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Stanley v. Illinois's Untold Story

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STANLEY V. ILLINOIS'S UNTOLD STORY

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ABSTRACT

Stanley v. Illinois is one of the Supreme Court's more curious landmark cases. The holding is well known: the Due Process Clause both prohibits states from removing children from the care of unwed fathers simply because they are not married and requires states to provide all parents with a hearing on their fitness. By recognizing strong due process protections for parents' rights, *Stanley* reaffirmed *Lochner*-era cases that had been in doubt and formed the foundation of modern constitutional family law. But Peter Stanley never raised due process arguments, so it has long been unclear how the Court reached this decision.

This Article tells *Stanley*'s untold story for the first time, using original research of state court and Supreme Court records. Those records show that the State was concerned about Stanley's parental fitness and did not remove his children simply because he was unmarried, as is frequently assumed. The State, however, refused to prove Stanley unfit and relied instead on his marital status to justify depriving him of custody. That choice, and Stanley's avoidance of a due process argument, created a complicated Supreme Court decision-making environment.

This Article explores the Supreme Court's decision-making in *Stanley* and reveals new insights both about *Stanley* and the Court more broadly. Four Justices changed their votes from conference to the final decision—an extreme amount of voting fluidity that shifted the case outcome. The Justices' varying and evolving views eventually led them to a strong due process holding even though Stanley did not ask for one. This issue fluidity—when the Court issues a ruling based on arguments not raised by the parties—reflects a complex interaction between Justices' efforts to form a majority coalition and lawyers' litigation choices. Finally, the Justices' papers reveal how Justice Harry Blackmun's shift to the liberal wing of the Court—and to a staunch parents' rights vote—began with his angst over *Stanley*, despite his vote for the State.

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INTRODUCTION

Stanley v. Illinois[1] is one of the Supreme Court's more curious landmark cases. The 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.[2] On equal protection grounds, Peter Stanley challenged an Illinois statute that required a showing of parental unfitness against all mothers and married fathers, but not unmarried fathers like him.[3] Although the Supreme Court issued substantive and procedural due process holdings, it seemingly only addressed equal protection as a one-paragraph afterthought.[4] This shift to due process transformed *Stanley* from a case about a statute's treatment of unwed fathers into a foundational case about parents' rights to the custody of their children[5] and it continues to inform important decisions about the scope of parental rights.[6] The Court, for the first time, recognized that nonmarital families have relationship rights important enough to provide constitutional protection.[7] It issued a broader holding under the Due Process Clause that only parental fitness can justify state action to remove children from their parents' custody.[8] In so doing, *Stanley* announced that the Court would meaningfully apply pre-New Deal substantive due process family law cases—thus forming the foundation of modern constitutional family law.[9]

This Article explores *Stanley*'s riddles. First, using original research into the papers of the Justices on the *Stanley* Court and the state court records,[10] this Article explains the complicated facts that led to the litigation and the attorneys' litigation choices that further complicated the case for the Supreme Court Justices. The Supreme Court decision reads as if state officials took custody of Peter Stanley's children

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[1] 405 U.S. 645 (1972).

[2] *Id.* at 646–67.

[3] *Id.* at 647.

[4] *Id.* at 658.

[5] MARTIN GUGGENHEIM, WHAT'S WRONG WITH CHILDREN'S RIGHTS 64 (2005).

[6] *See, e.g.*, *In re* Sanders, 852 N.W.2d 524, 532–34, 539 (Mich. 2014) (holding that an adjudication of one parent's unfitness does not suffice to deprive the other parent of custody, and overturning earlier cases to the contrary (citing *Stanley*, 405 U.S. 645)).

[7] *Stanley*, 405 U.S. at 658.

[8] *Id.* at 657–58.

[9] *Id.* at 651 (citing various pre-New Deal cases as the foundation for the Court's due process holding).

[10] The papers of Justices Harry Blackmun, William Brennan, William O. Douglas, Thurgood Marshall, and Byron White are available at the Library of Congress. The papers of Justice Potter Stewart are available at Yale University. These papers include draft opinions, memoranda from Justices and clerks, and Justices' notes from conference. Records from the Illinois Supreme Court litigation—including the trial court transcript, petition, and other pleadings—are available at the Illinois State Archives. Documents from these sources are cited throughout as "on file with author."

solely because he was unmarried and Joan Stanley had died; despite that, the full story is more complicated. The State had legitimate concerns about Stanley's parental fitness—a court had found that he had neglected his eldest child.[11] But the State chose to avoid litigating his fitness and instead sought custody based on Stanley's marital status.[12]

Stanley's lawyers added to the complexity. They challenged the notion that marital status could suffice to deprive a father of custody of his children—an argument they could have framed on equal protection and due process grounds.[13] But in an uncertain doctrinal landscape in which the reach of the Equal Protection and Due Process Clauses remained unclear, his lawyers chose narrower grounds through which to push their argument. They raised an equal protection challenge and argued that discriminating against unmarried fathers—as compared to all mothers and married fathers—had no rational basis; they neither asked for heightened scrutiny nor explicitly raised a due process argument.[14]

Second, this Article uses the Justices' papers to answer for the first time a question long posed by scholars—why and how did the Court broaden the case to reach a due process holding?[15] Four Justices—a majority of the seven who participated in *Stanley*—changed their votes during the Court's deliberations.[16] This is a rare and extreme example of voting fluidity—something noteworthy by itself, as it perhaps represents the greatest amount of documented vote switching in a single case.[17] Moreover, such vote switching—and the need to build a stable majority coalition in the midst of unstable votes—explains the Court's due process holding. Crucially, Justice William Douglas—usually a dependable vote for individual rights—first sided with the State at conference, likening unwed fathers to "hit-and-run drivers."[18] Douglas soon switched his vote, but refused to accept Stanley's equal protection

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[11] Transcript of Proceeding at 10, *In re* Stanley & Stanley, Nos. 69J4773, 69J4774, (Ill. Cir. Ct. Juv. Div. May 16, 1969) (on file with author) (the prosecutor notes on the record that in a prior proceeding the court found that Stanley neglected his eldest child). The *Stanley* case discussed in this Article actually involves Stanley's two younger children. *See Stanley*, 405 U.S. at 646 n.2.

[12] Brief for Respondent at 8–9, *Stanley*, 405 U.S. 645 (No. 70-5014).

[13] Brief for the Petitioner at 6–9, *Stanley*, 405 U.S. 645 (No. 70-5014).

[14] *See generally id.*

[15] *See, e.g.*, DOUGLAS E. ABRAMS ET AL., CHILDREN AND THE LAW: DOCTRINE, POLICY AND PRACTICE 670 (5th ed. 2014) (noting that the decision and reasoning in *Stanley* raised many questions); SUSAN FRELICH APPLETON & D. KELLY WEISBERG, ADOPTION AND ASSISTED REPRODUCTION: FAMILIES UNDER CONSTRUCTION 19 (2009) (posing similar questions as to why the Court decided *Stanley* on due process reasoning).

[16] *See infra* Part II.B–C.

[17] *See, e.g.*, Saul Brenner, *Fluidity on the United States Supreme Court: A Reexamination*, 24 AM. J. POL. SCI. 526, 530–31 (1980).

[18] Justice Douglas, 2d Draft Opinion at 4, Stanley v. Illinois, No. 70-5014 (Nov. 4, 1971) (dissenting) (unpublished manuscript) (on file with author).

argument, and insisted on a due process holding.[19] Justice Byron White—whose draft dissent evolved into the majority opinion—accommodated Douglas by writing a due process holding.[20] This opinion then overcame the doubts from other Justices about whether relying too frequently on due process would invite *Lochner*-era ghosts to return to the Court.[21]

Third, this Article reveals how the *Stanley* decision became such a strong due process holding. Although Douglas insisted on a due process focus, Justice Thurgood Marshall pushed for greater protections for parental rights and drafted a never-published concurring opinion that articulated such protections.[22] Marshall's work induced White to strengthen the opinion from initial drafts, adopting essential elements of the ultimate holding. White's initial drafts would not have required hearings on parental fitness, but, pressured by Marshall, the Court adopted a fitness standard as the central constitutional protection for parents' and children's family integrity, rather than a best-interest standard.[23]

This strong due process focus had enormous ramifications for family law. *Stanley* confirmed that pre-New Deal due process decisions establishing parental rights continued to have force and applied them for the first time to state action to remove children. In so doing, *Stanley* became the modern basis for standard pronouncements about parents' right to care, custody, and control of their children in a variety of legal contexts.

The vote switching, which led to the due process holding, also yields important insight about Supreme Court decision-making. Justice William Brennan's vote switch is particularly noteworthy. The full record of the case suggests that Brennan strategically voted with the State at conference to ensure that the Court would dismiss the writ of certiorari as improvidently granted, rather than issue a decision on the merits for the State. It also suggests that he immediately changed his vote to support Stanley as soon as it became clear that such a switch would make a majority.[24] *Stanley* would thus be a rare documented instance of a damage control vote against a Justice's true preferences.

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[19] Letter from WHA, Clerk for Justice Douglas, to Justice Douglas (Feb. 4, 1972), *in* THE BURGER COURT OPINION WRITING DATABASE (Paul J. Wahlbeck, James F. Spriggs, II & Forest Maltzman eds., 2011) [hereinafter Letter from WHA to Douglas], http://www.supremecourtopinions.wustl.edu/files/opinion_pdfs/1971/70-5014.pdf [http://perma.cc/K48V-QR48].

[20] *Id.*

[21] Memorandum from Justice White to the Conference on Stanley v. Illinois, No. 70-5014 (Dec. 3, 1971), *in* THE BURGER COURT OPINION WRITING DATABASE (Paul J. Wahlbeck, James F. Spriggs, II & Forest Maltzman eds., 2011), http://www.supremecourtopinions.wustl.edu/files/opinion_pdfs/1971/70-5014.pdf [http://perma.cc/K48V-QR48].

[22] Justice Marshall, 1st Draft Opinion at 3–7, Stanley v. Illinois, No. 70-5014 (Nov. 19, 1971) (concurring) (unpublished manuscript) (on file with author).

[23] Stanley v. Illinois, 405 U.S. 645, 649 (1972) (holding that "as a matter of due process of law, [a parent is] entitled to a hearing on his fitness as a parent before his children [are] taken from him").

[24] *See infra* notes 362–65 and accompanying text.

Moreover, a close analysis of the vote switching and multiple opinion drafts provides insight into Court decision-making not possible through empirical studies. *Stanley* illustrates the intersection of multiple phenomena typically discussed separately in the Supreme Court decision-making literature—strategic voting, voting changes, and litigation errors leading to the Court substituting its own framing of the issues for the litigants'. The Supreme Court's deliberations in *Stanley* illustrate the complex interactions between those features and the difficult task of crafting a majority opinion that maintains an evolving majority coalition.

Justice Harry Blackmun's vote switches—he voted for the State at conference, joined an early draft in favor of Stanley, then joined the dissent—are notable because they reveal the seeds of his later shift to a strong supporter of parental rights.[25] Blackmun's papers reveal how he both struggled in *Stanley* and finally sided with the State on procedural grounds—he did not believe the Court should address due process—rather than the merits of the case.[26] This belief helps explain his shift over the ensuing decade to a consistent vote for unwed fathers' rights in private family law cases[27] and for parents' rights in child protection cases.[28] Blackmun's shift to the parents' rights side of the Court was solidified seven years later in *Caban v. Mohammed*, when he resisted Justice Burger's entreaties and became the decisive fifth vote for the unwed father challenging the adoption of his children.[29]

This Article proceeds as follows: Part I explains *Stanley*'s underlying facts and litigation. It begins at the trial court, explaining why the State likely took custody of Stanley's children and the impact of the State's decision to rest its case on Stanley's

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[25] Justice Douglas, Conference Notes on Stanley v. Illinois, No. 70-5014 (Oct. 22, 1971) [hereinafter Justice Douglas, Conference Notes] (transcribed) (on file with author) (noting Justice Blackmun's inclination to affirm the state court); Letter from Justice Blackmun to Chief Justice Burger (Mar. 13, 1972), *in* THE BURGER COURT OPINION WRITING DATABASE (Paul J. Wahlbeck, James F. Spriggs, II & Forest Maltzman eds., 2011) [hereinafter Letter from Blackmun to Burger], http://www.supremecourtopinions.wustl.edu/files/opinion_pdfs/1971/70-5014.pdf [http://perma.cc/K48V-QR48] (writing Chief Justice Burger to join his dissent); Letter from Justice Blackmun to Justice White (Nov. 19, 1971), *in* THE BURGER COURT OPINION WRITING DATABASE (Paul J. Wahlbeck, James F. Spriggs, II & Forest Maltzman eds., 2011) [hereinafter Letter from Blackmun to White], http://www.supremecourtopinions.wustl.edu/files/opinion_pdfs/1971/70-5014.pdf [http://perma.cc/K48V-QR48] (writing Justice White to join his opinion).

[26] Letter from Justice Blackmun to Justice White (Mar. 13, 1972), *in* THE BURGER COURT OPINION WRITING DATABASE (Paul J. Wahlbeck, James F. Spriggs, II & Forest Maltzman eds., 2011) [hereinafter Letter from Blackmun to White], http://www.supremecourtopinions.wustl.edu/files/opinion_pdfs/1971/70-5014.pdf [http://perma.cc/K48V-QR48] (explaining that he did not think "that due process [could] be brought into the case").

[27] *See, e.g.*, Michael H. v. Gerald D., 491 U.S. 110 (1989); Lehr v. Robertson, 463 U.S. 248 (1983); Caban v. Mohammed, 441 U.S. 380 (1979).

[28] *See* Santosky v. Kramer, 455 U.S. 745 (1982); Lassiter v. Dep't of Soc. Servs., 452 U.S. 18 (1981).

[29] 441 U.S. 380.

marital status rather than his parental fitness. Part I also explains the choices that Stanley and his lawyer faced in determining which arguments to raise on appeal, and suggests reasons why they made only equal protection and not due process arguments. Part II then describes how the Supreme Court Justices reached their decision, and then analyzes the voting fluidity and the opinion-drafting process, which began with a 5–2 conference vote for the State and ended with a 5–2 strong due process holding for Stanley. Part II also explains the ambiguous aftermath for Peter Stanley and his two youngest children. Part III analyzes the Court's deliberations in light of the existing Supreme Court decision-making literature. Although most of that literature provides empirical studies of large numbers of cases, Part II provides a close analysis of a single case. In so doing, this Article is able to identify the interactions between strategic voting, voting fluidity, and issue fluidity (in which the Court decides an issue not presented by the parties—here, due process) both at conference and during the opinion-writing process. Part III also analyzes what *Stanley* tells us about Justice Blackmun's evolution on the Court. This Article concludes by explaining the importance of the *Stanley* decision-making process and, in particular, how the broad due process holding firmly established family integrity rights in the modern era, laying the groundwork for future constitutional family law cases.

I. *STANLEY V. ILLINOIS*: UNDERLYING FACTS, LITIGATION, AND CHOICE OF ISSUES ON APPEAL

The facts of *Stanley*—at least the facts recited by the Supreme Court—are deceptively straightforward. Peter Stanley and Joan Stanley lived together in Chicago for many years but never married.[30] They had three children together.[31] And when Joan Stanley died, the State of Illinois took custody of the two youngest children and placed them in foster care, relying on a state statute that deemed unwed fathers to lack standing as legal parents.[32] Based on these facts, the Supreme Court focused on Illinois's statute that cared only about an unwed father's marital status rather than his ability to parent.[33]

The Court, however, only focused on that statute because the state agency chose to use it, and that choice obscured the Stanley family's struggles on which the trial court case should have focused. The Court wrote that "[u]nder Illinois law, the children of unwed fathers become wards of the State upon the death of the mother,"[34] suggesting that foster care was the automatic result of both Joan Stanley's death and the absence of a marriage between her and Peter Stanley. Indeed, this is how the case is generally presented in law school casebooks, other academic work, and the

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[30] Stanley v. Illinois, 405 U.S. 645, 646 (1972).

[31] *Id.*

[32] Stanley v. Stanley, 256 N.E.2d 814, 815 (Ill. 1970), *rev'd sub nom. Stanley*, 405 U.S. 645.

[33] *Stanley*, 405 U.S. at 646–47.

[34] *Id.* at 646.

mass media.[35] However, the State had the ability to choose whether to file a case to declare children wards of the state.[36] The State did so in *Stanley* because of legitimate concerns about his ability to raise his children, and used Stanley's marital status to avoid litigating his suspected unfitness.[37] Stanley's trial further raised concerns about the family court's overall fairness—he was forced to a trial without counsel despite requesting it, and neither the judge nor the State made any effort to ensure that the real concerns about Stanley were heard in court.[38] His children were quickly placed into foster care and he was not given a clear procedure for determining when, if ever, he could reunify with them.[39]

Stanley retained lawyer Patrick Murphy who recognized that these procedures were flawed and was eager to fight to reform family court.[40] Murphy went to great efforts to remain Stanley's lawyer, despite having an apparent conflict of interest.[41] Murphy challenged the trial court procedures and the statute on which they were based.[42] Stanley's lawyer also nearly lost the case by only framing his arguments in equal protection terms—he attacked the statute for only declaring children of unwed fathers to be dependent and treating children of unwed mothers or wed fathers differently.[43]

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[35] *See, e.g.*, ABRAMS ET AL., *supra* note 15, at 665 (presenting *Stanley* in a chapter on adoption without discussing concerns about Stanley's parental fitness); ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 803 (3d ed. 2006) ("[T]he children were taken from the father and placed into the state's guardianship . . . simply because the Stanleys had never been married."); David D. Meyer, *Family Ties: Solving the Constitutional Dilemma of the Faultless Father*, 41 ARIZ. L. REV. 753, 759 (1999) ("When Joan Stanley died, the State of Illinois declared their children wards of the state in a dependency proceeding and placed them with court-appointed guardians . . . ."); Thai Phi Le, *Birth Fathers + Adoptions: Inequality in Parental Rights*, WASH. LAW. (2014), http://www.dcbar.org/bar-resources/publications/washington-lawyer/articles/february-2014-birth-fathers.cfm [http://perma.cc/WHB8-CXX7] ("When Joan died, the children automatically became wards of the state."); Kevin Noble Maillard, *A Father's Struggle to Stop His Daughter's Adoption*, ATLANTIC (July 7, 2015), http://www.theatlantic.com/politics/archive/2015/07/paternity-registry/396044/ [http://perma.cc/YBK6-NBEU] ("Upon [Joan Stanley's] death, the state took their three children and gave them to court-appointed guardians.").

[36] *Stanley*, 405 U.S. at 649.

[37] Transcript of Proceeding, *supra* note 11, at 10.

[38] *Id.* at 7–8 (a proceeding appointing the Ness couple as guardians over the Stanley children).

[39] *Id.* at 11.

[40] Murphy was a legal services attorney who had recently started an organization representing clients in juvenile court cases. As a legal services provider, he did not charge Stanley a fee. Interview with Judge Patrick T. Murphy, Circuit Judge, 5th Mun. Dist. Domestic Relations Div., State of Ill. Circuit Court of Cook Cty., in Chi., Ill. (Apr. 27, 2014) [hereinafter April 2014 Interview with Murphy] (now-Judge Patrick Murphy was the attorney for Peter Stanley).

[41] *See infra* notes 79–91 and accompanying text.

[42] Transcript of Proceeding, *supra* note 11, at 12–13.

[43] *See generally* Brief for the Petitioner, *supra* note 13.

This Section will first describe the factual and trial court history of *Stanley* and then describe the strategic choices that Stanley's lawyer confronted when choosing which issues to raise in his appeals to the Illinois state courts and United States Supreme Court.

A. Family Court Proceedings

A review of *Stanley v. Illinois*'s beginnings in Cook County Family Court reveals several key features essential to the Supreme Court's ultimate ruling. First, the case began with real questions about Peter Stanley's parental fitness—questions that were never definitively answered because the State chose to litigate Stanley's marital status rather than his fitness.[44] Second, *Stanley* only became a landmark Supreme Court case because Stanley retained a crusading lawyer, Patrick Murphy, who was eager to challenge long-standing family court practices and to find a way to represent Stanley despite an apparent conflict of interest.[45] Murphy's representation pushed Stanley's case to the Supreme Court—but Murphy could have lost the case by failing to raise explicit due process arguments.[46]

Peter and Joan Stanley lived together in Chicago "intermittently" and had three children together.[47] Peter asserted that Joan was his common-law spouse, an identity his lawyers noted at various points during the litigation,[48] and they even used a single family name.[49] Yet, for reasons not established in the record, Peter and Joan never married. Illinois had outlawed common-law marriage decades earlier,[50] so their relationship had no recognized legal status.

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[44] Transcript of Proceeding, *supra* note 11, at 10.

[45] *Id.* at 5–9.

[46] *See generally* Brief for the Petitioner, *supra* note 13.

[47] Stanley v. Illinois, 405 U.S. 645, 648 (1972).

[48] Chief Justice Burger of the United States Supreme Court opened oral argument for *Stanley v. Illinois* on October 19, 1971. Oral Argument at 0:00, *Stanley*, 405 U.S. 645 (No. 70-5014), https://www.oyez.org/cases/1971/70-5014. Attorney Patrick Murphy, representing Peter Stanley, began his oral argument by stating that "[f]or 18 years, Peter Stanley lived with his common-law wife." *Id.* at 0:43. Chief Justice Burger then forced him to acknowledge that Illinois banned common-law marriage; he stated, "I am using [the phrase "common law marriage"] in the generic sense of the word. He lived with a woman for 18 years whom he called his wife." *Id.* at 1:12. At trial, Peter testified that Joan was his wife. Transcript of Proceeding, *supra* note 38, at 19. Stanley first requested a continuance so he could produce a marriage certificate, but never produced one. *Id.* at 2.

[49] Although it is possible that Joan was born with the last name Stanley, it is unclear whether she had changed her name. During a 2014 interview, now-Judge Murphy could not recall whether she did but said that he assumed she took Peter's last name. April 2014 Interview with Murphy, *supra* note 40.

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

Whatever their reasons for not formalizing their relationship with each other, there was no doubt about Peter's paternity of their three children: Karen,[51] Peter Jr. (born in 1966), and Kimberly (born in 1968).[52] Peter and Joan raised all three children together.[53] Peter Sr. gave unrebutted testimony that he was their father,[54] no party ever challenged his paternity,[55] and the State named him as the father in its petitions.[56] Peter, Joan, and the three children formed a family until Joan's death on September 20, 1968.[57]

State intervention soon followed. In the months after Joan's death, the Juvenile Division of the Cook County Circuit Court found that Stanley neglected Karen and gave custody of her to the State, which placed her in a foster home.[58] Concern about Stanley's parental fitness likely motivated the State to intervene regarding his two younger children, especially in the wake of his adjudicated neglect of Karen. Stanley's lawyer, Patrick Murphy, later conceded at oral argument before the Supreme Court that Stanley's adjudicated neglect of Karen "may have been something to do with charges being brought" regarding the other two children.[59] Karen Stanley never reunited with her father during her childhood.[60] Although it was not addressed in the younger children's trial, Peter Stanley was possibly an alcoholic, as described by his lawyer, Patrick Murphy, in a 2014 interview.[61]

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[51] Karen was not party to the case that reached the Supreme Court, so her birth date is not included in the publicly available court records. In-court testimony suggests, however, that she was at least ten years old; a probation officer testified that Peter Stanley lived with Joan and the children "for approximately ten years after she had Karen." Transcript of Proceeding, *supra* note 38, at 17.

[52] *Id.* at 17–18.

[53] The probation officer acknowledged that Peter Stanley lived with Joan Stanley from Peter Jr.'s and Kimberly's births onwards. *Id.*

[54] *Id.* at 19.

[55] The State's attorney said at trial, "[W]e 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 dependant children under the Statute." *Id.* at 6. The State later opened its oral argument by describing the children as those "assumed to be [Peter Stanley's]" because "there ha[d] been no proof that Peter Stanley in fact [was] the father." Oral Argument, *supra* note 48, at 25:52, 35:22.

[56] Petition in Support of Motion to Vacate Order, *In re* Stanley, No. 69JO4773 (Ill. Cir. Ct. Juv. Div. Mar. 21, 1969) [hereinafter Petition in Support of Motion to Vacate] (on file with author).

[57] Transcript of Proceeding, *supra* note 38, at 17.

[58] Transcript of Proceeding, *supra* note 11, at 10. The court probation officer testified that "[t]here is a Finding of Neglect" in Karen's case and that she was then living in a foster home. *Id.* There is no description of what specific action was found. *Id.* This history regarding Karen is discussed in the case files of Peter Jr. and Kimberly. *Id.* It was those latter cases that became the Supreme Court case *Stanley v. Illinois*, and only they became available for public view. *See* Stanley v. Stanley, 256 N.E.2d 814 (Ill. 1970). The case involving Karen Stanley remains sealed.

[59] Oral Argument, *supra* note 48, at 21:33.

[60] April 2014 Interview with Murphy, *supra* note 40.

[61] *Id.*

Peter sent his two younger children to live with friends of his—the Ness family.[62] His precise reasons are unclear—perhaps he felt his work schedule did not permit him to parent two young children, or perhaps some mix of grief, alcohol use or abuse, stress from the case involving Karen, awareness that he was not then able to raise his children well, or concern that the State would remove them from his custody led him to conclude that living with the Nesses would serve his two younger children best. Soon after the trial in the younger children's case, his lawyer wrote that Stanley had his children live with the Nesses "while he was attempting to get back on his feet emotionally."[63] Whatever the full reasons, parents frequently permit their children to live with other adult caregivers without triggering allegations of neglect.

The State of Illinois then intervened, 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.[64] 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.[65] By amending the petition to allege dependency rather than neglect, the State only had to prove that Peter Stanley was not married and that Joan Stanley had died; those facts would establish that, under the then-existing law, the children had no legal parents and were per se dependent.[66] The State did not have to show that Stanley had done anything wrong as a parent, nor did it even have to show that foster care would

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[62] 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?' . . . [S]ame thing that a wed father might have done." Oral Argument, *supra* note 48, at 6:30.

[63] Patrick T. Murphy, *NLADA Juvenile Court Project*, 27 LEGAL AID BRIEFCASE 224, 232 (1969).

[64] The petition states "[t]hat the said minor is a *neglected* minor by reason of the following: *he is neglected as to care necessary for his well being*." Petition in Support of Motion to Vacate, *supra* note 56 (emphasis indicates text typed into a form petition).

[65] *See* Transcript of Record at 3, *In re* Stanley & Stanley, No. 42489 (Ill. Sept. 29, 1969) (on file with author) (arguments on appeal before the Illinois Supreme Court); *see also* Transcript of Proceeding at 3, Illinois v. Stanley, Nos. 69J004774, 69J004773 (Ill. Cir. Ct. Juv. Div. Apr. 15, 1969) (on file with author) (initial appearance before the Juvenile Court). The State's precise reasons for amending the petition are not divulged in the record. Stanley's attorney suggested that the State realized "a neglect finding could not be proved against the father [Stanley]." Murphy, *supra* note 63, at 232. It is not clear from the publicly available case record whether the State believed it could not prove neglect or if it would be easier to prove dependency. Either way, the State declined to drop the case and continued to seek a court order placing the two younger children in its custody, suggesting that it continued to harbor concerns about Stanley's parental fitness.

[66] *See* Stanley v. Stanley, 256 N.E.2d 814, 825 (Ill. 1970), *rev'd sub nom. Stanley*, 405 U.S. 645.

serve the children's best interests.[67] Hearing proof that no marriage existed,[68] the court ruled the children dependent and placed them in foster care with the Nesses.[69]

Because the State amended its petition to avoid litigating its allegation that Stanley was an unfit parent, essential facts are absent from the record. Was Peter Stanley a fit parent who appropriately decided that his children needed to live with someone else temporarily? Or did Peter Stanley's neglect of Karen Stanley affect his parenting of the younger children, and, if so, how? Did alcohol use affect his parenting, and, if so, how? The case record does not reveal answers. That loss is the effect of the State's litigation choice. By focusing on Stanley's marital status rather than his parental fitness, there is no way for the courts involved to assess his fitness, or whether foster care was necessary to protect Peter Jr. and Kimberly, or to determine what rehabilitative steps he ought to have followed as a condition of reunification.

Even the State's motivation for seeking custody of Stanley's children remains somewhat contested. Stanley's attorney, Patrick Murphy, alleged in a book that the State did not like Stanley's "attitude" toward his children after Joan Stanley's death.[70] The State framed the issue differently in court but never articulated in court pleadings or hearings a detailed reason why it sought to remove the children from Stanley.[71] The State's initial petition simply alleged that the children were "neglected as to care necessary for [their] well being," without specifying any details.[72] The probation officer who filed the petition stated in juvenile court:

> I was concerned about the welfare of the children [Peter Jr. and Kimberly] and at the time that Karen's case came into court, the whereabouts of these two children were unknown and I felt that the father was not in a state of mind to actually provide proper care for the children.[73]

The law presuming the children to be dependent meant both that the State never had to justify its position and that the court did not have to determine whether Stanley's neglect of his eldest daughter or his possible alcohol abuse required the protection of his younger children or whether Stanley had acted appropriately by leaving them temporarily in his family friends' custody.

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[67] *Stanley*, 405 U.S. at 650.

[68] Transcript of Proceeding, *supra* note 65, at 14–15.

[69] Transcript of Proceeding, *supra* note 38, at 22.

[70] PATRICK T. MURPHY, OUR KINDLY PARENT—THE STATE: THE JUVENILE JUSTICE SYSTEM AND HOW IT WORKS 15 (1974).

[71] *See* Transcript of Initial Proceeding at 2, *In re* Stanley & Stanley, Nos. 69J004773, 69J004774 (Ill. Cir. Ct. Juv. Div. Apr. 1, 1969) (initial appearance and continuance of case before the juvenile court); Transcript of Proceeding, *supra* note 38, at 11.

[72] Petition in Support of Motion to Vacate, *supra* note 56.

[73] Transcript of Initial Proceeding, *supra* note 71, at 2.

Stanley retained Patrick Murphy as his lawyer.[74] Murphy was a self-described activist leading Chicago's new Juvenile Legal Aid Society. In a 1974 book, he 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."[75] 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.[76] Murphy had not specifically targeted the statute discriminating between unwed mothers and fathers until Peter Stanley sought him out.[77] In a 2014 interview, Murphy said he did not take the case to the Supreme Court for reform purposes but that he merely sought to represent Peter Stanley, who was an engaging client to whom it was hard to say "no."[78]

One may suspect that Murphy's motivations were more complex—that this self-described activist litigator saw this case as a tool to reform juvenile court. Such a motivation would explain why Murphy went out of his way to take Stanley's case. Murphy met Stanley when he represented Karen Stanley in the earlier case stemming from Stanley's neglect of her.[79] By Murphy's account, Stanley told him, "[Y]ou were the only fair person in the courtroom" in Karen's case.[80] Murphy's prior representation of Karen Stanley in a case that found her father unfit posed conflict of interest challenges for representing Stanley in another case in which Stanley claimed to be a fit parent.[81] Indeed, Murphy's firm sought to withdraw from representing Stanley at trial due to the conflict, and the court granted leave to withdraw.[82] But Murphy and his associates[83] could not stay out of the case, especially as they witnessed juvenile court procedures that appeared to steamroll Stanley. Immediately after Murphy's firm withdrew, the judge asked Stanley if he was ready to proceed

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[74] *See* Transcript of Proceeding, *supra* note 11, at 1.

[75] MURPHY, *supra* note 70, at 14.

[76] *Id.* at 12–15.

[77] *See id.* at 14 (Murphy describing how he identified various issues for reform, and then "happened upon" the treatment of unwed fathers). Murphy also noted that the statute which discriminated against unwed fathers was "not a significant issue" in many cases, but that it was still wrong. *See* Telephone Interview with Judge Patrick T. Murphy, Circuit Judge, 5th Mun. Dist. Domestic Relations Div., State of Ill. Circuit Court of Cook Cty. (Oct. 26, 2015) [hereinafter October 2015 Telephone Interview with Murphy].

[78] April 2014 Interview with Murphy, *supra* note 40.

[79] Murphy assisted in switching payment of Karen's social security benefits from Peter Stanley to her legal guardian, the Illinois Department of Children and Family Services. *Id.*; *see also* Transcript of Proceeding, *supra* note 11, at 4.

[80] Telephone Interview with Judge Patrick T. Murphy, Circuit Judge, 5th Mun. Dist. Domestic Relations Div., State of Ill. Circuit Court of Cook Cty. (Mar. 14, 2014) [hereinafter March 2014 Telephone Interview with Murphy].

[81] *See* Transcript of Proceeding, *supra* note 38, at 4.

[82] *Id.* at 3–6.

[83] On one of the court dates, an associate of Murphy's, Fred Meinfelder, appeared. *Id.*

even though he no longer had a lawyer.[84] Stanley responded, "Gee, I would like to acquire an attorney," but the court proceeded anyway.[85] Murphy's associate then proceeded to participate in the hearing "as a friend of the Court,"[86] but operated essentially as Stanley's lawyer—cross-examining the State's witness, examining Stanley, and making an argument to the judge that Stanley's children were not dependent.[87] Ten days later, after the judge had declared Stanley's two younger children dependent and Stanley had asked Murphy to appeal, Murphy filed a motion to vacate on Stanley's behalf and asked the court to permit him to reappear.[88] Murphy argued that the case involving Karen Stanley had been resolved so that no present conflict existed and noted that no other attorney could practically represent Stanley.[89] Despite an attorney's ongoing obligation to former clients such as Karen Stanley,[90] the court permitted Murphy's appearance.[91]

The possible conflict between representing Karen Stanley and Peter Stanley would have been even more apparent had facts that arose at a later point been known at the time the younger children's case was tried. Later media reports stated that Stanley was accused of molesting his eldest daughter, Karen.[92] These allegations did not arise during the trial court's consideration of the younger children's case, and it cannot be determined from available public records when Illinois authorities became aware of the sex abuse allegations. Still, concerns about possible molestation impacted the Supreme Court's deliberations.[93]

Murphy soon challenged various aspects of the statute and the family court's treatment of Stanley, though the specific doctrinal grounds for these challenges were

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[84] *Id.* at 7–8.

[85] *Id.* at 8.

[86] *Id.* at 9.

[87] *Id.* at 17–22.

[88] Transcript of Proceeding, *supra* note 11, at 4.

[89] *Id.* at 5–6, 9–10.

[90] Rule 1.9(a) of the Illinois Rules of Professional Conduct bars lawyers from representing one party in a "substantially related matter" when a former client's interests are "materially adverse" to the potential new client. Since both the case regarding Karen Stanley and the cases regarding her younger siblings raised questions about Peter Stanley's fitness, especially in the period after their mother's death, the two cases would likely be considered "substantially related." Although the State's focus on Stanley's marital status, rather than parental fitness, in the younger children's cases differed from its focus in Karen Stanley's case, Stanley's lawyers still argued that a fitness hearing was required when they had represented an adverse party in a prior case that found him to be an unfit parent. The only exception to the rule is when a former client gives informed consent. *Id.* There was no suggestion that Karen Stanley gave such consent.

[91] Transcript of Proceeding, *supra* note 11, at 10.

[92] Joseph Sjostrom, *Unwed Dad Loses Rights to Children*, CHI. TRIB., Sept. 14, 1973, at A16, http://archives.chicagotribune.com/1973/09/14/page/36/article/display-ad-33-no-title [http://perma.cc/88QE-8EBH].

[93] *See infra* notes 234–36.

not always clear.[94] Stanley argued that, as his children's father, his marital status should not justify their placement in the State's custody and that juvenile court procedures did not give him a meaningful ability to reunify with his children.[95] At trial, his attorney argued that the absence of a legal marriage "should not be a basis for removing the children from Mr. Stanley and making them wards of the court since he did build up a father[-child] relationship"[96]—suggesting a relationship right was formed by Stanley raising his children, rather than depending on his biological fatherhood. After the court declared the children dependent, Stanley's lawyers shifted their focus to the difficulty Stanley would have in regaining custody. They filed a motion to vacate because the trial court's order declaring the children dependent "effectively terminated all of [Stanley's] parental rights" and he could "never remedy the basis of the finding."[97] The State's attorney had stated that Stanley could seek custody at a future point, but any such request would be subject to the probation officer's investigation and the court's decision.[98] The probation officer made it clear that she did not believe that Stanley was "in a position financially to provide properly for the children" and that he would have to present a "proper plan" in the "best interest of the children" for her to recommend that he obtain custody.[99] Thus, even without a finding of unfitness, she would have placed the burden on Stanley to prove his financial ability to raise the children and subjected a future custody decision to the best-interests standard. Challenging these rulings evoked due process concerns—that as a biological father who had raised his children, the absence of a marriage did not suffice to deprive Stanley of custody, and that, if he were deprived of custody, he would be entitled to some meaningful opportunity to reunify with his children. But neither at trial nor in the post-trial motions did the lawyers cite a specific constitutional clause as authority for their argument.[100]

B. Stanley's Appeals and the Focus on Equal Protection, Not Due Process

Through his lawyer, Patrick Murphy, Stanley appealed the family court's decision to the Illinois Supreme Court, and his argument on appeal cited the Equal Protection Clause, but not the Due Process Clause.[101] He argued that the Illinois statute classifying all mothers and married fathers as legal parents presumptively entitled to

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[94] Transcript of Proceeding, *supra* note 11, at 11–13.

[95] *Id.*

[96] Transcript of Proceeding, *supra* note 38, at 21.

[97] Petition in Support of Motion to Vacate, *supra* note 56.

[98] Transcript of Proceeding, *supra* note 38, at 10.

[99] *Id.* at 11.

[100] *See id.* at 9–10, 21; Transcript of Proceeding, *supra* note 11, at 11–13; Petition in Support of Motion to Vacate, *supra* note 56.

[101] *See* Stanley v. Stanley, 256 N.E.2d 814, 815 (Ill. 1970), *rev'd sub nom*. Stanley v. Illinois, 405 U.S. 645 (1972).

custody, while classifying unmarried fathers as not so entitled served no rational purpose.[102] He made no claim that sex discrimination entitled him to heightened scrutiny.[103] Although he discussed parental rights and criticized the absence of a clear procedure for regaining custody, he made no explicit argument that the Due Process Clause entitled him to a hearing on parental fitness or a particular procedure for obtaining custody.[104] Choosing which arguments to raise—and not to raise—shaped the Supreme Court's consideration of the case, significantly contributing to the voting and issue fluidity that arose at the Court, as will be discussed in Part II.C and Part III.[105]

Murphy's choice of which argument to raise, of course, came years before the Supreme Court decided the case and was shaped by the precedents available at the time. In a 2014 interview, Murphy said that he recalled no strategy in that choice.[106] An evaluation of the available precedents at the time can, however, explain the strategic options that were available. Both an Equal Protection and Due Process Clause focus carried risks, as both involved then-unsettled and controversial elements of constitutional family law.

The Equal Protection Clause allowed Murphy to challenge the disparate treatment of unmarried men—both as compared to women (whether married or unmarried) and to married men—because only unmarried men could lose their children to foster care without a showing of parental unfitness. And it allowed him to draw on the Supreme Court's 1968 decision in *Levy v. Louisiana*,[107] which held that a statute denying illegitimate children the ability to sue for the wrongful death of their mother violated the children's equal protection rights[108]—a holding that raised some question about state classifications based on the marital status of a child's parents. But the Supreme Court had historically applied deferential rational review to sex discrimination cases.[109] An equal protection argument, therefore, risked deference to the long legal history of assigning different legal statuses to the relationship between unwed fathers and their children.[110] Advocates had begun to seek heightened scrutiny for sex discrimination cases, but the Court had not yet decided to apply such scrutiny.[111]

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[102] *See id.*

[103] *See id.*

[104] *See id.* at 815–16.

[105] *See infra* Part II.C and Part III.

[106] April 2014 Interview with Murphy, *supra* note 40.

[107] 391 U.S. 68 (1968).

[108] *Id.* at 70–72.

[109] *See, e.g.*, Craig v. Boren, 429 U.S. 190, 217–21 (1976) (Rehnquist, J., dissenting) (arguing that historical precedent required gender classifications to be subjected to rational basis review); Goesaert v. Cleary, 335 U.S. 464 (1948) (applying rational basis review to a statute prohibiting females from bartending without familial relation to a male bar owner), *abrogated by Craig*, 429 U.S. 190.

[110] *See generally* MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA 196–233 (1985) (discussing the legal history of the status of illegitimate children).

[111] *See, e.g.*, Reed v. Reed, 404 U.S. 71, 75–76 (1971); Brief for Appellant at 5, *Reed*, 404

Such claims were just beginning to percolate at the time of Stanley's state court appeal, and had just reached the Supreme Court at the same time as *Stanley*. The first such claim to reach the Supreme Court, *Reed v. Reed*, was argued before the Supreme Court on October 19, 1971, the same day *Stanley* was ultimately argued before the Court.[112] Ruth Bader Ginsburg represented Sally Reed, challenging a state law that preferred men over women as executors of estates.[113] Ginsburg explicitly asked the Court to treat sex as a suspect classification and apply heightened scrutiny in equal protection challenges to sex classifications.[114] Her brief also argued that the statute failed under rational basis review.[115] At the time that Murphy had developed his equal protection arguments in *Stanley*, there was no Supreme Court precedent for heightened review. Efforts to establish heightened scrutiny were cutting edge, as evidenced by Ginsburg's brief's greater reliance on academic and policy arguments than Supreme Court precedent.[116] Although *Stanley* presented the opportunity to raise arguments similar to those that Ginsburg raised in *Reed*, it is unsurprising that Murphy did not make similar arguments. Murphy was a crusading reformer of juvenile courts' handling of foster care and juvenile delinquency cases; sex discrimination was not his core issue.

If Murphy's equal protection argument led to a deferential standard of review, a due process argument would have brought different benefits and risks. Certainly, he could have raised both claims—the children in *Levy* had done so, for example.[117] And the Supreme Court had ruled in the 1920s that the Due Process Clause protected parents' rights. Murphy could have cited *Meyer v. Nebraska*[118] and *Pierce v. Society of Sisters*[119] for the proposition that the Due Process Clause protected Stanley's right to "bring up children."[120] But reliance on these older cases carried risks. The Supreme Court decided them in the midst of the *Lochner* era's substantive economic due process focus.[121] Three decades after the New Deal repudiation of *Lochner*, it was not clear whether the Court would be willing to entertain a substantive due process argument or apply such older precedents with any force. In 1944, the *Prince*

U.S. 71 (No. 70-4), 1971 WL 133596 (arguing that sex is a "suspect class" which is due heightened scrutiny).

[112] Stanley v. Illinois, 405 U.S. 645 (1971); *Reed*, 404 U.S. 71.

[113] *Reed*, 404 U.S. at 71.

[114] Brief for Appellant, *supra* note 111; *see also supra* notes 14–59 and accompanying text.

[115] *Id.* at 60–67.

[116] *See id.* at 14–41.

[117] *See* Levy v. Louisiana, 391 U.S. 68, 70 (1968) (noting both Due Process and Equal Protection Clause challenges to the statute at issue).

[118] 262 U.S. 390 (1923) (holding invalid a law that prohibited a teacher from teaching a foreign language to children under the Due Process Clause).

[119] 268 U.S. 510 (1925) (holding invalid an education act that interfered with parents' right to direct the upbringing of their children).

[120] *Meyer*, 262 U.S. at 399; *see also Pierce*, 268 U.S. at 534–35 (recognizing parents' "liberty . . . to direct the upbringing and education of children under their control").

[121] Lochner v. New York, 198 U.S. 45, 64 (1905).

v. Massachusetts[122] Court had recognized some constitutional protections for families—at least when those rights were bolstered by the First Amendment's Free Exercise Clause—but still upheld state intervention to protect children while applying fairly deferential review.[123] The Supreme Court had never even addressed a case in which a state child welfare agency sought to remove a child from a parent's custody. For decades, such cases had occurred without meaningful constitutional oversight, and it was by no means certain that the Supreme Court would impose it. It was not clear whether the Court would want to analyze the child welfare system on due process grounds or, if it did so, whether the Court would defer to state action as in *Prince* or apply a more muscular review. Indeed, as the State pointed out to the *Stanley* Court, there was a split in authority whether the "best interest of the child" standard or something more deferential to parents' rights applied to child protection cases.[124] Presenting that issue squarely to the Court risked the Court ruling that the Constitution provided little protection to any parents.

A due process argument could have drawn analogies to contemporary efforts to reform juvenile delinquency cases. The first juvenile court was established in Chicago in 1899, and that court had intentionally handled juvenile delinquency and child welfare cases with great informality, on the theory that well-intentioned judicial intervention could improve troubled children's lives.[125] For more than half a century, juvenile courts handled both child welfare and juvenile delinquency cases with little constitutional oversight. That view was increasingly criticized, leading the Supreme Court in *In re Gault*[126] in 1967 to use the Due Process Clause to impose basic protections—"constitutional domestication"—on juvenile courts' delinquency cases.[127] Juvenile delinquency cases had strong analogies to criminal proceedings and the various rights of criminal defendants, but the Court nonetheless rested its holding on the Due Process Clause rather than the individual criminal procedure amendments.[128] How the Due Process Clause might apply to juvenile courts' child welfare dockets was an open question. *Stanley* presented the opportunity to raise at least

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[122] 321 U.S. 158 (1944).

[123] *See id. Prince* involved a child and her aunt, who wished to circulate religious tracts on a street corner at night in violation of state child labor laws. *Id.* at 159–62. In addition to *Prince*, the Court had also described parents', or at least mothers', rights to custody as "far more precious . . . than property rights." May v. Anderson, 345 U.S. 528, 533 (1953). This language, however, was dicta in a case that involved the enforcement of an ex parte private custody order across state lines, rather than a child protection case. *Id.*

[124] Brief for Respondent, *supra* note 12, at 20 n.15 ("The question of the circumstances under which the state can remove the control of children from the custody of legal parents has been the source of ultimate confusion.").

[125] Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 109 (1909) ("[T]he form of procedure is totally different [in juvenile court] and wisely so.").

[126] 387 U.S. 1 (1967).

[127] *Id.* at 22 (holding the requirements of due process apply to juvenile delinquency proceedings).

[128] *See id.* at 31–34, 57–58.

some due process concerns—the trial involved a juvenile court that thought it could take children out of a parent's custody without proving the parent unfit, offering a clear path toward reunification, or providing a parent an attorney, even when he explicitly requested one.[129] By crafting an equal protection argument, rather than a due process argument as in *Gault*, Murphy took aim at the statute, not juvenile court procedure.

Murphy's arguments did not fare well at the Illinois Supreme Court, which rejected his appeal in a two-page opinion.[130] As that court summarized, "Stanley urges . . . that an unconstitutional distinction inheres in the favorable classification of unwed mothers as parents, as opposed to the exclusion of unwed fathers from that classification."[131] The court rejected this argument because, in its view, a rational relationship existed between the juvenile court's purposes and the challenged sex classification.[132] The court, however, did not explain what that rational relationship was, suggesting that the deferential standard of review did much of the court's work.[133] There was no discussion of whether such rational review as applied sufficed for a sex discrimination case because Murphy made no claim that heightened scrutiny applied.[134] The court seemed unhappy with the clarity of Murphy's argument, writing that he "apparently" made a procedural argument regarding Stanley's difficulty in regaining custody,[135] which the court declined to address because he had not tried to reestablish such rights.[136] Neither Murphy's argument nor the Illinois Supreme Court's decision addressed whether the initial dependency finding and order, which placed the children with the Ness family, comported with due process.

Murphy presented similar arguments to the U.S. Supreme Court. The question presented was whether the Illinois statute "denies surviving unwed natural fathers the equal protection of the laws," and his brief conceded that this equal protection question was the "only issue" raised in the Illinois Supreme Court.[137] He made no specific due process argument, which reduced the risk that the Supreme Court would limit due process protections for parents and children in child welfare cases. Nor did he ask for heightened scrutiny of the equal protection claim.[138] Murphy also clouded the categories that the statute created. They obviously discriminated on the basis of sex, treating unwed mothers differently than unwed fathers. But Murphy lumped

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[129] *Gault* also held that the Due Process Clause guaranteed counsel to children in juvenile delinquency cases. *Id.* at 41.

[130] *In re* Stanley v. Stanley, 256 N.E.2d 814 (Ill. 1970).

[131] *Id.* at 815.

[132] *Id.*

[133] *See id.* at 816.

[134] *See id.* at 815–16.

[135] *See id.* ("If, as it appears, Stanley is arguing . . . .").

[136] *Id.* at 816.

[137] Brief for the Petitioner, *supra* note 13, at 2–3.

[138] Murphy made clear at oral argument that he assumed the equal protection standard was whether the classification was "reasonable and not arbitrary." Oral Argument, *supra* note 48, at 3:00.

such sex discrimination with other categories, specifically comparing "wed but widowed fathers" with unwed fathers like Stanley.[139] He thus implicitly questioned a sex discrimination frame and any heightened scrutiny (explicit or implied) that such a frame might trigger. Justice Brennan even sought to help Murphy frame it as a case about discrimination between unwed mothers and unwed fathers at oral argument, and Murphy responded with the allegedly "broader" argument that the State also discriminated between unwed and wed fathers.[140]

Murphy's approach only partly hid the due process issues that lurked within this equal protection claim. The brief emphasized that Stanley had not neglected either Peter Jr. or Kimberly[141] and argued that Stanley had no meaningful ability to be appointed custodian of his children.[142] Moreover, it directly cited the *Lochner*-era substantive due process parental rights cases.[143] The brief argued, for pages, that Stanley's "biological" and "familial" relationship with his children triggered constitutional protection[144]—a quintessential due process argument. And an amicus curiae explicitly argued that Illinois's statutory scheme violated due process.[145]

The State's brief also revealed the due process implications of the case, and the State explicitly argued against using the Due Process Clause to provide any significant protection to parents.[146] The State defended the sex-based classification, attacking the "general disinterest" of unwed fathers in their children,[147] but went much further to diminish the right to family integrity generally. The State relied on *Prince* for the proposition that "the state's reasonable attempts to secure the welfare of its children" trumped whatever rights parents might have in their children.[148] This argument implies that due process rights to family integrity were a relic of the *Lochner* era, significantly limited by *Prince*.[149] As a result, unwed fathers were not the only parents who could lose custody without being proven unfit—the State could do that to any parent, even married parents, "when the welfare of the child so requires."[150] If the State of Illinois had its way, the best interests of the child standard would govern all child protection cases.[151]

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[139] *Id.* at 9:12.

[140] *Id.* at 14:27.

[141] Brief for the Petitioner, *supra* note 13, at 11–12 & n.3.

[142] *Id.* at 13–15.

[143] *Id.* at 16 (citing Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923)).

[144] *Id.* at 19–22.

[145] Brief of Ctr. on Soc. Welfare Policy & Law as Amicus Curiae Supporting Appellant, Stanley v. Illinois, 405 U.S. 645 (1972) (No. 70-5014), 1971 WL 126675.

[146] Brief for Respondent, *supra* note 12, at 18–22.

[147] *Id.* at 8.

[148] *Id.* at 20.

[149] *See id.* (citing Prince v. Massachusetts, 321 U.S. 158 (1944)).

[150] *Id.* at 20–21.

[151] *Id.* at 21 ("[T]he only relevant consideration in determining the propriety of governmental

II. THE SUPREME COURT'S DECISION-MAKING IN *STANLEY*

When the case reached the Supreme Court, due process would finally have its day. The Court ultimately ruled 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."[152] This holding required recognizing the strong substantive due process right of parents to the custody of their children, which the Court described as a right that "undeniably warrants deference and, absent a powerful countervailing interest, protection."[153] That holding removed the cloud from *Lochner*-era precedents, which had first recognized such rights and suggested that the Supreme Court would offer stronger protection of these rights.[154] Procedurally, only a hearing on fitness—and not a presumption that unwed fathers were not fit—could suffice.[155] The Illinois statute also violated the Equal Protection Clause, but, as the Court noted, that ruling "follows" from its due process decision.[156]

The Court reached this set of holdings circuitously. The story—revealed through original research into the Justices' notes, memoranda to each other, memoranda from clerks, and draft opinions—involves strategic behavior by the Justices, a Court struggling to deal with due process and sex discrimination in a period of turnover and possible ideological shift, and lawyers' litigation choices that nearly doomed their client's case.

The lawyers turned the case over to the Supreme Court Justices after oral argument on October 19, 1971. Between then and the Court's ultimate decision, the result shifted from a 5–2 vote for the State—specifically, to dismiss the certiorari petition as improvidently granted (DIG) and leave the Illinois Supreme Court decision intact—to a 5–2 victory for Stanley.[157] Only two Justices—Byron White and Thurgood Marshall—voted for Stanley throughout the Court's decision-making.[158] But four of the five Justices originally aligned with the State changed their views.[159] By the

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intervention in the raising of children is whether the best interests of the child are served by such intervention.").

[152] Stanley v. Illinois, 405 U.S. 645, 649 (1972).

[153] *Id.* at 651.

[154] *See, e.g.*, Lochner v. New York, 198 U.S. 45, 64–65 (1905).

[155] *Stanley*, 405 U.S. at 652–58.

[156] *Id.* at 658.

[157] *See infra* Part II.B–C.

[158] Justice White, 1st Draft Opinion, Stanley v. Illinois, No. 70-5014 (Nov. 8, 1971) (dissenting) (unpublished manuscript) (on file with author); Letter from Justice Marshall to Justice Brennan (Oct. 28, 1971), *in* THE BURGER COURT OPINION WRITING DATABASE (Paul J. Wahlbeck, James F. Spriggs, II & Forrest Maltzman eds., 2011) [hereinafter Letter from Marshall to Brennan], http://www.supremecourtopinions.wustl.edu/files/opinion_pdfs/1971/70-5014.pdf [http://perma.cc/K48V-QR48] (dissenting from *per curiam* opinion).

[159] *See infra* Part II.B–C.

time the opinion was released several months later, Justices William Douglas, William Brennan, and Potter Stewart all changed their votes and joined White's opinion.[160] Justice Harry Blackmun flipped between both sides multiple times.[161]

The four Justices who changed their votes did so at different times and for different reasons. Brennan likely supported Stanley all along, but voted to dismiss the writ at conference to avoid a harmful precedent if the Court ruled for the State on the merits; thus, he switched his vote quickly when he recognized that a majority existed to rule for Stanley. Douglas initially wrote an opinion that would have ruled strongly for the State, describing Stanley and other unwed fathers as "hit-and-run drivers"[162] and dissenting from a DIG. Douglas changed his mind soon after White and Marshall circulated their opinions, and then joined the majority—but he insisted that the Court rule on due process grounds.[163] Stewart switched his vote just days before the Court issued its final decision, long after the ultimate result was clear.[164] Blackmun appeared torn at conference, yet stated his inclination to rule for the State.[165] He later switched his vote and joined White's opinion, only to later switch back and join Burger's dissent because he did not believe the Court should address due process issues, not because he concluded that the state statute was ultimately just.[166]

These vote changes, and the competing views of Justices in what became the majority, led directly to the Court adopting a strong due process holding. In particular, Douglas's insistence that he would vote for a due process ruling, but not an equal protection ruling, led White to focus his draft opinion on due process.[167] Marshall's strongly worded draft concurrence—which he ultimately did not file—led White to significantly strengthen the holding.[168]

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[160] *See infra* Part II.B–C.

[161] *See supra* notes 25–26 and accompanying text.

[162] Justice Douglas, 2d Draft Opinion, *supra* note 18, at 4 ("Most unwed fathers are not present at their children's births and like hit-and-run drivers are difficult to locate.").

[163] *See* Letter from WHA to Douglas, *supra* note 19.

[164] *See* Letter from Justice Stewart to Justice White (Mar. 30, 1972) (on file with author) [hereinafter Letter from Stewart to White] (writing Justice White to join the majority opinion).

[165] *See* Justice Douglas, Conference Notes, *supra* note 25 (noting Justice Blackmun's initial inclination to affirm state court's holding in favor of the State).

[166] *See* Letter from Blackmun to Burger, *supra* note 25 (writing to join the Chief Justice's dissent).

[167] *See* Letter from WHA to Douglas, *supra* note 19 (noting that Justice White retained the due process holding to keep Justice Douglas on the opinion).

[168] *Compare* Justice White, 2d Draft Opinion at 3, Stanley v. Illinois, No. 70-5014 (Nov. 18, 1971) (unpublished manuscript) (on file with author), *with* Justice White, 4th Draft Opinion at 4, Stanley v. Illinois, No. 70-5014 (Feb. 3, 1972) (unpublished manuscript) (on file with author) (adding sentence at the end of Part I stating the holding that Stanley had clearly been denied due process and equal protection under the Fourteenth Amendment).

A. Conference

Seven Justices[169] met for conference on October 22, 1971. Chief Justice Burger began the conference by passing—declining to share how he would vote.[170] To his colleagues' displeasure, Burger frequently passed, thus delaying his vote until other Justices' positions were clear—giving him the option to vote with the majority and thus to "retain the opinion assignment" and exercise "control over the content of the majority opinion."[171] Burger passed significantly more frequently than any other Justice.[172] Burger's "pass" in *Stanley* seems plainly strategic, as he favored the State on the merits. Justice Douglas's conference notes summarize Burger as believing that Stanley could obtain custody by adopting his children or establishing paternity of them, suggesting that the Illinois statute minimally invaded Stanley's rights, providing him a meaningful opportunity to seek custody.[173]

Justice Douglas went next,[174] and his position changed the dynamics of the conference. Justice Douglas was perhaps the Court's most liberal member;[175] a victory for *Stanley* would probably require votes from him and the Court's other two

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[169] The Justices were, in order of seniority, Chief Justice Warren Burger, Douglas, Brennan, Stewart, White, Marshall, and Blackmun. The Court had two vacancies at the time; President Nixon appointed Lewis Powell and William Rehnquist to fill those vacancies in October 1971, and those Justices took their seats on January 7, 1972, but took no role in *Stanley*. LINDA GREENHOUSE, BECOMING JUSTICE BLACKMUN: HARRY BLACKMUN'S SUPREME COURT JOURNEY 84–85 (1st ed. 2005).

[170] Justice Blackmun, Conference Notes on Stanley v. Illinois, No. 70-5014 (Oct. 22, 1971) [hereinafter Justice Blackmun, Conference Notes] (on file with author) ("CJ pass"); Justice Douglas, Conference Notes on Stanley v. Illinois, No. 70-5014 (Oct. 22, 1971) [hereinafter Justice Douglas, Conference Notes] (on file with author) ("CJ— . . . passes").

[171] SAUL BRENNER & JOSEPH M. WHITMEYER, STRATEGY ON THE UNITED STATES SUPREME COURT 54 (2009); *see also* BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN: INSIDE THE SUPREME COURT 174 (1979) (noting Justice Burger's "unwillingness to commit himself before he had figured out which side had a majority"); Forrest Maltzman & Paul J. Wahlbeck, *Strategic Policy Considerations and Voting Fluidity on the Burger Court*, 90 AM. POL. SCI. REV. 581, 585 (1996) (describing Justice Burger's alleged vote switching to the majority in order to "control the opinion assignment").

[172] Maltzman & Wahlbeck, *supra* note 171, at 589 n.22 ("Burger, more frequently than any other justice, passed at conference.").

[173] Justice Douglas, Conference Notes, *supra* note 170 (suggesting Stanley could "accomplish the ends by (a) adopting (b) [unclear] parentage").

[174] Supreme Court Justices discuss their views on cases at conference in order of seniority, starting with the Chief Justice.

[175] Jeffrey Segal and Harold Spaeth, for instance, rank Douglas as the single most liberal Burger Court Justice on eight out of ten categories. JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED 342–43 (2002); *see also id.* at 181 ("When Justice Douglas resigned, . . . Ford had to replace the Court's most liberal justice . . . .").

liberals (Brennan and Marshall), plus one other Justice. Burger had made clear that his sympathies were with the State.[176] Blackmun, then new in his tenure, was presumed averse to expanding constitutional protections.[177] Stewart's votes in prior cases made him unlikely to support Stanley.[178] Thus, when Douglas stated his inclination to affirm the judgment for the State—because, according to his own notes, the statute was a "reasonable classification[:] he can adopt children"[179]—the likely result seemed clear.

Burger then interjected[180] that he would dismiss the writ "as improvidently granted."[181] That result was consistent with both his and Douglas's stated views—if Stanley could somehow seek custody, the Court could wait until he did so to decide which rights he might be entitled to.[182] Burger's DIG suggestion, like his initial pass, may also have had strategic goals. Knowing that Douglas was troubled by Stanley's failure to file for custody of his children, Burger felt more comfortable that he could command a majority to dismiss the writ. Burger frequently sought to avoid a decision on a substantive legal issue by attempting to focus the conference on a procedural mechanism to dispose of the case—such as a DIG, or a dismissal on mootness, standing, or some similar ground.[183] The question remains, why would Burger settle for a DIG, rather than a judgment for the State on the merits? Perhaps he wanted to avoid a fight over the proper level of scrutiny to apply in a sex discrimination case,

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[176] *See* Letter from Chief Justice Burger to Justice White (Nov. 23, 1971), *in* THE BURGER COURT OPINION WRITING DATABASE (Paul J. Wahlbeck, James F. Spriggs, II & Forrest Maltzman eds., 2011) [hereinafter Letter from Burger to White], http://www.supremecourtopinions.wustl.edu/files/opinion_pdfs/1971/70-5014.pdf [http://perma.cc/K48V-QR48] (stating it is "clear" Stanley failed to use state remedies available to him).

[177] *See* GREENHOUSE, *supra* note 169, at 52 (explaining how Chief Justice Burger "fully expected" Justice Blackmun to not expand constitutional protections).

[178] Justice Stewart had dissented in *Levy v. Louisiana*, 391 U.S. 68 (1968), which struck down a statute denying illegitimate children the right to sue for damages for the wrongful death of their mother. The dissent would have allowed states to define what family relationships are entitled to legal recognition, especially when they followed traditional rules regarding parents' marital status. Glona v. Am. Guar. & Liab. Ins., 391 U.S. 73, 77–78 (1968) (Harlan, J., dissenting). The *Glona* dissent doubled as a dissent in *Levy*. *See id.*

[179] Justice Douglas, Conference Notes, *supra* note 170; *see also* Justice Blackmun, Conference Notes on Stanley v. Illinois, No. 70-5014 (Oct. 22, 1971) [hereinafter Justice Blackmun, Conference Notes] (transcribed) (on file with author) ("D— . . . Hs access thru adoption. This saves from unconst").

[180] Justice Douglas's Conference Notes summarize a statement from "CJ" (Chief Justice Burger) and then from himself, followed by another entry from "CJ." Justice Douglas, Conference Notes, *supra* note 170.

[181] *Id.*

[182] *See* Chief Justice Burger, 2d Draft Opinion at 12, Stanley v. Illinois, No. 70-5014 (Jan. 24, 1972) (dissenting) (unpublished manuscript) (on file with author); Justice Douglas, 2d Draft Opinion, *supra* note 18, at 5.

[183] Burger made such efforts in 18% of all cases in the 1983 term. LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE 91 (1998).

which could have arisen if the Court reached a decision on the merits—a goal that may have led him to support a per curiam opinion in a statutory sex discrimination case decided the prior term.[184] More immediately, the Court addressed *Reed v. Reed*, which was argued the same day as *Stanley* and which included Ruth Bader Ginsburg's request for heightened scrutiny for sex-based classifications.[185] Burger would avoid addressing that issue in *Reed* by writing a unanimous opinion striking down the sex classification under rational basis review.[186] (A majority of the Court would not apply heightened review until *Craig v. Boren*, which was decided in 1976.)[187] Seeking to avoid a fight over the level of scrutiny in *Reed*—in which the question was squarely presented—it would make sense for Burger to try to avoid it in *Stanley* as well.

Brennan went next, and then added to the weight against *Stanley*. Brennan thought it was "strange" for an adult to assert an equal protection problem based on different treatment of children,[188] thus agreeing with a DIG.[189] Though expressing skepticism about the equal protection claim, Brennan notably did not say that he would rule for the State. Instead he joined Burger's suggestion of issuing a DIG.[190] His equal protection skepticism was curious because he had previously voted to strike down a statute which prohibited illegitimate children from suing for the wrongful death of their mother.[191] As with Burger, scholars have documented Brennan's use of procedural arguments to prevent the Court's consideration of substantive issues when he feared the Court would rule against his wishes.[192] Brennan was skeptical of sex-based legal classifications, and he could have feared that a majority of the Court would create a harmful precedent for a future sex discrimination case and was thus possibly attracted to a DIG as a means of avoiding such possibility.

After Brennan's vote, Stewart explained that he also saw no invidious discrimination in the challenged statute[193] and further expressed concern that Stanley had

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[184] Burger had maneuvered toward a per curiam decision in *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971). WOODWARD & ARMSTRONG, *supra* note 171, at 123.

[185] Brief for Appellant, *supra* note 111, at 14–59.

[186] Reed v. Reed, 404 U.S. 71, 76 (1971).

[187] 429 U.S. 190 (1976).

[188] Justice Douglas, Conference Notes, *supra* note 25; see also Justice Blackmun, Conference Notes, *supra* note 179 ("Br—See no = P prob").

[189] Justice Douglas, Conference Notes, *supra* note 25.

[190] Justice Brennan, 1st Draft Opinion at 2, Stanley v. Illinois, No. 70-5014 (Oct. 28, 1971) (per curiam) (unpublished manuscript) (on file with author).

[191] Levy v. Louisiana, 391 U.S. 68 (1968). Perhaps Brennan initially saw a distinction between children raising an equal protection argument based on legitimacy classifications (as in *Levy*) and a parent doing so (as in *Stanley*), but such a distinction was not articulated fully.

[192] EPSTEIN & KNIGHT, *supra* note 183, at 92, 119–20 (discussing Brennan's use of "issue manipulation").

[193] Justice Douglas, Conference Notes, *supra* note 25; Justice Blackmun, Conference Notes, *supra* note 179.

been found to have neglected his older daughter, Karen.[194] There were now four votes—a majority—against Stanley.

White and Marshall then both stated their support for Stanley.[195] Justice Blackmun recorded their positions in sex discrimination equal protection terms—White stated that "mo[ther and] fa[ther are] treated diff[erently] . . . invid[ious] discrim[ination]" and Marshall said that there is "no good disti[nction] b[etween] mar[ried and] unmar[ried] fa[thers]."[196] Justice Douglas recorded White's position in terms evoking both due process and equal protection—an "unmarried father should not have to prove he is fit for the child—[the] state cannot take child away from mother without showing neglect."[197]

As the most junior Justice, Blackmun went last, and announced that he saw no invidious discrimination; thus ruling for the State.[198] He explained that he struggled with the case, especially in light of the level of scrutiny question raised in *Reed*, noting that if strict scrutiny applied to sex classifications, he would change his mind.[199] (Perhaps this level of scrutiny question was precisely the issue that Burger sought to avoid by pushing a DIG, rather than a set of competing opinions on the merits.) Blackmun had seen the case as a close one from the outset and dependent on the level of scrutiny applied.[200] In notes written three months before oral argument, he described Stanley's case as "very appealing on its facts . . . if one is going to be at all emotional," but that, under rational review, the differences between unwed mothers and fathers justify Illinois's statute.[201] He noted then that strict scrutiny would render the statute unconstitutional.[202] As Linda Greenhouse has established, *Reed v. Reed* had simultaneously forced Blackmun to wrestle with arguments in favor of heightened scrutiny for sex classifications, and he was inclined to support such scrutiny.[203] Blackmun's struggle with the case and the absence of any resolution to the level of scrutiny question raised in *Reed* made dodging the issue through a DIG an attractive option.

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[194] Justice Douglas, Conference Notes, *supra* note 25. Stewart had also grilled Patrick Murphy on the trial court finding that Stanley had neglected his daughter Karen. Oral Argument, *supra* note 48, at 21:01.

[195] *See* Justice Blackmun, Conference Notes, *supra* note 179.

[196] *Id.*

[197] Justice Douglas, Conference Notes, *supra* note 25.

[198] *Id.*

[199] *Id.* Blackmun's handwritten notes state similarly: "If our standard is one of rationality, + [affirm]. If " " " " " [our standard is one of] compelling state int, I am less sure." Justice Blackmun, Conference Notes, *supra* note 179 (second alteration in original).

[200] Memorandum from Justice Blackmun to himself at 2 on Stanley v. Illinois, No. 70-5014 (Aug. 17, 1971) (on file with author).

[201] *Id.* at 1–2.

[202] *Id.* at 2.

[203] GREENHOUSE, *supra* note 169, at 210 (noting Blackmun's internal memorandum shows a "judge wrestling with whether gender is a suspect class").

At the end of the conference, a majority of four—Burger, Brennan, Stewart, and Blackmun—voted to dismiss the writ as improvidently granted.[204] Douglas dissented because he would have ruled for the State on the merits, and White and Marshall dissented because they would have ruled for Stanley on the merits.[205] This decision would have amounted to a complete loss for Stanley—the underlying order declaring his children dependent would remain in effect and their case would proceed toward adoption.[206]

B. Three Vote Switches and Douglas's Insistence Led to a Weak Due Process Draft

This 5–2 vote for the State would quickly become a 5–2 vote for Stanley—though not the same 5–2 alignment of the final decision. Through this vote switching and, in particular, through Justice Douglas's rationale for his vote switch, this equal protection case became a due process one.

Less than a week after the conference, Brennan circulated a per curiam opinion dismissing the writ as improvidently granted because the Court lacked "a fuller state court definition of the rights of an unwed father to the control and custody of his illegitimate minor children."[207] That same day, Marshall announced that he would circulate a dissent.[208] Blackmun issued the first memo suggesting that the conference votes may switch, joining the per curiam "[s]ubject to what Thurgood may have to say."[209]

Douglas drafted the first dissent from the DIG, arguing that the Court should reach the merits and rule for the State because its statutory scheme served the "compelling and countervailing justification [of] the well-being of . . . illegitimate children," a goal which justified infringing on the admittedly fundamental right of family relationships.[210] Douglas would not have ruled that the State could intervene in families anytime it served children's interests, but did initially support the statute's denial of parental rights to unwed fathers.[211] Unwed fathers were not a suspect

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[204] Justice Douglas, Conference Notes, *supra* note 25.

[205] *Id.*

[206] The State reported in its merits brief that it had filed a motion "for appointment of a guardian with power to consent to an adoption," which the juvenile court was holding in abeyance pending resolution of the case by the Supreme Court. Brief for Respondent, *supra* note 12, at 6 n.6. Dismissing the writ would have left the Illinois Supreme Court's ruling for the State intact, which likely would have led the juvenile court to adjudicate the adoption motion.

[207] Justice Brennan, 1st Draft Opinion, *supra* note 190, at 1–2.

[208] Letter from Marshall to Brennan, *supra* note 158.

[209] Letter from Justice Blackmun to Justice Brennan (Nov. 2, 1971), *in* THE BURGER COURT OPINION WRITING DATABASE (Paul J. Wahlbeck, James F. Spriggs, II & Forrest Maltzman eds., 2011), http:/www.supremecourtopinions.wustl.edu/files/opinion_pdfs/1971/70-5014.pdf [http://perma.cc/K48V-QR48].

[210] Justice Douglas, 2d Draft Opinion, *supra* note 18, at 3.

[211] *Id.* at 4.

class, he wrote, because they "have control over initiating or continuing their membership therein."[212] He assumed, therefore, that the decision not to marry was unilaterally men's and that Peter could have married Joan at any time.[213] Stanley's counsel, Patrick Murphy, had contested this point at oral argument in response to a question from Justice Stewart: "[I]f we assume this, we are assuming that all women are weak, frivolous creatures, that any man has to say please marry me and she will. There is no evidence that it was not Joan Stanley that would not marry Peter Stanley."[214] (The assumption that marriage was completely up to men and not women was disproven in a 2013 Supreme Court family law case.[215]) Douglas's first opinion thus assumed that mothers necessarily wanted to marry the fathers of their children and would do so, but for the fathers' intransigence—a view rooted in stereotypes of both women and men.[216] Douglas made his prejudice even plainer, comparing unwed fathers to "hit-and-run drivers," for whom granting rights would only interfere with "swift and certain placement in adopting homes."[217] Douglas went on to suggest that unwed fathers would only assert parental rights to obtain public benefits and cited an anthropological work to suggest that women are "inherently stronger" parents.[218]

White circulated a draft dissent four days later.[219] His opinion—especially in comparison with the final decision—offered only modest support for parental rights.[220] It criticized the statute for permitting the removal of Stanley's children without any

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[212] *Id.* at 3 n.2.

[213] *Id.*

[214] Oral Argument, *supra* note 48, at 58:44. Follow-up questions from Stewart and Blackmun suggest some continuing doubt that women would turn down marriage in situations like the Stanleys'. *Id.* at 59:19. Murphy's response came off as a humorous play on women's supposedly inexplicable actions, which undermined his argument about sex stereotypes:

> Justice Stewart: He would have been a fairly eligible suitor after that history, wouldn't he? [Laughter]
>
> Mr. Murphy: I am a bachelor, I don't know, but they tell me the longer you live with a person, you might be less eligible.
>
> Justice Blackmun: Mr. Murphy, what could she possibly gain by not marrying him under these circumstances?
>
> Mr. Murphy: Your Honor, as I say, what makes a woman do what she does is beyond my comprehension very often, and I simply don't know why a woman might not marry a man. [Laughter]

Id.

[215] In *Adoptive Couple v. Baby Girl*, a child was conceived by an engaged couple at the time of conception. 133 S. Ct. 2552, 2561 (2013). The father also sought to marry the mother earlier than planned, but the mother "broke off the engagement." *Id.* at 2558.

[216] Justice Douglas, 2d Draft Opinion, *supra* note 18, at 3 n.2.

[217] *Id.* at 4. This was perhaps the first reference to how *Stanley* could impact private adoptions.

[218] *Id.* at 4 n.4 (citing MARGARET MEAD, MALE AND FEMALE 191 (1950)).

[219] Justice White, 1st Draft Opinion, *supra* note 158.

[220] *Id.* at 7 n.5 ("Only by supposing . . . Stanley as having no cognizable interest in . . . his children can I comprehend . . . the form of proof by which Stanley was deprived.").

consideration of parental fitness,[221] but White did not articulate how fitness should have been considered. White left open the possibility that the State might not even bear the burden of proving an unwed father unfit or neglectful, and could simply provide the father some "opportunity . . . to demonstrate that he has not been a neglectful parent."[222] Even this modest standard might be too much to impose on the State; White wrote in a footnote that the State "need do no more" than hold an individualized hearing into each child's welfare[223]—a less rigorous standard than fitness. Ironically, White's draft thus seemed to adopt the State's position that a best-interest standard sufficed to protect any constitutional right to family integrity.[224]

White's draft dissent discussed due process and equal protection issues simultaneously.[225] He framed the core issues in equal protection terms, beginning and ending his argument section with references to unequal treatment of different groups, yet he spent much of the relevant section criticizing the procedures that Illinois provided for Stanley to regain custody.[226] White made his due process concerns clear, arguing that Illinois's "procedure by presumption threatens to circumvent the constitutional guarantee of due process."[227] White reframed this concern in equal protection terms, arguing that differences between men and women do not justify "dispensing with the need for particularized proof in confronting some respondents but not others."[228]

White's dissent convinced Douglas; two days after White circulated his dissent, Douglas sent a memo to the conference, which announced that he was changing his vote and substituting a new one-page opinion dissenting from the DIG and arguing that Stanley should have won.[229] Douglas captioned his new opinion a dissent, suggesting he still presumed the Court would vote to dismiss the writ, with he, Marshall, and White dissenting.[230]

Crucially, Douglas's new opinion focused entirely on procedural due process—he faulted the Illinois proceedings for not permitting Stanley to either show that he was a fit parent or "disprove the inference" of unfitness that came from his unwed parenthood.[231] This reasoning did not go nearly as far as the final decision would—it

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[221] *Id.* at 5–6.

[222] *Id.* at 7.

[223] *Id.* at 8 n.6.

[224] *See supra* notes 146–51 and accompanying text.

[225] Justice White, 1st Draft Opinion, *supra* note 158, at 5–8.

[226] *Id.* at 1 (comparing statute's treatment of unwed fathers to that of married fathers and "mothers—even if unwed"); *id.* at 4 ("[T]o give an unwed father only 'custody and control' while an unwed mother or a married father retained the rights of natural parenthood, would still be to leave the unwed father prejudiced by reason of his status.").

[227] *Id.* at 5.

[228] *Id.* at 9.

[229] Memorandum from Justice Douglas to the Conference on Stanley v. Illinois, No. 70-5014 (Nov. 10, 1971) (on file with author).

[230] Justice Douglas, 1st Draft Opinion, Stanley v. Illinois, No. 70-5014 (Nov. 10, 1971) (dissenting) (unpublished manuscript) (on file with author).

[231] *Id.* at 1.

suggested that an unwed father, even one who raised his children, could bear the burden of proving his fitness, rather than placing the burden on the State to do so, and that the State could demand much more of unwed fathers than other parents solely based on their sex and marital status.[232] Douglas's opinion was pointedly silent on the equal protection argument stressed by Stanley.[233]

One reason for Douglas's narrow analysis may have been his discomfort with Stanley's neglect of his daughter Karen. Where White antiseptically suggested that it was possible that Stanley was an unfit parent, Douglas noted internally, "Indeed we are advised that he has been sleeping with his oldest daughter."[234] White was plainly aware of Douglas's concern, and, when circulating a revised version of his opinion, included a handwritten note distinguishing that concern from the issue presented by the younger children's case.[235] Intriguingly, White's note suggests that he misunderstood the facts. His note reads, "Dear Bill, You just think it was his eldest daughter. He may however have older ones and this one may not be his. BW."[236] The record makes clear that Karen Stanley was Peter Stanley's daughter, and Patrick Murphy conceded at oral argument that Stanley had neglected Karen.[237] It is not clear what impact, if any, White's confusion had on his or Douglas's view of the case.

Brennan would change the result before the day was out. Brennan circulated a memo "confirming" that he would change his vote—withdrawing his vote to DIG and voting to reverse the Illinois Supreme Court, making a four-justice majority for Stanley.[238] Perhaps White's opinion convinced Brennan as it did Douglas. But Brennan's prompt vote change—just two days after Justice White circulated his then-draft dissent, and the same day that Justice Douglas announced his vote change—suggests that his original vote to DIG was strategic. That is, Brennan was likely

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[232] *Id.* at 3.

[233] *See generally id.* (choosing to undergo a due process analysis, rather than equal protection).

[234] Handwritten Notes from Justice Douglas to Justice White on Justice White, 4th Draft Opinion, Stanley v. Illinois, No. 70-5014 (recirculated Feb. 3, 1972) (unpublished manuscript) (on file with author). It is not clear where Douglas heard the allegation of sexual abuse. As noted above, *supra* note 58, the record reflected that Stanley had been found to have neglected his eldest daughter. Neither the State's nor Stanley's briefs suggested sexual abuse occurred.

[235] Handwritten Note from Justice White to Justice Douglas on Stanley v. Illinois, No. 70-5014 (Feb. 3, 1972) (recirculated unpublished manuscript) (on file with author).

[236] *Id.* White's draft also noted that, even though Stanley had three children, the case before the Court only involved two—that is, Karen's case was not before the Court. Justice White, 4th Draft Opinion, *supra* note 168, at 1.

[237] Oral Argument, *supra* note 48, at 21:15.

[238] Memorandum from Justice Brennan to the Conference on Stanley v. Illinois, No. 70-5014 (Nov. 10, 1971), *in* THE BURGER COURT OPINION WRITING DATABASE (Paul J. Wahlbeck, James F. Spriggs, II & Forrest Maltzman eds., 2011), http://www.supremecourtopinions.wustl.edu/files/opinion_pdfs/1971/70-5014.pdf [http://perma.cc/K48V-QR48].

sympathetic to Stanley's argument from the outset, but, after Douglas voiced his position for the State at the conference, Brennan saw a majority for the State. When Burger suggested a DIG, Brennan chose to vote for a DIG at the conference to avoid a decision on the merits that would form binding precedent against Brennan's preferred outcome. Brennan then took advantage of Douglas's vote switch to quickly change his own vote and form a majority for his preferred outcome.[239]

With a new majority in hand, White circulated a draft majority opinion.[240] Most importantly, in a nod to Douglas, he made the due process holdings explicit and emphasized the fundamental narrowness of his due process holding.[241] He insisted that courts give some focus "to the strength and quality of the family bond" before severing it.[242] But he emphasized that the court "need do no more" than hold a hearing on a child's welfare—bringing this language into the body of the opinion[243] (it had been a footnote in his draft dissent).[244] White further explained that the Constitution required states to exercise only "minimal care" before removing a child.[245] With such language, *Stanley* would have been a far less dramatic decision—so long as "automatic separation" was not required, "minimal" protections would pass White's constitutional test.[246]

Blackmun padded the new majority for Stanley one week later, announcing that he too was changing his vote and would "probably" join White's opinion (though his use of the word "probably" suggested his continued struggle with the case).[247] He apparently moved further toward White's position overnight, joining White's opinion the next day.[248]

C. Marshall's Threatened Concurrence Strengthened the Due Process Holding and Led to Two More Vote Switches

A 5–2 majority now existed for Stanley—Douglas, Brennan, White, Marshall, and Blackmun supporting Stanley, and Burger and Stewart (who had remained silent since conference) for the State. But the new majority did not reach their result in the same way, leaving White with the task of writing an opinion that ruled for Stanley,

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[239] *Id.*

[240] Justice White, 2d Draft Opinion, *supra* note 168.

[241] *Id.* at 5.

[242] *Id.* at 6.

[243] *Id.* at 7.

[244] Justice White, 1st Draft Opinion, *supra* note 158, at 7–8 n.6.

[245] Justice White, 2d Draft Opinion, *supra* note 168, at 7.

[246] *Id.*

[247] Letter from Justice Blackmun to Justice White (Nov. 18, 1971), *in* THE BURGER COURT OPINION WRITING DATABASE (Paul J. Wahlbeck, James F. Spriggs, II & Forrest Maltzman eds., 2011), http://www.supremecourtopinions.wustl.edu/files/opinion_pdfs/1971/70-5014.pdf [http://perma.cc/K48V-QR48].

[248] Letter from Blackmun to White, *supra* note 25.

while keeping the support of the other Justices in the majority. That effort required both the opinion's ultimate due process focus and stronger protections for parents.

White faced competing pressures in keeping his majority coalition together. Douglas had joined the due process sections of White's opinion, but not the part addressing equal protection.[249] These sections went further than Douglas's one-page draft opinion of November 10, 1971—while Douglas would have only required that states provide unwed fathers an opportunity to rebut a presumption of unfitness, White's opinion made clear that unwed fathers (at least unwed fathers like Stanley who raised their children) enjoyed a presumption of fitness.[250]

Although Douglas had joined an opinion, going further than he would have initially gone, Marshall wanted the opinion to go further still. Marshall circulated a draft concurrence that focused strongly on parental fitness and insisted that Stanley enjoy the same protections that other parents did.[251] Marshall began by recognizing the "strong presumption in favor of" natural parents in Illinois laws, a presumption consistent with the Court's recognition of family integrity as a fundamental right.[252] He agreed with White and Douglas that the Illinois statute failed to provide Stanley an adequate means to regain custody.[253] The crux of the problem that Marshall saw, however, lay earlier in the procedure—that Illinois took children into foster care "without any determination that their father is unwilling, unable, or unfit to assume the parental role."[254]

Marshall's first sentence framed the case in equal protection terms.[255] This perhaps reflected a doubt that was articulated by his clerk in an internal memo: "whether the Court really means to resurrect substantive due process to decide this case."[256] Yet, Marshall's opinion could not avoid the case's due process overtones—citing, for instance, the *Lochner*-era due process family integrity cases for the proposition that the "Court has long recognized that the interest of a parent in the family relationship is a fundamental one."[257]

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[249] Letter from Justice Douglas to Justice White (Nov. 18, 1971), *in* THE BURGER COURT OPINION WRITING DATABASE (Paul J. Wahlbeck, James F. Spriggs, II & Forrest Maltzman eds., 2011) [hereinafter Letter from Douglas to White], http://www.supremecourtopinions.wustl.edu/files/opinion_pdfs/1971/70-5014.pdf [http://perma.cc/K48V-QR48] ("[P]lease note that I join Parts I and II of your opinion of this date.").

[250] Justice Douglas, 1st Draft Opinion, *supra* note 230, at 5; Justice White, 2d Draft Opinion, *supra* note 168.

[251] Justice Marshall, 1st Draft Opinion, *supra* note 22.

[252] *Id.* at 3.

[253] *Id.* at 1–2.

[254] *Id.* at 3.

[255] *Id.* at 1.

[256] Letter from Justice Marshall Clerk to Justice Marshall (Nov. 22, 1971) (on file with author).

[257] Justice Marshall, 1st Draft Opinion, *supra* note 22, at 3.

Marshall's draft differed from White's in another way: while White's draft conceded that most unwed fathers were unfit or uninterested in parenthood,[258] Marshall specifically challenged derogatory stereotypes of unwed fathers, especially those who were poor.[259] He did so by explaining various reasons poor parents, in particular, may not marry:

> [The state's] judgment about a class of parents suffers from the deficiencies of any stereotype. There are many reasons for illegitimacy in our society, and not all of them compel the inference that the father is unwilling or unable to care for his illegitimate children. For example, commentators have suggested that illegitimacy among poor people may be encouraged by the structure of state and federal welfare programs. Because many States provide financial assistance only to children in one-parent households, a father might decline to marry the mother of his children in order to maximize the family's eligibility for financial assistance.[260]

Marshall's opinion did not mention race explicitly,[261] and, indeed, Peter Stanley's race was never mentioned in court documents.[262] (According to his lawyer, he was white.)[263] Yet, it is not hard to see how concerns about race informed Marshall's perspective. In 1971 (as today), rates of unwed parenthood among blacks were higher than among whites, and this phenomenon received significant, and usually critical, attention.[264] In that context, one might reasonably hear a racial tinge in a blanket criticism of unwed fathers—and hear a pointed response in Marshall's draft.[265] Marshall's discussion of why some parents do not marry was also notable for what it lacked: there was no thorough discussion of the sex stereotypes at issue.[266] He did not challenge the idea that women like Joan Stanley were waiting passively to be

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[258] Justice White, 2d Draft Opinion, *supra* note 168, at 7 n.5.

[259] Justice Marshall, 1st Draft Opinion, *supra* note 22, at 5–6.

[260] *Id.* at 5.

[261] *See* Justice Marshall, 1st Draft Opinion, *supra* note 22.

[262] *See* Transcript of Record, *supra* note 65; *see also* Brief for the Petitioner, *supra* note 13; Brief for Respondent, *supra* note 12.

[263] April 2014 Interview with Murphy, *supra* note 40.

[264] For instance, several years earlier, Daniel Patrick Moynihan identified and wrote about the relative lack of black nuclear families as a core cause of black poverty. U.S. DEP'T OF LABOR, OFFICE OF POLICY PLANNING & RESEARCH, THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION (1965).

[265] In more recent times, scholars have pointed out that unwed "black fathers are more involved than the [unwed] white fathers are with their children, especially when the kids are younger." KATHRYN EDIN & TIMOTHY J. NELSON, DOING THE BEST I CAN: FATHERHOOD IN THE INNER CITY 215 (2013).

[266] *See generally* Justice Marshall, 1st Draft Opinion, *supra* note 22.

married by men like Peter Stanley, and he did not take up Murphy's argument that marriage was a two-way street.[267]

Finally, Marshall made clear that the case centered on the power of the State to break up families, not disputes between parents.[268] This state power to intervene in fundamental constitutional rights necessitated strong due process protections.

Marshall's opinion plainly sought a stronger ruling than White's or Douglas's drafts would provide,[269] yet Marshall had limited leverage. Votes flowed toward Stanley's side, but could flow back, especially considering both how narrowly Douglas described the due process issues at stake[270] and the perception of Blackmun as a generally conservative Justice not enamored with broad Due Process Clause holdings. If Marshall would not join White, the most that would happen was a split opinion. Marshall's chambers seemed aware of this dynamic; his clerk wrote in a November 22, 1971, memo to Marshall that she did not share her full concerns with White's draft "because [she] did not want to undermine the drift on the Court to the right result."[271]

Indeed, Burger, who now found himself in the minority, pushed back against the Court's drift toward Stanley. In a memo announcing that he would dissent from the Court's judgment for Stanley, he wrote, "This is really a ridiculous case to be absorbing our time and, paradoxically, I will spend a little more time trying to demonstrate that."[272] Burger wrote that his "gravest question" related to how the Court could even address the due process issues that formed the basis of both White's and Marshall's opinions when Stanley's lawyers did not explicitly raise them.[273] White promised to consider this concern in his next draft.[274]

Burger also found an opportunity to land a rhetorical punch at Douglas; when he circulated his draft dissent, he sarcastically noted: "My thanks to Mr. Justice Douglas for my unacknowledged plagiarizing of portions of the excellent opinion he wrote."[275]

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[267] *See generally id.*

[268] *Id.* at 7 n.12 ("This case does not present the question whether the father and the mother are entitled to equal rights in a custody contest between them, and we intimate no views on that question, which may involve considerations quite different from those presented by this case.").

[269] *See id.* at 6. This motive was also stated by Marshall's clerk, Barbara Underwood, in a memo to Marshall, in which she worried that, under White's opinion, "the state could continue to discriminate against an illegitimate father, so long as he gets his pretermination hearing." Letter from Justice Marshall Clerk to Justice Marshall, *supra* note 256, at 2.

[270] Justice Douglas, 1st Draft Opinion, *supra* note 230.

[271] Letter from Justice Marshall Clerk to Justice Marshall, *supra* note 256, at 1.

[272] Letter from Burger to White, *supra* note 176.

[273] Chief Justice Burger, 1st Draft Opinion at 6, Stanley v. Illinois, No. 70-5014 (Dec. 2, 1971) (dissenting) (unpublished manuscript) (on file with author).

[274] Memorandum from Justice White to the Conference, *supra* note 21.

[275] Memorandum from Chief Justice Burger to the Conference on Stanley v. Illinois, No. 70-5014 (Dec. 2, 1971), *in* THE BURGER COURT OPINION WRITING DATABASE (Paul J. Wahlbeck, James F. Spriggs, II & Forrest Maltzman eds., 2011), http://www.supremecourt

Burger referred to Douglas's first draft opinion for the State that Douglas had quickly disowned. Douglas and Burger did not get along well, with Douglas frequently voicing his disrespect for Burger at the conference.[276] Burger took the opportunity from Douglas's draft dissent and subsequent vote switch to return the favor.

White thus faced multiple pressures when revising his opinion: Burger's argument about the propriety of considering due process arguments at all;[277] Douglas's insistence that the Court focus on a narrow portion of due process (and his unwillingness to join an equal protection opinion);[278] and Marshall's draft concurrence espousing a stronger, fitness-based ruling for Stanley that also reached a strong equal protection conclusion.[279] If White failed to respond to Burger's concern about addressing due process, he could lose votes, especially from those Justices initially inclined to dismiss the writ. If White strayed too far from due process or endorsed too strong of a due process provision, he would have risked losing Douglas's and possibly Blackmun's vote. If White did not give a strong enough ruling for Stanley, he would have risked a separate opinion by Marshall, which could have reduced his own opinion to a plurality.

The tentative vote was still 5–2, an important detail given other events in the Court. White worked on his revision through January when William Rehnquist and Lewis Powell took their seats on the bench.[280] Burger suggested that all cases decided 4–3 be reargued with Rehnquist and Powell's participation.[281] Stewart had not yet revisited his position for the State at the conference, so *Stanley* avoided a discussion about reargument only because Blackmun had joined White's opinion.[282]

Soon after White circulated his revised opinion on February 3, 1972,[283] it was clear that he succeeded in maintaining a winning coalition, but barely. Within days, Douglas joined the due process sections of the opinion,[284] Brennan joined the opinion

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opinions.wustl.edu/files/opinion_pdfs/1971/70-5014.pdf [http://perma.cc/K48V-QR48].

[276] GREENHOUSE, *supra* note 169, at 59; *see also* WOODWARD & ARMSTRONG, *supra* note 171, at 85 (describing Burger and Douglas as "stubborn" and "on a collision course" in the early 1970s).

[277] Memorandum from Chief Justice Burger to the Conference, *supra* note 275.

[278] Letter from Douglas to White, *supra* note 249.

[279] Scholars have identified draft concurrences, like Marshall's, as bargaining tools, in which the concurrence author seeks to induce revisions in the majority draft. *See, e.g.*, EPSTEIN & KNIGHT, *supra* note 183, at 76–77. If concurring separately would deprive the majority opinion writer the opportunity to speak for a full Court, a possibly concurring Justice like Marshall has some leverage.

[280] Justice White, 4th Draft Opinion, *supra* note 168, at 11.

[281] WOODWARD & ARMSTRONG, *supra* note 171, at 176.

[282] *See* Letter from Blackmun to White, *supra* note 25 (noting he would join Justice White's majority opinion).

[283] Justice White, 4th Draft Opinion, *supra* note 168.

[284] Letter from Justice Douglas to Justice White (Feb. 7, 1972), *in* THE BURGER COURT OPINION WRITING DATABASE (Paul J. Wahlbeck, James F. Spriggs, II & Forrest Maltzman

in its entirety,[285] and Marshall withdrew his opinion and joined White.[286] White had held a four-Justice majority.

White focused his new draft on due process as a means of maintaining Douglas's support.[287] One of White's clerks made it known to one of Douglas's that "White's retention of the Due Process holding was aimed at keeping [Douglas] in his opinion."[288] Douglas's continued vote with White made clear that White's strategy worked.

White also maintained an equal protection section, but it was a derivative of the due process section. It began on page ten of an eleven-page draft, and simply held that, following the due process analysis, depriving unwed fathers, but not unwed mothers or wed fathers, of a hearing on fitness "inescapably" violates equal protection.[289]

White addressed the question of whether the due process argument was properly presented to the Court in a footnote.[290] He acknowledged at the outset of his draft that Stanley pressed an equal protection argument only.[291] Several pages later, he inserted a footnote claiming that "we dispose of the case on the constitutional premise raised below, reaching the result by a method of analysis readily available to the state court."[292] This conclusion may have been fair—as explained above, Stanley's lawyers presented the due process concerns without using the phrase[293]—but asserted in a rather conclusory manner.

White's thin analysis regarding how the Court could address due process cost Blackmun's vote. Blackmun joined Burger's dissent on March 13, 1972, explaining that White's footnote convinced him that the state courts should address the due process question before the Supreme Court did.[294] Blackmun wrote a longer memo

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eds., 2011), http://www.supremecourtopinions.wustl.edu/files/opinion_pdfs/1971/70-5014.pdf [http://perma.cc/K48V-QR48] (noting he would join Parts I and II of Justice White's opinion).

[285] Letter from Justice Brennan to Justice White (Feb. 4, 1972), *in* THE BURGER COURT OPINION WRITING DATABASE (Paul J. Wahlbeck, James F. Spriggs, II & Forrest Maltzman eds., 2011), http://www.supremecourtopinions.wustl.edu/files/opinion_pdfs/1971/70-5014.pdf [http://perma.cc/K48V-QR48] ("Your revision is completely persuasive . . . . I am happy to join.").

[286] Letter from Justice Marshall to Justice White (Feb. 7, 1972), *in* THE BURGER COURT OPINION WRITING DATABASE (Paul J. Wahlbeck, James F. Spriggs, II & Forrest Maltzman eds., 2011) [hereinafter Letter from Marshall to White], http://www.supremecourtopinions.wustl.edu/files/opinion_pdfs/1971/70-5014.pdf [http://perma.cc/K48V-QR48] ("I have decided to withdraw my concurring opinion and to join your opinion . . . .").

[287] Justice White, 4th Draft Opinion, *supra* note 168, at 6, 7, 10; Letter from Douglas to White, *supra* note 249; Letter from WHA to Douglas, *supra* note 19, at 1 (noting that Justice White's "retention of the due process holding was aimed at keeping [Douglas] in his opinion").

[288] Letter from WHA to Douglas, *supra* note 19, at 1.

[289] Justice White, 4th Draft Opinion, *supra* note 168, at 10.

[290] *Id.* at 10 n.7.

[291] *Id.* at 1.

[292] *Id.* at 10 & n.7.

[293] *See supra* notes 141–44 and accompanying text.

[294] Letter from Blackmun to White, *supra* note 26 ("I fell off at footnote 9 and am now not convinced that due process can be brought into the case.").

to Burger explaining his change in position.[295] He repeated that he saw *Stanley* as a "difficult" case and criticized White's footnote as a "bootstrapping" argument.[296]

In response to Marshall's draft concurrence, White's new draft also suggested stronger procedural rights for unwed fathers.[297] Most importantly, White placed parental fitness, and not children's welfare, at the center of the case.[298] White strengthened that focus while keeping it under a due process heading—thus simultaneously responding to both Marshall and Douglas.[299] The core problem with the Illinois statute, White now wrote, is that it made "Stanley's actual fitness as a father . . . irrelevant."[300] The draft explicitly held that the Due Process Clause entitled Stanley "to a hearing on his fitness as a parent before his children were taken from him."[301] And White added language making clear that, given the strong constitutional protections for family integrity, the majority saw no valid "state interest in separating children from fathers without a hearing designed to determine whether the father is unfit."[302] White's revision also included paeans to due process—rhetorical flourishes in line with the stronger language of Marshall's draft.[303]

White did not explicitly write that the State bore the burden of proving an unwed father unfit or that a parent's marital status could not be considered as evidence of unfitness.[304] This muted language might have also been designed to keep Justice Douglas's support—especially given Douglas's November 1971 opinion on relatively narrow due process grounds.[305] Still, it is hard to see how White's opinion could mean that any proof insufficient to remove children from a mother or a wed father could justify removing Stanley's children—an understanding shared with Douglas by his clerk.[306] White noted that Illinois provided mothers and wed fathers not only a hearing, but required "proof of neglect" before removing children;[307]

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[295] Letter from Blackmun to Burger, *supra* note 25, at 1.

[296] *Id.* (noting that "[d]ue process may lurk in the background" of the case, but that the State is "entitled to the first crack at it").

[297] Justice White, 4th Draft Opinion, *supra* note 168, at 10.

[298] *Id.* at 4.

[299] *Id.* at 4, 10.

[300] *Id.* at 1.

[301] *Id.* at 4.

[302] *Id.* at 7.

[303] For example, White wrote:

> Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy which may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.

Id. at 8.

[304] *See generally id.*

[305] *See* Justice Douglas, 1st Draft Opinion, *supra* note 230.

[306] Letter from WHA to Douglas, *supra* note 19, at 1.

[307] Justice White, 4th Draft Opinion, *supra* note 168, at 10.

coupled with his equal protection ruling, it is hard to see how anything less would be required for unwed fathers.

All of these changes were met with approval in Marshall's chambers. His clerk described the "great improvement" in White's draft, and advised Marshall that she saw "no compelling reason not to join Justice White's opinion."[308] Three days later, Marshall did exactly that, and withdrew his draft concurrence.[309]

Finally, Justice Stewart—who had sent no memos indicating his position since he had sided with the State at the conference—joined White's opinion on March 30, 1972, with a brief memorandum that did not explain his thinking.[310] Stewart's silence makes his thinking mysterious. Stewart was not a strong believer in unwed fathers' rights or parents' rights more generally. Stewart had dissented in *Levy v. Louisiana*, suggesting that he saw little problem in laws discriminating on the basis of parents' marital status.[311] Stewart's later votes suggest that he continued to harbor doubts regarding an unwed father's rights specifically, and the right to family integrity more broadly.[312]

Stewart's papers suggest that White's care to keep his opinion narrow in at least one respect convinced Stewart to join. In particular, White carefully avoided any categorical rule about levels of scrutiny; White's opinion did not hold Illinois's statute to strict scrutiny and avoided identifying a level of scrutiny altogether. Stewart's papers suggest that he was attuned to this issue through the Court's deliberation. When Douglas wrote in an early circulation that Illinois needed "a compelling and countervailing justification" to interfere in Stanley's fundamental rights to a family, Stewart underlined the language and wrote "No" in the margins.[313] Stewart also wrote "That's right" in the margins of a narrow due process point made by White—that, even if Stanley could have obtained custody of his children, he would still have an inferior status under Illinois law than any other parent.[314] Stewart seemed uneasy with Marshall's proposed opinion, writing that the assertion that

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[308] Letter from Justice Marshall Clerk to Justice Marshall (Feb. 4, 1972) (unpublished manuscript) (on file with author).

[309] Letter from Marshall to White, *supra* note 286.

[310] Letter from Stewart to White, *supra* note 164 (stating only that he would be "glad to join [White's] opinion").

[311] 391 U.S. 68, 70–72 (1968) (holding that a statute denying illegitimate children the ability to sue for wrongful death of their mother violated the children's equal protection rights).

[312] Stewart voted against unwed fathers' rights in *Caban v. Mohammed*, 441 U.S. 380, 394 (1979) (Stewart, J., dissenting), and against extended family rights in *Moore v. City of East Cleveland*, 431 U.S. 494, 531 (1977) (Stewart, J., dissenting). He wrote the opinion finding no constitutional right to counsel for parents in termination of parental rights cases. *See* Lassiter v. Dep't of Soc. Servs., 452 U.S. 18 (1981).

[313] Justice Douglas, 2d Draft Opinion, *supra* note 18, at 3.

[314] Handwritten Notes from Justice Stewart to Justice White on Justice White, 4th Draft Opinion at 3, Stanley v. Illinois, No. 70-5014 (recirculated Apr. 18, 1971) (unpublished manuscript) (on file with author).

Illinois offered no fitness determination was "not quite right," because Stanley could have "ask[ed] to get child."[315] Stewart noted that two other sections of Marshall's draft were "too strong."[316] When White circulated a near-final draft in March 1972, Stewart also noted some of White's language which narrowed the decision—underlining the words "and raised" when reading White's statement of the fundamental right "of a man in the children he has sired and raised."[317]

D. The Ambiguous Aftermath for Peter Stanley and His Two Younger Children

The Supreme Court announced its 5–2 decision for Stanley on April 3, 1972, but Peter Stanley's Supreme Court victory did not lead to a swift reunification. Rather, it led to extended wrangling in family court over his children's future and still no definitive resolution of his parental fitness.[318]

While his case was litigated in appellate courts, the case continued to develop in juvenile court. First, the juvenile court continued to issue orders affecting Peter Stanley's relationship with his two younger children.[319] That court first deprived him of any right to visit his children, and then ordered visits to resume while his state appeal was pending.[320] In the summer of 1970—after the Illinois Supreme Court had ruled against Stanley—the juvenile court again suspended visits.[321] Such intermittent visits likely did not set up Stanley and his children for a smooth reunification. Second, Stanley's relationship with the Ness family—with whom he had entrusted his children in late 1968 after Joan's death and to whom the juvenile court originally granted custody—deteriorated.[322] This dispute seems to have caused the children to leave the Ness home, subsequently being shifted through five foster homes in three years.[323] Third, Peter Stanley had married, which led his lawyer,

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[315] Handwritten Notes from Justice Stewart to Justice Marshall on Justice Marshall, 1st Draft Opinion at 3, Stanley v. Illinois, No. 70-5014 (circulated Nov. 19, 1971) (concurring) (unpublished manuscript) (on file with author).

[316] *Id.* at 6. The first notation comes in the portion of Marshall's draft discussing why some poor couples may not marry and arguing that "the fact of illegitimacy provides no support whatever for the inference that the father lacks concern for his children." *Id.* The second came in reference to Marshall's statement that the Illinois statute "imposes on those [fit] fathers a deprivation of enormous magnitude." *Id.*

[317] Justice White, 6th Draft Opinion at 5, Stanley v. Illinois, No. 70-5014 (unpublished manuscript) (on file with author).

[318] Frederic Soll, *Father Has Hopes of Getting Kids Back*, CHI. TRIB., Apr. 4, 1972, § 1, at 3, http://archives.chicagotribune.com/1972/04/04/page/3/article/display-ad-2-no-title [http://perma.cc/YT37-J6CW] (noting that Stanley still had to go back to the Illinois Juvenile Court to prove his fitness as a parent after the Supreme Court ruling).

[319] *Id.*

[320] *Id.*

[321] *Id.*

[322] Brief for Respondent, *supra* note 12, at 6 n.6.

[323] Soll, *supra* note 318, § 1, at 3.

Patrick Murphy, to predict that the juvenile court would promptly reunify Stanley with his children.[324]

But Murphy's prediction was not prescient. The State refiled a petition alleging that Stanley had neglected his two younger children—notably, this was the same allegation that the State had initially filed but then dropped so it could use Stanley's unmarried status as grounds for placing his children in foster care.[325] The case records remain sealed, but the media reported that the juvenile court ordered Stanley's children to remain in foster care pending litigation on these neglect allegations[326] and then ruled Stanley unfit in September 1973.[327]

That ruling did not end the saga; Stanley retained a legal services lawyer to appeal the unfitness finding and then, according to Murphy, the State dismissed the case against Stanley and returned his children to him.[328] A dismissal meant the trial court fitness ruling would be neither upheld nor reversed on appeal and, if there was unfitness, there was never a finding of whether Stanley had rehabilitated sufficiently to regain custody. The publicly available record does not disclose why the State ultimately relented. In the meantime, Karen Stanley—the older child whom a court found had been neglected by Peter Stanley—lived with her boyfriend and never reunified with her father.[329]

Peter Stanley's legal case thus ended ambiguously. It remains difficult if not impossible to know whether the State was right to seek custody of Stanley's two younger children. If, indeed, Stanley was an unfit parent, the case might represent an ultimate failure by the State to protect his children. By failing to even try to prove the neglect that it initially alleged, the State rendered its efforts vulnerable to legal attack and forced the children to live through years of uncertainty in multiple foster homes, and then, for unclear reasons, the State abandoned its efforts, leaving the two children to live with a questionable father from whom they had been separated for

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[324] *Id.* Murphy was quoted as saying, "[C]onsidering the facts, and Stanley's new situation, I doubt that it can be proved he is an unfit parent. But I think the most important thing in his favor is the mammoth desire Stanley has displayed in his attempt to regain his lost children." *Id.*

[325] JUDITH AREEN, FAMILY LAW: CASES AND MATERIALS 198 n.1 (3d ed. 1992) (quoting Letter from Patrick T. Murphy (Mar. 23, 1976)).

[326] *Father's Custody Fight Continues*, CHI. TRIB., Feb. 8, 1973, at A5, http://archives.chicagotribune.com/1973/02/08/ [http://perma.cc/9T73-KS55].

[327] Sjostrom, *supra* note 92. As the juvenile court records remained sealed on remand, the precise basis for this finding cannot be corroborated. Local media reports suggested it was informed by accusations that Peter Stanley had sexually abused his older daughter Karen. *Id.*

[328] AREEN, *supra* note 325, at 198 n.1. The letter stated that at the time the letter was written in 1976, the children had lived with Stanley for "about a year," suggesting reunification occurred in 1975. More recently, Murphy recalled that Peter Stanley and his two younger children reunified only after ongoing fights with the Illinois Department of Children & Family Services (DCFS). April 2014 Interview with Murphy, *supra* note 40.

[329] April 2014 Interview with Murphy, *supra* note 40.

six years. If, despite whatever problems he had and whatever occurred between him and his eldest daughter, Stanley remained a fit and committed father to his two youngest children, then the State's actions throughout the case spited its stated interest in protecting Stanley's children. Whichever version is closer to the truth, it is difficult to see how the State's actions served the long-term interests of either Peter Jr. or Kimberly.

III. HOW STRATEGIC VOTING, JUSTICES' STRUGGLES WITH DUE PROCESS AND EQUAL PROTECTION, AND LITIGATION ERRORS SHAPED *STANLEY*

Stanley illustrates the intersection of multiple phenomena typically discussed separately in the Supreme Court decision-making literature—strategic voting, voting changes, and litigation errors leading to the Court substituting its own framing of the issues for the litigants'. The Court's deliberations also add depth to our understanding of two crucial figures on the Supreme Court—William Brennan and Harry Blackmun—and demonstrate how much of the modern constitutional law regarding unwed fathers' rights, and parents' rights more generally, depends, in particular, on Blackmun's evolution to a strong supporter of parents' due process rights, which began in *Stanley*.

In political science terms, *Stanley* provides insight into Supreme Court voting and issue fluidity. Voting fluidity occurs when Justices change their votes between their initial poll at conference and their final decision. Issue fluidity occurs when the Court decides cases based on issues not presented by the parties. Both occur in a minority of cases, and scholars have debated how much of this fluidity is explained by Justices responding to preexisting law, Justices' own ideological preferences, or Justices acting strategically in pursuit of their policy preferences.[330]

Close study of individual cases and Justices can provide a richer understanding of Supreme Court decision-making, especially of how voting and issue fluidity intersect.[331] The leading literature follows an empirical approach, studying Justices' votes and Court decisions in hundreds or thousands of cases.[332] This approach is

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[330] *See* Jeffrey A. Segal, *What's Law Got to Do with It: Thoughts from "the Realm of Political Science," in* WHAT'S LAW GOT TO DO WITH IT?: WHAT JUDGES DO, WHY THEY DO IT, AND WHAT'S AT STAKE 17 (Charles Gardner Geyh ed., 2011) (noting that "justices who served on lower appellate courts are not more likely to abide by precedent, and are not less likely to vote ideologically than are judges without appellate court experience"). Over time, scholars have come to agree that all factors help explain voting and issue fluidity, though debates remain over each model's relative contribution to explaining judicial behavior. Charles Gardner Geyh, *Introduction: So What Does Law Have to Do with It?*, *in* WHAT'S LAW GOT TO DO WITH IT? WHAT JUDGES DO, WHY THEY DO IT, AND WHAT'S AT STAKE, *supra*, at 3–4 (noting that the "influences on judicial decision-making are varied").

[331] *Cf.* LAWRENCE BAUM, THE PUZZLE OF JUDICIAL BEHAVIOR 129–30 (1998) (calling both for more qualitative and quantitative research).

[332] *Cf.* Robert E. Riggs, *When Every Vote Counts: 5–4 Decisions in the United States*

immensely valuable and has allowed scholars to identify common factors correlated with voting and issue fluidity. However, that aggregate perspective can mask more nuanced factors that lead to voting and issue fluidity.[333]

Analyzing the decision-making in *Stanley* is particularly useful. A number of cases have involved individual Justices changing their votes and thus the outcomes of 5–4 cases, including high-profile cases such as *National Federation of Independent Business v. Sebelius*,[334] *Garcia v. San Antonio Metropolitan Transit Authority*,[335] and *Bowers v. Hardwick*.[336] Other vote changes that did not affect outcomes are also documented.[337] These changes may speak volumes about the individual Justices who changed their votes, but say less about the Court's inner workings other than the basic rule that conference votes are tentative and the obvious note that 5–4 conference votes are more likely to change than less close votes. Most other cases involving vote changes did not flip case outcomes. *Stanley*, however, may represent the most dramatic documented example of Supreme Court Justices changing their votes and the outcome, and it illustrates the various strategic considerations that Justices may have when they vote at conference and when they draft opinions.

Indeed, *Stanley* suggests several important contributions to this literature's understanding of voting and issue fluidity. It identifies strategic behavior in conference voting—a much-hypothesized, but little-documented phenomenon.[338] It identifies strategic behavior during the opinion-drafting process, as various Justices insist on particular rulings, threaten to concur separately, or raise concerns from a dissenting perch—all of which pressure an opinion's author to accommodate his or her colleagues' concerns to maintain a majority through multiple drafts.[339]

Supreme Court, 1900–90, 21 HOFSTRA L. REV. 667, 671, 703 (1993) (describing empirical research providing "modest insight" into "narrow slices of the subject").

[333] *See* BAUM, *supra* note 331, at 129–31.

[334] 132 S. Ct. 2566 (2012). Chief Justice John Roberts reportedly switched his vote. Jan Crawford, *Roberts Switched Views to Uphold Health Care Law*, CBS NEWS (July 2, 2012, 9:43 PM), http://www.cbsnews.com/news/roberts-switched-views-to-uphold-health-care-law/ [http://perma.cc/LU66-R6NL].

[335] 469 U.S. 528 (1985). Blackmun reportedly changed his vote, leading the Court to rehear the case and changing the outcome from the result indicated by the initial conference vote. GREENHOUSE, *supra* note 169, 148–49.

[336] 478 U.S. 186 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003). Justice Lewis Powell changed his initial vote to strike down antisodomy laws to upholding them. GREENHOUSE, *supra* note 169, at 150–51.

[337] For instance, Justice Clarence Thomas has discussed how the Justices voted unanimously at conference in one criminal case, but that he later changed his mind and drafted a dissent, which three other Justices joined. Nat'l Constitution Ctr., *The Supreme Court Revealed*, at 2:25-4:02, C-SPAN (Feb. 3, 2007), http://www.c-span.org/video/?c762945/clip-supreme-court-revealed (interview of Justice Thomas).

[338] *See supra* Part II.

[339] White circulated seven drafts, above the Burger Court's average (which ranged from 2.6 to 5.2). Paul J. Wahlbeck et al., *Marshalling the Court: Bargaining and Accommodation*

Stanley's full story also explains how litigation choices can influence the issues on which Justices decide cases. Although most political science literature describes issue fluidity as a phenomenon that occurs between Justices as they build majority coalitions,[340] *Stanley*'s litigation history demonstrates that issue fluidity can compensate for arguments that lawyers failed to make. Issue fluidity is not merely the result of internal Court dynamics.

Finally, *Stanley*'s full story identifies the importance of Harry Blackmun's evolution, in particular, to constitutional family law, and time stamps the beginning of such evolution to an earlier date in his tenure than is commonly stated.

A. Stanley*'s Strategic Voting and Voting Fluidity*

1. *Stanley* Involved an Unusually Large Amount of Voting Changes

The number and significance of voting changes in *Stanley* sets it apart. Voting switches occur with modest frequency—in about 10% of Warren and Burger Court cases[341]—but voting switches that shift a case's outcome after conference are rare—only 1% of cases.[342] Intuitively, conference majorities with more than a minimum of votes (usually six or more) were far less likely to break up than minimum winning coalitions.[343] In light of this data, multiple Justices changing their minds and flipping a 5–2 conference vote for one party to a 5–2 judgment for the other makes *Stanley*'s voting fluidity exceedingly rare.

Two factors separate from the specifics of *Stanley* may help explain this large extent of voting fluidity. First, the Supreme Court decided *Stanley* in the midst of significant turnover in its membership, which correlates with increased voting fluidity by all Justices. Hugo Black and John Harlan had recently left the Court (and died in late 1971),[344] and two new members—William Rehnquist and Lewis Powell—joined the Court soon after oral argument in *Stanley* (and did not participate in the

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on the United States Supreme Court, 42 AM. J. POL. SCI. 294, 309 (1998). That relatively high number of drafts is consistent with findings that more fragile majority coalitions lead Justices to circulate more opinion drafts. *Id.* at 312.

[340] *See, e.g.*, *id.*

[341] Maltzman & Wahlbeck, *supra* note 171, at 581 n.1.

[342] For instance, in cases decided between 1945 and 1958, 197 of 2,129 cases involved individual Justices changing their votes, but only 22 cases in which vote changes shifted case outcomes. Brenner, *supra* note 17, at 530–31. Between 1956 and 1967, 791 vote switches occurred, and this fluidity changed the outcome in only 85 cases. Saul Brenner, *Fluidity on the Supreme Court: 1956–1967*, 26 AM. J. POL. SCI. 388, 388, 390 (1982). Similar results were found for the Vinson Court. SEGAL & SPAETH, *supra* note 175, at 285.

[343] Saul Brenner & Harold J. Spaeth, *Majority Opinion Assignments and the Maintenance of the Original Coalition on the Warren Court*, 32 AM. J. POL. SCI. 72, 77 (1988).

[344] Black retired September 17, 1971, and Harlan retired September 23, 1971. ARTEMUS WARD, DECIDING TO LEAVE: THE POLITICS OF RETIREMENT FROM THE UNITED STATES SUPREME COURT 182 (2003).

case).[345] Blackmun was only in his second term on the bench,[346] and Burger had only become Chief Justice in 1969.[347] New members appear to "make continuing justices more likely to reverse their positions on merits votes."[348] This increased flexibility may result from strategic considerations or exposure to new substantive views.[349] The latter might be particularly apropos of the early Burger Court, which included multiple Nixon appointees who sought to shift the Court away from what was perceived as the Warren Court's excesses.[350]

Relatedly, scholars have identified a possible "freshmen effect"—that Justices might be particularly likely to change their votes in their first several terms on the Court as they acclimate to their new job.[351] This view has been subject to some debate.[352] Whether a freshmen effect exists generally, it appears likely to have affected Blackmun, who was in his second term on the Court when it decided *Stanley*. Blackmun was described as "paralyzed by indecision" in his first terms on the Court[353] when he went through a particular evolution[354] and was subject to intense lobbying from his friend, Warren Burger, especially on due process cases.[355]

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[345] *See* Stanley v. Illinois, 405 U.S. 645, 645 (1972) (noting that Justice Powell and Justice Rehnquist took no part in the consideration or decision of the case).

[346] Peter Manus, *The Whistling—The Silence Just After: Evaluating the Environmental Legacy of Justice Blackmun*, 85 IOWA L. REV. 429, 434 (2000).

[347] BERNARD SCHWARTZ, A HISTORY OF THE SUPREME COURT 313 (1993).

[348] Scott R. Meinke & Kevin M. Scott, *Collegial Influence and Judicial Voting Change: The Effect of Membership Change on U.S. Supreme Court Justices*, 41 LAW & SOC'Y REV. 909, 911 (2007).

[349] *See id.* at 914–15 ("[A] change in personnel can expose continuing justices to new views and persuasive personalities. All of these long-term factors have the potential to bring new information and social considerations into judges' decisions, making membership change lead to position shifts on specific cases as new collegial considerations make past decisions less relevant as a guide to the current choice.").

[350] DAVID L. HUDSON, JR., THE REHNQUIST COURT: UNDERSTANDING ITS IMPACT AND LEGACY 14 (2007) ("Rehnquist had railed against the excesses of the Warren Court particularly in the criminal justice arena.").

[351] *See generally* Saul Brenner, *Look at Freshman Indecisiveness on the United States Supreme Court*, 16 POLITY 320 (1983).

[352] *See id.* An early study asserted a three-year freshman effect. J. Woodford Howard, Jr., *On the Fluidity of Judicial Choice*, 62 AM. POL. SCI. REV. 43, 45 (1968). Another found such an effect on the Burger Court. Maltzman & Wahlbeck, *supra* note 171, at 589. But a more recent study found no statistically significant effect. Timothy M. Hagle & Harold J. Spaeth, *Voting Fluidity and the Attitudinal Model of Supreme Court Decision Making*, 44 W. POL. Q. 119, 123 (1991).

[353] WOODWARD & ARMSTRONG, *supra* note 171, at 121 (noting that "[t]he problem was greatest on cases where his was the swing vote").

[354] *See infra* Part III.C; *see also* Riggs, *supra* note 332, at 689 ("As is well known, [Blackmun's] ideological orientation was at first conservative but became more liberal as years passed.").

[355] Burger lobbied Blackmun and convinced him to agree to reargument of *Eisenstadt v.*

2. Strategy and Ideology in Voting Fluidity

Far more was at work in *Stanley* than the Court's shifting composition. First, Justices acted strategically—they used a vote, a vote change, or the possibility of a vote change to pull the Court's opinion closer to their preferred outcome. Some behavior of this sort is common and well accepted such as when a Justice offers her vote in exchange for a concession on one piece of an opinion.[356] More controversial strategies involve Justices voting contrary to their actual views in an attempt to shape a decision less to their disliking.[357] Such behavior has been criticized as "cross[ing] th[e] line" between acceptable and unacceptable strategic behavior.[358] Such behavior has also avoided nearly as much focus in the judicial decision-making literature as other forms of strategic behavior—perhaps because it has been difficult to document many examples of this behavior.

Second, Justices' ideology makes some of the voting fluidity predictable. The most powerful explanations of voting fluidity relate to ideology—Justices change their votes to conform with their principles—and the variables which correlate to fluidity in the aggregate do not involve strategic behavior.[359] The most frequent explanation of voting changes that shift a case's result is that the marginal Justice in a 5–4 case "is ideologically closer to the dissenters than he is to any member of the original vote coalition."[360] *Stanley* involved more than one vote switch, and thus presented a more

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Baird, 405 U.S. 438 (1972) and of *Roe v. Wade*, 410 U.S. 113 (1973). GREENHOUSE, *supra* note 169, at 87, 89.

[356] *See* BAUM, *supra* note 331, at 106 ("In particular, it is standard practice to modify the language of opinions in an effort to win colleagues' support."). It is also inherent in decision-making on "multi-judge courts, where . . . it is the norm for judges to sacrifice details of their convictions in the service of producing an outcome and opinion attributable to the court." Lewis A. Kornhauser & Lawrence G. Sager, *The One and the Many: Adjudication in Collegial Courts*, 81 CALIF. L. REV. 1, 52–53 (1993).

[357] *Id.* at 52 ("[S]trategic behavior refers to instances when an agent 'misrepresents' her preferences.").

[358] *Id.* at 53 ("A judge who disingenuously joins in an opinion dismissing a case on justiciability grounds in order to avoid an outcome on merits she regards as unjust, for example, has crossed the line.").

[359] *See* BRENNER & WHITMEYER, *supra* note 171, at 63–64 (noting other non-strategic reasons for voting fluidity). Forrest Maltzman and Paul Wahlbeck have demonstrated that most voting changes better match Justices' votes with their ideological views. Maltzman & Wahlbeck, *supra* note 171, at 588. Maltzman and Wahlbeck term such behavior "strategic," but not in the sense used here—they describe vote changes to better match a Justice's votes and views, not a vote switch designed to affect the case outcome. *Id.* A study of conference votes of the Burger Court found no *aggregate* evidence of an insincere vote—that is, a vote by a Justice for a position he did not believe in hopes of shaping the majority opinion. *See* BRENNER & WHITMEYER, *supra* note 171, at 56–57.

[360] Hagle & Spaeth, *supra* note 352, at 121. Similarly, a study of Warren Court cases whose results changed from conference to final vote found that the marginal Justice—the

complicated dynamic. Still, consistent with these views, two of the vote changes appear to reflect Justices' ideology. Two liberals—Brennan and Douglas—shifted their votes from the State to Stanley, joining the side that formed a better ideological fit.[361] There is little to explain Douglas's shift besides a reevaluation of the merits following White's draft opinion.

But a compelling case exists that Brennan acted strategically in *Stanley*, voting at conference against his actual wishes, and this represents a rare documented example of such behavior. Such possibilities have been noted in the Supreme Court decision-making literature, but rarely explored in depth.[362] Why would this liberal Justice who had voted for individuals against states in similar cases, before and after *Stanley*,[363] vote at conference for the State only to change his mind three weeks later? The most likely explanation is that Brennan's conference vote was damage control. By the time it was Brennan's turn to vote at the conference, it appeared impossible for Stanley to win because Douglas had just announced his position in favor of the State. Moreover, Burger had just suggested the possibility of dismissing the writ as improvidently granted rather than rule for the State on the merits, making clear that a nonsubstantive ruling for the State was possible. Brennan likely thought that joining the majority could help ensure a dismissal of the writ as improvidently granted rather than a decision for the State on the merits that would create negative precedent in a later equal protection case. Such avoidance of a bad precedent is the primary reason offered for a Justice voting contrary to her actual preferences.[364] Such a strategic damage-control vote may be especially likely when a procedural

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Justice most closely aligned with conference dissenters—changed his vote in 86% of these cases. Saul Brenner, Timothy M. Hagle & Harold J. Spaeth, *The Defection of the Marginal Justice on the Warren Court*, 42 W. POL. Q. 409, 409 (1989). Statistical analysis found that the likelihood of a change was greater when the marginal Justice "was ideologically closer to the dissenters than to any member of the ODC [original deciding coalition]." *Id.* at 415. Ideology held particularly strong predictive power for Justice Brennan, whose vote switches most frequently led him to join his more liberal colleagues. *Id.* at 422.

[361] For a statistical categorization of each Justice's ideology, see SEGAL & SPAETH, *supra* note 175, at 248–49.

[362] *See, e.g.*, BAUM, *supra* note 331, at 106 (noting that "strategic voting may be reflected in the original conference vote" but not exploring the frequency of or strategy in such voting).

[363] Such support would have been consistent with Brennan's vote that the State could not discriminate against children on the basis of their parents' marital status in *Levy v. Louisiana*, 391 U.S. 68 (1968), and his later vote for the unwed father in *Caban v. Mohammed*, 441 U.S. 380 (1979), and for stronger due process protections for family integrity in *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18 (1981), and *Santosky v. Kramer*, 455 U.S. 745 (1982).

[364] Kornhauser & Sager, *supra* note 356, at 55 (noting that a judge may support "an outcome or rationale with which she disagrees . . . [to] prevent her court's adoption of some other outcome or rationale that she thinks worse"); *see also* Evan H. Caminker, *Sincere and Strategic Voting Norms on Multimember Courts*, 97 MICH. L. REV. 2297, 2324 (1999) (describing such strategic voting as "the most frequently hypothesized scenario of strategic voting").

ruling is possible and the vote does not require an endorsement of the majority position on the merits.[365]

Brennan's strategic conference vote became voting fluidity[366] when Douglas changed his vote and Brennan could become the fourth and (on that seven-member Court) decisive vote for Stanley. The timing of Brennan's vote switch—on the same day that Douglas announced his vote switch, and just two days after White circulated his opinion—suggests that strategic calculations motivated his conference vote. The alternative—that in the course of forty-eight hours, Justice White's draft convinced both Douglas and Brennan to change positions—is possible but seems highly coincidental given the relative rarity of Justices changing votes. Moreover, there is already a record of Brennan making such strategic damage-control votes at conference. Brennan joined the majority in a criminal procedure case application so that he could write the opinion himself. The case, *Pennsylvania v. Muniz*,[367] addressed whether police had to give criminal suspects *Miranda* warnings when asking "routine booking questions." The majority of the Court voted to create an exception to *Miranda v. Arizona*[368] for such questions.[369] In a private letter to Marshall, Brennan revealed that he actually opposed the exception, but voted for it because he "made the strategic judgment to . . . use [his] control over the opinion to define the exception as narrowly as possible."[370]

My argument that Brennan's conference vote was strategic is not foolproof. Brennan did articulate some uneasiness with Stanley's equal protection argument at the conference. And though he was generally a strong supporter of due process rights, including parental rights, he did vote for the State in one later unwed father's case,[371] suggesting that he saw limits to the rights of unwed fathers. But Brennan continued to articulate a commitment to due process protections even in that later case,[372] and was otherwise a reliable vote for parents' rights.

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[365] *See* Caminker, *supra* note 364, at 2324 n.81.

[366] Voting fluidity is a subset of such strategic votes; if no majority had become possible, Brennan would not likely have changed his vote. Indeed, a successful damage control strategy at conference will not lead to voting fluidity unless another Justice changes her vote—suggesting that more instances of such voting may exist.

[367] 496 U.S. 582 (1990).

[368] 384 U.S. 436 (1966).

[369] *Muniz*, 496 U.S. at 602–05.

[370] FORREST MALTZMAN, JAMES F. SPRIGGS II & PAUL J. WAHLBECK, CRAFTING LAW ON THE SUPREME COURT: THE COLLEGIAL GAME 3 (2000) (quoting Brennan 1990). The authority to assign opinion-writing duties rests with the Chief Justice if he is in the majority or the senior Justice in the majority. Chief Justice Rehnquist was in the majority when deciding that a *Miranda* exception applied, but in the minority on another issue decided, thus leaving Brennan with opinion-assignment authority.

[371] Lehr v. Robertson, 463 U.S. 248 (1983).

[372] Supreme Court papers show that Brennan saw *Lehr* as a close case. He passed when discussing the case at conference. Justice Blackmun, Conference Notes on Lehr v. Robinson,

3. Stewart's Complicated Conforming Vote Shift

Most Supreme Court vote changes occur when a Justice in the minority changes his or her vote to conform to the majority view. Justices in the minority at conference are more likely to change their votes—they did so in 18.1% of cases, while Justices in the initial majority did so only 4.6% of the time.[373] Thus, when Justices change their votes, they tend to "increase the size of the final coalition rather than to transform the conference majority into either a minority or a smaller majority."[374]

Empirical research suggests rather simply that conforming vote changes represent Justices going along with the crowd, especially when they care relatively little about the case.[375] In a study of cases decided from the 1946 through 1975 terms, "justices appear most likely to conform when the case is less salient and they are opposed by a substantial majority on the other side."[376] In these situations, perhaps, drafting a dissenting opinion is simply not worth the effort when the Justice does not care much about the case, or sees it as a close case,[377] or even values consensus with colleagues greater than his or her concerns about the particular case.[378]

The conforming label potentially masks more complicated dynamics at work in Stewart's vote change, which has the functional hallmarks of a conforming vote change.[379] But this was not a simple choice—he could have easily joined Burger's

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No. 81-1756 (Dec. 10, 1982) (on file with author). Before joining the majority opinion in *Lehr*, Brennan circulated two memos requesting revisions designed to protect unwed fathers' rights in different factual circumstances. Letter from Justice Brennan to Justice Stevens (June 1, 1983) (on file with author); Letter from Justice Brennan to Justice Stevens (June 6, 1983) (on file with author).

[373] *See* Maltzman & Wahlbeck, *supra* note 171, at 587; *see also* Robert H. Dorff & Saul Brenner, *Conformity Voting on the United States Supreme Court*, 54 J. POL. 762, 764 (1992) ("Justices, therefore, are 12.1 times more likely to switch in the direction of conformity (minority-majority) than in the direction of counterconformity (majority-minority).").

[374] SEGAL & SPAETH, *supra* note 175, at 262.

[375] Dorff & Brenner, *supra* note 373, at 773.

[376] *Id.*

[377] *See* Saul Brenner, Tony Caporale & Harold Winter, *Fluidity and Coalition Sizes on the Supreme Court*, 36 JURIMETRICS 245, 253 (1996) (suggesting that "avoid[ing] writing a dissenting opinion" may motivate conforming voting).

[378] That description is perhaps particularly apt for lone dissenters at conference who decide to join their colleagues to make a unanimous Court. A study of the Vinson Court found a 36.8% probability of a lone dissenter switching votes, compared with only a 0.9% probability of a member of a unanimous conference majority changing his vote. *Id.* at 248. Similar results have been found in studies of different Court periods. Paul H. Edelman & Suzanna Sherry, *All or Nothing: Explaining the Size of Supreme Court Majorities*, 78 N.C. L. REV. 1225, 1226 (2000) (noting that studies show unanimous decisions and 5–4 split decision are the most common while 8–1 decisions are the least common).

[379] Stewart's vote shift may not be considered a technical conforming vote change. The empirical literature generally defines "conformity voting" as occurring when a Justice switches

dissent. Stewart appeared to have an open mind throughout the decision-making process and seemed interested in a narrow ruling for Stanley that avoided the broader ruling advocated by Marshall. He may also have communicated his open-mindedness through silence and been convinced by White's careful efforts to avoid any hint of a shift in the level of scrutiny to be applied in due process or sex discrimination cases.[380] That effort by White helped reduce the salience of the case because it avoided any decision on a contested and important issue and thus may have helped induce Stewart's vote switch.

B. Issue Fluidity and Attorneys' Litigation Choices

The Supreme Court frequently decides cases on issues different than those argued by the parties as it did in *Stanley*, which is a phenomenon known as issue fluidity.[381] One study of Warren Court decisions found that the Justices addressed issues *not* fully presented by the parties in "27 percent of all cases."[382] The explanation has been straightforward—Justices rule on whichever issues will attract a majority[383]—and is illustrated by White's efforts to preserve his majority in *Stanley* by including due process holdings to maintain Douglas's vote.

A review of *Stanley*'s litigation suggests that parties' litigation choices—and not only Supreme Court action—can shape issue substitution. Stanley's lawyers did not explicitly present a due process argument to the Court, relying entirely on an equal protection challenge.[384] Although Stanley's lawyers may have sought to avoid controversial topics, they left central issues in the case unaddressed and as a result nearly lost the case. The idea that litigation mistakes might lead to issue substitution has empirical support. In a study of the Warren Court, Barbara Palmer found that cases reaching the Supreme Court through State appellate courts lead to more issue substitution than those through federal courts of appeals.[385] Palmer noted a "perception" that state court cases were less fully litigated and less carefully decided than federal court cases, perhaps making the Court more likely to identify the key issue

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from the minority at conference to the majority, and the winning side remains the same. Dorff & Brenner, *supra* note 373, at 763. In *Stanley*, Stewart was not in the minority at conference. But by November 10, a new majority for *Stanley* was apparent, and from then until Stewart's decision to join White's opinion on March 30, Stanley had a majority.

[380] *See supra* notes 313–17 and accompanying text.

[381] Barbara Palmer, *Issue Fluidity and Agenda Setting on the Warren Court*, 52 POL. RES. Q. 39, 40–41 (1999).

[382] *Id.* at 44.

[383] *See, e.g.*, *id.* at 47 ("[J]ustices may be willing to discard issues in the interest of preserving a majority.").

[384] In a 2014 interview, Stanley's lawyer, Patrick Murphy, freely admitted that he did not raise a due process question, and said there was no strategy in that choice: "Maybe we were dumb." April 2014 Interview with Murphy, *supra* note 40.

[385] Palmer, *supra* note 381, at 56.

itself.[386] Anecdotally, the effect of litigation choices on issue fluidity may be seen in comparing *Stanley* with *Reed v. Reed*—an early sex discrimination equal protection case, which was argued on the same day.[387] Ruth Bader Ginsburg presented the Court with an innovative brief arguing first that the Court should apply heightened scrutiny to sex classifications or, in the alternative, void the particular classification at issue under rational basis review.[388] The Court chose one of those rationales and quickly issued a ruling—barely one month after oral argument.[389] Patrick Murphy's brief in *Stanley* limited the issue to equal protection and raised due process precedents without framing them as a due process claim.[390] After six months of deliberation, the Court issued a ruling on the due process claim, which was not explicitly presented to the Court.[391]

By illustrating *Stanley*, issue fluidity as a response to litigation choices (or, less generously, errors) reframes issue fluidity as part of the Court's response to litigants. It is not merely an internal Court function in which opinion writers seek to maintain a majority—though it is certainly that as well. Issue fluidity functions as a safety net for parties like Peter Stanley whose lawyers may overlook or omit crucial arguments.

Although issue fluidity saved Stanley's case, the Court's decision-making in *Stanley* also offers an illustration of issue fluidity's risks. The Court issued holdings regarding parents' substantive and procedural due process rights when those issues were not argued by the parties.[392] The lack of full development of those issues may be illustrated in the Court's unsteady path toward a parental fitness focus. The centrality of parental fitness to modern constitutional family law was nearly undermined—White's first several drafts would not have permitted states to offer parents hearings on their children's welfare rather than on parental fitness. Only the unique amount of vote switching and the pressure from Marshall's threatened concurrence saved Stanley from a dismissal of the writ as improvidently granted and ensured a strong due process focus.

C. Stanley*'s Voting Fluidity and Harry Blackmun's Evolution*

Harry Blackmun's changing views of parental rights made him crucial to both establishing the rights of unwed fathers in private adoption cases and to developing parental rights law more generally. Those changing views began in his deliberations over *Stanley*.

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[386] *Id.* at 48.

[387] *See* Stanley v. Illinois, 405 U.S. 645 (1972); Reed v. Reed, 404 U.S. 71 (1971).

[388] Brief for Appellant, *supra* note 111, at 5–6.

[389] *Reed*, 404 U.S. at 71. The Court decided *Reed* on November 22, 1971, after hearing argument on October 19, 1971. *Id.*

[390] *See* Brief for the Petitioner, *supra* note 13.

[391] *Stanley*, 405 U.S. at 645.

[392] *Id.*

Linda Greenhouse has told the story of Harry Blackmun's evolution from a personal friend and conservative colleague of Warren Burger to an iconic liberal Justice.[393] Blackmun had been close childhood friends with Burger, and Richard Nixon appointed both to the Court.[394] Upon Blackmun's nomination, Burger urged him to join Burger's skeptical approach toward expanding due process and equal protection rights.[395] Expecting Blackmun to hew closely to Burger's views, other Justices' clerks referred to Blackmun as "[h]ip pocket Harry" in his first terms on the bench.[396] Blackmun and Burger soon began splitting, personally and ideologically, in the early 1970s, and that split was well established by the late 1970s.[397] Scholars have dated the shift to "[a]fter a few years" on the Court[398]—and his final votes largely aligned with Burger until they began a steady decline in 1973, and a steeper decline in 1976.[399] Blackmun's votes in family law cases track that evolution—for the State in *Stanley* in 1972, but for the unwed father in *Caban v. Mohammed*[400] in 1979 and for parents in subsequent cases.[401]

The internal Court documents from *Stanley* and *Caban* reveal that Blackmun's evolution to a parents' rights stalwart began with his angst about how to vote in *Stanley* early in his tenure, not a later shift, and that this evolution was essential to shaping modern constitutional family law.[402] Blackmun's memos show that he joined Burger's opinion because he was convinced by the procedural arguments, but he was sympathetic to Stanley on the facts and willing to join an expansion of due process and equal protection rights had they been fully litigated.[403]

Blackmun's leanings became clear when, in two later unwed fathers' cases that split the Court, he sided with the fathers and against Burger's position.[404] The first

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[393] GREENHOUSE, *supra* note 169, at 122–52.

[394] Theodore W. Ruger, *Justice Harry Blackmun and the Phenomenon of Judicial Preference Change*, 70 MO. L. REV. 1209, 1211–12 (2005).

[395] GREENHOUSE, *supra* note 169, at 52.

[396] WOODWARD & ARMSTRONG, *supra* note 171, at 122.

[397] GREENHOUSE, *supra* note 169, at 122–52. Blackmun dated the beginning of his split with Burger to 1974, when the Court considered *United States v. Nixon*, 418 U.S. 683 (1974). *Id.* at 122–24 (noting that "from then on [they] grew apart"). Greenhouse concluded that by 1977, Blackmun and Burger's friendship "was crumbling away." *Id.* at 121.

[398] Ruger, *supra* note 394, at 1212.

[399] Note, *The Changing Social Vision of Justice Blackmun*, 96 HARV. L. REV. 717, 717 n.6 (1983).

[400] 441 U.S. 380 (1979).

[401] *See, e.g.*, Lehr v. Robertson, 463 U.S. 248 (1983); Lassiter v. Dep't of Soc. Servs., 452 U.S. 18 (1981).

[402] Letter from Blackmun to Burger, *supra* note 25; *see also* Letter from Blackmun to White, *supra* note 26.

[403] *See* Letter from Blackmun to White, *supra* note 26; *see also* Stanley v. Illinois, 405 U.S. 685, 659–63 (1972) (Burger, J., and Blackmun, J. dissenting).

[404] Blackmun joined the majority in *Caban v. Mohammed* for the father and dissented in *Lehr v. Robertson*. *See Caban*, 441 U.S. at 381–82; *Lehr*, 463 U.S. at 249, 276 (White, J., dissenting).

of these cases, *Caban*, is the case that firmly placed Blackmun on the parents' rights side.[405] That case involved a father's challenge to a New York statute that required the consent of an unwed mother—but not an unwed father—to a child's adoption.[406] The father, Abdiel Caban, had lived with the children and their mother from their birth past the youngest child's second birthday.[407] When the parents split up, the mother, Maria Mohammed, took the children to live with her and Kazin Mohammed, whom she soon married.[408] Caban continued to have regular visits and other contact with the children, but the Mohammeds petitioned for Kazim to adopt the children, and the trial court granted that petition, citing the statute which provided that Caban's consent was not required.[409] This terminated Caban's parental rights,[410] without a hearing on Caban's parental fitness.[411]

Blackmun was decisive in *Caban*—thus providing an example of how a Justice's "ideological movement can manifest itself in important legal change."[412] During the Court's deliberations, the Court split 4–4.[413] Despite lobbying from Stewart (from Stewart's clerks to Blackmun's clerks), Blackmun sided with the four other Justices on Caban's side.[414] Blackmun's notes on the case conclude that "factually this case is closer to *Stanley* than *Quillion* [sic] [*v. Walcott*]," another case involving a father who was less involved than Peter Stanley or Abdiel Caban.[415] Like Peter Stanley, the father in *Caban* had lived with his children for several years, and he sired and raised the children, yet was not given a hearing on his parental fitness. If a father like Caban could have his children adopted and his rights terminated without his consent or any allegation or proof of unfitness, then the Constitution would offer no meaningful protection for relationships between unwed fathers and their children. Blackmun's shift thus ensured the Court would not issue such a holding.

Blackmun recognized the importance of his shift in *Caban* and tied it back to his ongoing doubts about *Stanley*. Blackmun's papers include a copy of a personal note that he wrote to Burger after he had sealed the outcome in *Caban*.[416] Blackmun

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[405] *Caban*, 441 U.S. at 381–82.

[406] *Id.* at 384–85.

[407] *Id.* at 382.

[408] *Id.*

[409] *Id.* at 382–84.

[410] *Id.*

[411] *Id.* at 384.

[412] Lee Epstein et al., *Ideological Drift Among Supreme Court Justices: Who, When, and How Important?*, 101 NW. U. L. REV. 1483, 1487 (2007).

[413] *Caban*, 441 U.S. at 381.

[414] Memorandum from AGL to Blackmun (Jan. 23, 1979) (describing a phone call from Stewart's clerk); Letter from Justice Blackmun to Chief Justice Burger (Jan. 29, 1979) [hereinafter Letter from Blackmun to Burger] (on file with author) (joining Powell's opinion).

[415] Quilloin v. Walcott, 434 U.S. 246, 249 (1978); Papers of Harry Blackmun, "77-6431 Caban v. Mohammed" (undated, on file with author).

[416] Letter from Blackmun to Burger, *supra* note 414.

wrote, "I am frank to say that I am not sure how I would vote in [*Stanley*] were it being presented today."[417]

IV. LASTING EFFECTS OF *STANLEY*'S STRATEGIC DECISION-MAKING AND DUE PROCESS HOLDINGS

The voting and issue fluidity that shaped the Supreme Court's deliberations had a lasting effect on constitutional family law. Most importantly, they established the central importance of the Due Process Clause in protecting the rights of parents to the custody and control of their children. *Stanley* was the first of a series of cases which shaped the rights of unwed fathers in private adoptions.[418] It serves as the foundation of a separate string of cases that regard the due process rights of families facing a state child protection agency effort to break them up.[419]

The relevance of due process is now taken for granted, but that is because of what happened in *Stanley*. The Court could say in 1981 that these due process rights are so well established that they are "plain beyond the need for multiple citation,"[420] and in 2000 the Court referred to parental rights as "perhaps the oldest of the fundamental liberty interests recognized by this Court."[421] Reference to the Constitution's (now) well-established protection of parental rights added support for the Supreme Court's 2015 decision recognizing a right to same-sex marriage.[422] In 1971, however, these statements were far from clear—so unclear that Stanley's lawyers did not even choose to argue due process. Its limited precedents regarding parental rights had been grounded in due process, but those cases arose in the discredited *Lochner* era. The Supreme Court's subsequent consideration of those doctrines reflected a both post-New Deal respect for state action and reluctance by the Court after breaking with the *Lochner* era so fully to use substantive due process to void state action.[423]

The Supreme Court deliberations and vote switches that led *Stanley* to rest on due process affirmed that due process did, in fact, continue to protect parental rights—a result that has shaped modern constitutional family law. It made *Stanley* not only an unwed fathers' rights case, but "one of the leading cases on *parents'* rights in the Court's history."[424] Through a due process analysis that explicitly relied on the pre-New Deal cases of *Meyer*[425] and *Pierce*,[426] *Stanley* made clear that those

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[417] *Id.*
[418] Stanley v. Illinois, 405 U.S. 645 (1972).
[419] *Id.*
[420] Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 27 (1981).
[421] Troxel v. Granville, 530 U.S. 57, 65 (2000).
[422] Obergefell v. Hodges, 135 S. Ct. 2584, 2600 (2015).
[423] *See supra* notes 118–21 and accompanying text.
[424] GUGGENHEIM, *supra* note 5, at 64 (emphasis added).
[425] Meyer v. Nebraska, 262 U.S. 390 (1923).
[426] Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925).

cases remained good law and that the Court would continue to view parental rights to child custody as fundamental and strongly protected against state intervention.[427]

That due process framework also shaped the balancing tests that have dominated children-and-the-law casebooks and classrooms ever since—with parents' rights, children's rights, and state interests balanced, and sometimes in tension, in every case. That balancing fit easily into the due process framework adopted by the Supreme Court in *Mathews v. Eldridge*,[428] decided three years after *Stanley*, and applied in subsequent cases involving competing claims of children's rights, parents' rights, and state authority.[429]

Stanley's due process holdings became the foundation of the Supreme Court's development of a limited set of due process rights for parents in child protection cases. *Stanley* established the principles that parents presumptively have the right of 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 from a parent.[430] One other Court holding—that the State must prove its case by clear and convincing evidence before terminating parental rights[431]—depends on *Stanley*'s due process holding. So does the Court's analysis that the rights of even long-standing foster parents do not trump those of biological parents.[432] A decision that focused on equal protection issues between mothers and fathers would have had far less precedential value in these later child protection cases—those later cases had nothing to do with overt sex discrimination and everything to do with the rights of parents regardless of sex.

Stanley's due process focus also shapes the analysis for a host of other issues. Determining the rights of children committed to mental institutions by parents begins with a discussion of parents' right to control children.[433] Analyzing parental consent to abortion and judicial bypass laws begins with analyzing the extent of parents' due process right to control their children.[434] State statutes permitting nonparents to seek visitation rights require constitutional deference to fit parents' determinations.[435] When the State can require the provision of medical care to a child over a parent's objection begins with a due process right that traces back to *Stanley*.

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[427] Stanley v. Illinois, 405 U.S. 645, 658 (1972).

[428] 424 U.S. 319, 332–35 (1976).

[429] *See, e.g.*, Santosky v. Kramer, 455 U.S. 745, 754 (1982); Parham v. J.R., 442 U.S. 584, 599–600 (1979); Smith v. Org. of Foster Families for Equal. & Reform, 431 U.S. 816, 848–49 (1977). Some have criticized the balancing of constitutional rights as failing to address adequately how poverty affects child welfare cases and catalyzing conflict between the State and families. *See* Clare Huntington, *Rights Myopia in Child Welfare*, 53 UCLA L. REV. 637 (2006).

[430] *Stanley*, 405 U.S. at 651.

[431] *Santosky*, 455 U.S. at 746.

[432] *Smith*, 431 U.S. at 842–47.

[433] *Parham*, 442 U.S. at 601–03. Chief Justice Burger's majority opinion in *Parham* does not cite *Stanley*, but, by citing the older due process cases that preceded it, Burger reaffirmed *Stanley*'s central holding that the Due Process Clause protects parental rights. *See id.* at 602.

[434] Bellotti v. Baird, 443 U.S. 622, 637–39 (1979).

[435] Troxel v. Granville, 530 U.S. 57, 68–69 (2000).

Stanley v. Illinois is most frequently cited as the first case in the unwed fathers quartet—*Stanley* plus three cases that followed, all involving private adoption disputes—which established that the Due Process Clause provides unwed fathers with an opportunity interest in their children and, when fathers seize that interest, procedural rights are due before that legal relationship is severed.[436] Locating these rights in the Due Process Clause results directly from the decision-making in *Stanley*. *Stanley* also framed the question that future cases had to decide: it held that a father who "sired and raised" his child had fundamental due process rights to custody—making it necessary for a rule to distinguish between fathers who can and cannot claim such rights and requiring analysis of which relationships are worthy of constitutional protection.[437]

CONCLUSION: IMPLICATIONS OF *STANLEY*'S FULL HISTORY

The full story of *Stanley v. Illinois* has significant implications for the study of Supreme Court decision-making and helps explain modern constitutional family law, which rests on the *Stanley* decision. What we now take for granted—that the Due Process Clause protects parents' right to care, custody, and control of their children, that this right must be balanced against state interests in protecting children, and that the State must prove parental unfitness before taking custody of children—depends on this case. Yet the path to those holdings has never before been told. The full history of *Stanley v. Illinois* provides greater appreciation for the doctrinal shift toward a due process analysis that *Stanley*'s unique path at the Supreme Court led to. It was far from certain that the Court would choose to place family integrity rights under the Due Process Clause's protection—so uncertain that Stanley's lawyer declined to explicitly raise a due process argument. The Court only applied the Due Process Clause through compromises to form a majority on a Court whose members had changed their votes in large numbers.

The child protection context from which *Stanley* arose leads to a set of other questions for future work in constitutional family law. *Stanley* is best known as the first of several Supreme Court cases addressing the rights of unwed fathers in adoptions, and is typically treated either as an adoption case or as a forerunner to later adoption

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[436] *See infra* note 438.

[437] *See* GUGGENHEIM, *supra* note 5, at 65 (noting that *Stanley* did not clarify if all biological fathers or only those who had raised their children had constitutional rights). This effort 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. 463 U.S. 248 (1983). That rule continues to lead to significant commentary, variation across states, and a frequent lack of clarity about what to do when unmarried parents have a dispute about their children. Naomi Cahn & June Carbone, *Who's the Father?*, 93 B.U. L. Rev. 55, 56 (2013).

cases.[438] Even leading children and the law casebooks (which address child protection law) classify *Stanley* as an adoption case.[439] It is the only one of those cases, however, to arise in a foster care context, and the full facts of the case—including Peter Stanley's adjudicated neglect of his eldest daughter—demonstrate that the State was focused on protecting Stanley's children from a father it viewed as unfit.[440] Whether the State succeeded in such goal is unclear, and the State's decision to avoid litigating its real concerns may have undermined its ultimate goals.[441] Do state agency lawyers avoid litigating parental fitness by taking advantage of modern analogs to the unwed father statute in *Stanley*? Do child protection courts apply doctrines that resolve the questions raised by *Stanley*, or do they ignore them?[442] Answering such questions begins with a complete understanding of *Stanley* itself.

Such a complete understanding reveals important insight about Supreme Court decision-making beyond family law. It shows that strategic voting occurs—Justice Brennan voted differently than his true preferences at the conference in an effort to shape the Court's action closer to his liking. Moreover, *Stanley*'s path from a decision for the State at the conference to a weak due process holding several weeks later, to ultimately a strong due process holding illustrates the complex dynamic in which each Justice's votes and perspectives about a case shape the ultimate outcome. *Stanley* became a due process case because Justice Douglas made his vote depend on it, and it became a strong parents' rights holding because Justice Marshall threatened to concur separately and perhaps deprive Justice White of a clear majority. Responding to the pressures imposed by Douglas's and Marshall's views and

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[438] *See* Stanley v. Illinois, 405 U.S. 645 (1972). The academy now generally discusses *Stanley* only as the first of the unwed fathers quartet. *See, e.g.*, 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); Meyer, *supra* note 35, at 758–60; 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). 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 v. Robertson. See, e.g.*, Maillard, *supra* note 35.

[439] *See, e.g.*, ABRAMS ET AL., *supra* note 15, at 665 (placing *Stanley* in a chapter on "Adoption" rather than "Abuse and Neglect" or "Foster Care"); PETER N. SWISHER ET AL., FAMILY LAW: CASES, MATERIALS AND PROBLEMS 668–69 (2d ed. 1998) (placing *Stanley* in a chapter on "Adoption").

[440] *See Stanley*, 405 U.S. at 646–47.

[441] *See supra* Part II.D.

[442] For a brief exploration of these questions, see Josh Gupta-Kagan, In re Sanders *and the Resurrection of* Stanley v. Illinois, 5 CALIF. L. REV. CIR. 383 (2014), http://www.californialawreview.org/in-re-sanders-and-the-resurrection-of-stanley-v-illinois/ [http://perma.cc/R47R-T5SM].

Chief Justice Burger's dissent shaped the ultimate decision as much, if not more than, the author's initial views.

Stanley also was shaped by the lawyers who, with the benefit of hindsight, made a strategic error in focusing entirely on equal protection and overlooking due process arguments. This led several Justices to wrestle with the case more than necessary and ultimately cost Justice Blackmun's vote. It also caused the Court's issue fluidity—and demonstrates that issue fluidity is not merely a result of the Justices' interactions with each other, but a response to the legal arguments that each party raises in any given case.