

FAMILY LAW CASES AS LAW REFORM LITIGATION: UNRECOGNIZED PARENTS AND THE STORY OF *ALISON D. V. VIRGINIA M.*

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Although the gap between law and lived experience comes as no surprise to most people, the divergence is especially striking—and disturbing—in the area of family law. Legal training quickly reveals that love is not a foundational element of family law, yet it can still be jarring to find that love has little, if any, bearing on the contours of the legal family. Love, after all, does not account for who can and cannot marry. Nor does the past love of an unmarried couple trigger the protections of divorce should the couple separate.

When children are involved, we might be especially inclined to think that love should carry some weight in determining whether a parent-child relationship will be recognized. Yet even here, again, love is often not relevant to the analysis. While an adult might feel like a parent, be treated like a parent, and be “Mom” or “Dad” to the child, in many states that adult will not actually *be* a parent within the law, absent adoption or biological parentage. For families in those states, a non-legal parent may have no legal recourse if a couple separates and the “legal” parent bars him or her from seeing the child. As a matter of law, the non-legal parent and child in this situation are no closer than strangers.

Ironically, given the law’s disinterest in love, the chief hope for the non-legal parent to regain contact with his or her child lies in showing the court the love that once defined the family and continues to define the parent-child relationship. Put another way, non-legal parents must persuade the court to see the family as it once was. If the court does not understand that the adults and children before it once functioned as a family, claims that the parent-child relationship should survive the parents’ breakup have little chance of success.

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The case of *Alison D. v. Virginia M.*¹ provides an important opportunity to examine this complex relationship between family life and family law. Although it was decided in the early 1990s, the case and surrounding advocacy present questions that remain in play today, and the decision represents one significant point on the spectrum of family recognition decisions that continue to shape the lives of many families. The case arose after Alison's former partner, Virginia, barred Alison from seeing the child whom the two women had been raising together. Despite many efforts by Alison's lawyers to tell the family's story during nearly three and a half years of litigation, New York's highest court held in 1991 that Alison, as a "biological stranger" to her son,² lacked standing to petition the court for visitation.³ Simply put, the New York Court of Appeals found that Alison, despite being called "mommy" and having "nurtured a close and loving relationship with the child,"⁴ was not her son's parent in the eyes of the law.

To explore the law-life relationship, this Article presents the story of *Alison D.* on three levels. The first is the personal story of the parties to the case—or at least the little we can glean from court opinions and other published accounts; the remainder is under seal, as is traditional with family law cases in New York.⁵ The second tells of lawyering for social change within the confines of family law and examines the strategies used to present Alison's family life within a legal framework that denied her the opportunity to tell her story. The third level takes the long view, looking both at the many legal changes in the nearly two decades since the case was decided and at the decision's continued force despite those changes.⁶

¹ 572 N.E.2d 27 (N.Y. 1991).

² *Id.* at 28.

³ *Id.*

⁴ *Id.*

⁵ The litigation documents remain under seal pursuant to New York State Domestic Relations Law § 235(1), which forbids disclosure of litigation documents in, inter alia, custody and visitation proceedings. N.Y. DOM. REL. LAW § 235(1) (McKinney 1999 & Supp. 2007).

⁶ For extended doctrinal analysis of the issues presented here regarding non-legal parents, see, for example, J. Shoshanna Ehrlich, *Co-Parent Visitation: Acknowledging the Reality of Two Mother Families*, 9 L. & SEXUALITY 151 (2000); Paula L. Ettelbrick, *Who is a Parent?: The Need to Develop a Lesbian Conscious Family Law*, 10 N.Y.L. SCH. J. HUM. RTS. 513 (1993); John Dewitt Gregory, *Blood Ties: A Rationale for Child Visitation by Legal Strangers*, 55 WASH. & LEE L. REV. 351 (1998); William B. Rubenstein, *We Are Family: A*

At each of these levels, the question was not whether Alison was a good parent but rather whether the courts would permit Alison to show that she was a parent at all. The account here thus takes as true the facts about the relationship between Alison and her son that were alleged by Alison and largely uncontested by Virginia,⁷ and then focuses on the challenges presented as Alison sought to translate her life experience into legal protection.

This multi-tiered approach to the telling of *Alison D.* highlights, in turn, the core conceptual question for the enterprise of family law that runs through the layers of the story: How closely should family law correspond to the realities of families' lives? This Article aims not to answer that question directly but rather to show how the question shaped the parties' interactions and strategies, as well as the decision's impact on the development of family recognition law in New York and elsewhere.

More broadly, the discussion below demonstrates that cases like Alison's can and should fall into the category of "law reform" litigation. Most often, this label is attached not to family law cases but rather to high-profile federal constitutional challenges to government actions, such as the detention of enemy combatants or the placement of religious symbols in state parks and public buildings. On the surface, family law litigation may appear to have little in common with these kinds of cases, given its typical focus on fact-intensive evaluations of private relationships.

Yet Alison's case and others like it seek to transform the law, rather than just resolve individual conflicts, much like plaintiffs in sweeping constitutional cases. And Alison's lawyers' central task, the same as for lawyers handling the prototypical law reform case, was to persuade the court that the status quo was unacceptable and that legal change was required. Her advocacy strategy had to be tailored to present a story that was sufficiently compelling, both on the facts and on the law, to make her desired reforms seem both reasonable and necessary.

Reflection on the Search for Legal Recognition of Lesbian and Gay Relationships, 8 J.L. & POL. 89 (1991); Kimberly P. Carr, Comment, *Alison D. v. Virginia M.: Neglecting the Best Interests of the Child in a Nontraditional Family*, 58 BROOK. L. REV. 1021 (1992); Laurie A. Rompala, Note, *Abandoned Equity and the Best Interests of the Child: Why Illinois Courts Must Recognize Same-Sex Parents Seeking Visitation*, 76 CHI.-KENT L. REV. 1933 (2001).

⁷ Virginia contested the characterization of the facts but not the facts themselves. See *infra* Part II.

I. THE PRE-LITIGATION STORY, IN CONTEXT

1977 was an exciting time for gay people in the United States. Just eight years after the Stonewall riots in New York City marked the start of the gay liberation movement,⁸ lesbians and gay men were coming out in greater numbers than ever before, no longer concealing their sexual orientation in their workplaces, families, and communities.⁹ In major urban areas, in particular, a busy world of activism and organization had taken off. Lambda Legal Defense and Education Fund (now Lambda Legal), the nation's largest legal organization focused on lesbian and gay rights, had been incorporated just four years earlier.¹⁰ The longest-standing national lesbian and gay organization focused on grassroots organization and political activism, the National Gay Task Force (now the National Gay and

⁸ See MARTIN DUBERMAN, STONEWALL, at xv (1993); Ken Harlin, *The Stonewall Riot and Its Aftermath* (Columbia Univ. Starr East Asian Library, Cases 1 & 2), <http://www.columbia.edu/cu/lweb/eresources/exhibitions/sw25/case1.html> (last modified Sept. 27, 2004). Significant activism, organization, and litigation by lesbians and gay men occurred before the 1969 riots as well. For accounts of this history, see, for example, PATRICIA CAIN, RAINBOW RIGHTS: THE ROLE OF LAWYERS AND COURTS IN THE LESBIAN AND GAY CIVIL RIGHTS MOVEMENT 53-56 (2000); ERIC MARCUS, MAKING GAY HISTORY: THE HALF-CENTURY FIGHT FOR LESBIAN AND GAY EQUAL RIGHTS 3-118 (2002).

⁹ CAIN, *supra* note 8; MARCUS, *supra* note 8.

¹⁰ Lambda's own incorporation story helps put Alison's situation in context by illustrating the hostility of many courts toward lesbian and gay rights claims. Although Lambda's founders had virtually copied the Puerto Rican Legal Defense and Education Fund's successful application for non-profit status, the New York Appellate Division denied the application, finding Lambda's mission—"to educate and litigate to improve the legal status of lesbians and gay men"—to be "neither benevolent nor charitable." *In re Thom Lambda Legal Def. & Educ. Fund, Inc.*, 337 N.Y.S.2d 588, 589 (App. Div. 1972); ELLEN ANN ANDERSEN, OUT OF THE CLOSETS & INTO THE COURTS: LEGAL OPPORTUNITY STRUCTURE AND GAY RIGHTS LITIGATION 1-2 (2005). That decision was reversed by the New York Court of Appeals on the ground that it was unsupportable, *In re Thom*, 301 N.E.2d 542 (N.Y. 1973), but the Appellate Division, on remand, insisted on striking the part of Lambda's mission dedicated to "'promot[ing] legal education among homosexuals by recruiting and encouraging potential law students who are homosexuals and by providing assistance to such students after admission to law school.'" *In re Thom*, 350 N.Y.S.2d 1, 2 (App. Div. 1973).

Lambda Legal currently describes itself as "a national organization committed to achieving full recognition of the civil rights of lesbians, gay men, bisexuals, transgender people and those with HIV through impact litigation, education and public policy work." See Lambda Legal, About Lambda Legal, <http://www.lambdalegal.org/about-us> (last visited Mar. 29, 2008).

Lesbian Task Force), was also in its infancy, founded, like Lambda, in 1973.¹¹

While these and similar organizations were focused on creating a new political world for lesbians and gay men, a small but growing number of lesbian couples were also taking steps that had been largely unthinkable just a decade earlier. With the help of friends, sperm banks, and doctors, these couples began planning for and having children together.¹² Although these couples were not nearly as networked or strategic as the political and legal groups, their initiatives to create new family forms were no less socially and politically transformative.

A. The Alison/Virginia Family Relationship

Alison D. and Virginia M. were among these couples. They met in the fall of 1977 and began a relationship.¹³ By the following spring, they shared a home and a life together in Putnam County, New York, an area about eighty miles north of New York City.¹⁴ Two years later, in 1980, they

¹¹ See National Gay and Lesbian Task Force, Task Force History, http://www.thetaskforce.org/about_us/history (last visited Mar. 29, 2008). The National Gay and Lesbian Task Force now includes within its mission a focus on bisexual and transgender people. See National Gay and Lesbian Task Force, About Us, http://www.thetaskforce.org/about_us/mission_statements (last visited Mar. 29, 2008).

¹² See generally ARLENE STEIN, SEX AND SENSIBILITY: STORIES OF A LESBIAN GENERATION 131-39 (1997).

¹³ All of the facts regarding the relationship and litigation between Alison and Virginia are taken from the decisions in the case; interviews with Paula L. Ettelbrick, Alison's lead counsel through the litigation; a videotape of the Court of Appeals argument; and several articles about the case. See *Alison D. v. Virginia M.*, 572 N.E.2d 27 (N.Y. 1991); *Alison D. v. Virginia M.*, 552 N.Y.S.2d 321 (App. Div. 1990) (per curiam), *aff'd*, 572 N.E.2d 27 (N.Y. 1991); Ettelbrick, *supra* note 6, at 522-32; Rubenstein, *supra* note 6; Elliot Grossman, *City Boy at Center of Lawsuit that Aims to Change State Law*, POUGHKEEPSIE JOURNAL, July 24, 1988, at 1A; Interview with Paula Ettelbrick, former Staff Attorney and Legal Director, Lambda Legal Defense and Education Fund, in New York, New York (May and June, 2007) (on file with author) [hereinafter Ettelbrick Interview]. The videotape of the Court of Appeals argument can be ordered, for a fee, from Albany Law School. The order form is available at <http://www.courts.state.ny.us/ctapps/VideoForm.pdf> (last visited Mar. 29, 2008). Minor, non-material changes to excerpts from pleadings and other litigation documents quoted in these sources are not bracketed or otherwise marked.

¹⁴ See Ettelbrick, *supra* note 6; Rubenstein, *supra* note 6; Grossman, *supra* note 13.

In the interest of full disclosure, I joined Lambda's legal staff in the fall of 1991, after *Alison D.* was decided. Other than participating in one strategy session prior to Ettelbrick's Court of Appeals argument, I was not involved in the *Alison D.* litigation.

started planning in earnest to have children. Like most prospective parents, they talked extensively with each other about how they would approach parenthood. But, given that having children was not the norm for lesbian couples at that time, they also talked with relatives, friends, and a therapist to think through what it would mean to have a two-mom household.

Although today there are websites aplenty and a small cadre of well-trained lawyers to assist lesbian couples contemplating parenting,¹⁵ consulting with a lawyer was not the obvious thing to do at the time that Alison and Virginia began planning their family. What little law existed regarding lesbian parents did not even begin to address how lesbian couples might provide legal protection for their families. In some jurisdictions today, prospective parents like Alison and Virginia can plan to secure the non-biological (or non-adoptive) parent's relationship with the child through "second-parent adoption," which is akin to step-parent adoption.¹⁶ But in the late 1970s and early 1980s, when lesbian couples were first beginning to have children via physician-assisted insemination, the idea that two women could present themselves to a court, as a couple, and seek legal recognition as their child's mothers was not yet a realistic possibility, either for parents or advocates.¹⁷ Indeed, most states barely had laws in place regulating the legal status of children born to married couples with sperm from an unknown donor, let alone legal frameworks for determining the parental rights of lesbian couples raising children together.¹⁸

Instead, at that time, virtually all of the limited, scattered case law regarding the status of lesbian mothers arose in the context of post-divorce

¹⁵ See, e.g., National Center for Lesbian Rights, Issues & Cases, Families & Parenting, http://www.nclrights.org/site/PageServer?pagename=issue_families (last visited Mar. 29, 2008).

¹⁶ See, e.g., Sara R. David, Note, *Turning Parental Rights into Parental Obligations—Holding Same-Sex, Non-Biological Parents Responsible for Child Support*, 39 NEW ENG. L. REV. 921, 928 (2005) ("Second-parent adoptions are effectively step-parent adoptions that do not require the parents to be married.").

¹⁷ One of the earliest known second-parent adoptions involving a lesbian couple was granted in Alaska in 1985. See 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, 522-23 (1990) (discussing *In re Adoption of A.O.L.*, No. 1JU-85-25-P/A (Alaska Super. Ct. July 25, 1985)).

¹⁸ The Uniform Parentage Act first addressed the consequences of physician-assisted insemination for parental rights in 1973, but its provisions covered only married couples and the donor. See Helene S. Shapo, *Assisted Reproduction and the Law: Disharmony on a Divisive Social Issue*, 100 NW. U. L. REV. 465, 465-66 (2006). Not until 2002 was the Act amended to address insemination of unmarried women. *Id.* at 467.

custody and visitation disputes between the lesbian mother and her former husband.¹⁹ Why so few cases? As Rhonda Rivera, an early scholar of lesbian and gay rights, observed in a landmark 1979 article, lesbian mothers and gay fathers feared losing friends, family, jobs, and, most importantly, their children, if their sexual orientation became known.²⁰ For many courts, the fact that a mother was a lesbian was itself considered contrary to her child's best interests, regardless of her parenting abilities or relationship with the child.²¹ Even if a lesbian mother was permitted to retain custody of her children, restrictive court orders often barred her from associating with other lesbians, including an intimate partner.²² For all of these reasons, most lesbian mothers rightly believed that they were better off negotiating with their former husbands for custody of and visitation with their children out of court, bargaining in the shadow of unfavorable law.²³

This limited case law on divorce was not particularly relevant to women like Alison and Virginia, however, as their children would have lesbian parents whether the court granted custody to one parent or the other. Nor were there decisions from cases involving children raised by other lesbian couples to warn Alison and Virginia about the risks that their family might face if their relationship ended. As family law scholar Nancy Polikoff noted in 1990, "[c]ases concerning custody and visitation rights upon the dissolution of lesbian-family relationships [did not begin] to reach trial courts [until] the mid-1980s."²⁴ Given how little legal authority was available, it is unsurprising then that Alison and Virginia did not consider consulting a lawyer to be an important step in their family planning process.

¹⁹ See Rhonda R. Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States*, 30 HASTINGS L.J. 799, 885-86 (1979).

²⁰ *Id.* at 886-904.

²¹ See, e.g., *Chaffin v. Frye*, 119 Cal. Rptr. 22, 25 (Ct. App. 1975) (stating that "homosexuality is a factor which the trial court could consider"); *Jacobson v. Jacobson*, 314 N.W.2d 78, 80 (N.D. 1981) ("Because the trial court has determined that both parents are 'fit, willing and able' to assume custody of the children we believe the homosexuality of Sandra is the overriding factor [justifying denial of custody]."). Most courts simply presumed harm rather than considering whether the parent's lesbian or gay sexual orientation actually caused harm to the child. Rivera, *supra* note 19, at 886-904.

²² Rivera, *supra* note 19, at 890-904.

²³ For early discussion of the law's effects on extralitigation negotiations, see Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

²⁴ Polikoff, *supra* note 17, at 533.

The couple ultimately decided that Virginia would be the biological parent and that they would raise the child together, sharing responsibility for the child's care and associated expenses. Virginia became pregnant via insemination by their doctor with sperm from an unknown donor, and Andrew,²⁵ the couple's son, was born in July 1981. As Alison and Virginia had agreed, Andrew's surname included the surnames of both of his mothers.

Immediately after Andrew's birth, Virginia took a three-month maternity leave from her job, while Alison continued to work as a social worker to cover the family's expenses. As Andrew grew, both Alison and Virginia shared in the myriad activities involved in raising a young child, from doctor visits and discipline to the ins and outs of nursery school. Andrew's grandparents included Alison's parents ("Grammy" and "Granddad") and Alison's grandfather ("Poppa").

When Andrew was two years old, Alison and Virginia had a second child, with Alison as the biological parent this time. Alison gave birth to a daughter, Amy,²⁶ whom the couple also began to raise together.

In November 1983, several months after Amy was born, Alison and Virginia ended their relationship, and Alison moved out of the family's home. Like most separations, this one was not easy, particularly because Alison had found a new partner. Though Andrew remained with Virginia and Amy went with Alison, the women agreed that they would both remain involved in both children's lives. They agreed that Andrew would stay overnight with Alison two or three nights per week and would also spend some birthdays, holidays, and vacation time with her. With Virginia's encouragement, Alison took Andrew on vacations and to events with her extended family and continued in her role as one of his mothers.

For more than two years after the break-up, Alison continued to pay her half of the mortgage for the home that she and Virginia had bought and shared, in part because Virginia could not afford to make the full payments. As Alison later explained in pleadings filed in the case, she viewed these payments as "a form of child support." By early 1986, however, Virginia was able to buy Alison's share of the house, and soon after, she began to limit Alison's time with Andrew. Andrew objected to these restrictions,

²⁵ The court identified Alison and Virginia's child by his initials, A.D.M., to protect his privacy. I have substituted the name Andrew here.

²⁶ "Amy" is also not the child's real name. Public reports of the case provide no information about Amy, however, other than that she was born while Alison and Virginia were still together; hence, she receives little mention in this Article.

Alison later wrote in the pleadings, and wanted to spend more time with her.

The next year, Alison was offered a one-year position in Dublin, Ireland. Before accepting, she confirmed with Virginia that she could continue her relationship with Andrew during the year abroad. According to Alison, Virginia promised that Alison could write letters, speak weekly with Andrew by phone, and visit him on her trips back to the United States. The former couple also agreed that Alison's parents and grandfather would continue spending time with Andrew. With this plan in place, Alison took the position and moved temporarily to Dublin with Amy and her new partner, Margaret.²⁷

But shortly after Alison moved, Virginia changed her telephone number to an unlisted one. She also returned Alison's letters and gifts to Andrew unopened and barred Grammy, Granddad, and Poppa from contacting him.

At this point, the private conflict between Virginia and Alison took its first steps toward becoming a legal dispute. Late in that summer of 1987, Virginia hired a lawyer who wrote to Alison in Dublin: "I am returning your latest attempt to communicate with Andrew. Please stop it. We will continue to return to you any such letters from you, directly or indirectly. You may believe this to be fun and games. It is not."²⁸

In October 1987, the situation grew worse. Alison, Margaret, and Amy returned briefly from Dublin. Without notifying Virginia, Alison and Margaret visited Andrew, now age six, when he was home with a babysitter. They took him for a walk and gave him all of the letters and gifts that Virginia had returned unopened to Alison. When Virginia found out about the unannounced visit, she went to the local police and filed harassment charges. In her affidavit, she stated that Andrew "was very upset and confused" by the visit, and that "[f]or several weeks after, [he] was tearful and angry."²⁹

Alison, in turn, wrote to Virginia in November 1988: "I am very worried that things are at the point where each of us is on the verge of taking legal action I can't believe you wouldn't agree that this could

²⁷ Alison's new partner's name is not in the public record, so I am using the name Margaret here.

²⁸ Grossman, *supra* note 13.

²⁹ *Id.* There is no information in the public record about the charges, which were likely dropped when Alison returned to Dublin.

only lead to more anger and conflict, and no real resolution.”³⁰ Her letter continued:

You cannot totally stop me from having a relationship with [Andrew], no matter to what lengths you go You know how much I mean to him Is it possible for you to believe that all I want, and all [Andrew] probably wants, is to be able to continue to see each other?³¹

She concluded: “Can’t we figure out a compromise that will stop the confrontational course we are on?”³² Virginia’s answer was no.

B. Preparations for Litigation

Around the same time she reached out to Virginia to try to resolve the conflict privately, Alison realized that she might need help in trying to maintain her relationship with Andrew. After first contacting a local lawyer, Alison called Paula Ettelbrick, then a staff attorney of Lambda Legal Defense and Education Fund. As Ettelbrick recalled, “[i]n those days, calls just came out of the blue on lesbian parenting issues, and Alison was a very resourceful person.”³³ While much of Lambda’s docket was taken up with HIV-related discrimination, Ettelbrick had concentrated on lesbian and gay family law issues since arriving at Lambda in the spring of 1986. Alison’s call was one of many similar calls from parents she would receive over the course of her seven years on Lambda’s staff. Shortly after hearing from Alison, Ettelbrick met with Lambda’s Legal Advisory Committee, a group of lawyers who consulted with Lambda’s small legal staff on prospective cases.

Some members of the Committee were concerned about bringing a case like Alison’s in New York. Just a few months earlier, in *Ronald FF. v. Cindy GG.*, the New York Court of Appeals had rejected the visitation petition of a man who had spent nearly a year parenting his then-girlfriend’s child.³⁴ Relying on the fundamental right of a legal parent “to choose those

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ Ettelbrick Interview, *supra* note 13.

³⁴ 511 N.E.2d 75 (N.Y. 1987).

with whom her child associates,”³⁵ the court had held that Ronald, as a “biological stranger,”³⁶ was not entitled to seek court-ordered visitation against the mother’s wishes.³⁷ Ettelbrick argued that *Ronald FF.* could be distinguished on factual grounds: Ronald had not planned with the biological mother to have a child and did not have as long or as deep an involvement in raising the child as Alison had.

Ettelbrick also pointed out that *Ronald FF.* did not foreclose Alison from making equitable arguments to support the court’s consideration of factors not addressed explicitly by the law governing visitation, such as fairness to the parties. This reading of *Ronald FF.* would leave Alison free to argue that she stood *in loco parentis* to Andrew, a status in equity that recognizes adults who “[stand] in the place of a parent.”³⁸ In addition, Alison could argue that Virginia should be equitably estopped from denying Alison’s parental status because Virginia herself had encouraged Alison’s parental relationship with Andrew, thereby satisfying the traditional prerequisites for equitable estoppel—representation, reliance, and detriment.³⁹

In addition, Alison was seeking visitation, not custody. This more limited assertion of parental rights might be viewed more favorably by the court than a demand to shift custody away from Virginia, the biological mother. Further, presumably, the focus on visitation could diminish factual concerns that might be raised about Alison having first left the relationship to be with a new partner and then departing for a long stint outside the United States (albeit in reliance on Virginia’s promise that her relationship with Andrew could continue).

At this point, one might wonder about the possible tension for a gay rights organization in representing one lesbian against another. But the question has an easy answer. Lambda’s mission, after all, is not to represent *all* gay people, but rather to end discrimination and other harms based on

³⁵ *Id.* at 77.

³⁶ *Id.* at 76.

³⁷ *Id.*

³⁸ BLACK’S LAW DICTIONARY 359 (3d Pocket ed. 2006) (translating from the Latin).

³⁹ See DAN B. DOBBS, THE LAW OF REMEDIES: DAMAGES, EQUITY AND RESTITUTION 84-85 (2d ed. 1993). New York courts that have embraced equitable estoppel as a basis for according standing to a non-legal parent typically consider the adult’s tenure in the home with the child, the adult’s provision of support for the child’s welfare, and the child’s best interests. See Ettelbrick, *supra* note 6, at 524 & nn.46-48.

sexual orientation.⁴⁰ This mission includes reforming the law to secure the rights of families created by lesbian and gay couples,⁴¹ which was exactly what Alison sought to do. To the extent Virginia was taking advantage of the law's failure to recognize the families of same-sex couples, her position denied the reality of the family she created with Alison and was, in Lambda's view, contrary to the organization's aims. In late 1987, Lambda told Alison it would take her case.

Virginia was represented by Anthony G. Maccarini, a lawyer in private practice in Putnam County, New York, who presumably charged his standard fees (unlike Lambda, which represents its clients without charge).⁴² At the time, organizations that actively opposed recognition of the rights of gay people, such as the Moral Majority,⁴³ were forceful public players but did not ordinarily involve themselves in family law cases.⁴⁴ Today, by contrast, numerous organizations, such as the Alliance Defense Fund (ADF),⁴⁵ describe themselves as dedicated to preserving the "traditional family," and some of these groups focus intensively on the courts as a forum for opposing the rights of lesbian and gay parents and couples.⁴⁶ Although Alison and Virginia's conflict would have been a complicated case for an organization like ADF to handle because Virginia had not disavowed being a lesbian, a "traditional family" organization might still have sought to participate in some way to support Virginia's restrictive interpretation of the state's family law.⁴⁷

⁴⁰ See Lambda Legal, About Lambda Legal, *supra* note 10.

⁴¹ *Id.*

⁴² See Lambda Legal, Support Lambda Legal, <https://secure.ga3.org/01/donate2> (last visited Mar. 29, 2008) ("We do not charge our plaintiffs.").

⁴³ See *Moral Majority*, THE COLUMBIA ENCYCLOPEDIA (6th ed. 2007).

⁴⁴ *Cf. id.* (noting that the Moral Majority was a "political action group" which engaged in tasks such as lobbying).

⁴⁵ Alliance Defense Fund (ADF), <http://www.alliancedefensefund.org> (last visited Mar. 29, 2008).

⁴⁶ The ADF's "Traditional Family" Project, for example, describes its work as fighting to preserve the "traditional family" against incursions by, among others, lesbians and gay men. See Alliance Defense Fund, Protecting Family Values, <http://www.alliancedefensefund.org/issues/TraditionalFamily/Default.aspx> (last visited Mar. 29, 2008).

⁴⁷ In a case in which a child's biological mother had announced that she was no longer a lesbian, an ADF-affiliated attorney represented the woman against her former civil

Alison and Lambda needed a private, local lawyer on their side as well. As Lambda was a New York City-based organization with a national agenda, its standard practice included incorporating the pro bono services of a local cooperating attorney on all of its cases. This was particularly important for family law cases like Alison's. A cooperating attorney could bring familiarity with the upstate court's rules and practices but also, and perhaps more importantly, a local attorney could help ensure that the court saw Alison as an individual with her child's best interests at heart rather than as a front for a broader political battle about gay rights.

In the 1980s it was not an easy feat to find a lawyer in upstate New York willing to represent a lesbian seeking to sue another lesbian for visitation with the couple's child. Many lawyers had little idea that lesbian-parented families even existed, and of those who did, most were either hostile or completely pessimistic about the prospects for success.⁴⁸ Ettelbrick reached out to Noel Tepper, a solo practitioner in Poughkeepsie with a reputation for taking on "unusual" cases.⁴⁹ Tepper quickly signed on as a pro bono cooperating attorney for Lambda in the case.

II. THE FIRST STAGES OF THE LITIGATION

A. Framing the Case

The question of how to frame the case—or, more precisely, how to structure Alison's petition to the court—was critical. To succeed, the lawyers had to make a strong doctrinal showing to persuade the court that the law could recognize Alison and Andrew's relationship. At the same time, their presentation of the case had to be attentive to an array of non-doctrinal factors, since most judges had no experience with visitation petitions by the non-biological mothers of children born into two-mother households.

union partner, with whom she had been raising the child. *See Jones v. Barlow*, 154 P.3d 808 (Utah 2007). For further discussion of the case, *see infra* note 129 and accompanying text. After the Utah Supreme Court ruled in the biological mother's favor, the ADF's press release proclaimed "A HUGE Victory For a Mother and Daughter . . . A HUGE Defeat for the Homosexual Legal Agenda . . . !" http://www.alliancedefensefund.org/userdocs/updates/2007_0220.html (last visited Feb. 20, 2007).

⁴⁸ *See generally* Rivera, *supra* note 19 (describing the generally unfavorable legal position of gay people in civil matters in the late 1970s).

⁴⁹ Ettelbrick Interview, *supra* note 13.

If Alison and Virginia had been married, this step in the litigation would not have required high-level strategizing. Alison would have filed for divorce and, within that familiar governing framework, custody and visitation regarding the children born during the marriage would have been decided by a New York family court judge based on the best interests of the child.⁵⁰

But Alison and Virginia were not married and could not have married.⁵¹ Their relationship was not visible within the traditional scope of family law. Consequently, they did not have the benefit of existing divorce and custody law to govern the conflict over visitation.⁵² Moreover, because Alison and Andrew lacked a biological or adoptive connection, they had no formal legal relationship.

Thus, Alison's lawyers faced difficult questions as they strategized about how best to present Alison's claims. How much, if at all, would it matter that Alison and Virginia were a lesbian couple as opposed to an unmarried heterosexual couple? Should the petition acknowledge that, in some respects, Alison's claim was on the cutting edge? Or, by contrast, should it frame the case as involving roughly the same issues as any run-of-the-mill parenting dispute? Addressing these competing concerns required something of a balancing act both at the initial pleading stage and throughout the course of the litigation.

⁵⁰ N.Y. DOM. REL. LAW § 240(1)(a) (2007) (requiring custody and visitation determinations to be made, subject to certain provisions, with "regard to the circumstances of the case and of the respective parties and to the best interests of the child").

⁵¹ Articles 2 and 3 of Chapter 14 of New York Domestic Relations Law govern marriage in New York State. N.Y. DOM. REL. LAW ch. 14, art. 2-3 (2007). Although the statutory provisions did not explicitly preclude same-sex couples from marrying at the time of Alison and Virginia's conflict, no state court or legislature had even come close to recognizing marriage rights for same-sex partners. See CAIN, *supra* note 8, at 160-62 (describing efforts by same-sex couples to secure marriage rights during the 1970s); Rivera, *supra* note 19, at 904-06 (noting, in 1979, that "[t]he Supreme Court's acceptance of . . . a quasi-marital status does not appear to be imminent"). Confirming this view of the statute, the New York Court of Appeals held in 2006 that, in light of the common understanding of marriage at the time Articles 2 and 3 were written in 1909, the relevant Domestic Relations Law provisions "clearly limit[] marriage to opposite-sex couples." *Hernandez v. Robles*, 855 N.E.2d 1, 6 (N.Y. 2006).

⁵² Although divorce law might not be recognized widely as a "benefit" of marriage, its structure and background rules often provide invaluable assistance to individuals seeking to restructure their lives after the end of a relationship. See generally Jeremy Waldron, *When Justice Replaces Affection: The Need for Rights*, 11 HARV. J.L. & PUB. POL'Y 625 (1988).

Ettelbrick and Tepper decided to bring Alison's claim as a petition for a writ of habeas corpus.⁵³ In New York, Section 70 of the Domestic Relations Law specifically authorizes habeas petitions in disputes about child custody and visitation, providing that "either *parent* may apply to the supreme court for a writ of habeas corpus . . . [and] the court, on due consideration, may award the natural guardianship, charge and custody of such child to either parent."⁵⁴ But was Alison a "parent" within this provision? This question became the central issue in the case.

Alison's petition seeking visitation with Andrew, filed in a New York Supreme Court in March 1988, described in detail the commitment between Alison and Virginia, their decision to have a child together, their agreement that both women would be Andrew's parents even though

⁵³ Although best known as the petition filed by prisoners who believe that they have been wrongly detained by the state, *see, e.g., Habeas Relief for State Prisoners*, 36 GEO. L.J. ANN. REV. CRIM. PROC. 875 (2007), habeas petitions are available whenever a party believes that a person is being unlawfully restrained by someone else, including a private actor such as a parent. *See* N.Y. DOM. REL. LAW § 70 (McKinney 1999 & Supp. 2007).

⁵⁴ N.Y. DOM. REL. LAW § 70 (McKinney 1999 & Supp. 2007) (emphasis added). The statute provides, in relevant part:

(a) Where a minor child is residing within this state, either parent may apply to the supreme court for a writ of habeas corpus to have such minor child brought before such court; and on the return thereof, the court, on due consideration, may award the natural guardianship, charge and custody of such child to either parent for such time, under such regulations and restrictions, and with such provisions and directions, as the case may require, and may at any time thereafter vacate or modify such order. In all cases there shall be no *prima facie* right to the custody of the child in either parent, but the court shall determine solely what is for the best interest of the child, and what will best promote its welfare and happiness, and make award accordingly.

(b) Any order under this section which applies to rights of visitation with a child . . . shall be enforceable . . . against any person or official having care or custody . . . of such child.

Id. Although section 70 did not mention visitation at the time Alison filed her petition, it had been construed to cover visitation petitions as well. *See* *Alison D. v. Virginia M.*, 552 N.Y.S.2d 321, 322 (App. Div. 1990) (*per curiam*) (citing *In re Pierson*, 511 N.Y.S.2d 131 (App. Div. 1987)).

For historical background on the use of habeas proceedings in child custody and visitation litigation, see generally Paul J. Buser, *Habeas Corpus Litigation in Child Custody Matters: An Historical Mine Field*, 11 J. AM. ACAD. MATRIMONIAL L. 1 (1993).

Virginia was Andrew's birth parent, and their sharing of parental responsibilities.⁵⁵ Its "thick" description aimed to show a judge who might be unfamiliar with lesbian couples and their children that Alison had been as much Andrew's parent as Virginia, and that function, not biology, should guide the evaluation of Alison and Andrew's relationship.⁵⁶ At the same time, the petition suggested that Alison's claim was, at its core, much the same as the claims of other parents seeking visitation with their children.⁵⁷

In response to Alison's petition, Virginia maintained that biology was all that mattered. "Someone who has no biological tie to the child has no visitation rights," Anthony Maccarini argued on her behalf.⁵⁸ Erasing any trace of familial relationship, he added: "What right does the former co-tenant of a house have to see the child of the other?"⁵⁹

B. The Trial Court Decision and the First Appeal

On March 23, 1988, Ettelbrick and Tepper appeared before acting Supreme Court Justice James D. Benson to present argument on Alison's behalf. As it turned out, none of their strategizing appeared to influence the outcome. Immediately after the lawyers presented their arguments, Judge Benson ruled from the bench. His decision—a mere page and a half of court transcript, which amounted to about three minutes of oral presentation—dismissed Alison's petition outright, finding "no allegations upon which the relief that is requested could be granted within the law of the State of New York."⁶⁰ Noting that "the biological parent of a child is the parent within the meaning of the statute," Judge Benson cited *Ronald FF.* and "decline[d] to adopt the definition of parent as someone standing *in loco parentis*."⁶¹

Neither Alison nor her lawyers were greatly surprised at the outcome, and they quickly appealed. Because appeals from the Poughkeepsie trial court were heard in New York's Second Department in Brooklyn, Tepper stepped aside and Ettelbrick brought in Deborah

⁵⁵ Grossman, *supra* note 13; Ettelbrick Interview, *supra* note 13.

⁵⁶ Ettelbrick Interview, *supra* note 13.

⁵⁷ Grossman, *supra* note 13.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ Ettelbrick Interview, *supra* note 13.

Rothberg, an associate at a large Manhattan firm, to take on the cooperating attorney role. In 1988, most large firms had yet to take on a lesbian or gay rights case on a pro bono basis.⁶² Rothberg, who had been a New York University Law School student when she first met Ettelbrick, convinced her colleagues at the firm of Jones, Day, Reavis & Pogue to take the case.

The appeal presented Alison's lawyers with an opportunity to brief the issues in the case more thoroughly than they had at the trial level, which meant that the strategy questions present from the outset had to be considered with care once again. Alison's lawyers had to ensure that the court had enough information to understand the seemingly "new" type of family at the center of this case. At the same time, however, they had to show that Alison, as a parent in this family, fit well within traditional family law principles and stood *in loco parentis* to Andrew, which would give her standing to seek visitation with her son.

Since most courts had not yet encountered families like Alison's,⁶³ Lambda's brief for Alison, like its briefs in other early lesbian custody and visitation disputes, would have begun not with doctrinal arguments, but rather with background information about lesbian couples forming families and having children together.⁶⁴ This part of the brief would have described physician-assisted insemination and informed the court that as many as twenty thousand women each year became pregnant in this way, including a growing number of lesbians.⁶⁵ It also would have explained the use of the term "co-parent" for Alison as a means of recognizing (and challenging) the binary distinction between legal and non-legal parents.⁶⁶ While this information was basic—a sort of Lesbian Parenting 101—it was also essential in showing that Alison was Andrew's parent.

⁶² *Id.*

⁶³ See generally Polikoff, *supra* note 17 (discussing the genesis and development of legal arguments regarding the meaning of parenthood).

⁶⁴ See Ettelbrick Interview, *supra* note 13. As noted earlier, the entire record is sealed. Discussion here, therefore, does not cite to the briefs filed in the case but relies instead on the interviews and articles cited previously.

⁶⁵ A brief written at the time Alison's brief was prepared would have contained the type of information cited in Note, *Reproductive Technology and the Procreation Rights of the Unmarried*, 98 HARV. L. REV. 669, 669 n.1 (1985) (explaining the process and increasingly widespread use of physician-assisted insemination). Sources available at the time to show the numbers of lesbians having children included, for example, DONNA J. HITCHENS, *LESBIANS CHOOSING MOTHERHOOD: LEGAL ISSUES IN DONOR INSEMINATION* (1984); CHERI PIES, *CONSIDERING PARENTHOOD: A WORKBOOK FOR LESBIANS* (1985).

⁶⁶ See HITCHENS, *supra* note 65, at 105.

The brief also would have situated lesbian parents like Alison within a broader phenomenon of family diversity, pointing out that many families are better understood by function than by form.⁶⁷ Consequently, the brief would have urged that children's interests are best served by preserving emotional bonds with the adults they depend on for love, parenting, and support.

Even with these points in place, a crucial practical and theoretical question remained: Who should be considered a functional parent? Courts, after all, tend to prefer bright-line rules to case-by-case formulations.⁶⁸ While no brief could answer this question for all family configurations, Alison's brief emphasized three important factors: intent, experience, and voluntariness.⁶⁹ It explained that Alison and Virginia both intended to parent jointly, that they did parent jointly, and that over the course of six years, Virginia had voluntarily created and actively encouraged the development of an emotional and psychological parent-child bond between Alison and Andrew. Accordingly, Alison argued, Virginia should be estopped from treating her as anything other than a parent. Framing the story in this way also helped Alison show that she was in a materially different position than the functional father in *Ronald FF*. because Alison, unlike Ronald, had planned for Andrew's birth, had been in Andrew's life

⁶⁷ A child support case, *Karin T. v. Michael T.*, 484 N.Y.S.2d 780 (Fam. Ct. 1985), helps illustrate Alison's point. In *Karin T.*, the family court required Michael, who presented herself to the world as male, but was legally female, to provide child support for two children born to Karin by donor insemination while Karin and Michael were in a relationship (during which they had obtained a marriage license and had a marriage ceremony). *Id.* at 781, 784. Defending against a child support claim by the Department of Social Services, Michael had argued that she was a woman and was not biologically or legally related to the children. The family court found Michael liable on an equitable estoppel theory, concluding that Michael's conduct "certainly brought forth these offspring as if done biologically." *Id.* at 784.

Although a court might have perceived *Karin T.*'s facts to be even more "unusual" than Alison's, which in turn might have provoked some litigators to avoid mentioning the case for fear it would spark even greater skepticism of Alison's claim, relying on *Karin T.* had two distinct benefits. It showed—in a case further removed from the mainstream than Alison's—that a New York court was capable of recognizing a functional family. Moreover, because Alison was seeking to claim rather than avoid responsibility for her son, the contrast with Michael's conduct worked in her favor.

⁶⁸ See generally Suzanne B. Goldberg, *On Making Anti-Essentialist and Social Constructionist Arguments in Court*, 81 OR. L. REV. 629 (2002).

⁶⁹ Discussion of the brief here is based on my construction of the arguments from the appellate decision and the sources cited in note 13 *supra*.

from the moment he was born, and had continued in a parental role over the course of many years.

Alison also had new New York case law to support her claim. The summer after Judge Benson's terse ruling, the New York Court of Appeals held, in *Braschi v. Stahl Associates Co.*, that a gay couple should be treated as a "family" under New York City's rent control regulations.⁷⁰ Specifically, the court held that the surviving partner of a couple that had lived together in a rent-controlled apartment could succeed to his deceased partner's lease (a valuable commodity in the New York real estate market).⁷¹ The court had explicitly embraced a functional approach to the case, holding that "the term 'family' . . . should not be rigidly restricted to those people who have formalized their relationship by obtaining, for instance, a marriage certificate or an adoption order."⁷² Although *Braschi* arose in the housing context, the decision seemed to bode well for Alison's claim. The *Braschi* holding, after all, demonstrated the Court of Appeals' capacity to look beyond narrow legal categories to give legal effect to the relationship of a gay couple. If it could do that for real estate, perhaps it could be persuaded to do the same in the context of a parent-child relationship, where the harm from a loss would arguably be much greater.

To bolster this array of arguments, Ettelbrick solicited two amicus briefs. The first, from the American Civil Liberties Union (ACLU) and the New York Civil Liberties Union, rounded out the constitutional support for Alison's visitation claim.⁷³ The second, from the Gay and Lesbian Parents Coalition International and several other family organizations, provided an expanded portrait of gay- and lesbian-parented families.⁷⁴

For her part, Virginia presumably argued that *Ronald FF.* governed Alison's claim and that the statutory language of Section 70 did not allow for the term "parent" to include an adult unrelated by biology or adoption.⁷⁵

⁷⁰ 543 N.E.2d 49 (N.Y. 1989).

⁷¹ *Id.* at 52-55.

⁷² *Id.* at 53.

⁷³ See *Alison D. v. Virginia M.*, 552 N.Y.S.2d 321, 321 (App. Div. 1990) (per curiam), *aff'd*, 572 N.E.2d 27 (N.Y. 1991); Ettelbrick Interview, *supra* note 13.

⁷⁴ See *Alison D.*, 552 N.Y.S.2d at 321; Ettelbrick Interview, *supra* note 13.

⁷⁵ Although Alison's claims can be gleaned from the decision in the case and some of the articles about it, little has been written to elaborate Virginia's arguments. Still, based on the doctrine available at the time, the appellate court's ruling, and related resources, see *supra* note 13, these arguments are likely to mirror those that Virginia either made or considered making.

Although that argument could have stood alone, she might have made a “slippery slope” public policy argument as well, suggesting that any broadening of the definition could potentially harm legal parents by opening them up to visitation demands from any adult whom they had invited into their children’s lives.

As another option, Virginia could have portrayed Alison as a “bad” adult who lacked serious intent to maintain a familial relationship, because she first left the relationship and then left the country. It is unlikely, though, that Virginia pursued this approach. Discussing these facts would have invited the court to consider Alison’s conduct—which would, in turn, have diminished Virginia’s argument that Alison was not entitled to have the facts of her relationship with Andrew considered at all.

C. A Second Loss: The Appellate Division Decision

Notwithstanding Alison’s functional analysis, Virginia’s position prevailed; three of the four Appellate Division justices found themselves constrained by *Ronald FF*.⁷⁶ They recognized that the *Ronald FF* opinion had not addressed the *in loco parentis* argument that was at the heart of Alison’s case.⁷⁷ But, the court held, Alison’s arguments did “not, in their factual underpinnings[,] or legal analyses[,] differ [from Ronald’s] in any material way.”⁷⁸ *Braschi*’s functional analysis of family was also unavailing according to the majority, which characterized the case as a mere “dispute over tenancy rights to a rent-controlled apartment.”⁷⁹ The appellate court’s brief opinion also summarily rejected Alison’s equitable estoppel theory and the constitutional arguments advanced by the ACLU.⁸⁰

In a rhetorical move that has now become standard for courts denying familial status to lesbians and gay men,⁸¹ the Appellate Division stressed that the decision intended no disrespect to Alison personally by stating: “We do not, by virtue of our determination on this issue, minimize, in any way, the close and loving relationship that the petitioner has

⁷⁶ *Alison D.*, 552 N.Y.S.2d at 322-24.

⁷⁷ *Id.* at 324.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *See, e.g., Jones v. Barlow*, 154 P.3d 808, 819 (Utah 2007).

apparently developed with the child.”⁸² This acknowledgment provided little comfort to Alison, who remained barred from seeing her son.

The only bright note for Alison was Justice Sybil Hart Kooper’s dissent. Justice Kooper characterized Alison’s case as consistent with New York’s *in loco parentis* doctrine⁸³ and with *Braschi*, which looked beyond “fictitious [sic] legal distinctions or genetic history” and instead examined the “reality of family life.”⁸⁴ Justice Kooper also rejected the argument that allowing standing to functional parents would lead to a slippery slope of problems for legal parents:

As to the assertion that such a holding would open the door to a potentially limitless series of applications, I am confident that the trial courts, in the sound exercise of their discretion, will not lightly infringe upon the favored rights of a natural parent and that a searching inquiry into the best interests of the child will forestall any unwarranted interference with that relationship.⁸⁵

III. LITIGATION AT THE STATE HIGH COURT

Five weeks later, Alison’s lawyers filed their request for leave to appeal to the New York Court of Appeals. In press releases and public comments regarding the appeal, they stressed that the case would “heavily influence thinking about the changing face of legally-recognized families across the nation.”⁸⁶ They also emphasized the larger universe of children who might be cut off from a loving parent under the appellate court’s ruling, stating, “The notion that only biological parents can seek visitation or custody is not only unfair and absurd, but profoundly unrealistic in a world where children grow up in many kinds of families.”⁸⁷ The court

⁸² *Alison D.*, 552 N.Y.S.2d at 324. Adding insult to injury, the court suggested that Alison had offered strong facts to support her claim: “Indeed, had the petitioner come within the meaning of the term ‘parent’ contained in Domestic Relations Law § 70, her claim for visitation would have been worthy of serious consideration.” *Id.*

⁸³ *Id.* at 325-26 (Kooper, J., dissenting).

⁸⁴ *Id.* (Kooper, J., dissenting) (quoting *Braschi v. Stahl Assocs. Co.*, 543 N.E.2d 49, 53 (N.Y. 1989)).

⁸⁵ *Id.* at 327-28.

⁸⁶ Press Release, Lambda Legal Defense and Education Fund, Inc., Lambda Appeals Precedent-Setting Parenting Case for Lesbian Non-Biological Mother (Oct. 29, 1990) (on file with the Columbia Journal of Gender and Law).

⁸⁷ *Id.* (quoting Paula Ettelbrick).

granted review, putting a case involving a lesbian-parented family on the state high court's docket for the very first time.

A. Strategy Questions Redux

Alison now had her last chance to persuade a court to see her relationship with Andrew as parental and to recognize that she and Andrew were not a pair of legal strangers, but rather a mother and her son. It was now the fall of 1990, seven years after Alison and Virginia had ended their relationship and roughly three years since Virginia began to block Alison from contacting Andrew.

Within those few years, lesbian parents had come increasingly into the public spotlight. A 1990 *Newsweek* article announced that as many as ten thousand lesbians had borne children into single or two-parent lesbian households and that hundreds of others had adopted children.⁸⁸ At least a half-dozen articles featuring lesbian parents had appeared in major national newspapers since 1989.⁸⁹ And with every passing year, courts in New York and elsewhere faced an increasing number of cases involving diverse family forms,⁹⁰ of which families like Alison's were just one type.

Among the important strategy questions for Alison's lawyers at this stage was (yet again) what to do about *Ronald FF*. Both courts below had treated *Ronald FF* as controlling the outcome in Alison's case, suggesting strongly that the briefs to the Court of Appeals should devote immediate and significant attention to distinguishing it. On the other hand, an argument focusing first on legal distinctions between the visitation theories advanced in *Ronald FF* and those advanced in Alison's case, without the surrounding framework of Alison's family story, would be unlikely to gain much traction. Moreover, by discussing *Ronald FF* only later in the briefs,

⁸⁸ Jean Seligman, *Variations on a Theme*, NEWSWEEK, SPECIAL ED., Winter 1990-Spring 1991, at 39.

⁸⁹ See Jane Meredith Adams, *Gay Couples Begin a Baby Boom*, BOSTON GLOBE, Feb. 6, 1989, at 2; Patrice Gaines-Carter & Amy Stevens, *Gay Pride March to Mark Milestones on Road to Acceptance*, WASH. POST, June 18, 1989, at D1; Ann Hagedorn & Amy Dockser Marcus, *Case in California Could Expand Legal Definition of Parenthood*, WALL ST. J., Sept. 8, 1989, at B10; Gina Kolata, *Lesbian Partners Find the Means to be Parents*, N.Y. TIMES, Jan. 30, 1989, at A13; Jonathan Mandell, *The Lesbian Baby Boom: Many Lesbian Couples Have Decided There's No Reason to be Childless*, NEWSDAY, July 13, 1989, at 4; David Margolick, *Lesbian Child-Custody Cases Test Frontiers of Family Law*, N.Y. TIMES, July 4, 1990, at A1.

⁹⁰ See Craig W. Christenson, *Legal Ordering of Family Values: The Case of Gay and Lesbian Families*, 18 CARDOZO L. REV. 1299 (1997).

Alison's lawyers could signal their view that the decision did not govern here. Then again, unless the court could see its way around *Ronald FF.*, even the most well-constructed, heart-wrenching narrative would not be heard. From this perspective, a strong doctrinal distinction between *Ronald FF.* and Alison's case would have to come first.

Of course, like many litigation choices, the actual effects of the one made here cannot be known. Instead, the value of reflecting on the possibilities comes in the reminder that the litigation choices made in the midst of a law reform case are frequently neither obvious nor easy.

B. The Multiple Roles of Amici Curiae

At this final stage of the litigation, Lambda began a focused effort to gather amicus briefs in support of Alison's position.⁹¹ The amici had several roles to play. First and most obviously, their briefs brought before the court arguments and information that Alison's brief could not include either because of page limits or because of the risk that the additional material would distract from her central claims. Each of the six amicus briefs filed in support of Alison's position focused on distinct points, ranging from constitutional arguments by the American Civil Liberties Union and the New York Civil Liberties Union, to extended discussion of *Braschi* and equitable doctrines by the Association of the Bar of the City of New York, to the connection between functional parenthood and children's best interests by National Organization of Women Legal Defense and Education Fund (NOW LDEF).⁹² Others provided more information about lesbian and gay parenting cases, about the substantial interest of children

⁹¹ On the value of amicus briefs, see *Neonatology Assocs., P.A. v. Comm'r*, 293 F.3d 128, 131-33 (3d Cir. 2002) (characterizing the view that amici must be impartial as "outdated" and rejecting the contention that amici should be permitted to file briefs only when parties are inadequately represented); Andrew Frey, *Amici Curiae: Friends of the Court or Nuisances?*, LITIG., Fall 2006, at 5 (outlining reasons why amicus briefs "can often be extremely helpful to the courts"); Kelly J. Lynch, *Best Friends? Supreme Court Law Clerks on Effective Amicus Curiae Briefs*, 20 J.L. & POL. 33 (2004) (detailing the value of amicus briefs in Supreme Court litigation). But see *Voices for Choices v. Ill. Bell Tel. Co.*, 339 F.3d 542, 544 (7th Cir. 2003) (Posner, J.) (criticizing amicus briefs that duplicate party arguments or are "used to make an end run around court-imposed limitations on the length of parties' briefs").

⁹² Amici curiae on Alison's behalf also included the Gay and Lesbian Parents Coalition International et al., "Concerned Academics," including Deborah A. Batts et al., and the Youth Law Center. See *Alison D. v. Virginia M.*, 572 N.E.2d 27, 28 (N.Y. 1991); Press Release, Lambda Legal, *supra* note 86.

when their caregivers' rights are adjudicated, and about current social science research related to child development.⁹³

Amicus briefs also add to any litigation in ways that go beyond their explication of the relevant law or social science. By presenting narratives of people who are affected by the issue before the court, they can illuminate the real-life consequences of a case and counter the abstract focus on doctrine that sometimes takes hold at the appellate level. Abortion rights advocates, for example, have used this type of story-telling brief to bring forward the stories of women who have been harmed by restrictions on access to abortion.⁹⁴ In *Alison D.*, the Gay and Lesbian Parents Coalition International took up this task. Its brief told the actual stories of several families to show that when same-sex couples have children together, they, like heterosexual couples, do not consider one partner the "real" parent and the other partner just a supporting actor, as Virginia had characterized Alison.

In addition to their substantive storytelling role, amicus briefs also make the court aware of the groups that have a stake in the case beyond the litigants. To be sure, some groups may have little influence in this regard because their support is predictable. The presence of a gay and lesbian parents group in the case, for example, was unlikely to add great weight in this respect, as few would be surprised to see advocates for legal recognition of gay-parented families coming into the case.

But when organizations that are not presumptive allies file an amicus brief on a party's behalf, they alert the court that support also exists from credible "outsiders." For this reason, among others, Ettelbrick worked

⁹³ New social science data at the time showed that a parent's sexual orientation has no bearing on a child's healthy emotional development. See, e.g., ROBERTA ACHTENBERG, LESBIAN AND GAY PARENTING: A PSYCHOLOGICAL AND LEGAL PERSPECTIVE 1-3 (1987); Sharon L. Huggins, *A Comparative Study of Self-Esteem of Adolescent Children of Divorced Lesbian Mothers and Divorced Heterosexual Mothers*, in *HOMOSEXUALITY AND THE FAMILY* (Frederick W. Bozett ed., 1989). See generally GAY AND LESBIAN PARENTS (Frederick W. Bozett ed., 1987); Donna J. Hutchens & Martha J. Kirkpatrick, *Lesbian Mothers/Gay Fathers*, in *EMERGING ISSUES IN CHILD PSYCHIATRY AND THE LAW* 115 (Diane H. Schetky & Elissa P. Benedek eds., 1985). For a discussion of more recent research, see Charlotte J. Patterson et al., *Children of Lesbian and Gay Parents: Research, Law, and Policy*, in *CHILDREN, SOCIAL SCIENCE, AND THE LAW* 176 (Bette L. Bottoms et al. eds., 2002).

⁹⁴ See, e.g., Ruth Colker, *Feminist Litigation: An Oxymoron?—A Study of the Briefs Filed in William L. Webster v. Reproductive Health Services*, 13 HARV. WOMEN'S L.J. 137, 170-71 (1990) (considering briefs that included the testimony of women who had had abortions); Sarah E. Burns, *Notes from the Field: A Reply to Professor Colker*, 13 HARV. WOMEN'S L.J. 189, 198 (1990) (discussing a brief that summarized forty thousand women's personal experiences with abortion).

intently to encourage NOW LDEF, the national women's rights litigation group,⁹⁵ to file a brief. Virginia's focus on the exclusive rights of biological parents suggested that Alison's theory would render all biological parents (including heterosexual single mothers) vulnerable to intrusive visitation claims by third parties (such as abusive boyfriends). NOW LDEF's presence could assure the court that a prominent women's rights organization had thoughtfully considered the risks and had concluded that Alison's position protected parental rights while also serving children's best interests.

Similarly, the Youth Law Center's brief conveyed to the court that an expert organization focused entirely on children's well-being agreed with Alison that children are served best by maintaining ongoing relationships with the parent figures in their lives. The brief of the Eleven Concerned Academics, a consortium of family law scholars, also lent credibility to Alison's arguments, at least to the extent that academics are understood to offer a reasoned and unbiased consideration of an issue.⁹⁶ As a joint statement of family law scholars, the academics' brief sent the message that the nation's top experts found Alison's position to be the better of the two.

On a more political level, the brief for the Association of the Bar of the City of New York (ABCNY), New York City's twenty-thousand-plus member bar association,⁹⁷ signaled that issue-oriented advocates and experts were not alone in their attention to this case. Moreover, by participating in the case, the ABCNY, as a relatively conservative and non-partisan institution, conveyed that the court would not be going out on a radical political limb if it ruled in Alison's favor.

While we do not know whether Virginia and her lawyers solicited amicus briefs, the case reports indicate that none were filed to support her position.

⁹⁵ The group is now known as Legal Momentum. Legal Momentum, About Us, http://www.legalmomentum.org/site/PageServer?pagename=aboutus_1 (last visited Mar. 29, 2008).

⁹⁶ *But see* *Lawrence v. Texas*, 539 U.S. 558, 602 (2003) (Scalia, J., dissenting) (describing "a law-profession culture[] that has largely signed on to the so-called homosexual agenda").

⁹⁷ Association of the Bar of the City of New York, About Us, <http://www.nycbar.org/AboutUs/index.htm> (last visited Mar. 29, 2008).

C. Oral Argument

In March 1991, the New York Court of Appeals heard oral argument in the case, allotting each side thirty minutes. Ettelbrick, who argued first, was questioned intensely about the court's role in interpreting the term "parent" in the habeas statute that governed visitation. Associate (later Chief) Judge Judith S. Kaye asked, for example: "How would we not be fundamentally redefining the term 'parent' throughout the statutory law and the case law of the State of New York?"⁹⁸ The court's seven judges also pressed Ettelbrick on how the court could grant Alison standing to seek visitation without leaving *all* biological parents subject to suits from family friends, babysitters, or anyone else who had befriended the child. Ettelbrick responded by trying, yet again, to tell Alison's story, reminding the court that Alison was not a transient interloper in someone else's family but rather had actively planned, with Virginia, to bring a child into the world.⁹⁹ Despite Ettelbrick's efforts, "several judges made it clear through their questions to lawyers that they [were] uneasy about the broad implications of the visitation case," as the *New York Times* reported shortly after the argument.¹⁰⁰

Maccarini had great difficulty expressing Virginia's side of the story, stumbling a number of times as he presented her position. Still, his bottom line was clear: "The respondent here is a parent of her child The appellant is not."¹⁰¹ He continued: "And like any other parent, lesbian or not, the respondent has a right to raise her child as she sees fit and determine who her child can associate with."¹⁰² Responding to the court's concerns about the scope of judicial authority,¹⁰³ he urged that any adjustment of visitation rights be left to the legislature.¹⁰³

⁹⁸ Kevin Sack, *Visitation Case Could Redefine Parenthood*, N.Y. TIMES, Mar. 24, 1991, at 134 [hereinafter Sack, *Visitation Case*].

⁹⁹ A videotape of Ettelbrick's argument has been used in some law school classes to illustrate exemplary oral advocacy. Given the court's decision in the case, however, the tape also serves as a reminder that the quality of argument is not necessarily a predictor of success. The tape of the oral argument can be ordered, for a fee, from Albany Law School. See *supra* note 13.

¹⁰⁰ Sack, *Visitation Case*, *supra* note 98.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

D. A Final Loss for Alison

On May 2, 1991, nearly four years after Virginia unilaterally cut off Alison's contact with Andrew, the Court of Appeals ruled, in a 6-1 per curiam opinion, that Alison, as a "biological stranger" to her son, had no standing to seek visitation: "[A]lthough petitioner apparently nurtured a close and loving relationship with the child, she is not a parent within the meaning of Domestic Relations Law § 70."¹⁰⁴

The court's brief opinion fully embraced Virginia's position. "To allow the courts to award visitation . . . to a third person," it held, "would necessarily impair the parents' right to custody and control."¹⁰⁵ Relying in significant part on *Ronald FF.*, the court observed that "[w]hile one may dispute in an individual case whether it would be beneficial to a child to have continued contact with a nonparent, the Legislature did not in section 70 give such nonparent the opportunity to compel a fit parent to allow them to do so."¹⁰⁶ Having framed the issue as a conflict between the New York legislature's intent and Alison's aims, the court held that only the legislature could address Alison's concerns.¹⁰⁷

Judge Kaye's dissent, by contrast, embraced Alison's characterization of the issue as implicating the rights of many adults who function in parent-like relationships with children. She wrote, "The Court's decision, fixing biology as the key to visitation rights, has impact far beyond this particular controversy, one that may affect a wide spectrum of relationships—including those of longtime heterosexual stepparents, 'common-law' and nonheterosexual partners such as involved here, and even participants in scientific reproduction procedures."¹⁰⁸ Observing that "more than 15.5 million children do not live with two biological parents, and that as many as 8 to 10 million children are born into families with a gay or lesbian parent," Judge Kaye emphasized that "the impact of [the] decision falls hardest on the children of those relationships, limiting their opportunity to maintain bonds that may be crucial to their development."¹⁰⁹

¹⁰⁴ *Alison D. v. Virginia M.*, 572 N.E.2d 27, 28 (N.Y. 1991) (per curiam).

¹⁰⁵ *Id.* at 29 (citing *Ronald FF. v. Cindy GG.*, 511 N.E.2d 75 (N.Y. 1987)).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 30 (Kaye, J., dissenting).

¹⁰⁹ *Id.*

Judge Kaye added that the majority had expanded *Ronald FF.* beyond its original contours, and also contested the idea that granting standing to Alison would destabilize New York's family law, noting that *Braschi*'s recognition of function over form "did not effect a wholesale change in the law."¹¹⁰

IV. THE DECISION'S AFTERMATH

The day after the decision was handed down, Maccarini told the *New York Times*, "The ruling just confirms that if there is going to be a change in the definition of parent, this is not the forum for it," and added, "There are just too many social issues here."¹¹¹ By contrast, there was a chorus of disappointment on the other side. Ettelbrick described the ruling as "a fairly major setback for the gay and lesbian rights movement because it says that society does not recognize our relationships."¹¹² William Rubenstein of the ACLU, who had represented the gay tenant in *Braschi*,¹¹³ commented that the court "had the reality of family life staring them in the face and they blinked."¹¹⁴ The executive director of NOW LDEF noted starkly "that the courthouse doors have been closed to millions of children being raised by caring people not biologically related to them."¹¹⁵

Alison's lawyers were not only saddened for Alison and her son but were also worried that the decision would be followed wholesale by other state courts. And to some degree, that is what happened. For several years after *Alison D.*, courts regularly rejected the claims of lesbian co-parents to maintain relationships with the children they had planned for and parented with their former partners. Within two months, the Wisconsin Supreme Court rejected a non-biological mother's claim for custody or visitation based on her status as an equitable or de facto parent.¹¹⁶ In 1997, the

¹¹⁰ *Id.* at 32.

¹¹¹ Kevin Sack, *Lesbian Loses a Ruling on Parent's Rights*, N.Y. TIMES, May 3, 1991, at B1 [hereinafter Sack, *Lesbian Loses*].

¹¹² *Id.*

¹¹³ See *Braschi v. Stahl Assocs. Co.*, 543 N.E.2d 49, 50 (N.Y. 1989).

¹¹⁴ Sack, *Lesbian Loses*, *supra* note 111.

¹¹⁵ Gary Spencer, *Mother's Lesbian Partner Denied Visitation Rights*, N.Y. L.J., May 3, 1991, at 1.

¹¹⁶ *In re Z.J.H.*, 471 N.W.2d 202 (Wis. 1991), *overruled by In re Custody of H.S.H.-K.*, 533 N.W.2d 419 (Wis. 1995).

Vermont Supreme Court did the same, citing *Alison D.* for the proposition that a non-biological parent was not a parent for purposes of visitation rights.¹¹⁷ Notably, several courts also relied on *Alison D.* to deny standing to adults who had parented children while in *heterosexual* relationships, confirming the concerns of Alison's lawyers that the decision would cast a broad, harmful shadow.¹¹⁸

The legal fallout in the years immediately following *Alison D.* did not entirely track the New York Court of Appeals' approach, however. In that first year, a New Mexico appellate court specifically rejected the reasoning in *Alison D.* and permitted a lesbian co-parent to seek visitation with the child she had been raising with her former partner.¹¹⁹ In 1995, the Wisconsin Supreme Court overruled its own version of *Alison D.* and granted standing to a lesbian co-parent on the ground that she was a *de facto* parent.¹²⁰ The Massachusetts Supreme Judicial Court and a trial-level court in Missouri also both ruled that a non-biological lesbian parent had standing to bring a visitation petition.¹²¹

Moreover, as is often the case, a loss in one area of the law spurs victories in a related area to redress problems left exposed by the loss. In New York, this victory, albeit a partial one, came in 1995 in two consolidated cases when the New York Court of Appeals affirmed that

¹¹⁷ *Titchenal v. Dexter*, 693 A.2d 682, 689-90 (Vt. 1997). For other appellate rulings rejecting visitation claims by lesbian co-parents, see, for example, *Music v. Rachford*, 654 So. 2d 1234 (Fla. Dist. Ct. App. 1995); *In re Visitation with C.B.L.*, 723 N.E.2d 316 (Ill. App. Ct. 1999); *Kulla v. McNulty*, 472 N.W.2d 175 (Minn. Ct. App. 1991); *Liston v. Pyles*, No. 97APF01-137, 1997 WL 467327 (Ohio Ct. App. Aug. 12, 1997).

¹¹⁸ See, e.g., *Multari v. Sorrell*, 731 N.Y.S.2d 238, 239-41 (App. Div. 2001) (invoking *Alison D.* to deny standing to a man who parented a child with his girlfriend from toddlerhood until age eight); *Sean H. v. Leila H.*, 783 N.Y.S.2d 785, 788-90 (Sup. Ct. 2004) (holding that a non-biological father lacked standing under *Alison D.* to seek visitation even after having held the child out as his biological son for several years, including giving the child his name); cf. *In re B.E.D.*, No. W2003-02026-COA-R3-JV, 2004 WL 572342, at *2 (Tenn. Ct. App. Mar. 22, 2004) (relying on *Alison D.* to support the rejection of visitation rights for the child's adult sibling).

¹¹⁹ *A.C. v. C.B.*, 829 P.2d 660 (N.M. Ct. App. 1992).

¹²⁰ *In re Custody of H.S.H.-K.*, 533 N.W.2d at 419, overruling *In re Z.J.H.*, 471 N.W.2d 202.

¹²¹ *E.N.O. v. L.L.M.*, 711 N.E.2d 886 (Mass. 1999); *In re T.L.*, No. 953-2340, 1996 WL 393521 (Mo. Cir. Ct. May 7, 1996). In *In re T.L.*, the court held that an equitable parent would have standing to seek custody as well as visitation. *Id.* at *3.

unmarried adults can adopt their partners' biological children.¹²² This practice is now widely known as second-parent adoption.¹²³ The pair of cases involved two couples, one lesbian and the other heterosexual.¹²⁴ The non-biological parent in each case, with the agreement of the biological parent, sought to adopt his or her partner's child.¹²⁵ This was an action that Alison and Virginia (along with most other lesbian and gay parents a decade earlier) had not even contemplated.¹²⁶ Chief Judge Kaye wrote a lengthy opinion for the court that focused largely on statutory interpretation but also highlighted the policy arguments supporting adoption in these cases, particularly the issue of the child's "emotional security . . . should the coparents separate."¹²⁷ "[V]iewed from the children's perspective," she noted, "permitting the adoptions allows the children to achieve a measure of permanency with both parent figures and avoids the sort of disruptive visitation battle we faced in [*Alison D.*]."¹²⁸

For Alison and her son, this important development came too late. Presumably, had second-parent adoption been available at the time Andrew was born, Virginia and Alison both would have wanted Alison to adopt Andrew to provide security for their family. Instead, the absence of legal rights for Alison in the early 1990s meant that Andrew lost one of his parents at an early age. But at least for many other families, the circumstances have continued to improve, with a significant jump in legal security for lesbian-headed families in recent years. Since 2000, most state appellate courts deciding cases like *Alison D.* have permitted lesbian coparents to seek custody or visitation after the termination of the adults' relationship, embracing *de facto* parenthood, *in loco parentis*, and equitable

¹²² *In re Jacob*, 660 N.E.2d 397 (N.Y. 1995).

¹²³ See generally Patricia J. Falk, *Second-Parent Adoption*, 48 CLEV. ST. L. REV. 93 (2000).

¹²⁴ *In re Jacob*, 660 N.E.2d at 397. *In re Jacob* built on a New York Surrogate's Court decision issued shortly after *Alison D.* that allowed a non-biological mother to adopt the child she was raising with her partner under the same adoption rules that apply to step-parents. See *In re Adoption of Evan*, 583 N.Y.S.2d 997 (Sur. Ct. 1992); see also *In re Adoption of Camilla*, 620 N.Y.S.2d 897 (Fam. Ct. 1994).

¹²⁵ *In re Jacob*, 660 N.E.2d at 398.

¹²⁶ See *supra* notes 15-18 and accompanying text.

¹²⁷ *In re Jacob*, 660 N.E.2d at 399.

¹²⁸ *Id.* (citing *Alison D. v. Virginia M.*, 572 N.E.2d 27, 29 (N.Y. 1991)).

estoppel theories as a means of protecting the child's best interests.¹²⁹ In addition, second-parent adoption is widely, though not universally, available to secure the legal relationship between a non-biological parent and child.¹³⁰ The changes can likely be attributed in large part to broader societal acceptance of lesbians and gay men and, more specifically, to greater acceptance of and familiarity with lesbian- and gay-parented families, though it is of course impossible to link the legal developments definitively to these societal changes.¹³¹

The American Law Institute (ALI) has incorporated many of these developments into its Principles of the Law of Family Dissolution, which were adopted and promulgated in 2000.¹³² The Principles, which address issues ranging from custodial and decision-making responsibility to child

¹²⁹ See, e.g., *In re E.L.M.C.*, 100 P.3d 546 (Colo. Ct. App. 2004); *King v. S.B.*, 837 N.E.2d 965 (Ind. 2005); *V.C. v. M.J.B.*, 725 A.2d 13 (N.J. Super. Ct. App. Div. 1999); *T.B. v. L.R.M.*, 786 A.2d 913 (Pa. 2001); *Rubano v. DiCenzo*, 759 A.2d 959 (R.I. 2000); *In re Parentage of L.B.*, 122 P.3d 161 (Wash. 2005). In addition, in the course of holding a non-biological lesbian parent liable for child support, the California Supreme Court disapproved of numerous prior rulings that non-biological lesbian mothers were not legal parents. See *Elisa B. v. Super. Ct.*, 117 P.3d 660 (Cal. 2005).

By contrast, the Utah Supreme Court held in early 2007 that a lesbian co-parent did not have standing to seek visitation with the child she had been raising with her former partner, with whom she had entered into a civil union in Vermont. See *Jones v. Barlow*, 154 P.3d 808 (Utah 2007). Similarly, in 2000, the Tennessee Court of Appeals relied on *Alison D.* to deny standing to two women who had been raising children with their former partners. See *In re Thompson*, 11 S.W.3d 913, 922-23 (Tenn. Ct. App. 2000).

For further discussion of the legal theories available to support standing for non-biological parents, see Melanie B. Jacobs, *Micah Has One Mommy and One Legal Stranger: Adjudicating Maternity for Nonbiological Lesbian Coparents*, 50 BUFF. L. REV. 341 (2002); Polikoff, *supra* note 17; Richard F. Storrow, *Parenthood by Pure Intention: Assisted Reproduction and the Functional Approach to Parentage*, 53 HASTINGS L.J. 597, 662-78 (2002); Rachel E. Shoaf, Note, *Two Mothers and Their Child: A Look at the Uncertain Status of Nonbiological Lesbian Mothers Under Contemporary Law*, 12 WM. & MARY J. WOMEN & L. 267 (2005).

¹³⁰ See generally Sonja Larsen, *Adoption of Child by Same-Sex Partners*, 27 A.L.R. 5th 54 (1995). Second-parent adoption is generally available to different-sex couples wherever it is available to same-sex couples. See Falk, *supra* note 123, at 94-95.

¹³¹ See generally Suzanne B. Goldberg, *Constitutional Tipping Points: Civil Rights, Social Change, and Fact-Based Adjudication*, 106 COLUM. L. REV. 1955 (2006) (addressing the relationship between changing social views and legal change).

¹³² PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS §§ 2.03(1)(b)-(c), 2.18 (2002).

support and property distribution, devote extensive attention to the rights and responsibilities of adults who are not biologically or legally related to the children they parent.¹³³ Most relevant to Alison's situation, the Principles endorse legal recognition for a "parent by estoppel," defined as an individual who has "lived with the child since the child's birth, holding out and accepting full and permanent responsibilities as parent, as part of a prior co-parenting agreement with the child's legal parent . . . to raise a child together each with full parental rights and responsibilities."¹³⁴ The Principles also provide for recognition of a "de facto parent," defined as an individual who has resided with the child for at least two years and who regularly, "for reasons primarily other than financial compensation, and with the agreement of a legal parent to form a parent-child relationship," has performed significant parenting functions.¹³⁵ In its commentary, the ALI explains that "[t]he standards reflect the societal consensus that responsibility for children ordinarily should be retained by a child's parents, while recognizing that there are some exceptional circumstances in which the child's needs are best served by continuity of care by other adults."¹³⁶ Although the Principles are not binding on any state,¹³⁷ they provide advocates for parents in Alison's situation with additional important authority for their claims.

New York, however, has kept the barrier to visitation (and custody) petitions frozen where it was in 1991. Lower courts continue to treat *Alison D.* as barring all equitable actions by non-legal lesbian parents. Consequently, non-legal lesbian parents who have not completed second-parent adoptions remain shut out from even seeking visitation with the children they were raising with a former partner.¹³⁸ In 2005, in a case

¹³³ *Id.*

¹³⁴ *Id.* § 2.03(1)(b)(iii). Section (b) also provides alternate definitions for "parent by estoppel" under subsections (i), (ii), and (iv), which are not relevant here. *See id.* § 2.03(1)(b).

¹³⁵ *Id.* § 2.03(1)(c). Section (c) also includes, within its definition of de facto parent, an adult who takes on the caretaking role as a result of the failure or inability of the legal parent to do so. *See id.* § 2.03(1)(c)(ii).

¹³⁶ *Id.* § 2.18 cmt. a.

¹³⁷ *Id.* § 1.01 (defining a "rule of statewide application" as "a rule that implements a Principle set forth herein" and declaring that "a rule of statewide application may be established by legislative, judicial, or administrative action").

¹³⁸ *See, e.g.,* Behrens v. Rimland, 822 N.Y.S.2d 285 (App. Div. 2006) (denying standing to a non-legal mother); Lee P.S. v. Lisa L., 753 N.Y.S.2d 860 (App. Div. 2003)

similar to *Alison D.*, a New York family court explained that it considered itself

[U]nfortunately constrained to find that petitioner lacks standing to seek visitation with the child who has enjoyed a close and loving relationship with petitioner since infancy, with no consideration as to any detriment such a harsh result will have on this child Given the frequency with which children today are being raised by and bonding with long-term heterosexual stepparents (who are equally affected by the holdings herein) and nonmarital homosexual partners, perhaps the time has come for the Court of Appeals to revisit its ruling in *Alison D.*¹³⁹

Arguably, a court could conclude that *Alison D.* is not such an absolute barrier. After all, the decision did not explicitly foreclose several equitable arguments that the legal parent's cultivation of the other adult's parental role requires recognition of the non-legal parent. Indeed, New York courts have applied equitable theories in cases decided after *Alison D.* to recognize the rights of functional (but non-legal) fathers seeking visitation against the wishes of the child's biological mother.¹⁴⁰ Yet these same courts have refused to carry over this reasoning to cases where the parents are of the same sex, raising equal protection concerns that courts have not addressed.¹⁴¹

(same); *Janis C. v. Christine T.*, 742 N.Y.S.2d 381 (App. Div. 2002) (same); *Speed v. Robins*, 732 N.Y.S.2d 902 (App. Div. 2001) (same); *Lynda A.H. v. Diane T.O.*, 673 N.Y.S.2d 989 (App. Div. 1998) (same); *C.M. v. C.H.*, 789 N.Y.S.2d 393 (Sup. Ct. 2004) (same). The courts would presumably apply the same ruling to petitions brought by a non-legal gay father, but there are no reported cases with those facts. In the interest of full disclosure, I presented oral argument on behalf of the non-legal parent in the appellate litigation of *Behrens*.

¹³⁹ See *Same-Sex Partner Lacks Standing to Seek Visitation Rights with Ex-Partner's Adopted Child*, N.Y. L.J., Sept. 19, 2005, at 21 (reprinting unpublished opinion in *Denise B. v. Beatrice R.*).

¹⁴⁰ See, e.g., *Gilbert A. v. Laura A.*, 689 N.Y.S.2d 810 (App. Div. 1999) (granting standing to a man who functioned as the child's father, but lacked biological ties, to show that extraordinary circumstances existed to justify custody or visitation with the child born during his marriage to the child's mother, and basing the order in part on the mother's direct involvement in cultivating the parent-child relationship); *Jean Maby H. v. Joseph H.*, 676 N.Y.S.2d 677 (App. Div. 1998) (allowing a functional, but not biological, father to invoke equitable estoppel to continue his relationship with the child born during his marriage to the child's mother).

¹⁴¹ For the first time ever, a New York Supreme Court ruling recently distinguished *Alison D.* in a lesbian co-parent dispute and found that equitable estoppel

Even with this uninviting landscape, parents in New York with no other options continue to bring (and lose) claims to maintain their relationships with their children, though their case presentation strategy has adjusted with the times. Litigators no longer need to explain, for example, that lesbian couples have children or provide courts with background on physician-assisted insemination. At the same time, however, courts often ask lawyers to explain why the non-legal parent did not complete a second-parent adoption to secure her ties to the child while the couple was together.¹⁴² In fact, many couples deliberately delay the adoption process,¹⁴³ though not typically out of a lack of commitment, as judges sometimes assume. Instead, as with other legal protections that people should pursue but often do not (like making a will), couples delay second-parent adoption for a range of reasons. For example, the process can be expensive for couples who, in many cases, need to hire not only a lawyer but also a social worker to do an in-home evaluation. Some couples who plan to have more than one child simply find it more efficient and economical to wait to do all of the adoptions together.¹⁴⁴ In addition, couples seeking to adopt another child from a country that disfavors same-sex couples may delay the adoption process to avoid exposing their relationship and jeopardizing their opportunity to adopt a sibling for their child(ren).¹⁴⁵ Yet, even courts well-informed about the reasons for delayed adoption, about cases granting equitable relief to functional fathers, and about the myriad other changes in

principles authorized the non-biological mother's standing to seek a continued relationship with her children. *Beth R. v. Donna M.*, 853 N.Y.S.2d 501 (Sup. Ct. 2008). Unlike other cases in which *Alison D.*'s holding was enforced to deny parental status to the non-legal parent, the adults in this case had married each other in Canada, and the court found the marriage to be a "significan[t]" additional factor in its determination. *Id.* at 509. The trial court also relied on a 2006 ruling in which the New York Court of Appeals estopped a non-biological father from denying paternity of a child he had supported and visited intermittently. *Id.* at 507 (citing *Shondel J. v. Mark D.*, 853 N.E.2d 610 (N.Y. 2006)).

¹⁴² E-mail Interview with Judith E. Turkel, Partner, Turkel Forman & de la Vega LLP (Mar. 14, 2008) (on file with the author) [hereinafter Turkel Interview]. Ms. Turkel is a New York City-based lawyer with more than two decades of experience representing lesbian and gay parents. Turkel Forman & de la Vega LLP, Judith E. Turkel, <http://www.tfvlaw.com/judith.aspx> (last visited Mar. 29, 2008).

¹⁴³ Turkel Interview, *supra* note 142.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

recognition of the rights of gay people continue to adhere rigidly to *Alison D.*¹⁴⁶

Similarly, the state legislature has made no significant effort to reverse the effects of *Alison D.* In the wake of many significant legislative efforts to secure marriage rights for same-sex couples,¹⁴⁷ this inaction might seem surprising. On the other hand, it took New York until 2002 to amend the state's antidiscrimination law to cover sexual orientation,¹⁴⁸ something twelve other states had already accomplished at that point.¹⁴⁹ Other provisions of the state's family law that likewise are arguably in need of revision—such as the divorce law, which, unlike the law in any other state, requires a showing of adultery or a legal separation agreement before authorizing divorce¹⁵⁰—have endured without effective legislative reform for many years despite significant criticism.¹⁵¹

¹⁴⁶ See, e.g., *Behrens v. Rimland*, 822 N.Y.S.2d 285 (App. Div. 2006).

¹⁴⁷ The New York State Assembly has considered, but has not voted on, bills granting marriage to same-sex couples for several years. For updated information, see Empire State Pride Agenda, Legislation and Other Governmental Action, <http://www.prideagenda.org/IssuesExplained/MarriageandFamilyProtection/LegislationandOtherGovernmentAction/tabid/71/Default.aspx> (last visited Mar. 29, 2008). Empire State Pride Agenda is New York's statewide legislative advocacy organization for the rights of lesbians, gay men, bisexuals, and transgender individuals. See Empire State Pride Agenda, Our Mission and Public Policy, <http://www.prideagenda.org/AboutUs/OurMissionandPublicPolicy/tabid/55/Default.aspx> (last visited Mar. 29, 2008). Many of the Pride Agenda's recent family law reform efforts have focused on securing protections for adult relationships either by marriage or other means. See, e.g., Empire State Pride Agenda, Marriage and Family Protection, <http://dnn.prideagenda.org/IssuesExplained/MarriageandFamilyProtection/tabid/67/Default.aspx> (last visited Mar. 29, 2008).

¹⁴⁸ N.Y. EXEC. LAW §§ 291, 292, 296 (McKinney 2005 & Supp. 2007). Sections 291, 292, and 296 set forth New York's protected classes for antidiscrimination purposes in the context of, inter alia, employment, housing, education, and places of public accommodation. Discrimination on the basis of sexual orientation was not prohibited under these sections until 2002. See N.Y. EXEC. LAW § 291, L.2002, ch. 2 (effective 2003).

¹⁴⁹ See Press Release, Empire State Pride Agenda, New York Outlaws Anti-Gay Discrimination (Dec. 17, 2002), <http://www.prideagenda.org/tabid/304/default.aspx?c=272>.

¹⁵⁰ New York is now the only state in the country to "require[] the finding of fault or living apart pursuant to a legal document as a basis for divorce." *S.C. v. A.C.*, 798 N.Y.S.2d 348 at *5 (2004) (unpublished table decision).

¹⁵¹ See, e.g., *Molinari v. Molinari*, 839 N.Y.S.2d 434 (2007) (unpublished table decision) (identifying problems flowing from existing law and calling for legislative action).

V. CONCLUDING THOUGHTS

One might ask, in light of the law's intransigence in New York, why bother? Is law reform litigation in this area, no matter how carefully crafted, an exercise in futility? Certainly, if one evaluates the work by the win-loss record of advocates for non-legal lesbian mothers in New York during the past decade, there would seem to be little value in continuing to seek law reform on this issue.

Yet to stop now would be to miss one of the central points of law reform litigation. As discussed at the outset, law reform cases are defined, in part, by an effort to move beyond the status quo and change the law in ways that advocates believe are in the interest of justice. Winning a lawsuit can accomplish this, of course. Even when cases are lost, however, the very act of litigating against injustice can sometimes be an important step toward a victory on a similar issue in a subsequent lawsuit. The drumbeat of lawsuits maintains both public and legal attention, helping to ensure that this class of litigants will not be forgotten. Further, repeated, unsuccessful litigation shows, in stark relief, the terrible losses caused by an approach to family law that, in this area, is unresponsive to family life. The litigation, in other words, helps shape the public conversation. It frames a problem and proposes a solution.

Consequently, although lawyers for individuals like Alison continue to engage the same types of strategic questions about how best to persuade courts to recognize family relationships that are visible everywhere except in the law, the backdrop against which they are working is different, and richer, than when Alison first brought her case. There is now a documented history of the custody and visitation law's non-responsiveness to families in which one parent is legally recognized and the other is not. In this history lies the opportunity for law reform efforts to continue, and for advocates to work on framing and reframing the story so that, one day, telling the family story in this kind of case will become run-of-the-mill family court conflict-resolution fare, rather than an achievement in and of itself.