*, April 1, 1969, at 2. The case file of Peter Jr. and Kimberly discusses this history regarding Karen. The two younger children's cases became the Supreme Court case *Stanley v. Illinois*, and only their cases became available for public viewing. The case involving Karen Stanley remains sealed.

29. Murphy Interview, *supra* note 20.

30. *Stanley v. Illinois*, 405 U.S. 645, 667 (1972) (Burger, C.J., dissenting). Stanley's counsel described his action this way: "He left his children with his long time and trusted friend, the Nesses and he said, 'Would you take care of them?' . . . [It is the] same thing that a wed father might have done." Argument of Patrick Murphy, Oral Argument, *supra* note 19, at 6:30.

31. Neglect Petition, *supra* note 26.

32. *Stanley* Trial Transcript, *supra* note 7, Apr. 15, 1969, at 3.

33. *Id.* at 94.

34. Fredric Soll, *Father Has Hopes of Getting Kids Back*, CHI. TRIB., Apr. 4, 1972, at §1–3, <http://archives.chicagotribune.com/1972/04/04/page/3/article/display-ad-2-no-title> [https://perma.cc/X2S4-WY54].

35. Upon remand from the Supreme Court, the state refiled a petition alleging that Stanley had neglected his two younger children. The case records remain sealed, but the media reported that the juvenile court ruled Stanley unfit in September 1973. See Joseph Sjostrom, *Unwed Dad Loses Rights to Children*, CHI. TRIB., Sept. 14, 1973, at §2–16, <http://archives.chicagotribune.com/1973/09/14/page/36/article/display-ad-33-no-title> [https://perma.cc/8UQ8-GA62]. Stanley then appealed this ruling and, according to his attorney Patrick T. Murphy, the state dismissed the charges against him and returned his children to him. Letter from Patrick T. Murphy, counsel for



precipitated a years-long denial of Stanley's and his children's right to family integrity, unnecessarily harming all three individuals for years before they eventually reunified. If Peter Stanley was, in fact, unfit to raise his two younger children, then the state's decision not even to attempt to prove the neglect that it initially alleged rendered its efforts vulnerable to legal attack. Ultimately, this legal approach forced the children to live through years of uncertainty in multiple foster homes, with the state ultimately abandoning its efforts and leaving two children to live with a questionable father from whom they had been separated for six years.

*B. "Gee, I'd Like to Acquire an Attorney": Stanley and the Importance of Parent Representation*

The trial court litigation of *Stanley v. Illinois*<sup>36</sup> also aptly illustrates the essential need for zealous parent representation. It shows a disturbing willingness by the family court to force a parent to proceed without counsel and an impressive insistence by Stanley that he wanted counsel. Stanley's ability to retain a crusading reformer, Patrick Murphy, and Murphy's ability to stay on the case despite an apparent conflict of interest, were essential to *In re Stanley & Stanley* becoming a landmark Supreme Court case.

Stanley retained Murphy, a self-described activist in charge of Chicago's new Juvenile Legal Aid Society. In a 1974 book, Murphy described his firm as practicing "[Saul] Alinsky law—using a variety of legal actions (some valid, some spurious), investigations, and intelligent use of the media to try to move, embarrass, and change bureaucracies."<sup>37</sup> Murphy used these tactics in his effort to reform both juvenile court and the state agencies that took custody of children deemed delinquent, dependent, or neglected by the court.<sup>38</sup> Murphy did not specifically try to change the statute discriminating against unwed fathers until Peter Stanley retained him.<sup>39</sup> Murphy soon challenged various aspects of the statute and the family court's treatment of Stanley, leading to his ultimately successful appeal to the Supreme Court. While his lawyering was imperfect, his vigorous advocacy made it a Supreme Court case.<sup>40</sup>

The first challenge was whether Murphy could represent Stanley in juvenile court. Murphy had represented Karen Stanley, Stanley's oldest daughter, in the case that found Stanley had neglected her, and this representation presented a likely conflict of interest. Murphy had prosecuted the case leading to an

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Stanley (March 23, 1976), *quoted in* JUDITH AREEN, FAMILY LAW: CASES AND MATERIALS 261 (6th ed. 2012).

36. During the trial court litigation, the case was captioned *In re Stanley & Stanley*.

37. MURPHY, *supra* note 6, at 14.

38. *Id.* at 12–15.

39. *See id.* at 14–15 (describing how Murphy and his team identified various issues for reform and then "happened upon" the state's treatment of unwed fathers).

40. Gupta-Kagan, *supra* note 16, at 786–91 (describing litigation choices in *Stanley*, particularly the choice to rely entirely on equal protection rather than due process arguments).

adjudication that Stanley was not fit to parent Karen.<sup>41</sup> Murphy was then retained by Stanley to defend against the state's allegation that he was not fit. Murphy, through an associate, Fred Meinfelder, requested the trial court's leave to withdraw from representing Stanley due to this conflict, and the court readily granted that leave.<sup>42</sup>

This withdrawal left Stanley without a lawyer, facing a legal action that could deprive him of the legal custody of his two youngest children. The transcript reveals an exchange between Stanley, who insisted on finding a lawyer, and a judge, who appeared eager to move his docket and saw little importance in Stanley having his own attorney, either as a means to challenge the court's likely order against him or to further Stanley's sense of procedural justice:

The Court: Sir, you don't have an attorney at this point. The State is going to proceed and ask the Court to enter a finding of dependency, based on the fact that these children have no legal parent at this time. Are you ready for such a hearing?

Stanley: Is this the attorney? (Indicating Mr. Meinfelder)

The Court: No, he has just withdrawn.

Stanley: No, who is this attorney? [Indicating the guardian *ad litem*]

Attorney Kuzel: I am here for the children, sir.

The Court: Mr. Kuzel represents the children. Are you ready for that hearing? At the last hearing, it was a case of producing a marriage license and, apparently, that has not been done. Do you see any other point in obtaining an attorney to investigate any other aspect of this case?

Apparently from the last hearing, the court recalls that the only point of issue of whether or not you had a marriage license, which has not been produced.

What do you wish to do, sir, proceed with the hearing or what?

Stanley: Gee, I would like to acquire an attorney.

The Court: Well, we are going to proceed to take evidence now and possibly enter some finding which may be vacated if the father comes in with an attorney and presents argument which prevents the court otherwise.<sup>43</sup>

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41. Oral Argument at 22:15, *Stanley v. Illinois*, 405 U.S. 645 (1972) (No. 70-5014), <https://www.oyez.org/cases/1971/70-5014> [<https://perma.cc/4LS5-GGEY>] ("I was the attorney who prosecuted the case.").

42. *Stanley* Trial Transcript, *supra* note 7, May 6, 1969, at 3-6.

43. *Id.* at 7-8.

After the judge forced Stanley to try his case without counsel, Meinfelder and Murphy reevaluated their withdrawal. Meinfelder had remained in the courtroom and appeared concerned by the judge's treatment of Stanley. Meinfelder asked to approach the bench to "determine whether Mr. Stanley can come back," and the judge cut him off, asking if he approached "[a]s a friend of the Court."<sup>44</sup> Meinfelder answered affirmatively<sup>45</sup> and proceeded, essentially, to litigate the case on behalf of Stanley, conducting a cross-examination of the state's witness and a direct examination of Stanley and making a brief closing statement.<sup>46</sup> The court ruled for the state—finding Stanley's children dependent and shifting custody away from him.<sup>47</sup> Within a week, Murphy had filed a motion to vacate that order, and the hearing on that motion focused on whether Murphy could re-enter the case and represent Stanley.

Murphy's argument for re-entering the case rested significantly on the importance of parent representation. Murphy first argued that he did not believe there was an ongoing conflict of interest between his former client, Karen Stanley, and his new client, Peter Stanley,<sup>48</sup> but moved quickly onto the practical reality that Stanley had no other viable option for obtaining representation:

I might further add, if, in fact, Peter Stanley is to be given his right to appeal, we're the only people to appeal. He is not indigent enough to have [the] Public Defender, not wealthy enough to have a lawyer. We'll take this case on for nothing, whereas, [the] Public Defender cannot do that. So, what you do if you cannot allow us [to re-enter] as a friend of the Court, then, you are den[y]ing him [his] right to appeal.<sup>49</sup>

The parties' discussion of Stanley's desire to appeal underscores the importance of each party having his or her own representative. The state's attorney—who, of course, did not represent Stanley and who was directly adverse to him—attempted to cast doubt on Stanley's true wishes:

If I could, Your Honor, Mr. Stanley is not here. We don't know that he does have a definite desire to appeal this matter. As of the last hearing he seemed quite satisfied . . . since we left the child in the home that he chose. . . . Mr. Stanley raised no objection, at that time, and he has indicated not, at that time or since then, to me or any other person of the Court that I know of that he wishes to r[ai]se an appeal.<sup>50</sup>

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44. *Id.* at 9.

45. *Id.*

46. *Id.* at 17–22.

47. *Id.* at 22. The court then appointed the Nesses as Stanley's children's legal guardians, shifting custody from Stanley to the Nesses.

48. *Stanley* Trial Transcript, *supra* note 7, May 16, 1969, at 2–6.

49. *Id.* at 6.

50. *Id.* at 7.

Murphy noted that Stanley was not “quite satisfied” with the prior hearing. In fact, Mr. Stanley had called and asked Murphy to represent him in an appeal and the court quickly accepted that representation.<sup>51</sup>

The court granted leave for Murphy to re-enter the case and represent Stanley.<sup>52</sup> The court accepted Murphy’s argument that he had not previously represented the two younger children who were involved in the current case.<sup>53</sup> The court did not remark explicitly on the importance of Stanley having an attorney but the court’s ruling, permitting Meinfelder to advocate for Stanley as a friend of the court and allowing Murphy to re-enter so he could pursue an appeal, may have reflected a belief in the importance of parent representation.

Thus, a central issue at the trial court stage—taking up about as much attention as the issue ultimately litigated to the Supreme Court—was the importance of parent representation. Peter Stanley deserves credit for pushing this issue—seeking out his own counsel and standing up to the juvenile court judge with his simple statement, “Gee, I’d like to acquire an attorney.” While an ongoing conflict of interest may have existed as a result of Patrick Murphy’s prior representation of Karen Stanley and his later representation of Peter Stanley,<sup>54</sup> Murphy’s commitment both to Peter Stanley and to providing zealous parent representation in this case were essential to *Stanley v. Illinois* becoming a landmark Supreme Court case.

### C. A Legal Precedent to Guide All Child Protection Cases

In the Supreme Court of the United States, *Stanley* earned its place as “one of the leading cases on parents’ rights in the Court’s history,” giving powerful support to parents who oppose state efforts to place their children in foster care.<sup>55</sup> *Stanley* rooted these parental rights in the Due Process Clause and formed the foundation of all the later due process cases addressing child protection law.<sup>56</sup>

*Stanley* established that parents presumptively have the right to custody of their children, that this right is of fundamental importance, and that the state must prove parental unfitness if it seeks to take custody away from a parent. The

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51. *Id.* at 7–9. One is hard-pressed to imagine a prosecutor questioning a defense lawyer’s assertion that a defendant wished to appeal a conviction, or a plaintiff’s attorney questioning whether an insurance company’s lawyer wished to raise a particular point in a tort suit. That the state’s attorney felt he could question what an adverse party truly wanted indicates just how little power parents had.

52. *Id.* at 10.

53. *Id.* at 8–9.

54. Gupta-Kagan, *supra* note 16, at 785 & n.90.

55. MARTIN GUGGENHEIM, WHAT’S WRONG WITH CHILDREN’S RIGHTS 64–65 (2005).

56. For a discussion on how *Stanley* shaped the Supreme Court’s parents’ rights jurisprudence, see Gupta-Kagan, *supra* note 16, at 824–26. This influence depended in large part on the Court deciding the case on due process grounds, in addition to the equal protection grounds argued by the parties. For the story of how the Court came to its due process holding, see *id.* at 786–810, 820–24.

Court concluded that “as a matter of due process of law, Stanley was entitled to a hearing on his fitness as a parent before his children were taken from him.”<sup>57</sup> *Stanley* thus formed the basis for the argument that state agencies must prove *each* parent unfit before placing a child in foster care. Otherwise, “the State registers no gain towards its declared goals when it separates children from the custody of fit parents.”<sup>58</sup>

*Stanley* also included an equal protection holding. The Court held that because all parents “are constitutionally entitled to a hearing on their fitness before their children are removed from their custody. . . . [D]enying such a hearing to Stanley and those like him while granting it to other Illinois parents is inescapably contrary to the Equal Protection Clause.”<sup>59</sup> This equal protection holding addressed explicit sex discrimination—the Court noted that Illinois provided unmarried mothers with a fitness hearing but not unmarried fathers.<sup>60</sup>

*Stanley* also foreshadowed two issues that can be particularly difficult in child protection cases—determining which non-custodial and unwed fathers have constitutional rights and determining whether non-custodial parents have the same due process rights as custodial parents. *Stanley* noted that it addressed a father who “sired and raised” his children and held that such fathers have due process rights to custody.<sup>61</sup> Later, private adoption cases distinguished between fathers who can and cannot claim such rights. These cases culminated in *Lehr v. Robertson*’s holding that unwed and non-custodial fathers have an opportunity to develop a legally-protected relationship with their children and that those unwed fathers who “grasp[] that opportunity” have due process rights.<sup>62</sup> Considering the holdings of *Stanley* and *Lehr* together, any father who has grasped his opportunity in his child appears to have a constitutional right to a fitness hearing before the state can take custody of that child. This includes parents who did not exercise primary custody. In *Stanley*, the Supreme Court majority noted that Stanley lived with his children and their mother “intermittently,”<sup>63</sup> and the dissent pointed out that, at the time the state intervened, he had left his children with another family.<sup>64</sup> Since *Stanley* itself applied to a father who did not exercise full custody rights and did not have physical custody at the time of state

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57. *Stanley v. Illinois*, 405 U.S. 645, 649 (1972).

58. *Id.* at 652.

59. *Id.* at 658.

60. *Id.*

61. *See id.* at 651; *see also* GUGGENHEIM, *supra* note 55, at 65 (noting that *Stanley* did not clarify if all biological fathers or only those who had raised their children had constitutional rights). This issue continues to the present day. *Stanley* led to the Court’s rule in *Lehr v. Robertson* that unwed fathers have an opportunity interest in their children, but can lose constitutional rights if they fail to act on that interest. *Lehr v. Robertson*, 463 U.S. 248, 262 (1983).

62. *Lehr*, 463 U.S. at 262.

63. *Stanley*, 405 U.S. at 646.

64. *Id.* at 667.

intervention, *Stanley* should similarly apply to fathers who have had primary custody.<sup>65</sup>

### III.

#### NON-OFFENDING PARENTS AND CHILD PROTECTION LAW

*Stanley* recognized a constitutional liberty interest in parent-child relationships and required family courts to make a finding of parental unfitness before infringing on that liberty interest. But family courts historically have not applied *Stanley* uniformly in child protection cases involving non-offending parents. In particular, family courts deny custody to non-offending parents without the state proving them unfit<sup>66</sup> or, at the opposite extreme, transfer custody from an *allegedly* unfit parent to a non-offending parent without a trial on the unfitness allegations against the first parent.<sup>67</sup> Because such cases involve a variety of fact patterns and inconsistent responses from one jurisdiction to another, this Part will outline this issue and states' responses to it, while Parts V and VI will discuss how *Stanley* was and was not applied in the years immediately following the Supreme Court's ruling and more recently.

Consider this simplified fact pattern: a child's primary custodian abuses her, state child welfare authorities file a petition in family court seeking custody of the child, and a judge temporarily places the child in foster care. The child's other parent lives apart from the abusive parent, has shared custody of the child, and bears no responsibility for the other parent's abuse. That non-offending parent seeks custody of the child. Is the non-offending parent entitled to custody of the child? Is the child entitled to live with her non-offending parent rather than with strangers in foster care? Must that parent first prove his or her fitness, or must the state prove that parent unfit if it wishes to keep custody of the child? If that parent obtains temporary custody, how should a family court adjudicate permanent custody? Should it grant the non-offending parent custody quickly and close the child protection case, or should the court keep that case open, with orders for rehabilitative services to the abusive, primary custodial parent, and delay a permanent custody decision until it knows more facts?

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65. Courts addressing the rights of non-custodial parents in other contexts have split. Compare *Burke v. Cty. of Alameda*, 586 F.3d 725, 733 (9th Cir. 2009) (applying same parental right to parents with legal but not physical custody), with *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004) (holding that a non-custodial parent lacked authority to assert his child's First Amendment Rights at school). David Meyer has surveyed a range of cases in which non-custodial parents have lost constitutional claims. David D. Meyer, *The Constitutional Rights of Non-Custodial Parents*, 34 HOFSTRA L. REV. 1461, 1473–83 (2006). These cases, however, largely deal with disputes between custodial and non-custodial parents or cases like *Newdow*, in which the custodial parent's authority diminishes non-custodial parent's right to speak on behalf of the child. *Burke* exemplifies a fact pattern more relevant to this article—a dispute between a non-custodial parent and the state where the state also seeks (and has some grounds to seek) to intervene in the custodial parent's rights, leaving the non-custodial parent as the sole fit parent.

66. See *infra* Part III.B.

67. See *infra* Part III.C.

There is significant variation in how courts handle such cases. Extreme approaches remain common, and these approaches fail to follow *Stanley*'s basic instruction to focus on parental fitness. At one extreme, some doctrines treat non-offending parents as if they have few if any rights to their own children. On this extreme, one parent's abuse or neglect justifies state custody of the child over the objection of the other parent, whose fitness is considered irrelevant. At the other extreme, a court immediately grants the non-offending parent custody and then closes the case, even without the allegedly unfit parent getting a hearing on the state's allegations against her. More moderate positions exist as well, but these extremes continue to play out with frequency.

Like much else in the child protection system, this issue is highly gendered. A large majority of foster children are removed from single-parent homes, and a vast majority of these children live in female-headed households.<sup>68</sup> So the abusive parent in this basic fact pattern is usually the mother, and the non-resident and non-offending parent is usually the father. There are, of course, many non-custodial mothers,<sup>69</sup> but the issue of non-offending, non-custodial parents seeking custody during child welfare proceedings most frequently arises when fathers seek custody. Both legal and social work publications routinely address the issue in gendered terms, focusing on non-resident fathers, not on non-offending parents.<sup>70</sup> The child protection system's attitude towards such non-offending fathers (and towards offending mothers) is thus essential to understanding the issue. Extreme approaches to the issue reflect problematic gendered stereotypes. The first extreme—that of denying non-offending parents' custody regardless of their fitness—reflects negative stereotypes of deadbeat, absentee, and abusive fathers. The second extreme treats fathers as heroes, saving their children from bad mothers.

#### A. A Non-Offending Parent Child Protection Case Study

A case study, from a case that I worked on while teaching in the Washington University School of Law's Civil Justice Clinic, illustrates both

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68. See, e.g., Leslie Joan Harris, *Involving Nonresident Fathers in Dependency Cases: New Efforts, New Problems, New Solutions*, 9 J. L. & FAM. STUD. 281, 283–84 (2007) (reporting that more than half and as high as 80% of foster children come from single parent, female-headed households); WASH. STATE DEP'T OF SOC. & HEALTH SERV., RACIAL DISPROPORTIONALITY ADVISORY COMM., RACIAL DISPROPORTIONALITY IN WASHINGTON STATE, SECOND EDITION COMMITTEE REPORT 6 (2008) (reporting that large majorities of foster children in Washington State lived in single-parent homes in 2000); Meyer, *supra* note 65, at 1463 (“[N]on-custodial parents are overwhelmingly men . . .”).

69. E.g., David Pate, Jr., *African American Fathers and Their Involvement in the Child Welfare System*, in CHILD WELFARE FOR THE 21ST CENTURY: A HANDBOOK OF PRACTICES, POLICIES, AND PROGRAMS 635, 637 (Gerald P. Mallon & Peg McCartt Hess eds. 2005).

70. E.g., ABA CTR. ON CHILDREN & THE LAW & NAT'L QUALITY IMPROVEMENT CTR. ON NON-RESIDENT FATHERS & THE CHILD WELFARE SYS., ADVOCATING FOR NONRESIDENT FATHERS IN CHILD WELFARE COURT CASES (2009); U.S. DEP'T OF HEALTH & HUMAN SERVS., WHAT ABOUT THE DADS?: CHILD WELFARE AGENCIES' EFFORTS TO IDENTIFY, LOCATE AND INVOLVE NONRESIDENT FATHERS 39 (2006) [hereinafter WHAT ABOUT THE DADS?].

doctrinal difficulties and family courts' instinctive distrust of unwed fathers.<sup>71</sup> The court appointed our clinic to represent Andrew, a six-week-old infant.<sup>72</sup> Andrew had been born prematurely to his mother, who had used heroin for several years, including while pregnant with Andrew. After spending his first month in the neonatal intensive care unit (NICU), he was finally ready for discharge, but his mother had continued to use heroin. The local child protective services (CPS) agency did not believe she could safely have custody and, therefore, requested court intervention.

The petition named Andrew's father, Charles Grant, and included only his name, address, phone number, and date of birth. The date of birth stood out—Mr. Grant was 58, 30 years older than Andrew's mother, with whom he did not live. The petition's sparse facts showed that Mr. Grant was an older man who had a sexual relationship with a much younger woman who had a serious drug problem. The implication, intentional or not, was clear: he was not father material. No facts related to his parenting warranted inclusion, other than one fact, which triggered a host of negative stereotypes. The students ran a background check on Mr. Grant and discovered that he had been convicted of a homicide in the 1970s and served more than a decade in prison—not exactly a helpful fact.

The student attorneys initially focused on Andrew's mother. They obtained Andrew's complete hospital records, in hopes of finding records of her involvement in her son's life since his birth. Instead, they found a surprise: Mr. Grant had visited Andrew every day since his birth. The hospital social worker described Mr. Grant in glowing terms—always loving and appropriate in his interactions with Andrew and never any indication that he had any substance abuse problem or any other problem that would interfere with his parenting. In contrast, Andrew's mother was discharged from the hospital and had not visited her son in the NICU since. Various individuals had offered Andrew's mother the opportunity to enter drug treatment, but she declined.

The students prepared for the initial hearing, in which they planned to seek immediate release of Andrew to Mr. Grant. They were optimistic for a positive result. After all, Mr. Grant had plainly taken on an active role in Andrew's life, and the hospital notes provided evidence of his fitness. The state did not allege that he was an unfit parent or offer evidence of parental unfitness. Mr. Grant's paternity had not been established, but he stated his willingness to sign an acknowledgement of paternity at the initial hearing. However, the judge was

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71. I have changed names and other identifying details. Much credit for this case goes to the students involved and also to Professor Annette Appell, who directs the Civil Justice Clinic and primarily supervised this case (I assisted and also handled the case during the summer).

72. Our Clinic took appointments to represent both children and parents in child protection cases. Under Missouri law, we were charged with representing Andrew's best interests as his guardian *ad litem* (GAL). We quickly determined that living in his father's custody served his best interests.



clear—she would not risk Andrew’s safety with his father and did not want to establish paternity at the initial hearing.

The state then made a perfunctory request for a finding of reasonable efforts to prevent removal of Andrew from his mother. The state argued that its efforts to enroll Andrew’s mother in treatment amounted to reasonable efforts to prevent Andrew’s foster care placement. The students objected. They argued that the state did nothing for more than one month to confirm Mr. Grant’s paternity, which would not have taken much effort, or permit Andrew to go home to his father, even though he was a regular and positive presence. The judge brushed us off and found that the agency had made reasonable efforts.<sup>73</sup> She also ordered the agency to conduct a DNA test as soon as possible to determine Mr. Grant’s paternity.

As soon as possible took nearly two months. In the meantime, Mr. Grant visited Andrew as much as the CPS agency permitted. When the DNA test finally confirmed his paternity, we suggested that Mr. Grant’s attorney move to place Andrew in his client’s custody. That lawyer then filed a one-paragraph, handwritten motion seeking to transfer custody to his client based on the DNA test. We—as Andrew’s guardian *ad litem* (GAL)—filed a long memorandum in support of that motion. We documented Mr. Grant’s ability to take care of his son—the crib and other baby gear he had, his plans for medical care and child care, his experience with his adult children, and the availability of those adult children to assist with their newborn sibling. We acknowledged his criminal history (which all parties knew) but explained that he had served his time. He had been a productive citizen who avoided further criminal justice system involvement since his release in the late 1980s—a longer period of time than many parents with custody had been alive. We argued that the Missouri statute permitted, if not required, that custody be granted to Mr. Grant<sup>74</sup> and that, if the judge concluded otherwise, such a ruling would create a serious constitutional question about Mr. Grant’s rights.<sup>75</sup>

Prior to the motion, the local CPS agency had resisted Mr. Grant’s efforts. The foster parents had begun talking about adopting Andrew. After reading the motion and our memorandum, the agency made no argument against the motion—but neither would the agency agree with it.

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73. Leslie Joan Harris has surveyed state statutes and case law regarding delayed paternity establishment and found varying rules in different states. Some fault fathers who do not establish paternity, while others excuse fathers’ delays. Harris, *supra* note 68, at 294–96. The better approach is for state agencies to do what we advocated for in the Grant case: “[t]hey should determine legal paternity promptly.” *Id.* at 297.

74. Missouri has enacted a statute governing when juvenile courts must release children to non-offending parents. MO. REV. STAT. § 211.037 (2016).

75. Our strategy of arguing both that Mr. Grant could take care of Andrew well and that he had the legal right to custody of Andrew illustrates the “dual strategy” recommended by parents’ attorneys. Darice Good-Dworak & Diana Rugh Johnson, *The Adjudicatory Hearing*, in REPRESENTING PARENTS IN CHILD WELFARE CASES: ADVICE AND GUIDANCE FOR FAMILY DEFENDERS 153, 207 (Martin Guggenheim & Vivek S. Sankaran eds. 2015).

After a hearing, the judge granted the motion and sent Andrew home to live with his father. The judge ruled that the Missouri statute mandated this result. Several months later, after it was clear that Mr. Grant was taking good care of his son, (and when Andrew's mother had not documented progress in her struggle with substance abuse) the court granted Mr. Grant full custody and closed his child protection case.

This custody order came with benefits and costs for Andrew's mother. Closing the case may have served her interests by shielding her from court-sanctioned government oversight of her ongoing battles with substance abuse, while preserving a later opportunity to seek a modification of the order granting custody to Mr. Grant. But closing the case imposed a cost on her. If Andrew remained in foster care, she would have had more time to avail herself of services and to seek reunification with the help of her court-appointed lawyer.

Soon after this hearing, I told the judge, and others whom I had gotten to know in St. Louis, about my impending move to the University of South Carolina. The judge who heard Andrew and Mr. Grant's case politely wished me well, then paused, mentioned that case, and said, "You know, it's good to be proven wrong from time to time."

Several important truths are embedded in the judge's statement. First, he implicitly conceded his skepticism towards Mr. Grant—even in the absence of any negative evidence about his parenting abilities. Rather than insisting that the state prove Mr. Grant unfit, he put the burden on Mr. Grant to prove his own fitness. Second, it took some significant work to prove the judge's initial instincts wrong, and it was Andrew's GALs, not Mr. Grant's lawyer, who did that work. GALs and even children's attorneys in other jurisdictions (or even others in the same courthouse) may not have taken the same position.<sup>76</sup> The absence of strong advocacy from Mr. Grant's own lawyer illustrates the ongoing challenge of protecting family integrity—without vigorous advocacy, there was little likelihood that this case would have ended as it did.

Elements of the Grant case reflect two extreme options applied in many states and offer insights into the current state of the law and practice regarding non-offending parents. This section will explain those options and then offer some reflections on the state of the law.

### *B. Extreme Option 1: Ignore the Father*

"Low-income noncustodial fathers are often stereotyped as irresponsible absentee parents who must be legally compelled to fulfill their obligations."<sup>77</sup> Non-custodial fathers of foster children may especially be seen as deadbeats to be avoided or feared. If that were true, one would expect child protection agencies to avoid engaging them or to impose multiple prerequisites to such

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76. See *infra* Part V.C.2.

77. Pate, *supra* note 69, at 641.

fathers obtaining custody. Indeed, some research has suggested that precisely such activities take place.<sup>78</sup> The Grant case provides one example—a fit father was ignored by the child protection agency and initially brushed off by a family court judge.

Two frequently applied legal doctrines have effectively justified such an approach: the one-parent doctrine and the Interstate Compact on the Placement of Children. These two doctrines treat non-offending parents as suspect, permitting state authorities to maintain custody of children over non-offending parents' objection unless that parent can prove their fitness to the court and, in one category of cases, agency staff.

The one-parent doctrine implicitly operated at the beginning of the Grants' case. *Stanley* held that the Due Process Clause entitles parents to custody of their children unless and until the state can prove them unfit. Mr. Grant was plainly involved in his son's life and had sought to establish his paternity, and the state made no allegations that Mr. Grant was unfit to raise his son. Nevertheless, the state never even considered him as a caretaker for his son or made any effort to help establish paternity, while his son stayed in the hospital. This reliance on the mother's fitness alone is an example of the one-parent doctrine at work. This doctrine provides that one parent's maltreatment suffices for the state to take custody of the child, thus rendering parents like Mr. Grant legally irrelevant.<sup>79</sup>

If Mr. Grant lived across the Mississippi River in East St. Louis, Illinois, then the second doctrine—the application of the Interstate Compact on the Placement of Children (ICPC) to parents—would have further delayed if not prevented Mr. Grant from obtaining custody. Under that doctrine, before a foster care agency sends a child from one state to another for a foster or adoptive placement, child welfare authorities in the second state must find that the placement will serve the child's interests.<sup>80</sup> That policy is reasonable for foster and adoptive placements but not for non-offending parents. Parents, under *Stanley*, should have presumptive rights to custody, and any determination of their rights should focus on their fitness. Yet the Compact flips those *Stanley*-based rules, denying parents custody and imposing a standard of best interests of the child rather than fitness of the parent.

In practice, both the one-parent doctrine and application of the Interstate Compact to parents is highly gendered. Gender's role in child protection cases has long been recognized; juvenile and family courts “developed as ‘mother-blaming’ institutions where fathers are absent and larger social forces are virtually invisible.”<sup>81</sup> As noted above, mothers far more frequently serve as primary caretakers. As a result, state child protection agencies more frequently

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78. See *infra* Part VI.A.2.

79. See *infra* Part V.B.

80. See *infra* Part V.A.

81. Bernadine Dohrn, *Bad Mothers, Good Mothers, and the State: Children on the Margins*, 2 U. CHI. L. SCH. ROUNDTABLE 1, 4–5 (1995).

bring allegations of unfitness against mothers, and the non-offending parents at issue are overwhelmingly fathers.<sup>82</sup>

Doctrines that deny non-offending parents custody even without a fitness hearing reinforce negative stereotypes of fathers as “absent” and untrustworthy. They are not parents entitled to custody or decision-making power absent proof of unfitness. Rather, they are men to be skeptical of—potential deadbeat dads with inherently suspect childrearing skills.

This distrust can exist whether or not fathers comply with gender norms. *In re LaShonda B.*, an early one-parent doctrine case discussed in Part V.B, involved a father who fulfilled the stereotypical breadwinner role by doing what he could to earn a living and provide for his child, while depending on family members to provide much of the day-to-day care. He traveled frequently for work and stayed with relatives when work permitted. The court described this arrangement as “clearly” inadequate.<sup>83</sup> That conclusion suggests that even men who comply with expected gender roles—at least, lower-income men who do so without earning enough money for a more stable lifestyle—do not benefit from the parental rights established in *Stanley*. This result is particularly ironic given that the law has historically seen breadwinning as a father’s “preeminent” role.<sup>84</sup>

In other states, unwed fathers’ rights can come down to whether they fulfill a breadwinner role, at least as the state defines it, consistent with the law’s historic emphasis on fathers’ breadwinning over all other roles.<sup>85</sup> If an unwed father of a New York foster child wishes to exercise his due process protections by having a trial on the termination of his parental rights—requiring the state prove him unfit by clear and convincing evidence before terminating his rights—then he must prove that he has paid “a fair and reasonable” amount of child support,<sup>86</sup> especially in the months “immediately preceding the filing of the adoption petition.”<sup>87</sup> That child support, however, goes directly to the state, because, in foster care cases, the state has custody of a child in the time leading up to filing a termination of parental rights case. Mothers and married fathers do

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82. *Supra* notes 63–65 and accompanying text.

83. *In re LaShonda B.*, 157 Cal. Rptr. 280, 284 (Ct. App. 1979).

84. See Laurie S. Kohn, *Money Can’t Buy You Love: Valuing Contributions by Nonresidential Fathers*, 81 BROOK. L. REV. 53, 57 (2016) (“The legal system’s current valuation of the paternal breadwinning role as preeminent to any other parental function—particularly a father’s role as caregiver—has deep roots in social norms, traditional family law doctrine, and practical concerns about child well-being and the role of the state.”).

85. See *id.* at 53 (noting that the legal system prioritizes paternal financial contributions above other forms of caretaking).

86. N.Y. DOM. REL. LAW § 111(d)(i) (McKinney 2016).

87. *In re Adoption of Adreona C.*, 914 N.Y.S.2d 546, 547 (App. Div. 2010). One commentator has noted that New York “[c]ourts have noted that the most relevant time frame for consideration when determining consent fatherhood is the six months preceding the filing of an adoption or termination petition.” Amanda Sen, *Measuring Fatherhood: “Consent Fathers” and Discrimination in Termination of Parental Rights Proceedings*, 87 N.Y.U. L. REV. 1570, 1582 (2012).

not face the same obligation to prove child support.<sup>88</sup> This rule can deny parental rights to fathers based on their perceived failure to meet stereotypical male breadwinning obligations, even when these fathers were significantly involved in their children's lives in other ways.<sup>89</sup>

Fathers who defy expected gender roles and seek to be primary caregivers—not breadwinners—also face stiff challenges. In one telling case involving the Interstate Compact on the Placement of Children, discussed in Part V.A, a father spent significant caretaking time with his daughter before the child protection agency removed her due to the mother's neglect without making any allegations against the father. Citing the Interstate Compact, the child protection agency and the family court denied the father custody for one month and limited the father's contact to supervised visits but gave custody to female extended family members.<sup>90</sup> In another Compact case, a social worker's conclusion that paternal custody was not in a child's best interest applied “darned if he does, darned if he doesn't” logic. The case worker was concerned both that the father “did not have a steady income” and that he “was attending school in the evenings and would not be able to parent the child should he become gainfully employed.”<sup>91</sup> That is, the case worker faulted him for not currently fulfilling his gender-specific duty to provide for his child *and* for trying to obtain more education to be a better provider. In yet another case, a non-offending out-of-state father sought custody of his son, whose mother had neglected him and voluntarily relinquished custody. An appellate court upheld termination of the father's rights, raising concerns that the father was “responsible for the care of five small, active children, one of whom has problems similar to those of Warren [which included attention deficit hyperactivity disorder].”<sup>92</sup> The court did not see these responsibilities as a sign of the father's experience or fitness to raise his son but instead concluded that his son's special needs would overwhelm him.<sup>93</sup>

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88. Sen, *supra* note 87, at 1580–82. For an argument that this requirement violates the U.S. Constitution, see *id.* at 1592–97.

89. Sen describes one father subject to this rule who lived with the child for the first few months of her life and subsequently paid support to the child's mother (but not the state) and visited the child regularly. *Id.* at 1571–72.

90. Amended Complaint at 8–9, *Adgerson v. District of Columbia*, No. 1:11-cv-01772-RLW (D.D.C. June 19, 2012). The family court eventually closed the case, allowing the father to obtain custody. He later sued, alleging that the agency's refusal to give him custody of his daughter violated his and his daughter's rights. *Id.* at 9. The agency and the father settled the case. Order, *Adgerson v. District of Columbia*, Case 1:11-cv-01772-RLW (D.D.C. June 19, 2012). The author was one of Adgerson's attorneys in this case.

91. *In re D.F.–M.*, 236 P.3d 961, 963 (Wash. Ct. App. 2010). The father eventually obtained custody, but the court did not disapprove of the case worker's concerns about his employment or education.

92. *Adoption of Warren*, 693 N.E.2d 1021, 1023 (Mass. 1998).

93. This finding was exacerbated by the procedural problems inherent in applying the Compact. A New York foster care agency would not approve placing the child, then in a Massachusetts foster home, in part because it concluded the father did not have the ability to “fully” understand and care for his son given his son's special needs. *Id.* at 1023–24. Details supporting this conclusion are not included in the opinion, and the trial and appellate courts

*C. Extreme Option 2: Treat the Father as a Hero*

Most of the sparse legal commentary that exists criticizes treatment of non-offending fathers for reasons similar to those articulated in Part III.A.<sup>94</sup> But another prevalent practice illustrates the opposite extreme: when a father appears and seeks custody, many states will treat him as the white knight saving the child from both an unfit mother and a troubled foster care system. These states will transfer custody to the father and then close the child protection case, even if the family court never adjudicates the unfitness allegation against the mother.

For this approach, a leading case is *In re M.L.*, in which the Pennsylvania Supreme Court held that, when a non-offending parent (in that case the father) wishes to raise the child, the child does not satisfy the statutory definition of a neglected child, which requires a child to have no available and fit parent.<sup>95</sup> Although superficially logical, this holding raises serious due process concerns, discussed in the dissent.<sup>96</sup> Holding that the child could never be deemed neglected meant the petition would be dismissed and the case closed. There would be no adjudication of the state's neglect allegations against the mother and, as a result, the mother lost custody of her child through state action without her *Stanley*-required fitness hearing. If the mother—this child's primary caretaker—had neglected the child, this decision would absolve the child protection agency of responsibility to provide reunification and rehabilitative services to that parent. The family court and the child protection agency would simply wipe its hands of the case, infringe on the mother's rights, and eliminate whatever benefits might come to the child and mother through rehabilitative services. Other states have similar rules to Pennsylvania's *In re M.L.* rule. Kansas, for instance, gives non-custodial parents the right to custody absent proof of unfitness and does not require trial courts to evaluate whether to pursue reunification with formerly custodial parents before transferring custody to the other parent.<sup>97</sup>

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suggested any such facts would not require close scrutiny because the Compact required New York's assent. *Id.* at 1023 n.2, 1025. The appellate court concluded that the Massachusetts foster care agency had no obligation to help the father understand and address his son's needs because assent from New York was lacking. *Id.* at 1025.

94. *E.g.*, Vivek S. Sankaran, *Parens Patriae Run Amuck: The Child Welfare System's Disregard for the Constitutional Rights of Nonoffending Parents*, 82 TEMP. L. REV. 55 (2009); Angela Greene, *The Crab Fisherman and His Children: A Constitutional Compass for the Non-Offending Parent in Child Protection Cases*, 24 ALASKA L. REV. 173 (2007).

95. *In re M.L.*, 757 A.2d 849, 851 (Pa. 2000); *see also* Harris, *supra* note 68, at 300–01. *In re M.L.* addressed the conflict between two earlier Pennsylvania opinions. 757 A.2d at 850. *In re Justin S.* had held, as *In re M.L.* later did, that a court could change custody of a child without making a dependency determination. 543 A.2d 1192, 1201 (Pa. Super. Ct. 1988). In contrast, *In re Barclay* affirmed a change of custody to a non-offending parent following the entry of a dependency order—suggesting that the existence of a non-offending parent did not eliminate the court's jurisdiction. 468 A.2d 778, 783 (Pa. Super. Ct. 1983). Neither *In re Justin S.* nor *In re Barclay* cited or discussed *Stanley*.

96. *In re M.L.*, 757 A.2d at 854–58 (Cappy, J., dissenting).

97. *In re T.S.*, 74 P.3d 1009, 1017–18 (Kan. 2003).

A similar dynamic occurred in the Grant case. Although Andrew's mother conceded early in the case that she had neglected her son, she was still statutorily entitled to rehabilitation services to help her become and stay sober to raise her son. By closing the case and granting permanent custody to Mr. Grant, such services came to an abrupt halt, and Andrew's mother lost her court-appointed counsel.

Tactically, some parents and their counsel might be attracted to the *In re M.L.* approach. They might be skeptical of rehabilitation services offered through the child protection system and concerned that they will not be able to reunify with their children, which could lead to more severe interventions, especially a termination of parental rights. Indeed, Andrew's mother—who consented to Mr. Grant obtaining custody of Andrew, thus closing the child protection case—may have adopted this tactic. An accused parent making an informed choice to surrender her opportunity to challenge allegations against her by consenting to a non-offending parent's custody differs, of course, from the law denying an accused parent her opportunity to challenge allegations against her.

The *In re M.L.* approach raises complicated policy questions. All other things being equal, the law should always prefer custody with a fit parent over a currently or formerly unfit parent. But in real cases, all other things are rarely equal. The offending parent has often been the primary caretaker the longest and has developed the deepest bonds with the child. The long-term benefits of working towards reunification with that parent may be in tension with immediate custody with the other parent—especially if that other parent lives far away or has significant conflict with the primary custodial parent.

A similar approach to *In re M.L.* raises other policy concerns. Maryland courts have held that a child is “in need of assistance” only if both parents are unfit.<sup>98</sup> Codifying this rule, the Maryland legislature permits a court to dismiss a case and award custody to the non-offending parent, after sustaining unfitness allegations against the other parent.<sup>99</sup> Unlike *In re M.L.*, this statute requires adjudication of the allegations against the offending parent and thus complies with *Stanley*. But this statutory scheme still raises analogous policy questions—it requires making a custody decision without essential information. When a child has been moved from a long-time custodial parent to another parent, reunification might be appropriate if that parent rehabilitates. But when a court closes a case immediately after adjudication, it cannot know if such rehabilitation will occur.

Cases like *In re M.L.* imply gender stereotypes in a different direction than the one-parent doctrine. Under the *In re M.L.* approach, the non-offending parent (usually the father) gets immediate custody and the offending parent (usually the mother) does not even get a fitness hearing, even if she wants one. Under that

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98. *In re Russell G.*, 672 A.2d 109, 116 (Md. Ct. Spec. App. 1996).

99. MD. CODE ANN. CTS. & JUD. PROC. § 3-819(e) (2013).

process, the very accusation of abuse or neglect suffices to brand mothers. The child protection literature has long recognized the essential “bad mother” tropes, which unduly inform what happens in child protection cases.<sup>100</sup> These gender stereotypes can be particularly pernicious when they intersect with racial or ethnic stereotypes.<sup>101</sup> Labeling a mother bad (with or without a trial), transferring custody to a father, and closing a case adheres to such stereotypes and avoids the difficult but essential question: which parent over the long term will serve the child’s best interests?

#### D. Observations on the State of the Law

Those two extremes—the one-parent doctrine and *In re M.L.*—do not fully represent the state of the law. There is an absence of any generally accepted approach. Several states have codified statutes or issued appellate decisions attempting to strike a balance between a non-offending parent’s right to custody with the formerly custodial parent’s rights. In particular, several states give trial courts discretion to strike a precise balance on case-specific facts.<sup>102</sup> But those states do not represent the leading approach, and a core law reform task should be spreading balanced approaches to all states.

The two extreme approaches discussed above share something in common—they give short shrift to very real constitutional concerns established in *Stanley*. Moreover, they ignore key policy reasons to provide more nuanced approaches to non-custodial and non-offending parents.

*Stanley* starts the conversation in a better place; unlike the two extreme options, it focuses on the fitness of each parent claiming custody. And *Stanley*’s equal protection holding—rejecting the state’s explicit sex discrimination—also suggests skepticism of modern practices with implicitly gendered application. Leslie Joan Harris has identified the few states that offer modest models for balancing the rights of custodial (and offending) parents against both the rights of non-offending parents to be granted custody over their children and children’s rights to maintain relationships with both parents.<sup>103</sup> Vivek Sankaran has offered a proposal to balance those rights: grant non-offending parents’ requests for custody absent proof of unfitness, but permit courts to take jurisdiction over cases and order non-offending parents to cooperate with visitation and

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100. See, e.g., Marie Ashe, “Bad Mothers,” “Good Lawyers,” and “Legal Ethics,” 82 GEO. L.J. 2533, 2547 (1993) (describing the “gendered focus of child dependency law” as imposing a “stigma of ‘badness’” on women); Melissa L. Breger, *The (In)visibility of Motherhood in Family Court Proceedings*, 36 N.Y.U. REV. L. & SOC. CHANGE 555, 558 (2012) (identifying “motherhood bias” as a core feature of child protection cases); Dohrn, *supra* note 81, at 5–9 (describing “misogynistic” family court practices).

101. See, e.g., Annette R. Appell, “Bad” Mothers and Spanish-Speaking Caregivers, 7 NEV. L.J. 759, 965–66 (2007); DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE 28 (2002).

102. Harris, *supra* note 68, at 303–05. Precisely identifying the correct balance is beyond the scope of this Article.

103. *Id.* at 303–07 (summarizing balanced approaches in several states).



reunification efforts with the other parent.<sup>104</sup> This proposal ensures that fitness remains the centerpiece of cases and that each parent has a right to a fitness hearing.

*Stanley* provides the starting point to get to a balanced approach. *Stanley* insists that parents from whom the state removes children are entitled to a hearing on their fitness and that the Constitution prefers the non-offending parents who step up to raise their children over foster care. This approach provides legal protections for the relationships between both parents and children and requires the state to prove both parents unfit before it can claim custody over the parents' objections.

The continued presence of doctrines that deny parents custody without a finding of unfitness ought to be surprising, even shocking, given both the prevalence of non-marital childbearing and the clarity of *Stanley's* focus on parental fitness forty-four years ago. The field remains uncomfortable with the topic of non-offending parents and lacks even a basic vocabulary for addressing these fact patterns.<sup>105</sup> Does a court ordering a child to live with a non-offending and non-custodial parent qualify as "reunification" if the child had never lived in that parent's full custody before?<sup>106</sup> If not, does it qualify as a parental placement, in which preferences for parental custody would apply, or a kinship placement, which might be preferred over state custody but with significantly less deference than a parent would get?<sup>107</sup> Different child protection agency administrators use different terminology.<sup>108</sup> What language should describe the fathers at issue: non-offending fathers, non-custodial fathers, or non-resident fathers?<sup>109</sup> Court case naming conventions skate over questions about how to

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104. Sankaran, *supra* note 94, at 84–87.

105. Given the absence of a common vocabulary, academic writers often insert definitions and justifications for their chosen terminology. *E.g.*, Laurie S. Kohn, *Engaging Men as Fathers: The Courts, the Law, and Father-Absence in Low-Income Families*, 35 *CARDOZO L. REV.* 511, 513 n.7 (2013).

106. For an example of a court wrestling with this definitional question and determining that the term "reunification" could apply, see *In re T.S.*, 74 P.3d 1009, 1015–16 (Kan. 2003).

107. Leslie Joan Harris, for example, notes that North Carolina "has no statute dealing particularly with nonresidential fathers but instead treats them as 'relatives.'" Harris, *supra* note 68, at 302.

108. See *WHAT ABOUT THE DADS?*, *supra* note 70, at 39 ("Administrators varied in the terminology they used for this process [of arranging for a foster child to live with his/her father]: Some considered it a placement as any other kin placement, while others were adamant that a child living with a nonresident father should not be called a placement at all.").

109. One ABA publication refers to "nonresident fathers," which it defines as "men whose children are involved in the child welfare system, but who did not live with their children when the suspected abuse or neglect occurred. They are also often referred to as noncustodial fathers." ABA *CTR. FOR CHILDREN & THE LAW, ADVOCATING FOR NONRESIDENT FATHERS IN CHILD WELFARE COURT CASES* iii (2009). Vivek Sankaran appears to use the term "non-offending parents" to describe parents whose children are allegedly maltreated by the other parent, without the non-offending parent's knowledge. See generally Vivek S. Sankaran, *But I Didn't Do Anything Wrong: Revisiting the Rights of Non-Offending Parents in Child Protection Proceedings*, 85 *MICH. B.J.* 22 (2006).

address a non-offending parent. Courts caption child protection cases “In the Matter of Child” or “In re Child,” which can imply that the key question is whether the child has been neglected (in the passive voice), not who neglected the child or what to do if one parent has not neglected the child.

This issue goes beyond semantics. Kinship placements still must meet some standard—kin have the burden of establishing their ability to take care of the child. But it is the state that bears the burden of proving a parent (at least, a primary custodial parent) unfit. The term “non-offending parent” emphasizes the absence of parental unfitness and thus the parent’s presumptive right to custody against the state, while “non-custodial” or “non-resident” suggest that the parent has lesser rights. More broadly, the inconsistency in the vocabulary used reflects the unsettled nature of the law, decades after *Stanley* decided a closely related case.

#### IV.

##### STANLEY’S IMMEDIATE EFFECT ON PRIVATE ADOPTION CASES

*Stanley*’s due process holding shaped future decisions in every area of constitutional family law. But it was not followed with equal vigor in each area. Courts and adoption agencies immediately applied it to private newborn adoption cases. Such cases involved related but different facts, yet cited *Stanley* for the proposition that all unwed fathers, even those who had not raised their children, had fundamental rights and adoption procedures had to change dramatically to account for these rights.<sup>110</sup> In a subsequent case involving unwed fathers challenging private adoptions, the Supreme Court eventually modified these strict interpretations but also confirmed that *Stanley* applied to them.<sup>111</sup>

This strong role for *Stanley* in private adoption cases contrasts sharply with developments in child protection cases. Part V discusses the way in which state family courts often ignored *Stanley* in cases that were far more factually similar—cases in which child protection agencies intervened due to abuse or neglect by one parent, and the other parent (usually the father) came forward to raise the child. *Stanley* would suggest that such fathers should get custody unless the state can prove them unfit, but that did not occur in many cases across various jurisdictions. Family courts and child welfare agencies did not cite or discuss *Stanley* in these cases, uncritically assuming that the case did not apply.<sup>112</sup>

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110. See *infra* notes 118–25 and accompanying text.

111. Ultimately, the Court held that unwed fathers have an opportunity interest in their children but can lose constitutional rights if they fail to act on that interest. *Lehr v. Robertson*, 463 U.S. 248, 262 (1983).

112. See *infra* Part V.B.

A. *Immediate, Uncritical Application of Stanley in Private Adoption Cases*

*Stanley* is best known as the first in the quartet of cases defining unwed fathers' rights in private family law disputes, especially adoptions. Those cases culminated in the now well-known rule from *Lehr v. Robertson* that unwed biological fathers have an opportunity interest in the care, custody, and control of their children, but that they must "grasp[] that opportunity" or surrender their parental rights.<sup>113</sup> *Lehr* upheld state statutes that deemed many unwed fathers who did not sign up for putative father registries to have failed to grasp that opportunity interest.<sup>114</sup> Those statutes were necessitated by earlier cases that applied *Stanley* to private adoption cases.

Unlike the rest of the quartet, *Stanley* involved no private family law dispute, only a fight between a father and a state agency that asserted an interest in protecting children from abuse and neglect. Mr. Stanley had "sired *and raised*" his children over many years.<sup>115</sup> The disputes in the other cases in the quartet were between a non-custodial father and a step-father who was living with the child and the child's mother and sought to adopt the child; they involved disagreements between a mother who believed adoption by the step-father was best for the child and a father who did not, rather than disagreements between a parent and a state child protection agency.<sup>116</sup> Moreover, many unwed fathers challenging adoptions had not raised children as Peter Stanley had raised his; at the very least, in private newborn adoptions, the children were simply too young to have been cared for by any parent. Surely *Stanley's* protections for parents' rights are relevant to these private family law cases, but *Stanley* does not resolve whether an unwed father who has not raised his children has any rights, let alone how courts should balance an unwed father's rights with the rights of an unwed mother who either wants her new partner to adopt the child or wants the child adopted by someone else.<sup>117</sup>

Despite the lack of answers to these questions in *Stanley*, state courts and adoption agencies applied *Stanley* in private newborn adoption cases quickly, strictly, and with little analysis. Resulting media attention focused on how *Stanley* (as interpreted) "put[] adoptions in legal limbo."<sup>118</sup> This story began at the Supreme Court, just two weeks after it decided *Stanley*. Jerry Rothstein—the

113. *Lehr*, 463 U.S. at 262. The other two quartet cases, taken along with *Lehr* and *Stanley*, are *Quilloin v. Walcott*, 434 U.S. 246 (1978), and *Caban v. Mohammed*, 441 U.S. 380 (1979).

114. *Lehr*, 463 U.S. at 250–51.

115. *Stanley v. Illinois*, 405 U.S. 645, 651 (1972).

116. One early commentator predicted that *Stanley* would be limited to state interventions. See Frederick C. Schafrick, *The Emerging Constitutional Protection of the Putative Father's Parental Rights*, 7 FAM. L. Q. 75, 107–08 (1973).

117. Some contemporaneous observers have made this point. See Oscar Marquis, *Recent Decisions: Family Law—Adoptions of Illegitimates*, 61 ILL. B.J. 378, 379 (1973) ("[*Stanley*] can, however, be read narrowly so as to require the consent of the unwed father only in a similar fact situation . . .").

118. Carol Kleiman, *Ruling Puts Adoptions in Legal Limbo*, CHI. TRIB., Dec. 4, 1972, at B7.

biological father of a child put up for adoption by the child's biological mother, without Rothstein's consent<sup>119</sup>—appealed a Wisconsin Supreme Court opinion holding that, as an unwed father, he had no right to notice or a hearing prior to the adoption. The Supreme Court vacated the state court ruling and remanded “for further consideration in light of *Stanley*.”<sup>120</sup> Yet the Court included a signal that applying *Stanley* strictly to adoption cases was not inevitable—its remand order directed the state courts to evaluate the case “with due consideration for the completion of the adoption proceedings and the fact that the child has apparently lived with the adoptive family for the intervening period of time.”<sup>121</sup>

The Wisconsin courts did not immediately take up *Rothstein* on remand. As a result, Illinois courts had the first opportunity to apply *Stanley* in private adoption cases. Just seven weeks after the Supreme Court decided *Stanley*, the Illinois Supreme Court decided a private newborn adoption case. The court described *Stanley* as broadly recognizing “that the interests of the father of an illegitimate child are no different from those of other parents.”<sup>122</sup> The court offered that broad reading of *Stanley* without carefully articulating why and without addressing Peter Stanley's particularly significant role in raising his children. The Illinois court simply cited *Stanley* and the *Rothstein* remand order and held that the state private adoption statutes were “unconstitutional insofar as they are in conflict with *Stanley* [and] *Rothstein*.”<sup>123</sup> *Rothstein* was a relatively weak authority given the general rule that an order to vacate and remand does not decide the merits of a case.<sup>124</sup> Courts in other states quickly followed Illinois' lead.<sup>125</sup>

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119. The facts are discussed in the underlying state court opinion. *State ex rel. Lewis v. Lutheran Soc. Servs.*, 178 N.W.2d 56, 57 (Wis. 1970).

120. *Rothstein v. Lutheran Soc. Servs.*, 405 U.S. 1051, 1051 (1972), *vacating and remanding State ex rel. Lewis v. Lutheran Soc. Servs.*, 178 N.W.2d 56 (Wis. 1970).

121. *Id.*

122. *Slawek v. Covenant Children's Home*, 284 N.E.2d 291, 292 (Ill. 1972). The Supreme Court decided *Stanley* on April 3, 1972, and the Illinois Supreme Court decided *Slawek* on May 26, 1972.

123. *Id.* at 292. *Slawek* also referenced a third case, *Vanderlaan v. Vanderlaan*, a custody case between an unwed mother and father. After the Illinois Court of Appeals ruled that an unwed father had no rights to the child, 262 N.E.2d 717, 720 (Ill. App. Ct. 1970), the U.S. Supreme Court remanded for reconsideration in light of *Stanley*. 405 U.S. 1051, 1051. The father won on remand. 292 N.E.2d 145 (Ill. App. Ct. 1972). This ruling did not extend *Stanley*, as it involved a father who had helped raise his children and had been voluntarily given custody of them by their mother. *Id.* at 147.

124. The Supreme Court clarified that a vacate and remand order did “indicate that we found [an intervening precedent] sufficiently analogous and, *perhaps*, decisive to compel re-examination of the case.” *Henry v. City of Rock Hill*, 376 U.S. 776, 777 (1964). Commentators have noted that the import of such orders can be ambiguous in practice, especially in state courts. Erwin Chemerinsky & Ned Miltenberg, *The Need to Clarify the Meaning of U.S. Supreme Court Remands: The Lessons of Punitive Damages' Cases*, 36 ARIZ. ST. L.J. 513, 517–18 (2004).

125. *See, e.g., Doe v. Dep't of Soc. Servs.*, 337 N.Y.S.2d 102, 104–07 (Sup. Ct. 1972); *State ex rel. Lewis*, 207 N.W.2d at 830 (holding that unwed fathers must receive the same procedural rights as married parents). State courts also quickly began relying on *Stanley* to affirm the rights of unwed fathers to seek custody and visitation rights in suits against their former partners. *See, e.g.,*

The first set of law review articles that analyzed *Stanley* and its implications in depth also quickly focused on its impact on adoption cases.<sup>126</sup> One commentator questioned the constitutionality of adoption statutes across the country in light of *Stanley*.<sup>127</sup> He parsed the Court's wording in footnote 9 of the *Stanley* decision to suggest that its holding applied beyond the child protection context<sup>128</sup>—even though the Court in that footnote expressed concern specifically that children will become “wards of the state,” not adopted by another family.<sup>129</sup> Other commentators have relied on the ambiguous and non-precedential *Rothstein* remand order for a similar reading.<sup>130</sup> One academic—who also served as reporter-draftsman for the Committee on a Uniform Parentage Act<sup>131</sup>—described *Stanley* in private custody and adoption terms, as “[a] somewhat imprecise opinion, giving the father an interest in his illegitimate child’s custody and adoption.”<sup>132</sup>

### B. *Stanley* Triggers Fast Legislative Reforms Regarding Private Adoptions

The view that *Stanley* gave unwed fathers interests in their children’s adoptions informed the first legislative responses to *Stanley*, which focused entirely on private adoption cases. The National Conference of Commissioners on Uniform State Laws drafted the Uniform Parentage Act (UPA) in 1973 in direct response both to *Stanley* and other Supreme Court cases disfavoring the historical treatment of so-called “illegitimate” children.<sup>133</sup> The drafters included a provision requiring termination of birth fathers’ rights when an unmarried mother “relinquishes or proposes to relinquish for adoption.”<sup>134</sup> The drafters described this provision as responding directly to *Stanley*, *Rothstein*, and

Marshall v. Stefanides, 302 A.2d 682, 688 (Md. Ct. Spec. App. 1973); Doe v. Doe, 307 A.2d 166, 169 (Conn. 1972).

126. Other contemporaneous articles cite *Stanley* but do not address it in depth. See, e.g., Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a New Equal Protection*, 86 HARV. L. REV. 1, 25–26 (1972) (noting *Stanley* but dismissing the extended applicability of the equal protection holding it contains).

127. See Benjamin G. Reeves, *Protecting the Putative Father’s Rights after Stanley v. Illinois: Problems in Implementation*, 13 J. FAM. L. 115, 116 (1973–1974).

128. *Id.* at 125–26.

129. *Id.* at 126 (citing *Stanley v. Illinois*, 405 U.S. 645, 657 n.9 (1972)).

130. See Peter C. Bazos, *Due Process and Equal Protection, Classifications Based on Illegitimacy*, 1973 WIS. L. REV. 908, 909–10 n.15 (1973); Tracy S. Rich, *Plight of the Putative Father in California Child Custody Proceedings: A Problem of Equal Protection*, 6 U.C. DAVIS L. REV. 1, 15–16 (1973).

131. See Harry D. Krause, *The Uniform Parentage Act*, 8 FAM. L.Q. 1, 1 (1974).

132. *Id.* at 7. Krause went on to note that applying *Stanley* to adoption cases was “causing difficulty with the adoption process in many states,” *id.*, though he suggested that some state courts had applied *Stanley* “very broadly, probably overly broadly,” *id.* at 12.

133. UNIF. PARENTAGE ACT § 2 cmt. (NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS 1973) (citing *Levy v. Louisiana*, 391 U.S. 68 (1968), and *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972)).

134. *Id.* § 25(a) (governing adoptions of unmarried women’s children, including children who did not have a presumed or legal father under other provisions of the UPA).

*Vanderlaan*, focusing exclusively on private adoptions rather than child protection cases and asserting that the UPA seeks to “safeguard” those adoptions rather than the rights of fit parents.<sup>135</sup> The UPA’s reporter-draftsman, Harry D. Krause, described the statute as creating a mechanism for identifying “the *disinterested* unmarried father” and the “very speedy termination of his potential rights” when a mother consents to an adoption.<sup>136</sup> The UPA also established procedures for unwed fathers to establish legal paternity,<sup>137</sup> and those procedures could be relevant in child protection cases to determine whether a specific man is a child’s father. But the UPA was not drafted with this purpose in mind. None of its provisions or comments discusses the child protection system. Nor did a contemporaneous law review article by Krause discuss any intended impact on child protection cases, custody claims between a parent and the state, or custody claims beyond infant adoptions.<sup>138</sup>

Subsequently, state policy-makers and, ultimately, the Supreme Court established rules for applying *Stanley* in these private adoption cases. The Uniform Law Commission lists 14 states as having adopted the 1973 UPA.<sup>139</sup> Other states enacted their own statutes recognizing rights of some unwed fathers in private adoption cases.<sup>140</sup> Child welfare organizations sought to limit unwed fathers’ rights to those “who have either acknowledged paternity or been so adjudicated.”<sup>141</sup> State legislatures adopted new statutes granting unwed fathers some rights while also establishing laws to limit the rights of fathers.<sup>142</sup> In 1976, New York established a putative father registry and denied fathers who failed to sign up for such registries the right to object to their children’s adoption—

135. *Id.* § 25 cmt. (“In the light of the U.S. Supreme Court’s decisions in *Stanley v. Illinois*, *Rothstein v. Lutheran Social Services of Wisconsin and Upper Michigan*, and *Vanderlaan v. Vanderlaan*, and related state court decisions, it is considered essential that the unknown or unascertained father’s potential rights be terminated formally in order to safeguard the subsequent adoption.”) (citations omitted). The “safeguard” terminology was repeated in a law review article by the UPA’s reporter-draftsman. Krause, *supra* note 131, at 14. For a summary of *Vanderlaan*, see *supra* text accompanying note 123.

136. Krause, *supra* note 131, at 14.

137. See, e.g., UNIF. PARENTAGE ACT § 6 (NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS 1973).

138. Krause, *supra* note 131.

139. NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS, LEGISLATIVE FACT SHEET - PARENTAGE ACT (1973), [http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Parentage%20Act%20\(1973\)](http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Parentage%20Act%20(1973)) [<https://perma.cc/EDY3-4GGW>] (last visited Apr. 9, 2017).

140. For instance, the South Carolina legislature enacted a statute in 1981 requiring an unwed father’s consent to an adoption “if he has consistently on a continuing basis exercised rights and performed duties as a parent.” South Carolina Children’s Code, 1981 S.C. Acts 71 (codified as amended at S.C. Code Ann. § 20-7-1710(b)). The legislature has subsequently amended that law to more precisely describe when an unwed father’s consent is required. South Carolina Children’s Code, 2008 S.C. Acts 361 (codified as amended at S.C. Code Ann. § 63-9-310(A)(4)–(5)).

141. Reeves, *supra* note 127, at 135 (quoting the Child Welfare League of America’s statement following a joint meeting with the American Bar Association in the fall of 1972).

142. See, e.g., Reeves, *supra* note 127, at 132–33 (describing a Michigan statute enacted shortly after *Stanley* requiring unwed fathers who did not live with their children’s mother to file a “notice of intent to claim paternity”).

legislation approved by the Supreme Court in *Lehr*.<sup>143</sup> State courts also found exceptions to applying *Stanley* in private adoption cases. The Wisconsin Supreme Court applied one such exception to uphold the adoption in *Rothstein* on remand from the U.S. Supreme Court.<sup>144</sup> The Supreme Court then decided a series of cases in which unwed fathers challenged the private adoptions of their children, and the Court distinguished between fathers who had seized their opportunity interest in their children and those who had not<sup>145</sup> (or, in Krause's terminology, interested and disinterested fathers). These changes culminated in the *Lehr* rule discussed above.<sup>146</sup>

### C. Lessons from Stanley's Application to Private Adoptions

The initially strict application of *Stanley* to private adoptions and quick legislative reforms illustrate several points. First, the initial reaction to *Stanley* involved a superficial analysis of *Stanley*'s holding and the ways it might apply in private family law cases; a more nuanced view took several years of legislative and case law developments.

Second, this early application of *Stanley* to private adoptions solidified the idea that *Stanley*'s due process holding in a public family law case begins our understanding of due process rights in private family law cases. A more concerning corollary may also be true—these legal developments may have solidified into a widespread understanding that *Stanley* was primarily a case about unwed fathers' rights, especially in the context of private adoptions, rather than a parents' rights case more generally or a leading case about state intervention in family life. The academy now generally discusses *Stanley* as the first of the unwed fathers' quartet.<sup>147</sup> Casebooks—even those casebooks that

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143. N.Y. SOC. SERV. LAW § 372-c (McKinney 2017); see *Lehr v. Robertson*, 463 U.S. 248, 265 (1983).

144. The Wisconsin Supreme Court found that a father abandoned his opportunity interest in his child by initially denying paternity and refusing to provide any assistance to his former partner during her pregnancy. See *State ex rel. Lewis v. Lutheran Soc. Servs.*, 227 N.W.2d 643, 646–47 (Wisc. 1975). The father in that case changed his mind about providing for the mother while the mother was still pregnant. He sought involvement with the baby but the mother returned multiple letters that he wrote to her. He could not find her and the baby until after the birth, by which time the mother had surrendered the baby for adoption. *Id.* at 646. The Wisconsin court ruled that “Rothstein abandoned the child” and thus abandoned any interest that could have overcome the mother's desire to place the child for adoption, even when he changed his mind before the child was born. *Id.* at 647.

145. The Court in *Lehr*, decided after *Quilloin v. Walcott*, 434 U.S. 246 (1977), and *Caban v. Mohammed*, 441 U.S. 380 (1979), presented the issue as acknowledging that “the biological connection . . . offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring,” and asking the crucial question of whether he has “grasp[ed] that opportunity.” *Lehr*, 463 U.S. at 262. See also Krause, *supra* note 131, at 14.

146. See *supra* notes 113–14 and accompanying text.

147. See, e.g., Serena Mayeri, *Foundling Fathers: (Non-)Marriage and Parental Rights in the Age of Equality*, 125 YALE L.J. 2292, 2300 (2016); Laura Oren, *Thwarted Fathers or Pop-Up Pops?: How to Determine When Putative Fathers Can Block the Adoption of Their Newborn Children*, 40 FAM. L.Q. 153, 157–58 (2006); David D. Meyer, *Family Ties: Solving the*

address child abuse and neglect law—present *Stanley* alongside adoption cases, even though it actually involved a father fighting the child protection agency for custody.<sup>148</sup>

Finally—and perhaps most importantly—the quickly enacted set of legislative reforms reflect the power of the private adoption bar. Adoption agencies and adoptive families had lawyers who could focus their attention on *Stanley*'s application and develop effective responses to early state court decisions by applying *Stanley* strictly to private adoption cases. With the attention of these lawyers, the statutory and constitutional law regarding unwed fathers in private adoptions developed quickly, creating the legal landscape that largely remains intact today. As the next section describes, these legal developments contrast with what happened in child protection cases—in which the law governing non-offending parents developed without reference to the explicitly relevant Supreme Court precedent.

## V.

### MEANWHILE IN NON-OFFENDING PARENT CASES, *STANLEY* WAS IGNORED

One would expect the state action in public family law cases—a state agency taking custody of children over parents' objections and placing them in state-licensed temporary foster homes—to trigger important procedural protections or at least careful consideration of how *Stanley* should impact procedures in individual cases. Yet while the UPA and putative father registries were developed for private adoptions, “child welfare proceedings remained a world apart.”<sup>149</sup> In particular, policy-makers and state courts began crafting rules that allowed states to deprive non-offending parents of custody of their children without any allegations or proof of parental unfitness.<sup>150</sup> *Stanley* questions, if not

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*Constitutional Dilemma of the Faultless Father*, 41 ARIZ. L. REV. 753, 758–60 (1999); Carolyn Wilkes Kaas, *Breaking Up a Family or Putting It Back Together Again: Refining the Preference in Favor of the Parent in Third-Party Custody Cases*, 37 WM. & MARY L. REV. 1045, 1074 (1996). In one leading recent work, this story has been condensed to a footnote, citing *Stanley* and *Lehr* and the rule that emerged from that quartet. Clare Huntington, *Postmarital Family Law: A Legal Structure for Nonmarital Families*, 67 STAN. L. REV. 167, 203 n.198 (2015). Mass media publications similarly present *Stanley* as a landmark case providing rights to unwed fathers generally, and the first case in a series leading to *Lehr*. E.g., Kevin Noble Maillard, *A Father's Struggle to Stop His Daughter's Adoption*, ATLANTIC (July 12, 2015), <http://www.msn.com/en-us/news/us/a-father%E2%80%99s-struggle-to-stop-his-daughter%E2%80%99s-adoption/ar-AAcERIJ> [<https://perma.cc/X9KT-8Y83>].

148. See, e.g., DOUGLAS E. ABRAMS, SARAH H. RAMSEY & SUSAN V. MANGOLD, CHILDREN AND THE LAW: DOCTRINE, POLICY AND PRACTICE 665 (5th ed. 2014) (placing *Stanley* in a chapter on “Adoption” rather than “Abuse and Neglect” or “Foster Care”); PETER N. SWISHER, ANTHONY MILLER & JANA B. SINGER, FAMILY LAW: CASES, MATERIALS AND PROBLEMS 668 (2d ed. 1998).

149. Harris, *supra* note 68, at 286.

150. State courts were the essential legal players. Federal court review was limited by Supreme Court decisions limiting federal courts' power to hear cases challenging state child protection proceedings. See *Lehman v. Lycoming Co. Children's Servs. Agency*, 458 U.S. 502, 516 (1982) (denying federal *habeas corpus* jurisdiction in a parent's challenge to a completed child protection case); *Moore v. Sims*, 442 U.S. 415, 434–35 (1979) (applying abstention bars to federal



prohibits, such policies. As described in Part III.A and III.B, these policy developments have a distinctly gendered tone, because non-offending parents are overwhelming fathers. *Stanley*'s equal protection holding should raise doubts about a strongly gendered doctrine in child protection law. While private adoption cases applied *Stanley* uncritically, they at least recognized the precedential value of the case. Yet for these child protection cases, in which *Stanley* even more clearly applied, authorities adopted questionable practices with no explicit consideration of the case.

As noted in Part III, some difficult questions exist regarding how to apply *Stanley* in non-offending parent cases—especially how to strike an appropriate balance between a primary custodial parent who rehabilitates from some temporary unfitness and a fit parent who has not previously exercised primary custody. Answering these questions starts with *Stanley*, but the relevant authorities in child protection law largely ignored that case, especially in the years immediately following the Supreme Court's decision.

#### A. *The Interstate Compact on the Placement of Children*

The first example of family courts ignoring *Stanley* came in an esoteric corner of child welfare law—the Interstate Compact on the Placement of Children (ICPC) and, in particular, the question of its application to a parent in one state seeking custody of a child taken by child protective services authorities in another. This question arises in thousands of cases each year.<sup>151</sup> The Compact is designed to ensure some safety checks occur before a court or agency sends a child from one state to another for, in the Compact's terms, a foster or adoptive placement.<sup>152</sup> Consider a child in foster care in Maryland and a potential foster parent in the District of Columbia.<sup>153</sup> When the Compact applies, it requires the

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court intervention in ongoing child protection cases); Martin Guggenheim, *State Intervention in the Family: Making a Federal Case Out of It*, 45 OHIO ST. L.J. 399 (1984) (discussing these and other procedural bars to federal court intervention). Parents may be able to bring Section 1983 claims for damages, but only when their claim was not fully litigated in state court (and thus barred from relitigation in a later case) and when the challenged action was by a state employee or agency rather than a court decision. *Id.* at 410–14, 424; 42 U.S.C.A. § 1983 (West 2017). Direct appeals to the Supreme Court remained possible, but were, of course, rarely heard.

151. Precise figures are hard to find, but an Anne E. Casey Foundation report identified 11,741 ICPC referrals regarding parents in eleven states between 2006 and 2011. VIVEK S. SANKARAN, MICHIGAN LAW, FOSTER KIDS IN LIMBO: THE EFFECTS OF THE INTERSTATE COMPACT ON THE PLACEMENT OF CHILDREN ON THE PERMANENCY OF CHILDREN IN FOSTER CARE 4 (2014), <https://www.law.umich.edu/centersandprograms/pcl/Documents/Final%20Summary%20to%20Casey.pdf> [<https://perma.cc/ARV5-9VSE>].

152. Interstate Compact on the Placement of Children, art. III(a). The Compact can be found at <http://www.aphsa.org/content/AAICPC/en/ICPCArticle.html> [<https://perma.cc/57MV-E97L>]. State legislatures have codified it. *E.g.*, D.C. CODE § 4-1422 (2001).

153. I describe a hypothetical case. But it is one that repeats itself frequently. One could, of course, substitute other jurisdictions, especially metropolitan areas that cross state lines, as along the border between the District of Columbia and Maryland—for example, in big cities like Charlotte, Chicago, Cincinnati, Kansas City, Memphis, New York, Philadelphia, and St. Louis and smaller towns like Augusta, the Quad Cities, and Texarkana.

District to perform a home study and conclude that the foster placement would serve the child's interests before a Maryland foster care agency or family court may place the child there.<sup>154</sup>

If we change the hypothetical so that a District of Columbia parent seeks custody of that same child, the constitutional questions under *Stanley* become apparent: A state agency has placed a child in foster care in Maryland because her mother, who lives in the suburbs outside of the District of Columbia, neglected her. The child has visited regularly with her father, who lives one mile away in the District. The father and mother never married, but the father has clearly seized his opportunity interest in the child and helped raise her. No party alleges that he has abused, neglected, or abandoned his child. Applying the Compact raises several constitutional problems. First, that application denies the fit father custody (and denies the child the benefits of her father's custody) while an agency performs a home study. Second, the father enjoys no presumption of parental fitness—he must prove that the child should live with him by passing the home study, rather than the state having to prove him unfit before taking custody over his objection.<sup>155</sup> Third, the standard applied addresses the child's interests, not the parent's fitness. Fourth, the Compact does not provide a hearing at which the father can challenge a state agency's finding that he should not have his child, which violates his entitlement to a fitness hearing under *Stanley*.<sup>156</sup>

Such a scenario does have some nuance. The state might have a legitimate interest in confirming the biological relationship between the District of Columbia father and the child. In many cases the state may question whether the father has seized his opportunity interest in his relationship with the child and whether he was complicit in the other parent's abuse or neglect. If he obtains custody, the family court should wrestle with whether to keep the case open to supervise the mother's rehabilitation and make any rulings regarding long-term custody between the father, who has the advantage of being a non-offending parent, and the mother, who often has the advantage of being the longer-term primary caretaker.

Given that *Stanley*'s holding is directly on point, no court should apply the Compact to parents without analyzing *Stanley*. Yet in 1976, just four years after *Stanley*, a group of state officials—the Association of Administrators of the Interstate Compact on the Placement of Children—decided to apply the Compact to parents, using language directly contrary to *Stanley*, without even discussing the case. The administrators responded to a request for an advisory opinion in

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154. Interstate Compact on the Placement of Children, art. III(d).

155. *Stanley* did not explicitly determine who bears the burden of proof regarding parental fitness, but strongly suggested the state does. *Stanley v. Illinois*, 405 U.S. 645, 646, 652 (1972); see *supra* notes 57–58 and accompanying text.

156. For a constitutional and policy critique of the ICPC's (continuing) application to non-custodial parents, see Vivek S. Sankaran, *Out of State and Out of Luck: The Treatment of Non-Custodial Parents Under the Interstate Compact on the Placement of Children*, 25 YALE L. & POL'Y REV. 63 (2006).

1976 about an interstate family.<sup>157</sup> Two parents had divorced and the children lived with their mother.<sup>158</sup> A child protection agency later obtained custody of the children due to the mother's unfitness. The administrators considered whether the Compact should apply when the out-of-state father sought custody of those children.<sup>159</sup>

The administrators insisted that the Compact applied to the father in terms difficult to square with *Stanley*. The administrators wrote, "It cannot be assumed that a mother or father is a suitable recipient of a child merely because he or she is the natural parent."<sup>160</sup> The mother's unfitness, according to the administrators, proved that "where trouble has already occurred"—even when the non-offending parent was not involved in the "trouble"—that fitness "may need to be ascertained rather than presumed."<sup>161</sup> Intriguingly, the administrators did not cite any legal authority besides the Compact itself; they made no reference to *Stanley*, to a constitutional presumption of fitness, or to exceptions to such a presumption. They offered no discussion about whether the burden of proof regarding the non-offending parent's fitness should lie on the parent or on the state. Later that year, the administrators reaffirmed their view, writing that the Compact existed because of "the need to ascertain whether the home of a biological parent is in fact able to care for a child."<sup>162</sup>

The administrators' approach contrasts starkly with *Stanley*. The administrators saw application of the Compact as providing essential "protections" against possibly unfit parents and believed those protections outweighed the harm of being kept in foster care.<sup>163</sup> *Stanley*, in contrast, noted that "children suffer from uncertainty and dislocation" when the state forces such protections upon them without first considering parental fitness.<sup>164</sup> By applying the Compact to a non-offending parent, the administrators refused to presume parental fitness and insisted parents establish their fitness to a social worker—with no judicial remedy.<sup>165</sup> *Stanley* explicitly envisioned a judicial hearing on

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157. ICPC Secretariat Opinion No. 32 (Sept. 8, 1976), *reprinted in* AM. PUB. HUMAN SERVS. ASS'N, 1 COMPACT ADMINISTRATOR MANUAL 3.54, 3.54 (2002).

158. If anything, the father's case was stronger than Peter Stanley's because he had been married to the children's mother and thus had unquestioned legal paternity.

159. ICPC Secretariat Opinion No. 32, at 3.55–56.

160. *Id.* at 3.55.

161. *Id.*

162. ICPC Secretariat Opinion No. 34 (1976), *reprinted in* AM. PUB. HUMAN SERVS. ASS'N, 1 COMPACT ADMINISTRATOR MANUAL 3.5861, 3.59 (2002).

163. *Id.*

164. *Stanley v. Illinois*, 405 U.S. 645, 647 (1972).

165. Article III(d) of the Compact provides that, when it applies, children can only be placed across state lines when "the appropriate public authorities in the receiving state shall notify the sending agency, in writing, to the effect that the proposed placement does not appear to be contrary to the interests of the child." Interstate Compact on the Placement of Children, art. III(d), <http://www.aphsa.org/content/AAICPC/en/ICPCArticle.html> [<https://perma.cc/H9VE-8D9V>]. Applying the Compact to a non-offending parent therefore requires such a parent to convince "appropriate public authorities" that it is not "contrary to the interests of" the parent's own child to live with the

fitness and noted that failing to provide one ran contrary to any legitimate child protection interest.<sup>166</sup>

The administrators made no effort to explain away *Stanley*—they simply ignored it. And in its place, they wrapped themselves in vague rhetoric about their beneficent purposes: the Compact should be applied “liberally” to ensure all children “have maximum opportunity for a suitable” placement and that state authorities “have knowledge of the placement and its circumstances” and confidence in its quality.<sup>167</sup> Applying the Compact’s “protections”<sup>168</sup> to parents have led to absurd results—for instance, keeping children in foster care rather than with a parent because a social worker’s home study concluded that a two-bedroom home was too small for a father, his mother, and his child.<sup>169</sup>

The administrators’ opinion survived because many courts similarly ignored *Stanley*. At least eight state courts have upheld application of the Compact against parents whom the state did not allege or prove to have abused or neglected their children or to be otherwise unfit.<sup>170</sup> Like the administrators’ 1976 opinion, these courts’ analyses rest on an assumption directly contrary to *Stanley*’s constitutional presumption that custody with fit parents serves children’s interests. One court, contradicting this presumption, asserted that “[o]nce a court has legal custody of a child, it would be negligent to relinquish that child to an out-of-state parent without some indication that the parent is able to care for the child appropriately.”<sup>171</sup> *Stanley* suggests that courts may not maintain such children in foster care absent some evidence of the parent’s unfitness, but rather than find an exception to *Stanley*, the courts simply ignore it; none of the eight cases even mentions *Stanley*.

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parent. *Id.* The Compact includes no provision for parents to appeal a refusal of public officials to so find.

166. *Stanley*, 405 U.S. at 652.

167. ICPC Secretariat Opinion No. 32, at 3.54–55.

168. *Id.* at 3.59.

169. *In re D.-F.M.*, 236 P.3d 961, 963 (Wash. Ct. App. 2010). The trial court placed the child with his father despite this ruling, but only after much time had passed and over the child protection agency’s objection. That decision was upheld on appeal, in one of the cases discussed in Part V.C. that may indicate a resurrection of *Stanley*. *Id.* at 963, 967.

170. *Faison v. Capozello*, 856 N.Y.S.2d 179 (App. Div. 2008); *Green v. Div. of Family Servs.*, 864 A.2d 921 (Del. 2004); *H.P. v. Dep’t of Children & Families*, 838 So. 2d 583 (Fla. Dist. Ct. App. 2003); *Ariz. Dep’t of Econ. Sec. v. Leonardo*, 22 P.3d 513 (Ariz. 2001); *K.D.G.L.B.P. v. Hinds Co. DHS*, 771 So. 2d 907 (Miss. 2000); *D.S.S. v. Clay Cty. Dep’t of Human Res.*, 755 So. 2d 584 (Ala. Civ. App. 1999); *Adoption of Warren*, 693 N.E.2d 1021 (Mass. 1998); *see also State ex rel. Juv. Dep’t of Clackamas Co. v. Smith*, 811 P.2d 145, 147 n.4 (Or. Ct. App. 1991) (providing in dicta that “[t]he compact *does* apply to a child who is sent to another state for placement with parents or relatives, when someone *other* than a parent or relative makes the placement”).

171. *Dep’t of Children & Families v. Benway*, 745 So. 2d 437, 439 (Fla. Dist. Ct. App. 1999) (finding that a child in Florida could not be returned to his biological father in Vermont until the State of Vermont approved the placement).

### B. One-Parent Doctrine

Just as the Interstate Compact administrators and the courts that upheld their decisions raised serious *Stanley* questions without mentioning the case, family court judges also ignored *Stanley* in cases in which both parents lived within one state. When a family court ruled one parent unfit and the other in-state parent sought custody, jurisdictions split.<sup>172</sup>

Some states established the one-parent doctrine and held that finding one parent unfit sufficed to deprive the other parent of custody. This doctrine also raises a number of obvious questions under *Stanley*, including most importantly whether it violates the non-offending parent's constitutional right to custody absent a hearing on—and proof of—that parent's unfitness. One-parent doctrine cases, like the Compact cases described above in Part V.A, did not cite or discuss *Stanley* when adopting related doctrine.<sup>173</sup> As one commentator has put it, “[i]n these jurisdictions, Supreme Court precedent has played little impact in shaping the jurisprudence involving non-offending parents.”<sup>174</sup>

The 1979 California case *In re LaShonda B.* illustrates how the one-parent doctrine evolved in the years following *Stanley*.<sup>175</sup> The state child protection agency removed LaShonda—a two-month-old infant—after her mother abused her.<sup>176</sup> The father “travelled frequently in his employment as a plasterer and had no permanent residence” but stayed at the homes of various relatives.<sup>177</sup> He planned for his infant daughter to remain in relatives' full-time care, presumably with him living with the child when he stayed with relatives.<sup>178</sup> The state did not allege that he had abused or neglected the child or that he was unfit. And it would have been hard for the state to do so. There was no evidence he had abused the child. The worst the state could say was that he planned to leave the child with family members while he traveled for work. Yet millions of children live with family members other than their parents.<sup>179</sup> The family court found that he was “able to care for the child,” including through “proper day-care

172. For a summary of jurisdictions' differing approaches, see Good-Dworak & Johnson, *supra* note 75, at 205–06.

173. *In re C.R.*, 646 N.W.2d 506 (Mich. Ct. App. 2001); *In re A.R.*, 330 S.W.3d 858 (Mo. App. W.D. 2011), *In re C.R.*, 843 N.E.2d 1188 (Ohio 2006), and *In re Amber G.*, 554 N.W.2d 142 (Neb. 1996). None of these cases cites or seeks to distinguish *Stanley*. The only citation to *Stanley* relates to a different point. *Amber G.*, 554 N.W.2d at 150 (citing *Stanley* for the difference between custody or guardianship and adoption).

174. Good-Dworak & Johnson, *supra* note 75, at 205.

175. *In re LaShonda B.*, 157 Cal. Rptr. 280 (Ct. App. 1979).

176. *Id.* at 281.

177. *Id.* at 282.

178. *Id.*

179. The Census reports that more than 2.8 million children live with adults other than their parents—2.28 million with relatives, and 558,000 with nonrelatives. U.S. CENSUS BUREAU, LIVING ARRANGEMENTS OF CHILDREN UNDER 18 YEARS OLD: 1960 TO PRESENT, tbl.CH-1 (2016), available at <https://www.census.gov/data/tables/time-series/demo/families/children.html> [<https://perma.cc/5XQA-EUCJ>]. In 1979, when *LaShonda B.* was decided, the figures were also large—2.56 million children living without parents, 2.14 with relatives and 423,000 with non-relatives. *Id.*

arrangements.”<sup>180</sup> Citing a prior appellate case, which had quoted *Stanley* at length in reversing an adjudication that a child was dependent based only on one parent’s unfitness, the trial court granted him custody and closed the child protection case.<sup>181</sup> The state appealed.<sup>182</sup>

*In re LaShonda B.* presented what could have been some complicated post-*Stanley* questions. Had the unwed father been involved enough in the baby’s life to assert parental rights? If so, was he entitled to the same deference as Peter Stanley, who had “sired and raised” his children? What specific procedure was he entitled to—a trial on his fitness or some other less formal procedure after adjudication of the mother’s unfitness?<sup>183</sup> After the court gave him custody, should it have kept the child protection case open to supervise the mother’s rehabilitation efforts? These questions may not have easy answers. As the only Supreme Court case involving unwed fathers’ rights and decided just seven years prior, and as the core authority in the state court case relied upon by the trial court, *Stanley* should have been a starting point for the analysis.

*Stanley* was entirely absent from the *In re LaShonda B.* court’s discussion. The California appellate court instead cited a pre-*Stanley* state court decision to overturn the trial court and keep LaShonda in foster care.<sup>184</sup> Moreover, the court offered no clear discussion of what legal standards applied to non-offending parents like LaShonda’s father; the court suggested that “employment, a stable residence, and appropriate day-care arrangements” were required.<sup>185</sup> The court offered no discussion of parental fitness and no discussion of whether *Stanley*’s fitness standard applied or, if so, the appropriate way to apply it to LaShonda’s father’s work and housing situation. The father did not appear to raise a fitness argument explicitly, instead defending the trial court’s ruling that he was able to take care of his child.<sup>186</sup> Nonetheless, the court’s analysis ran directly into *Stanley*’s fitness discussion. The *In re LaShonda B.* analysis suggests that the court could take jurisdiction based on the mother’s abuse and then maintain jurisdiction based on the father’s poverty—even if that poverty would not justify taking jurisdiction in the first instance.<sup>187</sup> The *In re LaShonda B.* court offered no guidance for distinguishing impoverished yet fit parents from those whose children must live in foster care and did not note that the court in *Stanley* disapproved of procedures that made it difficult for “impecunious” parents to

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180. *LaShonda B.*, 157 Cal. Rptr. at 282.

181. *Id.* at 283 (citing *In re Kelvin M.*, 143 Cal. Rptr. 561 (1978)).

182. *Id.* at 281.

183. *LaShonda B.* suggested the latter. *Id.* at 283.

184. *Id.* (citing *In re Adele L.*, 267 Cal. App.2d 397 (1968)).

185. *Id.* at 284.

186. The court stated “We have no due process issue before us . . .” *Id.* at 283. The briefs in the case are unavailable. Email from California Court of Appeal, Second District, Clerk, Jan. 19, 2017 (stating that the records in this case had been destroyed) (on file with author).

187. California courts later confirmed that poverty alone, “even abject poverty resulting in homelessness, is not a valid basis for assertion of juvenile court jurisdiction.” *In re P.C.*, 80 Cal. Rptr. 3d 595, 599 (Ct. App. 2008).

regain custody.<sup>188</sup> The court in *In re LaShonda B.* imposed the burden of proof on the non-offending parent to “make a sufficient showing that he or she is capable,” rather than requiring the state to prove him or her incapable.<sup>189</sup>

The *In re LaShonda B.* court relied on the positive goals of child protection actions, asserting that “[a] petition is brought on behalf of the child, not to punish the parents.”<sup>190</sup> *Stanley*, of course, had required a hearing on parental fitness and suggested that states did not serve children’s interests by avoiding a focus on fitness. Nonetheless, this language from *In re LaShonda B.* has echoed in subsequent court decisions adopting the one-parent doctrine, including those directly citing *In re LaShonda B.*<sup>191</sup> and other cases making similar points.<sup>192</sup> Under these cases, once the state proves one parent unfit, then the state’s child protection agency becomes the driving force by working to reunite the child through a case plan. This work presumes the non-offending parent needs rehabilitation, even if the state has not alleged or proven him unfit. The state will often raise fitness only if it tries to terminate the non-offending parent’s rights or if the non-offending parent seeks custody sooner.<sup>193</sup> In one case, the state agency pursued such a course for nearly four years and alleged the non-offending father was unfit only after it decided to stop working towards custody with him.<sup>194</sup> Other cases rely on the fact that parents can regain custody to justify foster care placements without any fitness findings, essentially regarding the custody loss as a temporary inconvenience.<sup>195</sup> In contrast, *Stanley* emphasized that “children suffer from uncertainty and dislocation” during such separations, and this was one reason a fitness finding was a necessary prerequisite to state custody.<sup>196</sup>

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188. *Stanley v. Illinois*, 405 U.S. 645, 648 (1972).

189. *LaShonda B.*, 157 Cal. Rptr. at 284–85.

190. *Id.* at 283.

191. *See, e.g., In re Constance G.*, 529 N.W.2d 534, 539 (Neb. 1995) (citing *LaShonda B.*, 157 Cal. Rptr. at 284).

192. *See, e.g., In re B.R.*, 97 A.3d 867, 870–71 (Vt. 2014) (noting that “the focus of a CHINS proceeding is the welfare of the child,” and approving the trial court’s focus on the child’s “welfare, rather than on the respective unfitness of each parent”); *In re A.R.*, 330 S.W.3d 858, 863 (Mo. Ct. App. 2011) (finding that once a family court obtained jurisdiction based on one parent’s unfitness, “the court then has the inherent jurisdiction to award custody as it deems will preserve and protect the child’s welfare”); *In re C.R.*, 843 N.E.2d 1188, 1192 (Ohio 2006) (describing a neglect finding as “a determination about the care and condition of a child” that only “implicitly” addresses a parent’s fitness, making explicit findings unnecessary).

193. *See In re Amber G.*, 554 N.W.2d 142, 149–50 (Neb. 1996) (describing state’s reunification efforts without explaining why the father had to participate in them). *Amber G.* upheld depriving a non-offending parent of custody based on abuse or neglect by the other parent, so long as the non-offending parent could later attempt to make “a sufficient showing that he or she is capable of providing proper parental care.” *Id.* at 150. The court did require an unfitness finding against the non-offending parent, *id.* at 149, but permitted that this finding be delayed multiple years, during which the father did not have custody.

194. *Id.* at 150.

195. *See, e.g., In re C.R.*, 843 N.E.2d at 1192.

196. *Stanley v. Illinois*, 405 U.S. 645, 647 (1972).

Other cases treated a non-offending father as a “nonparty” to the case, even when he appeared at hearings seeking custody.<sup>197</sup>

Some states have codified the difference between the constitutional fitness standard adopted in *Stanley* and the treatment provided to non-offending parents.<sup>198</sup> For instance, Missouri statutes provide that non-offending parents do not have a right to custody if they have any criminal history or drug and alcohol abuse within the previous five years.<sup>199</sup> A single arrest for marijuana possession five years prior—perhaps before the child was even born—could deprive such a parent of custody. In contrast, proving unfitness requires some nexus between any past criminal or drug history and the parent’s ability to take care of the child.<sup>200</sup> Maine has codified this difference indirectly, providing that a court can place a child in foster care pending a trial if it finds “that returning the child to the child’s custodian”—singular—“would place the child in immediate risk of serious harm.”<sup>201</sup> North Carolina authorizes the state to take custody based on one parent’s abuse or neglect and treats non-offending parents as no different than other relatives who seek custody yet lack any protected constitutional status.<sup>202</sup>

State statutory and case law vary significantly. Several states have clearly held that non-offending parents have a right to custody absent the state proving them unfit.<sup>203</sup> Several other states make it easier for family courts to grant non-offending parents custody but still fail to address *Stanley* directly. California (after *In re LaShonda B.*) adopted a statute providing that a non-offending parent’s request for custody should be adjudicated under a “detriment” standard.<sup>204</sup> While “detriment” is usually seen as a more favorable standard to parents than best interests,<sup>205</sup> some courts have also called it a “nebulous

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197. See, e.g., *In re Tumari W.*, 885 N.Y.S.2d 753, 754 (App. Div. 2009). *Tumari W.* was an Interstate Compact case, which distinguished an earlier precedent that would have required the release of the child to a non-offending father. *Id.* at 757 (citing *In re Alfredo S.*, 568 N.Y.S.2d 123 (App. Div. 1991)).

198. Counter examples exist as well, as noted in Part III.C. E.g., MD. CODE ANN. CTS. & JUD. PROC. § 3-819(e) (2013).

199. MO. REV. STAT. § 211.037.1(3) (2016).

200. Indeed, commentators summarizing generally-accepted law say that there must be such a nexus for parents who *presently* suffer from some form of substance abuse. “Generally, the mere existence of a parent’s alcoholism or substance abuse does not constitute grounds for a dependency unless the parent demonstrates an unwillingness or inability to properly care for the child. The attorney for the parent should insist that the inquiry focus on the actual parenting of the child.” ANN HARALAMBIE, 1 HANDLING CHILD CUSTODY, ABUSE AND ADOPTION CASES § 11.13, 591 (1993, current as of 2008 Supp.).

201. ME. REV. STAT. § 4034(4) (2004).

202. Harris, *supra* note 68, at 301–02 (citing N.C. GEN. STAT. ANN. § 7B-506(h)(2) (2004)).

203. See, e.g., *In re Bill F.*, 761 A.2d 470, 475–76 (N.H. 2000) (holding that “upon request” a non-offending parent is entitled to custody unless the state can prove unfitness at a “full hearing”); MD. CODE ANN. CTS. & JUD. PROC. § 3-819(e); N.H. REV. STAT. § 169-C:19-e(I) (2010).

204. CAL. WELF. & INST. CODE § 361.2(a) (West 2016).

205. See *In re Jonathan P.*, 172 Cal. Rptr. 3d 846, 858–59 (Ct. App. 2014). But see *In re Jacob P.*, 68 Cal. Rptr. 3d 817, 824 (Ct. App. 2007) (describing detriment and best interests as



standard” that implicates the “emotional security of the child”<sup>206</sup> and considers factors such as children’s wishes—which would not arise in a fitness analysis.<sup>207</sup> The California statute also gives the court discretion to determine whether to give the non-offending parent permanent custody and terminate jurisdiction immediately upon placing the child with that parent—effectively ending the other parent’s rehabilitation efforts—or keep the case open.<sup>208</sup> Florida has adopted a similar statute.<sup>209</sup>

A related but less frequently litigated issue is whether an agency possesses a duty to help non-custodial fathers establish legal paternity. In the Grant case, the case study discussed in Part III.A, the GAL argued that the agency failed to make reasonable efforts to prevent removal, because it failed to make any efforts to establish paternity before the baby was ready for discharge, which would have rendered foster care unnecessary. This argument rests in the statutory duty of each state to make reasonable efforts to prevent removal.<sup>210</sup> The argument lost in that case, but at least one commentator has argued that state agencies should make efforts to “determine legal paternity promptly.”<sup>211</sup> As the Grant case illustrates, that has not been the practice. Regardless of any rights *Stanley* might recognize in unwed fathers, state agencies do not appear to have regularly offered even minimal assistance to such fathers establishing their legal paternity before taking custody of children. Congress passed a law in 1980 requiring states to make reasonable efforts to prevent removal.<sup>212</sup> I have been unable to find a reported state court decision suggesting that such efforts include assistance to establish paternity until 2010. In that case, the court noted that it is not “unduly burdensome” for an agency to assist a parent with a voluntary acknowledgement of paternity by referring non-custodial fathers to appropriate agencies and providing evidence regarding paternity already in the state’s possession.<sup>213</sup> The

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“basically two sides of the same coin” (quoting *In re Randalynne G.*, 118 Cal. Rptr. 2d 880 (2002)).

206. *In re C.C.*, 92 Cal. Rptr. 3d 168, 176 (Ct. App. 2009).

207. *In re C.M.*, 182 Cal. Rptr. 3d 206, 212 (Ct. App. 2014).

208. See CAL. WELF. & INST. CODE § 361.2(b).

209. Under Florida law, if the previously custodial parent cannot have custody, then the other parent “shall” have custody if he or she so desires, but only after a home study and not if “the court finds that such placement would endanger the safety, well-being, or physical, mental, or emotional health of the child.” FLA. STAT. § 39.521(3)(b). This standard is more favorable to parents than a best interests test. See *T.S. v. Dep’t of Children & Families*, 992 So.2d 299, 300 (Fla. Dist. Ct. App. 2008). But just as “detriment” may be a somewhat different standard than fitness, finding a risk to a child’s “well-being” may also provide less protection than a fitness standard. Additionally, the Florida statute, like California, gives courts discretion to give a non-offending parent custody and close a case, ending the other parent’s court-supervised rehabilitative services. FLA. STAT. § 39.521(b)(1)–(2) (2016).

210. States must adopt a state plan in compliance with federal law to receive federal foster care funding. 42 U.S.C. § 671(a)(15)(B) (2012).

211. Harris, *supra* note 68, at 297–99.

212. Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 503 § 671(a)(15) (codified as amended at 42 U.S.C. § 671(a)(15)).

213. *In re Bernard T.*, 319 S.W.3d 586, 605 (Tenn. 2010).

court stated this point without any citation to prior cases, suggesting both a dearth of attention given to it both by agencies and by lawyers who might question agency actions. The court also suggested that a minimal level of assistance would suffice, approving as “reasonable efforts” an agency action that simply told a father to “take the results [of a paternity test] to the juvenile court,” even when, perhaps predictably, the father was unable to establish paternity without more substantial assistance.<sup>214</sup>

### *C. Explaining Child Protection Cases That Ignored Stanley*

There is no easy explanation for how the first Supreme Court case regarding child protection law was ignored in a large number of child protection cases raising factually similar questions. We cannot interrogate the relevant authorities’ stated reasons for ignoring *Stanley*, because they did not offer any. We can, however, suggest several explanations. First, counsel for non-offending parents had long been inadequate and, despite progress celebrated at this symposium, remains so in many jurisdictions. Second, and relatedly, children’s advocates were more firmly established in the years following *Stanley* and, especially in those years, were not likely to challenge the doctrines discussed in this part. Third, a single Supreme Court opinion was simply insufficient to reform a deeply ingrained family court culture, especially without strong advocates to challenge that culture. Fourth, soon after *Stanley*, child protection law adopted a legislative and policy focus, which avoided wrestling with how to apply *Stanley*—a marked contrast to the quick consideration of how *Stanley* would impact private adoption cases discussed in Part IV.

#### *1. Counsel for Non-Offending Parents*

Providing counsel to help individuals facing state invasions of their constitutional rights is an essential means of protecting those rights. Without lawyers, unrepresented litigants are unlikely to effectively assert specific rights they arguably had under *Stanley*. And following the *Stanley* decision, the United States lacked a system to provide parents with counsel, let alone quality counsel. *Stanley*’s trial court history reflected that reality,<sup>215</sup> but a parent’s right to counsel did not reach the Supreme Court, whose decision said nothing about the issue. Most non-offending parents were unlikely to have access to attorneys in many states.<sup>216</sup> No significant parents’ bar in child protection cases existed in the years immediately following *Stanley*. In 1981, the Supreme Court held that the Constitution does not provide a right to counsel in termination of parental

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214. *Id.* at 605–06. The court faulted the father for not informing the agency that he needed more help. *Id.* at 606.

215. *See supra* Part II.B.

216. Harris, *supra* note 68, at 287 n.28.

rights cases.<sup>217</sup> If parents had no constitutional right to counsel in permanent termination cases, then parents surely had no constitutional right to counsel in cases leading to a temporary placement in foster care.

There was no group of attorneys insisting that family courts give non-offending parents hearings on their fitness, or questioning state agencies' assertions that children should come into foster care. Parent defense is marked by its "relative youth" and did not develop until the enactment of federal statutes in the 1970s, hitting powerful roadblocks along the way—not least of which was the Supreme Court's refusal to require states to provide parents with attorneys.<sup>218</sup> Significant growth in the parents' bar has been dated to the twenty-first century—more than 30 years after *Stanley*.<sup>219</sup> As a result, in the years immediately following *Stanley*, the capacity to challenge the development of the one-parent doctrine and the application of the Interstate Compact to parents was functionally quite limited. When parents did have lawyers, available records suggest that they did not consistently raise constitutional arguments based on *Stanley*, even when a case presented issues relating to *Stanley*.<sup>220</sup>

## 2. Counsel for Children

Children were provided a stronger system of courtroom advocates (at least compared to parents) soon after *Stanley*. The Child Abuse Prevention and Treatment Act of 1974 required states to provide guardians *ad litem* (GALs) for children in child protection cases.<sup>221</sup> GALs are obligated to represent what they believe to be in a child's best interest, not the child's stated interests. Much ink has been spilled on the subject of children's representation,<sup>222</sup> and the topic does not require rehashing here. It suffices to note that, while the topic continues to be debated, there is a strong argument that, in practice, children's lawyers (especially best interest advocates) "serve state interests" by supporting state intervention in families.<sup>223</sup> Laws permitting children's lawyers to substitute their own judgment of what is best for their clients for their clients' wishes, explicit and implicit judicial pressure for children's lawyers to side with state agencies,

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217. *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 31–32 (1981) (“[N]either can we say that the Constitution requires the appointment of counsel in every parental termination proceeding.”).

218. See Martin Guggenheim, *The Importance of Family Defense*, 48 FAM. L.Q. 597, 597 (2015) (referring to growth in the decade prior to the article's publication).

219. *Id.*

220. See, e.g., *supra* note 186 and accompanying text (describing the non-offending parent's argument in *In re LaShonda B.*, 157 Cal. Rptr. 280 (Ct. App. 1979)).

221. Pub. L. No. 93-247, § 4(b)(2)(G), 88 Stat. 4, 7. This provision is now codified at 42 U.S.C. § 5106a(b)(2)(B)(xiii) (2012).

222. In particular, two influential symposia were held on the topic. Symposium, *Special Issue on Legal Representation of Children*, 6 NEV. L.J. 571 (2006); Symposium, *Conference on the Ethical Issues in Representation of Children*, 64 FORDHAM L. REV. 1281 (1996).

223. Martin Guggenheim, *How Children's Lawyers Serve State Interests*, 6 NEV. L.J. 805 (2006).

and a broader family court culture all steer children's lawyers to advocate for state intervention.<sup>224</sup>

The record in *Stanley* and later non-offending parent cases support the notion that children's lawyers often serve state interests. The attorney appointed to represent Peter Stanley's two younger children did not object to state intervention. After clarifying that he represented the children and not Stanley,<sup>225</sup> the attorney questioned the state's witness to confirm that she had no knowledge of the Stanleys being married and to introduce Joan Stanley's death certificate.<sup>226</sup> That is, the children's lawyer helped the state make its case that Stanley's two younger children were dependent. In one-parent doctrine cases discussed above in Part V.B, children's lawyers similarly did not object to the application of that doctrine.<sup>227</sup>

### 3. Family Court and Child Protection Agency Culture

Commentators have roundly criticized the culture of family courts, especially in child protection cases. An insular group of repeat players—the family court judges, lawyers, and case workers who practice regularly in family court—is allowed to create an institutional culture where the professionals, although dedicated to serving vulnerable children, are susceptible to group think<sup>228</sup> and make decisions based on heuristics—“cognitive short cuts.”<sup>229</sup> As a result, these repeat players tend to use coercive authority in a therapeutic guise to pressure GALs, other attorneys, and parties to acquiesce to state-created plans to break up families pending parental rehabilitation.<sup>230</sup> Limited access to federal court review<sup>231</sup> has shielded family court culture from any significant intervention.

Studies of case worker behaviors reveal many of the default attitudes and actions that shape family courts' treatment of non-offending fathers. Case workers often “adopt an all-good or all-bad view of fathers,” and negative views

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224. *Id.* at 805, 819–25.

225. See *Stanley* Trial Transcript, *supra* note 7, May 6, 1969 at 8.

226. *Id.* at 16–17.

227. Cases cited *supra*, notes 173, 191–92, do not note objections from children's lawyers to the one-parent doctrine.

228. See Melissa L. Breger, *Making Waves or Keeping the Calm?: Analyzing the Institutional Culture of Family Courts Through the Lens of Social Psychology Groupthink Theory*, 34 L. & PSYCHOL. REV. 55, 60–62 (2010) (explaining that group cultures with certain characteristics, including those in family courts, are particularly susceptible to groupthink).

229. See Matthew I. Fraidin, *Decision-Making in Dependency Court: Heuristics, Cognitive Biases, and Accountability*, 60 CLEV. ST. L. REV. 913, 938–39 (2013) (finding that high caseloads and time pressures in family court lead decision-makers to “employ a variety of effort-reducing, time-saving heuristics”).

230. See Amy Sinden, “*Why Won't Mom Cooperate?*”: *A Critique of Informality in Child Welfare Proceedings*, 11 YALE J.L. & FEMINISM 339, 343–44 (1999).

231. See *supra* note 150 and accompanying text (describing limits on federal court jurisdiction over child protection cases).

can become self-fulfilling prophecies.<sup>232</sup> Studies have documented how case workers often “deactivate” fathers who do not live with mothers in case management data systems, effectively sidelining them from case planning involvement.<sup>233</sup> Even after the Supreme Court decided *Stanley*, family courts continued to manifest a “deeply embedded” culture of ignoring non-custodial parents, especially fathers.<sup>234</sup>

When case workers arrive in family court, they often find a culture suspicious of due process protections for parents; such suspicion was evident in *Stanley* and remains so in modern doctrines. The ICPC and one-parent doctrines are part of a family court culture in which judges, CPS agencies, and lawyers (including many lawyers for parents and children) see themselves as engaged in an exercise that helps children. Keeping a child in foster care without a finding that the parent seeking custody is unfit is therefore seen as protective rather than invasive. Decisions applying the Compact to parents reflect that culture, asserting that the Compact should be “liberally” construed to serve children’s interests—without questioning whether such application actually serves those interests.<sup>235</sup> Language from cases like *In re LaShonda B.* also reflect that culture, describing the child protection case as about the child, not the parent, and placing soft rhetorical edges on a decision ignoring the value of parents and children living together.

This culture is evident in the trial transcripts of *Stanley*. Most importantly, the state amended its petition to avoid having to put on any evidence that Peter Stanley was an unfit father or that living in the state’s legal custody would serve his children’s best interests. The state’s decision to avoid a focus on Mr. Stanley’s fitness conformed with a family court culture that presumed foster care would serve children’s interests regardless of parental fitness. Such trial tactics continue to this day. In a recent one-parent doctrine case, Michigan authorities chose to rely on the one-parent doctrine rather than prove a father unfit<sup>236</sup>—just as Illinois authorities had relied on the absence of a marriage between Peter and Joan Stanley rather than prove Peter Stanley unfit.<sup>237</sup>

Family court practitioners have documented the power of family court culture. When non-offending parents, especially fathers, seek custody, the default response has been: “*We don’t do it that way in juvenile court.*”<sup>238</sup> A practice guide describes it this way:

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232. Christina A. Campbell, Douglas Howard, Brett S. Rayford & Derrick M. Gordon, *Fathers Matter: Involving and Engaging Fathers in the Child Welfare System Process*, 53 CHILD. & YOUTH SERVS. REV. 84, 85 (2015).

233. *Id.* at 87.

234. Harris, *supra* note 68, at 286.

235. *See supra* note 167 and accompanying text.

236. *In re Sanders*, 852 N.W.2d 524, 527 (Mich. 2014).

237. *See supra* Part II.A.

238. Cyrenthia D. Shaw, *Creating a New Norm: Engaging Fathers Through Direct Representation in Child in Need of Protection or Services Action*, 40 WM. MITCHELL L. REV. 1143, 1157 (2014).

[F]ew fathers who become involved [in their children's case] have a positive experience. Most say that they don't understand what is expected of them, and that the system makes them jump through hoops to see their kids. They don't understand why they are looked at with suspicion or why placing their children with complete strangers is better than letting their "kids come home" with them. They become frustrated and angry with "the system," causing them and their children to lose out.<sup>239</sup>

The American Bar Association's self-described "practical guidance" to attorneys representing non-offending fathers<sup>240</sup> explains that many courts will be reluctant to grant custody to non-offending fathers and that "[s]ome judges may even hold stereotypical views of gender roles."<sup>241</sup> First-hand accounts—often more detailed than publicly available appellate records, which depend on lawyers establishing facts at trial and filing appeals—depict deep-seated aversions to letting children live with non-offending parents, especially fathers.<sup>242</sup> Unsurprisingly, studies of fathers involved in child protection systems find that they feel that they are frequently "treated unfairly and with little respect."<sup>243</sup>

#### 4. Academics' and Policy-Makers' Focus Away from Constitutional Fitness

In the period following the *Stanley* decision, leading academics and policy-makers focused more on child protection policy reform and less on how constitutional law might require family court reform.<sup>244</sup> Although the academy quickly opined on *Stanley*'s application to private family law disputes, it remained largely silent regarding its application in foster care cases.<sup>245</sup> As a result, child protection law focused on policy questions, while the constitutionality of agencies' and courts' treatment of non-offending parents received scant attention.<sup>246</sup>

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239. Howard A. Davidson, *Foreword*, in *ADVOCATING FOR NONRESIDENT FATHERS IN CHILD WELFARE COURT CASES* vii (ABA CTR. ON CHILDREN & THE LAW ed. 2009).

240. Andrew S. Cohen, *Representing Nonresident Fathers in Dependency Cases*, in *ADVOCATING FOR NONRESIDENT FATHERS IN CHILD WELFARE COURT CASES*, *supra* note 239, at 49, 52.

241. *Id.* at 60.

242. *E.g.*, Ellen Kinney, *Shaine's Story: My Experience with Child Welfare and the Legal System*, in *ADVOCATING FOR NONRESIDENT FATHERS IN CHILD WELFARE COURT CASES*, *supra* note 239, at 66.

243. Christina A. Campbell, Douglas Howard, Brett S. Rayford & Derrick M. Gordon, *supra* note 232, at 87.

244. Child protection law reform efforts thus differed from juvenile justice law reform, which focused on the "constitutional domestication" of juvenile court. *In re Gault*, 387 U.S. 1, 22 (1967).

245. A student note provides a modest exception. It acknowledged that *Stanley* arose in the foster care context and could even be limited to it. Schafrick, *supra* note 116, at 1608–09. That comment did not explore the issues that might arise within the foster care context—such as the one-parent doctrine.

246. Sankaran, *supra* note 94, at 58.

Two influential scholarly works published soon after *Stanley* illustrate how the case inexplicably escaped attention. Robert Mnookin's 1975 article *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy* advocated for determinate statutory standards for removing children.<sup>247</sup> For instance, he proposed that the state should have power to remove only those children who faced an imminent danger and for whom no other reasonable means of protection existed.<sup>248</sup> In his article, Mnookin failed to cite *Stanley* and made only passing reference to the Constitution. This omission was odd for several reasons. First, *Stanley* was the only Supreme Court case that addressed a parent's right to custody in the face of state intervention.<sup>249</sup> Second, Mnookin feared that, under existing, indeterminate standards, state agencies might remove children from their families, because they believed that another family would serve children's interests better.<sup>250</sup> But *Stanley* directly rejected this argument by requiring the state to prove the non-offending parent's unfitness and not the child's best interests before a removal.<sup>251</sup> Nonetheless, Mnookin's article was influential enough to warrant a retrospective symposium forty years later.<sup>252</sup>

Also in 1975, Michael Wald published *State Intervention on Behalf of "Neglected" Children: A Search for Realistic Standards*.<sup>253</sup> Wald cited *Stanley* for the proposition that state intervention in families has constitutional limits.<sup>254</sup> But he did not cite *Stanley*'s fitness standard and focused instead on current and proposed statutory standards for state intervention.<sup>255</sup> Again, *Stanley* escaped deep analysis.

Reforms that followed these two influential works did so as a matter of statutory law,<sup>256</sup> leaving the right to family integrity incompletely protected. For example, some state legislation authorized removal only when a child faces an immediate risk of harm,<sup>257</sup> and federal legislation required states to make

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247. Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 L. & CONTEMP. PROBS. 226 (1975).

248. *Id.* at 277–78.

249. Emily Buss, *An Off-Label Use of Parental Rights? The Unanticipated Doctrinal Antidote for Professor Mnookin's Diagnosis*, 77 L. & CONTEMP. PROBS. 1, 3 (2014).

250. Mnookin, *supra* note 247, at 268–69.

251. *Stanley v. Illinois*, 405 U.S. 645, 658 (1972).

252. Katharine T. Bartlett & Elizabeth S. Scott, *Child-Custody Decisionmaking*, 77 L. & CONTEMP. PROBS. i (2014).

253. Michael Wald, *State Intervention on Behalf of "Neglected" Children: A Search for Realistic Standards*, 27 STAN. L. REV. 985 (1975).

254. *Id.* at 989.

255. *Id.* at 1000–36.

256. Buss, *supra* note 249, at 13–14. The exception that proves the rule is *In re Juvenile Appeal*, 455 A.2d 1313, 1318–22 (Conn. 1983). Similar constitutional rules are suggested in a small number of federal civil rights cases challenging state actors for allegedly unconstitutional removals of children, some of which draw on due process law and cite *Stanley*. *E.g.*, *Tenenbaum v. Williams*, 193 F.3d 581, 593–95 (2d Cir. 1999).

257. *E.g.*, D.C. CODE § 16-2309(a). Mnookin proposed such a standard. *Supra*, note 247, at 278.

“reasonable efforts” to prevent the need for removal.<sup>258</sup> This legislative codification allowed difficult questions to remain unanswered: If the state were to remove a child from one parent, under what circumstances could the state keep the child out of the other parent’s custody? If the other parent were an unwed father, when would his right to custody (and the child’s right to live in his custody) trump the state’s interest?

## VI.

### STANLEY’S RECENT RESURGENCE IN CHILD PROTECTION CASES

After more than four decades of being ignored in family court cases, *Stanley* is enjoying a small resurgence. Although state agencies still often choose the same troublesome litigation tactics that they used in *Stanley*—avoiding a hearing on parental fitness through reliance on the Interstate Compact on the Placement of Children or the one-parent doctrine—those practices face greater skepticism by family courts today. The law remains inconsistent across the nation, but recent progress has been significant on a state by state basis. That progress stems, in no small part, from the vigorous parent representation that has grown in recent years. It also results from legal, policy, and academic developments that create a more receptive context for *Stanley*-based arguments.

#### A. Concerning Practices Continue

##### 1. Litigation Practices and Court Rulings akin to Stanley

The facts in *Stanley* reflect significant ambiguity in the record. Though Stanley won in the Supreme Court, he was previously found to have neglected his oldest child, and the state may have had legitimate concerns about his ability to raise his youngest children, whose custody was at issue in *Stanley*.<sup>259</sup> The state of Illinois’ litigation choices avoided a prompt and clear decision regarding Stanley’s fitness, electing instead to seek custody of Stanley’s two younger children based on Stanley’s marital status. This litigation choice ensured that the state’s case would not serve the children’s interests. Either Stanley was, in fact, fit and the state harmed the children through an unnecessary separation from their father, or he was not fit and the state’s refusal to litigate his fitness imposed years of uncertainty followed by an ultimate failure to protect the children.

*Stanley* suggests that such litigation choices are impermissible.<sup>260</sup> State agencies would have to litigate the fitness of parents who sought custody of their

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258. 42 U.S.C. § 671(a)(15)(B)(i) (2015).

259. To be clear, I do not take a position on this issue. Because the state chose to litigate Stanley’s marital status rather than his fitness, no definitive public determination of Stanley’s fitness exists.

260. *Stanley v. Illinois*, 405 U.S. 645, 658 (1972) (“We have concluded that all Illinois parents are constitutionally entitled to a hearing on their fitness before their children are removed from their custody. It follows that denying such a hearing to Stanley and those like him while granting it to other Illinois parents is inescapably contrary to the Equal Protection Clause.”).



children, thus avoiding the harms that Illinois' litigation choice imposed on Stanley's children. Yet, using the one-parent doctrine and the Interstate Compact on the Placement of Children, states have avoided adjudicating parents' fitness and thus have been replicating the harm imposed on Stanley. The litigation of a recent Michigan case, *In re Sanders*, illustrates how these practices have continued in other states.<sup>261</sup> State authorities in *In re Sanders* sought custody of two children, alleging that both their mother, Tammy Sanders, and their father, Lance Laird, had neglected them. Sanders pleaded no contest to the allegations against her, but Laird insisted on a trial on the allegations against him. Rather than prove its allegations at a trial, the state dismissed its case against Laird and convinced the court at a post-disposition motions hearing to keep the children in a kinship placement with their aunt without ever obtaining an adjudication that Laird was unfit.<sup>262</sup> Just as Illinois had legitimate concerns about Peter Stanley's parenting, Michigan had reasons to question Laird's fitness as a parent.<sup>263</sup> As in *Stanley*, the state avoided litigating its concerns, preventing a trial's rigorous testing of the evidence against Laird—either unnecessarily placing the children with an aunt, or unnecessarily extending litigation and putting the children at risk of reunification with an unfit parent. The Michigan Supreme Court declared the one-parent doctrine—on which the state's litigation strategy depended—unconstitutional in *In re Sanders* in 2014.<sup>264</sup> Unfortunately, the case's litigation history illustrates an ongoing problem. Similarly, in the Grant case discussed in Part III.A, the state never alleged that Mr. Grant was unfit to raise his son, Andrew. It simply sought (and, temporarily, won) custody of Andrew without addressing Mr. Grant's fitness.

Another recent case from Kansas illustrates how judges—even over all parties' objections—sometimes fail to give non-offending parents appropriate respect. In *In re A.G.*, the trial court determined that a 16-year-old should be removed from his father.<sup>265</sup> The GAL and the child's mother requested that the

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261. *In re Sanders*, 852 N.W.2d 524, 527 (Mich. 2014). *Sanders* also illustrates *Stanley*'s rediscovery. See *infra* Part VI.B.

262. *Sanders*, 852 N.W.2d at 527–28.

263. Laird tested positive for cocaine use, was on probation for a domestic violence conviction, had violated a court order to keep the neglectful mother away from the children, and had been arrested for selling cocaine. *Id.* at 553 (Markman, J., dissenting). At the time of the appellate decision, he was incarcerated after having been convicted of conspiracy to distribute more than five hundred grams of cocaine. *Id.* at 553 n.23.

264. See *infra* Part VI.B.

265. *In re A.G.*, No. 114,297, slip. op. at 1 (Kan. Ct. App. Apr. 22, 2016), <http://www.kscourts.org/Cases-and-Opinions/Opinions/Unpublished/Ctapp/2016/20160422/114297.pdf> [<https://perma.cc/JL22-RY5V>]. For media coverage of this case, see Justin Wingerter, *Court of Appeals: Shawnee County Too Quick to Place Children in State Custody: 'Long-Standing Rule' of Declaring Emergency When None Exists*, TOPEKA CAP.-J., (Apr. 25, 2016), [http://cjonline.com/news/2016-04-26/court-appeals-shawnee-county-too-quick-place-children-state-custody?utm\\_source=WhatCountsEmail&utm\\_medium=CJOnline%20Morning%20Headlines&utm\\_campaign=Morning%20News%3Chttp://lists.icfwebservices.com/t/189963/2031941/15895/32/#](http://cjonline.com/news/2016-04-26/court-appeals-shawnee-county-too-quick-place-children-state-custody?utm_source=WhatCountsEmail&utm_medium=CJOnline%20Morning%20Headlines&utm_campaign=Morning%20News%3Chttp://lists.icfwebservices.com/t/189963/2031941/15895/32/#) [<https://perma.cc/8XTX-LVBH>].

child live with her, because no allegations had been made against her. Yet, echoing the poverty-based concerns in *In re LaShonda B.*, the trial court ordered the child into foster care, because the child's mother lived temporarily in a house rented by someone else while the family was "saving money to move into an apartment of their own."<sup>266</sup> Absent a study of the individuals that the mother was living with at the time, the court refused to award her custody of the child.<sup>267</sup> While the appellate court eventually reversed this decision, several elements of the litigation are telling. First, the local trial court had "a long standing rule" preventing parents from maintaining custody when they lived with friends—regardless of any evidence regarding fitness.<sup>268</sup> Second, the appellate court's holding remains limited. It held that there was no emergency justifying an immediate, pre-adjudication removal or justifying a failure to make reasonable efforts to prevent removal.<sup>269</sup> But what if reasonable efforts had been made and no alternative housing was available? The court did not rule that poverty or temporary housing was irrelevant to parental fitness and thus could not be used to deny a non-offending parent custody.

## 2. *Inadequate Social Worker Engagement with Non-Custodial Fathers*

Federal government reviews reveal widespread failure by child protection agencies to involve, and in many cases even contact, non-custodial fathers. Under federal funding statutes, the Department of Health and Human Services conducts regular Child and Family Services reviews of state agencies and analyzes their performance on a set of performance benchmarks.<sup>270</sup> The most recent aggregate report for these reviews identifies significantly weaker efforts by CPS agencies regarding fathers than mothers. For instance, federal authorities found that state and local agencies made "concerted efforts" to support a "positive and nurturing relationship" between foster children and their mothers in 68 percent of cases but achieved similar success in only 52 percent of cases involving fathers.<sup>271</sup> These figures exclude cases in which the agency believed that a relationship with parents was contrary to a child's best interests.<sup>272</sup> That suggests that this disparity exists even accounting for absentee or abusive fathers with whom child protection agencies would be less eager to work. The federal agency also found forty-nine states out of compliance regarding caseworker

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266. *In re A.G.*, No. 114,297, slip op. at 2 (Kan. Ct. App. Apr. 22, 2016).

267. *Id.*

268. *Id.* at 7.

269. *Id.* at 5.

270. 45 C.F.R. §§ 1355.32–34 (2012).

271. U.S. DEP'T OF HEALTH & HUMAN SERVS., ADMIN. FOR CHILDREN & FAMILIES, FED. CHILD AND FAMILY SERVS. REVIEWS: AGGREGATE REPORT, ROUND 2, FISCAL YEARS 2007–2010 27 (2011).

272. *Id.* at 26.

visits with fathers, as compared with forty states regarding caseworkers visits with mothers.<sup>273</sup>

These gender disparities were particularly pronounced for fathers of Black and Latino children.<sup>274</sup> That racial disparity exists despite research suggesting that Black fathers' involvement with their children, even when their romantic relationship with their children's mother has ended, is at least on par with that of White fathers and may be greater compared to Latino fathers.<sup>275</sup>

Some earlier efforts by state agencies working to identify parents illustrated how agencies' view foster children's fathers as obstacles to adoption, rather than as parents who could help their children. For example, South Carolina's initiation of a diligent search program in the 1990s focused "on identifying and locating fathers primarily for the purposes of expediting the termination of parental rights, to hasten adoption proceedings."<sup>276</sup> Other efforts focused on increasing child support collections but not non-monetary paternal involvement.<sup>277</sup>

### 3. Viewing Non-Offending Parents as Saviors

*In re M.L.*<sup>278</sup> remains good law in Pennsylvania. Its approach—to transfer custody to the non-offending parent and close the case, even if the custodial parent never gets a day in court to challenge the allegations against him or her—has been endorsed by a collection of state agencies<sup>279</sup> that seek to update the

273. *Id.* at 31; *see also id.* at 65 ("Cases were more likely to be rated a Strength for items relating to the provision of services for mothers than for fathers.").

274. *Id.* at 67.

275. *See, e.g.,* Calvina Z. Ellerbe, Jerrett B. Jones & Marcia J. Carlson, *Nonresident Fathers' Involvement after a Nonmarital Birth: Exploring Differences by Race/Ethnicity* 19–20 (Bendheim-Thoman Center for Research on Child Wellbeing, Working Paper No. WP14-07-FF, 2014), <http://crcw.princeton.edu/workingpapers/WP14-07-FF.pdf> [<https://perma.cc/4P38-XVFU>] (summarizing prior studies and offering confirming new studies). The population studied here—fathers who were never married to and do not live with the mothers of their children—is broader than the population of families whose children are placed in foster care. Some factor—not yet evident in the research—must explain why unwed and nonresident Black fathers would be generally more involved with their children yet less involved when their children are brought into foster care. One hypothesis is that the sub-group of fathers whose children are brought into foster care have many more obstacles to involvement and that agencies treat unwed Black fathers differently than unwed White fathers. One study of a small group of foster children suggested that most Black fathers of children in foster care had some contact with their children and saw being a "good father" as a key element of their identity. Pate, *supra* note 69, at 644.

276. WHAT ABOUT THE DADS?, *supra* note 70, at 4.

277. *Id.* at 4–5. A federal review found one exception to this trend—an Illinois program focused on identifying non-custodial fathers as placement options for foster children. *Id.*

278. *See supra* Part III.C.

279. The Compact calls on each member state to identify a "compact administrator" who, in conjunction with other states' compact administrators, can promulgate rules and regulations for administering the compact. *See, e.g.,* Interstate Compact on the Placement of Children (ICPC), art. VII (codified at D.C. CODE § 4-1422(2011)). That collection of compact administrators is known as the Association of Administrators of the Interstate Compact on the Placement of Children.

Interstate Compact on the Placement of Children. The group has proposed a new compact that more explicitly addresses its application to parents. The new compact would codify the 1976 opinion applying the Compact to parents<sup>280</sup> and a procedure akin to *In re M.L.* The new compact would also provide that it does not apply if a non-custodial parent—defined as one not accused of abuse or neglect—has a substantial relationship with the child, as long as the family court finds living with that parent serves the child’s best interests and terminates jurisdiction over the case.<sup>281</sup> Thus, under the new ICPC, a non-offending parent could come forward and request custody, and the court and child protection agency could wipe its hands of the case by giving him or her custody and closing the case—depriving the custodial parent of a hearing on the allegations against him or her, similar to the result of the court’s decision in *In re M.L.*

The new ICPC is not in effect. By its own terms it can take effect only when thirty-five states adopt it.<sup>282</sup> As of 2016, only eleven states have adopted it.<sup>283</sup> While those states have thus decided to continue ignoring *Stanley*, a majority of states have effectively rejected the new ICPC. That rejection might indicate a renewed application of *Stanley*’s core holding in child protection cases, the topic of the next section.

### B. Stanley’s Resurgence

*Stanley* may be experiencing a much delayed resurgence in the child protection and state intervention context from which it arose, but in which it has been dormant for many years. Most dramatically, the Michigan Supreme Court declared the one-parent doctrine unconstitutional in the summer of 2014 in *In re Sanders*, relying heavily on *Stanley*.<sup>284</sup> In its opinion, the court cited *Stanley*

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AAICPC, *Association of Administrators of the Interstate Compact on the Placement of Children*, <http://www.aphsa.org/content/AAICPC/en/home.html> [https://perma.cc/22SB-95YN].

280. The original Compact provided that “[n]o sending state shall send, bring, or cause to be sent or brought into any other party state a child for placement in foster care or prior to a possible adoption.” ICPC, D.C. Code § 4-1422, art. III(a) (codified at D.C. CODE § 4-1422) (1989). The new Compact would more broadly refer to the “interstate placement of a child subject to ongoing court jurisdiction in the sending state.” New Interstate Compact on the Placement of Children, art. III(A)(1) (2009), [http://www.aphsa.org/content/dam/AAICPC/PDF%20DOC/PROPOSED\\_LEGISLATIVE\\_LANGUAGE.pdf](http://www.aphsa.org/content/dam/AAICPC/PDF%20DOC/PROPOSED_LEGISLATIVE_LANGUAGE.pdf) [https://perma.cc/52N9-P7RV]. See also Vivek S. Sankaran, *Perpetuating the Impermanence of Foster Children: A Critical Analysis of Efforts to Reform the Interstate Compact on the Placement of Children*, 40 FAM. L.Q. 435, 454 (2006) (“The proposed Compact also continues to treat most biological parents as legal strangers to the child.”).

281. New Interstate Compact on the Placement of Children, art. III(B)(5) (2009), [http://www.aphsa.org/content/dam/AAICPC/PDF%20DOC/PROPOSED\\_LEGISLATIVE\\_LANGUAGE.pdf](http://www.aphsa.org/content/dam/AAICPC/PDF%20DOC/PROPOSED_LEGISLATIVE_LANGUAGE.pdf) [https://perma.cc/52N9-P7RV].

282. *Id.* at art. XIV(B).

283. A map created by the Association of Administrators of the Interstate Compact on the Placement of Children shows Alaska, Delaware, Florida, Indiana, Louisiana, Minnesota, Missouri, Nebraska, Ohio, Oklahoma, and Wisconsin as the only states that have adopted the new ICPC. *New ICPC Enactment Progress*, ASS’N ADMINS. INTERSTATE COMPACT ON PLACEMENT CHILD., <http://www.aphsa.org/content/AAICPC/en/NewICPC.html> [https://perma.cc/X5R3-XN2E].

284. *In re Sanders*, 852 N.W.2d 524, 539 (Mich. 2014).

twenty-two times, including two block quotes. The dissent also acknowledged that *Stanley* required some type of hearing on the non-offending father's fitness.<sup>285</sup>

*In re Sanders* followed several other recent cases that cast doubt on the one-parent doctrine and the Interstate Compact on the Placement of Children's application to non-offending parents. The Nevada Supreme Court held in 2013 that "keeping the child from the custody of the parent who is not the subject of the dependency proceeding violates the parent's fundamental constitutional rights to parent his child, when the child was not removed from the home because of his conduct . . . ."<sup>286</sup> Although it did not discuss *Stanley*, the District of Columbia Court of Appeals held in 2014 that "the right to presumptive custody of a fit, unwed, non-custodial father who has grasped the opportunity to be involved in his child's life can be overridden only by a showing by clear and convincing evidence that it is in the best interest of the child to be placed with someone else."<sup>287</sup> A similar trend may be evident in the most recent Interstate Compact cases, which have ruled against its application to parents,<sup>288</sup> and in a post-*Sanders* Illinois Supreme Court opinion, citing constitutional grounds for reversing an order placing children in foster care despite their non-offending mother's fitness.<sup>289</sup>

### C. Explaining Stanley's Emergent Resurgence—and Ongoing Challenges

Several factors help explain why family courts are rediscovering *Stanley* now. First, the parents' bar is significantly stronger today than in the 1970s and 1980s. Second, the children's bar has grown more complicated, with many children's lawyers and law offices opposing historical treatment of non-offending parents. Two other developments distinguish the present policy context from that which immediately followed *Stanley*: a greater academic and policy attention to the role of fathers generally and unwed fathers in particular, including a focus on how unwed fathers can be a positive force in their children's lives, and a greater attention to the harms of foster care.

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285. *Id.* at 554 (Markman, J., dissenting).

286. *In re A.G.*, 295 P.3d 589, 590 (Nev. 2013). The Nevada Supreme Court cited *Stanley* three times but did not discuss it in detail like the *Sanders* court did. *Id.* at 593, 595.

287. *In re D.S.*, 88 A.3d 678, 681 (D.C. 2014).

288. *See, e.g., In re C.R.-A.A.*, No. 04-16-00782-CV, 2017 WL 2260115, at \*5–11 (Tex. App. May 24, 2017); *In re Courtney R.*, No. M2015-01024-COA-R3-JV, 2017 WL 1548241, at \*5–6 (Tenn. Ct. App. Apr. 28, 2017); *In re S.R.C.-Q.*, 367 P.3d 1276, 1279–82 (Kan. Ct. App. 2016); *In re Emoni W.*, 48 A.3d 1, 6 (Conn. 2012); *In re D.F.-M.*, 236 P.3d 961, 962 (Wash. Ct. App. 2010); *In re A.X.W.*, Docket No. 299622, 2011 Mich. App. LEXIS 983 (Ct. App. May 26, 2011); *In re Alexis O.*, 959 A.2d 176, 185 (N.H. 2008).

289. *People v. Heather M. (In re M.M.)*, 2016 IL 119932, ¶¶ 26–27 (2016).

*1. Expanded and Strengthened Parents' Bar—with Significant Room for Improvement*

This Article focuses on the strong development of the parents' bar—the group of lawyers who specialize in representing parents in child protection cases—which has come into its own through “a growing national movement” in recent years.<sup>290</sup> The ABA has established the National Parent Representation Steering Committee and, in 2009, began hosting national parents' attorney conferences.<sup>291</sup> States have funded pilot programs devoted to high-quality parent defense and found positive results.<sup>292</sup> There are, quite simply, more and better lawyers representing all parents in child protection cases around the country, and they are more likely to request application of fundamental precedents like *Stanley*.

The organized parents' bar has paid particular attention to legal and advocacy issues related to representing non-offending parents, especially non-offending fathers. The ABA Center on Children and the Law published a guide to representing non-offending fathers in 2009,<sup>293</sup> and a 2015 guide to representing parents includes a section on “non-adjudicated parents.”<sup>294</sup>

Despite progress compared to the 1970s, states do not provide representation for non-offending parents across the board. The Supreme Court has held that the Constitution does not require a right to counsel in every parental status termination proceeding.<sup>295</sup> Several states have right to counsel statutes that explicitly limit right to counsel to parents from whom child protection authorities seek to remove children or parents against whom child protection authorities file accusations of abuse or neglect.<sup>296</sup> The practice in

290. Guggenheim, *supra* note 218, at 597.

291. ABA CTR. ON CHILDREN & THE LAW, *National Project to Improve Representation for Parents Involved in the Child Welfare System*, [http://www.americanbar.org/content/dam/aba/publications/center\\_on\\_children\\_and\\_the\\_law/parentrepresentation/project\\_description.athcheckdam.doc](http://www.americanbar.org/content/dam/aba/publications/center_on_children_and_the_law/parentrepresentation/project_description.athcheckdam.doc) [https://perma.cc/AL53-G9T7].

292. Steve M. Wood, Alicia Summers & Crystal Soderman Duarte, *Legal Representation in the Juvenile Dependency System: Travis County, Texas' Parent Representation Pilot Project*, 54 FAM. CT. REV. 277 (2016); Mark E. Courtney & Jennifer L. Hook, *Evaluation of the Impact of Enhanced Parental Legal Representation on the Timing of Permanency Outcomes for Children in Foster Care*, 34 CHILDREN & YOUTH SERV.'S REV. 1337, 1343 (2012). For a less rigorous study, see NAT'L COUNCIL OF JUVENILE & FAMILY COURT JUDGES, *Research Report: Exploring Outcomes Related to Legal Representation for Parents Involved in Mississippi's Juvenile Dependency System* (2014), [http://www.ncjfcj.org/sites/default/files/MS%20Parent%20Representation%20Follow-up%20Report%20\(1\).pdf](http://www.ncjfcj.org/sites/default/files/MS%20Parent%20Representation%20Follow-up%20Report%20(1).pdf) [https://perma.cc/3TK7-YAXN].

293. ABA CTR. ON CHILDREN & THE LAW & NATIONAL QUALITY IMPROVEMENT CTR. ON NON-RESIDENT FATHERS AND THE CHILD WELFARE SYSTEM, *Advocating for Nonresident Fathers in Child Welfare Court Cases* (2009).

294. Good-Dworak & Johnson, *supra* note 75, at 204–08.

295. *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18 (1981).

296. See ARK. CODE ANN. § 9-27-316(h)(1)(A)–(B) (2015) (providing all parents with a right to counsel but limiting the right to *appointed* counsel to “the parent or custodian from whom custody was removed”); KY. REV. STAT. § 620.100(1)(b) (2014) (requiring the court to appoint “counsel for the parent who exercises custodial control or supervision,” but not requiring this for

some other jurisdictions may functionally deprive non-offending or non-custodial parents from representation; the U.S. Department of Health and Human Services studied four states' efforts to involve non-resident fathers in 2006 and reported that two did not provide representation to these parents.<sup>297</sup>

Such statutes and practices can leave non-offending parents without counsel to advocate for them—just as the Cook County juvenile court proceeded to trial despite Peter Stanley's request, "Gee, I would like to acquire an attorney."<sup>298</sup> The result is that such parents lack attorneys to help them establish paternity, file for custody, or challenge dispositional orders that deprive them of custody or visitation.<sup>299</sup> And even when attorneys are present, they sometimes fail to challenge such practices; some parents who have sought to challenge the one-parent doctrine on appeal lost due to attorneys' failure to preserve objections in the trial court.<sup>300</sup>

## 2. A Children's Bar Friendlier to Stanley and Parental Rights

Commentators have long criticized children's lawyers for overly supporting state intervention in families, rather than providing a check on such intervention,<sup>301</sup> and specifically for ignoring fathers in many cases.<sup>302</sup> But the child protection field's increased focus on the value of family integrity and foster care's harms now extends to many children's advocates, who have joined the fight on the side of limiting state intervention, both generally and in specific reference to one-parent doctrine and Interstate Compact cases. The GAL in the Grant case, described in Part III.A, took a leading role in advocating for the child to live with his father. The GAL in the recent Kansas case, *In re A.G.*, appealed

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parents who do not exercise custodial control or supervision); NEV. REV. STAT. § 432B.420(1) (2013) (providing a right to counsel for a "parent . . . of a child who is alleged to have abused or neglected the child," but not a parent not so alleged); N.H. REV. STAT. § 169-C:10(II)(a) (2010) (providing that "the court *shall* appoint an attorney to represent an indigent parent alleged to have neglected or abused his or her child" and that "the court *may* appoint an attorney to represent an indigent parent not alleged to have neglected or abused his or her child if the parent is a household member and such independent legal representation is necessary to protect the parent's interests") (emphasis added).

297. WHAT ABOUT THE DADS?, *supra* note 70, at 29.

298. Stanley Trial Transcript, *supra* note 7, May 6, 1969, at 8.

299. Shaw, *supra* note 238, at 1144. For an example of a one-parent doctrine case in which the non-offending parent lacked counsel, at least initially, see *In re Bill F.*, 761 A.2d 470, 472 (N.H. 2000).

300. E.g., *In re A.R.*, 330 S.W.3d 858, 864–65 (Mo. Ct. App. 2011); *In re Mays*, 807 N.W.2d 307, 307–308, 308 n.1 (Mich. 2012).

301. See, e.g., Guggenheim, *supra* note 223, at 806.

302. Andrew Zinn & Clark Peters, *Expressed-Interest Legal Representation for Children in Substitute Care: Evaluation of the Impact of Representation on Children's Permanency Outcomes*, 53 FAM. CT. REV. 589, 594 (2015) (reporting criticisms of a Florida county's child representation program as "favor[ing] adoption over reunification" and "seriously neglect[ing]" fathers and paternal relatives).

the trial court's refusal to release the child to his non-offending mother.<sup>303</sup> Children's organizations have joined amicus efforts against the Interstate Compact on the Placement of Children and the one-parent doctrine<sup>304</sup>—efforts that did not exist in years immediately following *Stanley*.

### 3. Academic Attention

In the immediate aftermath of *Stanley*, academic attention to child protection law largely ignored issues involving non-offending parents, especially fathers.<sup>305</sup> Three decades later, that largely remained the case. One scholar noted in 2005 that “[s]light attention has been paid to the issue [of fathers in the child welfare system] in the academic and general literatures,”<sup>306</sup> and a federal review in 2006 found a “dearth of research specific to the topic of nonresident father involvement in the child welfare system.”<sup>307</sup> That failure has begun to change in the last decade.

First, the doctrines at issue—and their problems under *Stanley*—have received belated academic attention. Vivek Sankaran has written about *Stanley* violations,<sup>308</sup> litigated relevant cases (he represented the father in *Sanders*), and published policy papers on related topics.<sup>309</sup> Leslie Joan Harris and others have written law review articles on the topic, cited throughout this piece.<sup>310</sup> More broadly, academics have recently begun to consider a wider set of constitutional protections for family integrity. While scholars in the 1970s recommended that states make efforts to keep families intact as a policy matter, for instance, a leading scholar recently argued that the Constitution might require such efforts.<sup>311</sup> Another leading scholar has concluded that “the future of marital supremacy”—including the privileged treatment of married parents compared to

303. *In re A.G.*, No. 114, 297, slip op. at 4 (Kan. Ct. App. Apr. 22, 2016), <http://www.kscourts.org/Cases-and-Opinions/Opinions/Unpublished/Ctapp/2016/20160422/114297.pdf> [<https://perma.cc/V573-LRB9>].

304. The National Association of Counsel for Children, for instance, has filed amicus briefs in both categories of cases. NACC, *Amicus Curiae Activity*, <http://www.naccchildlaw.org/news/default.asp?id=1335> [<https://perma.cc/D8B2-PJ5J>] (last visited Apr. 9, 2017) (noting amicus briefs in *In re Emoni W.* and *In re Mays*). The author serves on the NACC's *amicus curiae* committee and wrote the NACC's *amicus* brief in *Emoni W.* regarding the ICPC.

305. *See supra* Part V.C.4.

306. Pate, *supra* note 69, at 635.

307. WHAT ABOUT THE DADS?, *supra* note 70, at 4.

308. Sankaran, *supra* note 94, at 58; Sankaran, *supra* note 156.

309. *E.g.*, VIVEK S. SANKARAN, FOSTER KIDS IN LIMBO: THE EFFECTS OF THE INTERSTATE COMPACT ON THE PLACEMENT OF CHILDREN ON THE PERMANENCY OF CHILDREN IN FOSTER CARE (2014), <https://www.law.umich.edu/centersandprograms/pcl/Documents/Final%20Summary%20to%20Casey.pdf> [<https://perma.cc/Q6F6-5BA8>].

310. Harris, *supra* note 68; Greene, *supra* note 94.

311. Buss, *supra* note 249. Buss wrote in a symposium that focused on Mnookin's 1975 article discussed in Part V.C.4.



unmarried parents and especially unmarried fathers—”is among the most pressing outstanding constitutional questions.”<sup>312</sup>

Moreover, scholars and policy advocates have examined the role of non-offending parents in more depth. A wider set of research by federal agencies in the first decade of the 2000s also signaled a new openness to examining the issue and taking initial steps to change practice. Research also failed to show any association between involving non-resident fathers and negative outcomes that some might fear from such involvement—such as safety dangers (if certain fathers are abusive) or delays in finalizing adoptions or guardianships (if fathers raise objections late in a case). When children reunified, researchers found no difference in the rate of subsequent maltreatment allegations when CPS officials contacted fathers about their children’s cases.<sup>313</sup> Comparing cases in which a father was identified but not contacted by CPS officials with cases in which CPS officials did contact fathers, the U.S. Department of Health and Human Services concluded that “contacting fathers does not appear to slow case proceedings or complicate the case in a way that delays permanency for the child.”<sup>314</sup> If anything, involving fathers was associated with more positive outcomes<sup>315</sup>—faster case closing due to both reunification and to adoption.<sup>316</sup> The federal government established a “Quality Improvement Center on Non-Resident Fathers,” which identified the “will and commitment of the [child protection agency] staff” as an essential barrier to involving fathers and set a goal of “changing a culture to value and seek out a father’s involvement.”<sup>317</sup>

Much of the federally funded research and other advocacy in the early 2000s still did not fully address the complicated issues raised by non-offending parent involvement. Research has measured simple quantifiable topics like whether CPS workers contacted identified biological fathers of foster children on their case loads.<sup>318</sup> That bar is low, and the large number of cases in which CPS workers did not make such contacts provides a sobering reminder of the deep problems that remain.<sup>319</sup> This research did not broach the more difficult topics of when and how to involve non-custodial fathers, what evidence would justify not involving them, and how to balance a previously non-custodial father’s request for custody with the previously custodial mother’s wishes for reunification.

312. Mayeri, *supra* note 147, at 2388.

313. U.S. DEP’T OF HEALTH & HUMAN SERVS., MORE ABOUT THE DADS: EXPLORING ASSOCIATIONS BETWEEN NONRESIDENT FATHER INVOLVEMENT AND CHILD WELFARE CASE OUTCOMES 18 (2008).

314. *Id.* at 12.

315. *Id.* at 21. As the phrase “associated with” suggests, the data reveals correlation but cannot prove causation.

316. *Id.* at 11.

317. *QIC 9 Steps*, AM. HUMANE ASS’N (on file with author).

318. WHAT ABOUT THE DADS?, *supra* note 70, at ix.

319. In a study documenting the efforts of child welfare agencies in four states to contact the fathers of children in foster care, agency staff had attempted to contact “nonresident fathers” in only 55% of cases. *Id.*

Federal reports, for instance, noted that “[w]hen a nonresident father is considered appropriate to care for his child, perhaps with the aid of available services, the agency may place a child with him.”<sup>320</sup> This statement gives no indication that the standard for parental custody is usually fitness rather than “appropriate[ness]” or that in some cases an agency must (rather than “may”) permit a father and child to live together. Federal reports also note that many non-custodial fathers appeared to have various problems—many had some criminal justice system involvement, substance abuse conditions, or other “issues preventing placement,” in the federal government’s terminology.<sup>321</sup> But under *Stanley* the question is not whether a parent has “issues” but whether those issues render the parent unfit.

Despite these flaws, research on the child welfare system helps explain the renewed scholarly focus on the relationships of non-custodial parents, especially fathers, with their children. The Fragile Families data set has led scholars to document a wide range of non-custodial father involvement.<sup>322</sup> It concludes that fathers maintain “high” levels of involvement with former partners pregnant with their children, and most set a goal of continued involvement through the child’s life.<sup>323</sup> Finding a rich body of evidence that non-custodial fathers have strong connections with their children, anthropologists Peter Gray and Kermyt Anderson have proposed recognizing such relationships as an essential marker of humanity: “One definition we have never seen proposed for humanity, but which seems to be applicable is this: *humans are the species in which males continue to invest in offspring after the parents cease to be in a sexual relationship.*”<sup>324</sup> Noting the value of keeping fathers engaged with their children, Laurie Kohn proposes various legal reforms in the private child support and custody systems to avoid possible “adverse consequences on paternal engagement” from the current legal structure.<sup>325</sup>

#### 4. Increased Focus on Foster Care’s Harms

The strengthened parents’ bar may find more receptive audiences as child protection professionals focus again on limiting the state’s ability to remove children. Recent studies have compared maltreated children removed from their families and placed in foster care with similarly maltreated kids left with their

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320. *Id.* at 39.

321. *Id.* at x.

322. See Ellerbe, *supra* note 275.

323. Sara McLanahan & Audrey N. Beck, *Parental Relationships in Fragile Families*, 20 *FUTURE CHILD*. 17, 20 (2010). A majority of non-resident fathers see their children at least monthly in the first year of their child’s life. Such involvement declines as children age, but remains for a majority of non-resident fathers for the first five years of their children’s lives. Such involvement also includes formal and informal child support for a large portion—though not a majority—of non-resident fathers. *Id.* at 22.

324. PETER B. GRAY & KERMYT G. ANDERSON, *FATHERHOOD: EVOLUTION AND HUMAN PATERNAL BEHAVIOR* 129–30 (2010) (emphasis in original).

325. Kohn, *supra* note 105, at 515.

families; the latter did better on a host of long-term outcomes.<sup>326</sup> Leading policy advocates and policy trends also reflect a focus on using foster care as a last resort. Casey Family Programs—a leading foundation providing services and funding to a range of child welfare-related activities—has set a goal of “safely reduc[ing] the need for foster care [by] 50 percent by the year 2020.”<sup>327</sup> When Congress authorized the Department of Health and Human Services to offer limited waivers of federal funding rules to permit greater flexibility, fifteen states sought waivers to prevent foster care entries.<sup>328</sup>

In this context, removals by child protection authorities have decreased 14 percent—from 307,000 in 2005 to 265,000 in 2014, although the most recent figures suggest an uptick.<sup>329</sup> That downward trend might reflect an increasing concern for the harms of removal—which might translate to closer consideration of questions raised by *Stanley*.

This trend may have a particular effect in the child protection system’s treatment of fathers, because efforts to provide a plausible alternative to a foster care placement may find a more receptive audience now than in the years following *Stanley*. The increasing numbers of single fathers raising children<sup>330</sup> might lessen some suspicion of non-offending fathers who seek custody of their children. Some observers have identified an “emerging paradigm shift concerning rethinking the role of fathers in the child welfare process.”<sup>331</sup> Informed by positive outcomes for children associated with fathers’ involvement, some agencies have increased efforts to engage fathers more in child protection cases. Even if these efforts do not always involve rethinking the

326. Joseph J. Doyle, *Child Protection and Child Outcomes: Measuring the Effects of Foster Care*, 97 AMER. ECON. REV. 1583, 1607 (2007) (finding children removed from their families have “higher delinquency rates, along with some evidence of higher teen birth rates and lower earnings” than similar children left at home); Joseph J. Doyle, *Child Protection and Adult Crime: Using Investigator Assignment to Estimate Causal Effects of Foster Care*, 116 J. POL. ECON. 746, 748 (2008) (“The results suggest that among children on the margin of placement, children placed in foster care have arrest, conviction, and imprisonment rates as adults that are three times higher than those of children who remained at home.”).

327. *About Casey Family Programs*, CASEY FAM. PROGRAMS, <http://www.casey.org/about> [<https://perma.cc/3F24-S6Z6>].

328. JAMES BELL ASSOCIATES, SUMMARY OF THE TITLE IV-E CHILD WELFARE WAIVER DEMONSTRATIONS (2015), [http://www.acf.hhs.gov/sites/default/files/cb/cw\\_waiver\\_summary\\_2015.pdf](http://www.acf.hhs.gov/sites/default/files/cb/cw_waiver_summary_2015.pdf) [<https://perma.cc/SH4Z-WYAP>].

329. U.S. DEP’T OF HEALTH & HUMAN SERVS., ADMINISTRATION FOR CHILDREN AND FAMILIES, ADMINISTRATION ON CHILDREN, YOUTH AND FAMILIES, CHILDREN’S BUREAU, TRENDS IN FOSTER CARE AND ADOPTION: FFY 2002-FFY 2013, [http://www.acf.hhs.gov/sites/default/files/cb/trends\\_fostercare\\_adoption2013.pdf](http://www.acf.hhs.gov/sites/default/files/cb/trends_fostercare_adoption2013.pdf) [<https://perma.cc/8E72-3AQ3>]. Over the past decade, the number of removals hit their lowest point—252,000 in fiscal years 2011 and 2012, before increasing to 255,000 in 2013, and 265,000 in 2014. Whether that recent increase reflects a shift towards more removals generally, or a more immediate response to the heroin epidemic or other factors remains hard to discern.

330. PEW RESEARCH CENTER, THE RISE OF SINGLE FATHERS: A NINEFOLD INCREASE SINCE 1960 (2013).

331. Christina A. Campbell, Douglas Howard, Brett S. Rayford & Derrick M. Gordon, *supra* note 232, at 85.

doctrines discussed in this Article, it may make family court culture somewhat less resistant to efforts to change those doctrines.

## VII. CONCLUSION

Nearly forty-five years after the Supreme Court's first unwed parent case, child protection law still requires reform to comport with that holding. The one-parent doctrine and the Interstate Compact on the Placement of Children continue to separate thousands of children from non-offending parents, mostly fathers, and require those children to live in foster care. On the other end of the spectrum, accused parents frequently lose custody of their children when non-offending parents come forward—even without the accused parents getting their day in court.

Fortunately, child protection law appears to be adapting to the new realities. State courts and academics have increasingly developed nuanced approaches to these issues. In particular, courts appear increasingly likely to begin their analysis with the appropriate starting point—the constitutional rights of both parents, especially their right to custody unless the state can prove them unfit. If state officials have legitimate concerns about a parent—as they may have had regarding Peter Stanley and as they may have in modern cases such as *In re Sanders*—they should plead that and prove them.

Understanding these issues—both how problematic doctrines were developed and how reforms have occurred—requires an understanding of the curious course taken by the Supreme Court's path-breaking decision in *Stanley v. Illinois*. That case centered on child protection law but, until recently, courts have largely not applied it in child protection cases. Exploring how *Stanley* has (and has not) been applied over the past four decades is a case study in law reform in a field that has been the subject of frequent reform efforts. Contrasting the period in which *Stanley* was ignored, and in which problematic doctrines developed, with more recent years highlights important elements of the system that can provide a stronger context for law reform.

First, advocacy for all parties is essential. Peter Stanley won because he had a lawyer who stood up to the prevailing family court culture and challenged a long-standing practice. And *Stanley* has enjoyed a resurgence in recent years due in large part to improved advocacy by parents' attorneys. The parent representation movement should continue to grow and press these (and many other) important legal claims in courts and legislatures.

Second, aspects of family court culture perpetuate bad practices. This recognition underscores how lawyers for parents and children fighting against state intervention must have the willingness and ability to challenge long-standing but troublesome practices. It also affirms the importance of imposing basic due process rules to provide a check on a system that would otherwise make frequent mistakes.

Third, the actions of policy and academic elites can make a difference. Ignoring the role of the Constitution in child protection reform in the years immediately following *Stanley*, and ignoring the issue of non-offending and non-custodial parents in the child protection system, enabled doctrines to develop that instead relied on bad policy. Much of this area relates to political power—the power of the private adoption lobby demanded immediate responses in the 1970s, shifting the common understanding of *Stanley* from its origins as a child protection case to a private adoption case. Increasing academic and policy attention on these issues has helped foster the recent steps towards reform. Scholars and researchers can counteract the political power dynamic by focusing attention on important legal and policy questions, which may otherwise be left unexamined.

*Stanley* remains the constitutional foundation of the modern child protection system. With renewed interest in this system's reform, *Stanley* can continue to play the role it should have played four decades ago in shaping child protection law's response to recurring and difficult issues.