JUDGE KAYE'S 1991 SOLOMONIC DISSENT IN *ALISON D. V. VIRGINIA M.*

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INTRODUCTION

It is not an accident that the term "Solomonic" often refers to judicial decisions in cases involving disputes between adults who seek to maintain relations with their children. The Biblical roots of the phrase "Solomonic decision" acknowledge that no disputes are more difficult to resolve than those between adults who seek to maintain relationships with a child that they have nurtured and loved.[1] Adults place high value on these relationships, and children also have powerful interests in maintaining connections with those who raise them and upon whom they depend. But when the concerned adults no longer love or respect one another, many find it difficult to share responsibility, and courts are left to make the difficult decision of who may maintain relations with the child.

In 1991, in *Alison D. v. Virginia M.*, the New York Court of Appeals held that only a biological parent, their legal spouse, or an adoptive parent could claim a right to maintain a relationship with a child.[2] Judge Kaye dissented alone.[3] At the heart of her opinion is her observation that a parental relation with a child only "came into being with the consent of the biological or legal parent."[4] A quarter century

 Special thanks to Christine Sifferman for excellent research assistance.

[1] *See* 1 *Kings* 3:16–28 (recounting the story of King Solomon ordering a baby to be cut in half and divided equally among two women who claimed him as their own, only to reveal that the true mother would rather the baby go to the other woman than have the child harmed).

[2] Alison D. v. Virginia M., 572 N.E.2d 27, 29 (N.Y. 1991), *overruled by* Brooke S.B. v. Elizabeth A.C.C., 61 N.E.3d 488 (N.Y. 2016).

[3] *Id.* at 30 (Kaye, J., dissenting).

[4] *Id.*

later, in 2016, in *Brooke S.B. v. Elizabeth A.C.C.*, the New York Court of Appeals adopted Judge Kaye's analysis,[5] joining many other states that already had expanded definitions of parental rights.[6]

Alison D. and her partner Virginia M. met in 1977, bought a home, and decided to have a child together.[7] They agreed that Virginia should become pregnant by artificial insemination from an anonymous donor. When Andrew was born in 1981, his birth certificate listed both of their surnames. The couple shared childcare and support, and their parents embraced him as a grandchild. Two years later, they had a second child, Amy, with Alison as the biological parent. Shortly after Amy's birth, they separated. Andrew and Virginia remained in the family home, while Alison and Amy left. For a time, both women and Alison's parents visited with both children, and Alison continued to pay her half of the mortgage on their joint home.[8] In 1986, Alison took a one-year job in Dublin, Ireland. Virginia changed her phone number, stopped giving Alison's letters and gifts to Andrew, and refused to allow Alison's parents to visit. Alison sought to persuade Virginia to allow her to maintain a relation with Andrew, failed, and filed suit.[9]

This Essay begins by placing the case in the social, political, and legal context of the time. The framework most concretely and obviously relevant is that gay and lesbian people were just beginning to emerge from the closet imposed by moral and criminal condemnation. A second relevant framework of the time was the erosion of traditional social and legal norms protecting parents' rights to direct the nurturing of their children. That erosion took two forms. In the name of child welfare, growing numbers of children, disproportionately poor and black, were involuntarily separated from their biological parents. In addition, influential voices challenged the historic notion that biology was the primary determinant of parental rights.

Part I explores these contexts. It does not mean to suggest that larger social concerns drove Judge Kaye's decision. Rather, as explained below, her narrowly drawn dissent was based on the facts of the case before her and her understanding of New York law. However, as an informed, sophisticated, and compassionate New Yorker

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[5] Brooke S.B. v. Elizabeth A.C.C., 61 N.E.3d 488, 500 (N.Y. 2016).

[6] *See* Courtney G. Joslin, *Leaving No (Nonmarital) Child Behind*, 48 FAM. L.Q. 495, 500–01 (2014) (detailing judicial decisions and statutes in sixteen states plus the District of Columbia that allowed for nonbiological parental rights).

[7] Suzanne B. Goldberg, *Family Law Cases as Law Reform Litigation: Unrecognized Parents and the Story of* Alison D. v. Virginia M., 17 COLUM. J. GENDER & L. 307, 311–12 (2008).

[8] *Id.* at 314.

[9] *Id.* at 315–16.

living in 1991, her understanding of the case was inescapably and wisely influenced by these larger social and intellectual contexts. Part II examines the decision itself, and Part III considers its wider impact on the law in New York and the United States.

I
THE SOCIAL AND POLITICAL CONTEXT OF *ALISON D.*

The most important framework for this case was the changing situation of gay and lesbian people. Professor Suzanne B. Goldberg of Columbia Law School offers a rich description of this context and of the case.[10] Alison and Virginia met eight years after the Stonewall rebellion of 1969, widely regarded as the beginning of the gay liberation movement.[11] While change was in the wind, during the years of their relationship and this litigation, lesbian, gay, bisexual, and transgender (LGBT) people remained largely closeted and subject to broad legal and social sanctions.[12] In 1986, in *Bowers v. Hardwick*, the Supreme Court approved the constitutionality of a Georgia law imposing criminal sanctions on consenting adults who engaged in oral or anal sex in private.[13]

With respect to their desire to form a family, the law offered Alison and Virginia little support. Marriage was not available to same-sex couples in any state, and would not be so until 2003, when Massachusetts became the first state to legalize such unions.[14] Theoretically, a same-sex couple embarking on parenthood could have entered into a contract expressing their mutual understandings.[15] But few couples, gay or straight, made such agreements, and it was not clear that contracts altering the state-defined meanings of marriage were enforceable, particularly in relation to children.[16]

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[10] *Id.*

[11] *See* MARTIN DUBERMAN, STONEWALL, at xv (1993).

[12] *See* Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1998 WIS. L. REV. 187, 188–96 (describing the legal and social sanction placed on gay men and lesbians in the 1980s).

[13] 478 U.S. 186, 189 (1986). The Supreme Court directly overruled its decision in *Lawrence v. Texas*, 539 U.S. 558, 578 (2003), and held that antisodomy laws are unconstitutional.

[14] Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 969 (Mass. 2003) (holding that the Massachusetts Constitution mandated the right of same-sex couples to marry).

[15] *See generally* LENORE J. WEITZMAN, THE MARRIAGE CONTRACT: SPOUSES, LOVERS, AND THE LAW (1981).

[16] *See* Marsha Garrison, *Marriage: The Status of Contract*, 131 U. PA. L. REV. 1039, 1058 n.97 (1983) (reviewing LENORE J. WEITZMAN, THE MARRIAGE CONTRACT (1981)) (discussing the dearth of reported cases and questionable enforceability of marriage-like agreements).

Cases considering claims of gay and lesbian parents who sought to maintain relationships with their children were relatively rare. Most involved married women who, upon divorce, sought to maintain relations with the children they had birthed and raised.[17] Some women in this situation lost custody or visitation rights on the ground that being a lesbian rendered them unfit as a parent.[18] In other cases lesbian mothers won custody or visitation, but only on the condition that they not socialize with other lesbians, including their intimate partners.[19] Sensibly, many divorcing lesbian women remained closeted.

Another alternative possibly available to Alison and Virginia was to petition to allow Alison to adopt Andrew. But it was far from clear that second-parent adoption was allowed in New York or any state. In 1991, just after the decision in *Alison D.*, Surrogate Judge Eve Preminger asked me to serve as guardian *ad litem* for a child, Evan.[20] Like Alison and Virginia, petitioners Diane F. and Valerie C. had lived together in a committed relationship for many years. They decided to have a child together. Valerie was artificially inseminated by a friend who formally relinquished any claim in a relationship with the child. The couple sought to allow Diane F. to adopt Evan, to formalize her relationship with him.[21] The primary legal difficulty was that in New York and most other states, adoption terminates the rights and responsibilities of the biological parents.[22] The Surrogate Court noted that strict enforcement of this requirement would produce "an absurd outcome which would nullify the advantage sought by the proposed adoption: the creation of a legal family unit identical to the actual family setup."[23]

I took seriously my responsibility as guardian for Evan. My job was not to argue the law, but rather to inform the court whether adoption would be in Evan's best interests. Two home studies by social workers, one appointed by the court, found that Evan was a "charming, well nourished and articulate child who relates well to

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17 *See* Goldberg, *supra* note 7, at 312–13 (noting this phenomenon). *See generally* Rhonda R. Rivera, *Queer* Law: Sexual Orientation Law in the Mid-Eighties, Part II*, 11 U. DAYTON L. REV. 275, 327–71 (1986) (discussing early custody cases).

18 *See, e.g.*, Rivera, *supra* note 17, at 353 (detailing individual cases in which lesbian and gay parents were denied custody because their sexual orientation rendered them unfit as parents).

19 Goldberg, *supra* note 7, at 313.

20 *In re* Evan, 583 N.Y.S.2d 997 (Sur. Ct. 1992).

21 *Id.* at 998.

22 New York Domestic Relations Law § 117(1)(a) provides that "the natural parents of the adoptive child shall be relieved of all parental duties toward and of all responsibilities for and shall have no rights over such adoptive child." N.Y. DOM. REL. LAW § 117(1)(a) (McKinney 2002).

23 *In re Evan*, 583 N.Y.S.2d at 1000.

peers and adults."[24] He had a strong parental relation with both women. Both social workers believed that adoption served Evan's best interests by promoting stability and continuity in his relationship with Diane, who was his functional parent. Research on the children of divorce then showed that, absent abuse, children do better if they maintain relationships with both of their parents.[25] Adoption provided Evan obvious material benefits. If the couple were to separate, or if Valerie C. were to become incapacitated or to die, only adoption by Diane could assure Evan stability. Adoption served his best interests by ensuring that he could look to both women for financial support.

Despite the concrete benefits that adoption would provide to this particular child, I searched for and expected to find some sociological or psychological literature casting doubt on whether parenting by same-sex couples served the best interests of children. Research specifically examining the children of lesbian couples was understandably scarce, but entirely reassuring.[26] In more recent years, the principal defense of those who seek to exclude same-sex couples from marriage has been that heterosexual couples are categorically more qualified to parent. All efforts to defend that proposition have been unsuccessful.[27] Shortly after the decision in *Alison D.*, the New York Surrogate Court declared that second-parent adoption was available to lesbian couples in appropriate cases.[28]

The erosion of the traditional nuclear married family as the predominant unit for raising the next generation was not limited to same-sex couples. Judge Kaye begins her dissent recognizing that the case "has impact far beyond this particular controversy."[29] Heterosexual

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[24] *Id.* at 998.

[25] *Id.* at 999 (noting that in the event of a separation, "it is known to be better for a child to continue its relationship with both parents"); *see also* David J. Miller, *Joint Custody*, 13 FAM. L.Q. 345, 362–63 (1979) (noting near-unanimous opinion that children of divorced couples do better with the continued inolvement of both parents). *See generally* JUDITH S. WALLERSTEIN & SANDRA BLAKESLEE, SECOND CHANCES: MEN, WOMEN, AND CHILDREN A DECADE AFTER DIVORCE (1989).

[26] *See, e.g.*, Charlotte J. Patterson, *Children of Lesbian and Gay Parents*, 63 CHILD DEV. 1025, 1036 (1992) (finding "no evidence to suggest that psychosocial development among children of gay men or lesbians is compromised in any respect relative to that among offspring of heterosexual parents").

[27] *See* KENJI YOSHINO, SPEAK NOW: MARRIAGE EQUALITY ON TRIAL 155–72 (2015) (describing the arguments advanced by opponents of same-sex marriage and their pitfalls).

[28] *In re Evan*, 583 N.Y.S.2d at 1002.

[29] Alison D. v. Virginia M., 572 N.E.2d 27, 30 (N.Y. 1991), *overruled by* Brooke S.B. v. Elizabeth A.C.C., 61 N.E.3d 488 (N.Y. 2016).

couples were increasingly choosing to form families, and to have children, without entering into marriage.[30]

A second significant social context informing the decision in *Alison D.* was the erosion of the traditional U.S. assumption that legal and biological parents have wide discretion to control the upbringing of their children.[31] Legal rules governing "private" family relations—child custody and visitation—respect the judgments of biological parents and recognize that children's best interests are served by the preservation of established family relations. But the same rights are dramatically undervalued in the context of foster care and child protective services.[32] Professor Martin Guggenheim documents that during the years preceding and following *Alison D.*, child welfare policies, both nationally and in New York, involuntarily removed large numbers of children, disproportionately poor and black, from their biological parents.[33] While theoretically the draconian remedy of removal was limited to situations in which the parent's conduct posed a serious danger to the child, in practice, most children removed from their parents and placed in foster care had not been abused by their parents, but rather were removed because their parents lacked material resources.[34] While formally committed to family reunification, child protective services often failed to seek to reunify families.[35] These persistent patterns cautioned against changes in traditional legal protection of the relations between biological parents and their children.

Another challenge to the historic notion that biology was the primary determinant of parental rights came in the form of prestigious professional, academic, and psychological theory. Between 1973 and

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[30] *See, e.g.*, CYNTHIA GRANT BOWMAN, UNMARRIED COUPLES, LAW, AND PUBLIC POLICY 8 (2010) (showing that more than three million heterosexual couples cohabited according to the 2000 census, forty percent of whom had children).

[31] *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 234 (1972) (holding Amish parents have a constitutional right to exempt their fourteen- and fifteen-year-old children from compulsory school attendance law); Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925) (finding that state law prohibiting parochial school education unconstitutionally interferes with the right of parents to control the upbringing of their children); Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (recognizing that "liberty" in the Fourteenth Amendment includes freedom to "establish a home and bring up children").

[32] *See* Marsha Garrison, *Parents' Rights vs. Children's Interests: The Case of the Foster Child*, 22 N.Y.U. REV. L. & SOC. CHANGE 371, 386–87 (1996) (discussing economic and stigmatic undervaluation of foster care as compared to adoption).

[33] *See* Martin Guggenheim, *Somebody's Children: Sustaining the Family's Place in Child Welfare Policy*, 113 HARV. L. REV. 1716, 1720 (2000) (reviewing ELIZABETH BARTHOLET, NOBODY'S CHILDREN: ABUSE AND NEGLECT, FOSTER DRIFT, AND THE ADOPTION ALTERNATIVE (1999)).

[34] *Id.* at 1724–25.

[35] *Id.* at 1726–32.

1986, influential experts[36] Joseph Goldstein, Anna Freud, and Albert Solnit published a series of books advocating new approaches to the resolution of disputes about child custody and visitation.[37] The authors urged that, in the case of disputes between adults seeking custody of a child, one person, the "psychological parent," should be given sole authority, absent a showing of abuse or neglect.[38] The "psychological parent" is the adult who, regardless of biological or legal relationship, satisfies the child's psychological as well as material needs.[39] Other parties, including the state or a legal or biological parent, should not be allowed to intervene to disrupt a relation between a psychological parent and child.[40]

The proposals were controversial. Other psychological and sociological work suggests that continued contact with both parents after separation is best for a child's well-being.[41] Respected New York Family Court Judge Nanette Dembitz applauded the emphasis on the best interest of the child and the importance of continuity, but argued that the proposals were simplistic and gave too little recognition to children's relations with legal and biological parents, as well as the fact that circumstances change.[42] Reliance upon the psychological parent concept as a deciding factor in child custody and visitation disputes has waned.[43]

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[36] "Anna Freud and Albert J. Solnit are pre-eminent figures in child psychoanalysis and psychiatry, respectively . . . . Joseph Goldstein [is] a distinguished professor of law who has also acquired professional psychoanalytic training . . . ." Peter L. Strauss & Joanna B. Strauss, *Book Review: Beyond the Best Interests of the Child*, 74 COLUM. L. REV. 996, 996 (1974).

[37] JOSEPH GOLDSTEIN, ANNA FREUD & ALBERT J. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD (1973) [hereinafter GOLDSTEIN, FREUD & SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD]; JOSEPH GOLDSTEIN, ANNA FREUD & ALBERT J. SOLNIT, BEFORE THE BEST INTERESTS OF THE CHILD (1979); JOSEPH GOLDSTEIN, ANNA FREUD, ALBERT J. SOLNIT & SONJA GOLDSTEIN, IN THE BEST INTERESTS OF THE CHILD (1986). *See generally* Rita Kramer, *Parent and Child: A New Approach to Adoption and Custody*, N.Y. TIMES (Oct. 7, 1973), http://www.nytimes.com/1973/10/07/archives/the-psychological-parent-is-the-real-parent-parent-and-child-a-new.html.

[38] GOLDSTEIN, FREUD & SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD, *supra* note 37, at 98–99.

[39] *Id.*

[40] *Id.* at 38 ("[T]he noncustodial parent should have no legally enforceable right to visit the child, and the custodial parent should have the right to decide whether it is desirable for the child to have such visits.").

[41] *See* Miller, *supra* note 25.

[42] Nanette Dembitz, *Beyond Any Discipline's Competence*, 83 YALE L.J. 1304 (1974) (reviewing GOLDSTEIN, FREUD & SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD, *supra* note 37); *see also* Strauss & Strauss, *supra* note 36, at 997 (criticizing the analysis for "failure to relate its insights to the reality of an operating legal system").

[43] *E.g.*, Jane Spinak, *When Did Lawyers for Children Stop Reading Goldstein, Freud and Solnit? Lessons from the Twentieth Century on Best Interests and the Role of the Child*

II
The Decision

In February 1988, Alison petitioned for visitation in the Dutchess County Supreme Court pursuant to Section 70 of New York's Domestic Relations Law. The statute states:

> [E]ither parent may apply to the supreme court for a writ of habeas corpus to have [a] minor child brought before [the] court; and . . . the court . . . may award the natural guardianship, charge and custody . . . to either parent . . . . [T]he court shall determine solely what is for the best interest of the child, and what will best promote its welfare and happiness . . . .[44]

Domestic Relations Law Section 70 authorizing a parent to bring an action in habeas corpus does not define the term "parent," though comparable statutes in other states expressly define "parent" as covering only natural or adoptive parents.[45] The trial court dismissed the suit and ruled that Section 70 applied only to biological, legal, or adoptive parents, and the Appellate Division affirmed.[46]

The New York Court of Appeals affirmed, per curiam, holding that Alison lacked standing to seek visitation under Section 70. The majority rejected the petitioner's claim that she was a de facto parent or a parent by estoppel. It noted that expanding the definition of a parent beyond the natural, legal, or adoptive parent "would necessarily impair the parents' right to custody and control."[47] The court observed that the legislature had expressly provided visitation rights to siblings and grandparents, but not for people in Alison's situation. The court concluded that, although it might "be beneficial to a child to have continued contact with a nonparent, the Legislature did not . . . give [a] nonparent the opportunity to compel a fit parent" to allow that contact.[48]

Judge Kaye, dissenting alone, began by noting that this decision "may affect a wide spectrum of relationships—including those of longtime heterosexual stepparents, 'common-law' and nonheterosexual

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Advocate, 41 Fam. L.Q. 393, 394, 411 (2007) (acknowledging that Goldstein et al. has had too little influence and encouraging attorneys for children to reread their work).

[44] N.Y. Dom. Rel. Law § 70 (McKinney 1991).

[45] Judge Kaye notes that, unlike New York, California specifically defines a "parent" who can bring a petition for custody or visitation as "natural or adoptive parents." Alison D. v. Virginia M., 572 N.E.2d 27, 30–31 (N.Y. 1991), *overruled by* Brooke S.B. v. Elizabeth A.C.C., 61 N.E.3d 488 (N.Y. 2016).

[46] Alison D. v. Virginia M., 552 N.Y.S.2d 321, 324 (App. Div. 1990).

[47] *Alison D.*, 572 N.E.2d at 29.

[48] *Id.*

partners" and others.[49] She then cited the pioneering legal scholarship available at the time addressing these increasingly common family disputes.[50] The majority, she said, "retreat[ed] from the courts' proper role" by refusing to "retain the capacity to take the children's interests into account."[51] In classic common law mode, she defined the issue narrowly: whether Alison had the right to a hearing on the question of visitation.

She observed that earlier cases reflected the "Supreme Court's equitable powers that complement the special habeas statute."[52] The primary objective of Section 70 was to determine the best interests of the child, and, she asserted, the majority's holding limited the opportunity of children to "maintain bonds that may be crucial to their development."[53]

Judge Kaye distinguished petitions for visitation from custody suits. In disputes about custody, the stakes may be higher than in disputes about visitation. Courts should focus on the child's need to continue particular kinds of relationships. Judge Kaye recognized that there must be limits on who can petition for visitation. She set forth three criteria, present in this case, that seemed important. First "the petitioner demonstrate[d] actual assumption of the parental role and discharge of parental responsibilities."[54] Second, "the relationship with the child came into being with the consent of the biological or legal parent."[55] Finally the petitioner "had joint custody of the child for a significant period of time."[56] In adopting this standard, and par-

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[49] *Id.* at 30. She estimates that more than 15.5 million children do not live with two biological parents. *Id.*

[50] *Id.* Among the works Judge Kaye cited were Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459, 461 n.2 (1990), which described statistics and the increasing public recognition of children and parents who do not fit the conventional norm of one father and one mother; Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879, 880–81 (1984), which discussed the increasing prevalence of children forming parent-like attachments to adults outside the nuclear family paradigm; and *Developments in the Law—Sexual Orientation and the Law*, 102 HARV. L. REV. 1508, 1629 (1989), which discussed statistics of gay and lesbian parents.

[51] *Alison D.*, 572 N.E.2d at 30.

[52] *Id.* at 31. Note that Supreme Court is the New York trial court of original jurisdiction. For an excellent analysis of the common law tradition in New York family law, see Martin Guggenheim, *Rediscovering Third Party Visitation Under the Common Law in New York: Some Uncommon Answers*, 33 N.Y.U. REV. L. & SOC. CHANGE 153 (2009).

[53] *Alison D.*, 572 N.E.2d at 30.

[54] *Id.* at 32.

[55] *Id.*

[56] *Id.* Judge Kaye cited *Spells v. Spells*, 378 A.2d 879, 881–82 (Pa. Super. Ct. 1977), in deriving these three criteria.

ticularly the second factor on the consent of the biological parent, Judge Kaye distinguished her ruling from the "protective services" cases, as well as from more general theories about "psychological parents." She empowered biological parents.

III
The Influence of Judge Kaye's Dissent

Judge Kaye's *Alison D.* dissent gained influence nationwide. Within two decades, "with glaring exceptions, most appellate courts had created a mechanism for ensuring that a child would not lose a parent when the couple's relationship ended."[57] While states differed in the details of their analysis, most relied on Kaye's dissent and particularly on the requirement that the intent of the biological mother was key in creating a parental relation.[58]

In New York and other states, courts grappled with related issues. In 1995, four years after *Alison D.*, the New York Court of Appeals held that "the unmarried partner of a child's biological mother, whether heterosexual or homosexual, who is raising the child together with the biological parent, can become the child's second parent by means of adoption."[59] Following the lead of Judge Kaye's dissent in *Alison D.*, the court reasoned that even though "the adoption statute must be strictly construed," the court's "primary loyalty must be to the statute's legislative purpose—the child's best interest."[60] Second-parent adoption is not an ideal solution for couples seeking to provide a stable home for a child. Adoption is a lengthy and costly process, and, in the words of Professor Polikoff, "a mother should not have to adopt her own child."[61]

The times were changing for same-sex couples and LGBT parents. A pivotal year was 2003. The Supreme Court reversed *Bowers v. Hardwick* and held that the Constitution prohibited criminal prosecution of private, adult, consensual conduct.[62] Also, the Massachusetts Supreme Judicial Court held that denying marriage to otherwise quali-

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[57] Nancy D. Polikoff, *The New Illegitimacy: Winning Backward in the Protection of the Children of Lesbian Couples*, 20 J. Gender, Soc. Pol'y & L. 721, 724 (2012).

[58] *See, e.g.*, Debra H. v. Janice R., No. 106569/08, slip op. at 11–12 (N.Y. Sup. Ct. 2008) (citing cases that followed Judge Kaye's dissent in *Alison D.*), *rev'd*, 877 N.Y.S.2d 259 (App. Div. 2009), *rev'd on other grounds*, 930 N.E.2d 184 (N.Y. 2010), *abrogated by* Brooke S.B. v. Elizabeth A.C.C., 61 N.E.3d 488, 501 (N.Y. 2016).

[59] *In re* Jacob, 660 N.E.2d 397, 398 (N.Y. 1995).

[60] *Id.* at 399.

[61] Nancy D. Polikoff, *A Mother Should Not Have to Adopt Her Own Child: Parentage Laws for Children of Lesbian Couples in the Twenty-First Century*, 5 Stan. J.C.R. & C.L. 201, 247–50 (2009) (elaborating on the point made in the article title).

[62] Lawrence v. Texas, 539 U.S. 558, 578 (2003) (expressly overruling *Bowers*).

fied same-sex couples violated the Massachusetts Constitution.[63] The Commonwealth defended the exclusion arguing that heterosexual couples constituted the "optimal" unit for raising children, but conceded that many same-sex couples are "excellent" parents.[64] The court found that "[e]xcluding same-sex couples from civil marriage will not make children of opposite-sex marriages more secure, but it does prevent children of same-sex couples from enjoying the immeasurable advantages that flow from the assurance of a 'stable family structure in which children will be reared, educated, and socialized.'"[65]

In 2006, the New York Court of Appeals upheld the exclusion of same-sex couples from marriage by a vote of 4 to 2.[66] The majority opined that the legislature might have found "that an important function of marriage is to create more stability and permanence in the relationships that cause children to be born."[67] It could encourage opposite-sex couples to marry by offering "an inducement—in the form of marriage and its attendant benefits."[68] But the "Legislature could find that this rationale for marriage does not apply with comparable force to same-sex couples. . . [because] they do not become parents as a result of accident or impulse."[69]

Now-Chief Judge Kaye, joined by Judge Carmen Beauchamp Ciparick, dissented.[70] Chief Judge Kaye responded, writing, "[W]hile encouraging opposite-sex couples to marry before they have children is certainly a legitimate interest of the State, the *exclusion* of gay men and lesbians from marriage in no way furthers this interest. There are enough marriage licenses to go around for everyone."[71] Further, "the ability or desire to procreate is not a prerequisite for marriage. The elderly are permitted to marry, and many same-sex couples do indeed have children."[72] Her dissent offered a comprehensive analysis of marriage as a fundamental right, including "the right to marry the person of one's choice."[73]

Like her dissent in *Alison D.*, the dissent in *Hernandez* was influential. In 2008, courts in both California and Connecticut relied upon

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63 Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 969 (Mass. 2003).
64 *Id.* at 963.
65 *Id.* at 964.
66 Hernandez v. Robles, 855 N.E.2d 1, 5 (N.Y. 2006).
67 *Id.* at 7.
68 *Id.*
69 *Id.*
70 *Id.* at 22.
71 *Id.* at 30 (Kaye, C.J., dissenting).
72 *Id.* (Kaye, C.J., dissenting).
73 *Id.* at 22–23 (Kaye, C.J., dissenting).

it in holding that excluding same-sex couples from marriage violated the constitutions of those states.[74] In June 2011, New York became the third and largest state to enact marriage equality legislatively,[75] and the New York Court of Appeals' stance was persuasive in that decision.[76] In 2015, the United States Supreme Court held that excluding same-sex couples from marriage violates the U.S. Constitution.[77]

In addition to allowing second-parent adoption in 1995,[78] the New York Court of Appeals recognized other exceptions to *Alison D.*'s restrictive definition of who qualified as a parent under Section 70. In 2006, the court held that a "man who has mistakenly represented himself as a child's father may be estopped from denying paternity, and required to pay child support . . . ."[79] In 2010, the court, on facts very similar to those presented in *Alison D.*, allowed a nonbiological mother standing to seek visitation on grounds that New York would recognize the parentage created by the couple's civil union in Vermont.[80]

In 2016, twenty-five years after *Alison D.*, the New York Court of Appeals held in *Brooke S.B. v. Elizabeth A.C.C.* that "where a petitioner proves by clear and convincing evidence that he or she has agreed with the biological parent of the child to conceive and raise the child as co-parents, the petitioner has presented sufficient evidence to achieve standing to seek custody and visitation of the child."[81] The court noted that "*Alison D.* has become unworkable when applied to increasingly varied familial relationships."[82]

On one level, the issue presented in *Brooke S.B.* in 2016 was more challenging than that presented in *Alison D.* in 1991. In 2016, New York law allowed same-sex couples to marry and to adopt, while neither of those things were true in 1991.[83] The court therefore had to decide whether to take a nonmarried partner's claim as seriously in

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[74] *See In re* Marriage Cases, 183 P.3d 384, 430 (Cal. 2008) (relying on Chief Judge Kaye's dissent); Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 450–51, 470–71 (Conn. 2008) (relying on Chief Judge Kaye's dissent).

[75] Nicholas Confessore & Michael Barbaro, *New York Allows Same-Sex Marriage, Becoming Largest State to Pass Law*, N.Y. TIMES, June 25, 2011, at A1.

[76] *See* Douglas NeJaime, *Winning Through Losing*, 96 IOWA L. REV. 941, 999–1001 (2011) (suggesting that the loss in *Hernandez* benefitted the movement for legislative change in New York).

[77] Obergefell v. Hodges, 135 S. Ct. 2584, 2604–05 (2015).

[78] *In re* Jacob, 660 N.E.2d 397, 405–06 (N.Y. 1995).

[79] Shondel J. v. Mark D., 853 N.E.2d 610, 611 (N.Y. 2006).

[80] Debra H. v. Janice R., 930 N.E.2d 184, 197 (N.Y. 2010).

[81] Brooke S.B. v. Elizabeth A.C.C., 61 N.E.3d 488, 501 (N.Y. 2016).

[82] *Id.* at 490.

[83] *Id.* at 503–04 (Pigott, J., concurring). Judge Pigott concurred in the decision to remand on the facts of this case, but would not overrule *Alison D.* in light of the recent legalization of same-sex marriage. *Id.* at 501.

visitation proceedings where marriage and adoption had been an option. Nonetheless, life is complicated and often people seek to form a family and to raise children without the formality of marriage or adoption.

Writing for five judges, Judge Shelia Abdus-Salaam considered whether *stare decisis* required adherence to *Alison D.* The court found that long before *Alison D.*, "New York courts invoked their equitable powers to ensure that matters of custody, visitation and support were resolved in a manner that served the best interests of the child."[84] Relying on Judge Kaye's dissent, the court found that *Alison D.* was a departure from that tradition.[85] The court also noted that legal commentators and social science literature had "taken issue with *Alison D.* for its negative impact on children."[86]

While limiting its decision only to the question of standing, the Court of Appeals remanded to the trial court to determine whether the standard to determine visitation and custody rights had been met:

> We stress that this decision addresses only the ability of a person to establish standing as a parent to petition for custody or visitation; the ultimate determination of whether these rights shall be granted rests in the sound discretion of the court, which will determine the best interests of the child.[87]

Conclusion

Judge Kaye's dissent in *Alison D.* is indeed Solomonic. She understood the high value of parent-child relations and appreciated that they were not based solely on marriage or biology. She appreciated the need for crisp limitations that would provide stability for children and parents, and particularly for biological mothers, who are often vulnerable in both homosexual and heterosexual relations.

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[84] *Id.* at 497.
[85] *Id.* at 498.
[86] *Id.* at 499.
[87] *Id.* at 501.