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THE DELIBERATE CONSTRUCTION OF FAMILIES WITHOUT FATHERS: IS IT AN OPTION FOR LESBIAN AND HETEROSEXUAL MOTHERS?

Nancy D. Polikoff*

I. INTRODUCTION

I start this paper with the premise that it is no tragedy, either on a national scale or in an individual family, for children to be raised without fathers. Children raised without love and guidance, without shelter, nutrition, and health care, without meaningful education, without physical safety in their homes and on their streets — that is tragic. While current discourse, exemplified in the public pronouncements about welfare reform ¹ and in the recent book Fatherless America, ² blames virtually all social ills on father absence, I find such rhetoric both misdirected and terrifying. It is misdirected because it fails to focus on the needs of children I have identified above, and it is terrifying because it furthers social control of women by degrading the families that women form without men. ³

Castigating women for raising children without fathers and outside of marriage is nothing new. In response to the resurgence of the feminist movement in the early 1970's, George Gilder, then considered an ideological eccentric, developed the theory that men's aggressive, destructive tendencies could be controlled only by a social order in which men are motivated to be productive by the necessity of providing

* Professor, The American University Washington College of Law. I would like to acknowledge the able research assistance of Lisa Levine, Alys Summerton, and Joan Fina.

². DAVID BLANKENHORN, FATHERLESS AMERICA (1995).
³. For an excellent analysis of the woman-hating dimensions of the attack on single mothers, see Nancy Dowd, Stigmatizing Single Mothers, 18 HARV. WOMEN'S L.J. 19 (1995).
economic security for their wives and children. According to Gilder's theory, all policies that make it possible for women to live and raise children independently of men — including welfare, affirmative action programs for women, and economic justice upon divorce — thereby directly contribute to the decline of a peaceful social order. Gilder went on to be a Reagan guru; his theories, if articulated somewhat differently, are now mainstream.

An extreme outgrowth of Gilder's early theories was the position that it should be difficult for women to obtain custody of minor children upon divorce. Stated most bluntly by Daniel Amneus in his book, presciently titled Back to Patriarchy, this position is: fathers should get custody of their children, all alimony and child support should be eliminated, and women who want to compete in the work world should do so unencumbered by children and should leave those children to fathers who will remarry women who want to stay home and take proper care of them. It is a sobering indication of the current political climate that Amneus, whose first book is long out of print, is writing a new book, The Case for Father Custody in Divorce.

Contrary to the ideology that simultaneously glorifies fathers and vilifies mothers, I want women to have the option to form families in which their children have no fathers. This is a hard position to develop without acknowledging a larger social context of male indifference to the consequences of sexual intercourse and male irresponsibility for the economic well-being of the children they sire. What I envision as a method of liberating women and children from the control of men and of recognizing the legitimacy of deliberate childrearing without fathers, men might see as a method of solidifying sexual access to women with impunity and of eliminating unwanted financial obligations for children. What one woman considers freedom to create the family structure she wishes, another may view as coercion into an arrangement that leaves her with no buffer against either relative or absolute poverty.

6. Telephone Interview with Maureen Downey, Reporter, Atlanta Constitution (June 5, 1995).
As long as responsibility for the economic necessities of childrearing rests upon individual biological parents rather than the larger society, this tension will exist. Until health care, child care, decent housing, nutrition, and education are entitlements, as they are in the social democracies of Western Europe, many women will be driven by economic imperative to rely on their children’s fathers for support. Any avenue that eliminates a man’s obligation to support his biological children must be scrutinized to ensure that the mother’s choice to forego such support is made as freely as possible.

The choice to raise a child without a father is a legitimate choice and the family thereby created is a legitimate family. Planned lesbian families exemplify the construction of parenthood as a process distinct from biology, and the initial impetus for the analysis developed in this paper was my desire to develop a framework within which to safeguard planned lesbian families. But I do not want to limit the availability of raising children without fathers to lesbians. Rather, I like to think of lesbian and heterosexual women as sisters in a struggle against the relentless propaganda of women-hating associated with the glorification of fathers.

Limiting the arguments in this paper to lesbian families would be unwise for another reason. Analyses specific to lesbians bearing children almost always focuses on conception through alternative insemination, as though this was the only method used by lesbians to get pregnant. Although carving out space for forming families without fathers when children are conceived through donor insemination is tempting, and might obviate the concerns about male avoidance of responsibility for sexual activity that I discussed above, I am not willing to so limit myself. The option of raising a child without a father should be available to all women, and even lesbians cannot be fully protected by focusing solely on donor insemination. Anecdotal experience, requests made of lesbian legal organizations, and some reported cases all confirm

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8. This term was first coined by psychologist April Martin. April Martin, Lesbian Parenting: A Personal Odyssey, in Gender in Transition 249 (J. Offerman-Zuckerberg ed., 1989). A planned lesbian family is one in which a lesbian deliberately chooses to raise a child without being married or heterosexually involved. Id. One anthropologist, describing the same phenomenon, uses the term “intentional motherhood.” Ellen Lewin, Lesbian Mothers 47-48 (1993).
that sometimes lesbians conceive children through sexual intercourse.\(^9\) The willingness of the biological parents, not the method of conception, should be the cornerstone of any analytical framework.

The analysis in this paper assumes that: (1) at least at some point, the biological father agrees that he will have no legal rights and responsibilities towards his child; and (2) the biological mother wants to raise her children without a legal father. In this paper, I examine two recent cases where there were such agreements but the biological father later changed his mind. After considering the two very different approaches and outcomes of these cases, I look at the possibility of obtaining a judicial termination of parental rights while the father is in agreement, thereby eliminating the possibility of a later change of heart.

II. COURT REACTION TO PRIVATE ORDERING

A. Thomas S. v. Robin Y.

*Thomas S. v. Robin Y.*\(^10\) began sixteen years ago when Robin Young and Sandra Russo decided to expand their family to include children.\(^11\) They lived in New York, but they had friends in California and they knew that it was becoming increasingly common for lesbians in California to bear children — usually conceived through alternative insemination — and to raise them in an openly lesbian family structure. This phenomenon of planned lesbian families was not yet common in New York, or anywhere on the east coast.

Robin and Sandra decided that Sandra, who was older, would bear a child first. They found a gay man, Jack Kolb, who lived in California and who agreed to donate his semen. He also agreed that Robin and Sandra would raise the child as coparents, that he would have no parental rights or obligations, and that he would make himself known to the child at a

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future time selected by the mothers. Cade Russo-Young was born on May 18, 1980.

Shortly thereafter, the couple decided that Robin would bear a child. They selected a different sperm donor, Thomas Steel, who also lived in California and who agreed to the same conditions that the mothers had established with their first donor. Ry Russo-Young was born on November 16, 1981.

In early 1985, Cade, almost five years old, began asking about her biological origins. The mothers contacted both Jack Kolb and Tom Steel and traveled to San Francisco so that both children could meet the "men who helped make them."

The contact with Tom was happy and led to a continuing relationship. There were several visits between Tom and the family over the next six years. These visits took place at the family's home in New York, at vacation homes and in San Francisco. However, Tom decided he wanted to reinstate his parental rights. The twenty-six day trial that took place over several months in 1992 included substantial evidence, much of it contested, about the nature of these visits and the relationships that developed. Tom portrayed himself as having an independent, father-daughter relationship with Ry. The mothers portrayed the relationship as one between Tom and the entire family in which Tom was no more important to Ry than were other close family friends.

Tom's most significant evidence included: instances Ry had referred to him as "Dad," verbally and in correspondence, including in a Father's Day card, descriptions of times he spent with Ry in which Ry was obviously happy to see him, and gifts he had sent Ry, including money he had sent to the family which he characterized as a form of support. The mothers' most significant evidence established that: Tom had never spent a night with Ry in which the mothers were not also present; that the number of days he claimed to spend with Ry were misleading both because the time was spent with the family, not just Ry, and because either Tom was at work or Ry was in school during many of the days included in Tom's calculations; that Tom had never made decisions concerning Ry's life or provided any daily care or financial support for her; that Ry had sent an identical Father's Day card to Jack Kolb; and that whatever relationship Tom had with the children, he had with Ry and Cade together.
In late 1990, Tom decided that he wanted to introduce Ry to his parents and his grandmother, who up until that time had not known of her existence. He was not comfortable including the mothers in these introductions. He asked the mothers to send both girls to California the following summer. When the mothers refused, he filed a paternity action in New York Family Court in August, 1991, seeking an order of paternity for Ry and two weeks of immediate visitation in California. The immediate visitation order was denied. Once Tom commenced the litigation, Robin and Sandra ceased all social contact between Tom and their family.

At the paternity trial, in addition to the evidence concerning the history of the relationships among the parties, the court heard the testimony of a psychiatrist, Dr. Myles Schneider, who, with the consent of all parties, had conducted a lengthy evaluation of all the relevant individuals. Dr. Schneider recommended against an order of paternity and against court-ordered visitation. The trial court's decision characterized Dr. Schneider's testimony as follows:

Ry, Dr. Schneider said, considers Sandra R. and Robin Y. to be her parents and Cade to be her full sister. She understands the underlying biological relationships, but they are not the reality of her life. The reality of her life is having two mothers, Robin Y. and Sandra R., working together to raise her and her sister. Ry does not now and has never viewed Thomas S. as a functional third parent. To Ry, a parent is a person who a child depends on to care for her needs. To Ry, Thomas S. has never been a parent since he never took care of her on a daily basis.

Ry, Dr. Schneider said, views Robin Y. and Sandra R. as having a relationship with each other that should be given respect. She knows that she, Cade and her mothers comprise an unusual and unconventional family. She knows that some outside her family have often shown intolerance and insensitivity toward her family. Notwithstanding this intolerance, Ry's own view of her family is that of a warm, loving, supportive environment.

Ry, he said, views this court proceeding as an attack on and threat to her positive image of herself and her family. Her sense of family security is threatened. [For Ry, a declaration of paternity would be a statement that she, Young, and Steel constitute one family unit and Cade, Russo, and Kolb form another. This juxtaposition of relationships frightens her]. . . .
Ry does not want to visit Thomas S. [for various reasons, Dr. Schneider believes. She is angry at him for undermining the security she felt in her concept of family. She feels betrayed because she and her family had counted on him as a supporter of their unconventional family unit. She feels he is acting out of a selfish desire to get what he wants, without appreciating how hurtful his actions have been to her and her family.]\(^\text{12}\)

Dr. Schneider did not believe that Ry was “brainwashed” into expressing her views. Of course, he recognized, as I do, that her views were shaped by the views of Robin and Sandra.\(^\text{13}\) The trial court had appointed a law guardian to represent Ry who also argued against a finding of paternity.

The trial court denied Tom’s petition. It applied the principles of equitable estoppel which numerous New York courts had used in cases involving paternity. The court found that Tom had agreed that he would not have parental rights and that, had he not done so, he would not have been chosen as the donor. The court found that Tom’s conduct over the subsequent decade “confirmed his earliest representations.”\(^\text{14}\) This conduct included his failure to provide financial support, failure to file for paternity early in Ry’s life, lack of effort to see Ry for the first three years of her life, his subsequent willingness to allow his contacts with Ry to be at Robin’s complete discretion, and his knowledge of Ry’s parental bond with Sandra and sibling bond with Cade and his support of that functional family for many years. The court also found that Tom decided to change the ground rules of Ry’s life due to changes in his own life.\(^\text{15}\)

The court concluded that an order of paternity would not be in Ry’s best interests, finding:

This attempt [to change the ground rules of Ry’s life] has already caused Ry anxiety, nightmares, and psychological harm. Ry views this proceeding as a threat to her sense of family security. For her, a declaration of paternity would be a statement that her family is other than what she knows it to be and needs it to be.

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13. Id.
14. Id. at 382.
15. Id.
To Ry, Thomas S. is an outsider attacking her family, refusing to give it respect, and seeking to force her to spend time with him and his biological relatives, who are all complete strangers to her, for his own selfish reasons.\(^{16}\) The court further concluded that even were there an adjudication of paternity, Tom's application for visitation would be denied.\(^{17}\)

On appeal, the appellate division reversed, in a three to two decision with strong emotions in both the majority and the dissent.\(^{18}\) The majority grounded its ruling in the statute that defines paternity by biology alone. Thus, Tom was entitled to an order of filiation because he was Ry's biological father. The majority rejected the trial court's application of estoppel principles, finding prior cases in which a biological father was estopped from obtaining a paternity order irrelevant because in those cases the child was considered the "legitimate" child of the mother and a different man. The majority further distinguished the one case, *Terrence M. v. Gale C.*,\(^{19}\) in which estoppel was applied to bar a paternity action even though the child was not considered the "legitimate" child of a marital union. It referred to *Terrence M.* as a case in which an order of paternity would have "[shocked] the child's sensibilities," and noted that there would be no such shock in this case as Ry had known since she was three that Tom was her biological father.\(^{20}\)

Fundamentally, the appellate division saw a different family from that seen by the trial court, the examining psychiatrist, and the guardian ad litem. The trial court saw Tom as ancillary to the central family unit of Robin, Sandra, Ry and Cade; the appellate division saw Tom, Robin and Ry as a family no different from that which exists when parents divorce and the mother remarries. The appellate majority considered the trial court's decision a termination of Tom's parental rights and found that Robin was the one against whom estoppel should be applied because she initiated and fostered a relationship between Ry and Tom.

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16. *Id.*
The dissent criticized the majority's characterization of the case as one concerning termination of parental rights, considering it instead an action to establish parental rights that did not otherwise exist. The dissent found no parental rights flowing from biology alone in the absence of facts that would justify the necessity of the biological father's consent in an adoption proceeding concerning the child. Here, Tom had neither sufficient contact with Ry, nor had he provided her with sufficient financial support to confer the right to a parental relationship with Ry.\textsuperscript{21}

The dissent supported the use of equitable estoppel against Tom, rejecting preservation of a child's legitimacy as the \textit{sine qua non} of equitable estoppel and finding instead that serving the best interests of the child is the primary purpose of the estoppel doctrine. Agreeing with the conclusions of the trial court, the dissent found that

[w]hile the child has always known that petitioner is her biological progenitor, it had consistently been demonstrated by petitioner himself that this factor did not confer upon him any authority or power over her life, that it did not mean that Sandra R. was less her mother than Robin Y., and that it did not mean that her sister was not her full sister. To now grant him the standing to claim the very considerable authority and power held by a parent, against her wishes, would change her life in drastic ways. For this reason, I believe that the elements of misrepresentation, reliance and detriment have clearly been established and that the evidence demonstrated that an order of filiation is not in this child's best interests. Under these circumstances, the doctrine [of equitable estoppel] should be applied.\textsuperscript{22}

The dissent recognized not only that a legitimate family can consist of two mothers and two children, but that, within a deliberate family structure, a child can know the man who is her biological progenitor and comprehend the biological reality without considering that man a parent.

The radically different visions of family identified by the appellate division majority and dissent should not obscure their common reasoning in one significant area. Both concurred that any agreement between Tom and Robin was un-

\textsuperscript{21} Id. at 365 (Ellerin, J., dissenting).
\textsuperscript{22} Id. at 367 (Ellerin, J., dissenting).
enforceable. The dissent characterized Tom’s agreement to forego initiating contact with Ry as “clearly not binding”\(^\text{23}\) and the majority called it “unenforceable for failure to comply with explicit statutory requirements for surrender of parental rights.”\(^\text{24}\) Thus no facet of *Thomas S.* supports the private ordering of families without fathers.

B. Leckie v. Voorhies

An Oregon case, *Leckie v. Voorhies*,\(^\text{25}\) stands in contrast. It is the only other reported appellate decision addressing a paternity claim filed by a semen donor who originally agreed to forego parental rights and subsequently developed a relationship with his biological child. The biological father was unsuccessful in *Leckie* for the reason rejected by both the majority and the dissent in *Thomas S.*: his agreement to forego parental rights. The Oregon court had no trouble holding Leckie to his agreement, even though the facts he presented demonstrated an arguably stronger relationship with the child than that which Tom had with Ry.

Before conception, Michael Leckie (“Michael”) entered into a written agreement with Janet Voorhies (“Janet”) and her partner Margaret Sparrow (“Margaret”) that he would have “no paternal rights whatsoever” to any child conceived with his semen.\(^\text{26}\) Each party waived any right to bring a paternity action, and the women agreed not to seek financial responsibility toward the child from Michael. The women agreed that Michael would have limited visitation rights at their convenience, and they stated that they were happy to have Michael in their lives “not as a father, but as a good male role model” for their children.\(^\text{27}\)

After Maya was born in July, 1988, Michael visited with both her and with Janet’s older son. When Maya was two years old, Janet and the children moved to a house on Michael’s property close to Michael’s house. For a year, Michael saw the children between four and ten hours a week; later he saw them less frequently. The court noted that Michael made substantial financial contributions to Maya

\(^{23}\) Id. (Ellerin, J., dissenting).
\(^{24}\) Id. at 361.
\(^{26}\) *Leckie*, 875 P.2d at 521.
\(^{27}\) Id. at 521-22.
and that both Maya and her brother sometimes referred to Michael as “Dad” without Janet’s objection.\(^\text{28}\)

When Maya was three and a half years old, after conflict between Janet and Michael over such matters as writing thank you notes to Michael’s mother and his drinking in front of the children,\(^\text{29}\) and after several mediation sessions, the parties again signed their original agreement with a specific provision for six hours per month of visitation. Janet subsequently terminated all visitation, and Michael filed a paternity action.

The trial court granted Janet’s motion for summary judgment and the appellate court affirmed. The court upheld Michael’s waiver of his entitlement to assert parental rights. Michael tried to argue that the parties’ conduct implicitly modified their agreement, thereby vitiating the waiver. In rejecting this argument, the court particularly noted that there was no evidence of such conduct after the parties reaffirmed their agreement in December, 1991.\(^\text{30}\)

The appellate court upheld Michael’s waiver of parental rights without citing any authority. In fact, Oregon has two statutes that support private ordering. One reads that “[a]ny authorization, release or waiver given by the putative father with reference to the custody or adoption of the child or the termination of parental rights shall be valid even if given prior to the child’s birth.”\(^\text{31}\) Another reads that “[a]ny contract between the mother and father of a child born out of wedlock is a legal contract, and the admission by the father of his fatherhood of the child is sufficient consideration to support the contract.”\(^\text{32}\) Despite the obvious relevance of these statutes, neither was cited by the court.

Because the court found a valid waiver of parental rights, it did not address the question of whether it would be unconstitutional as applied to Michael to bar his paternity action under the Oregon statute that semen donors have no parental rights.\(^\text{33}\) The court also avoided any reference to policy

\(^{28}\) Id. at 522.

\(^{29}\) Memoranda from Mediation Sessions (on file with author).

\(^{30}\) Leckie, 875 P.2d at 522-23.


\(^{32}\) Id. § 109.230.

\(^{33}\) In McIntyre v. Crouch, 780 P.2d 239 (Or. Ct. App. 1989), appeal denied, 784 P.2d 1100 (1989), cert. denied, 495 U.S. 905 (1990), the Oregon appeals court found that the state statute denying parental status to semen donors
questions underlying enforceability of agreements involving children. Further, there was no reference to the child's best interests or to Michael as a potential source of financial support. The court further avoided any commentary on the family configuration involved in the case.

Although the court did not issue a ruling grounded in the child's best interests, those interests had been the subject of a separate proceeding under a distinctive Oregon statute. Michael had filed for visitation under an Oregon statute not dependent upon biological parenthood. He had a full hearing on this claim, and he was unsuccessful in obtaining visitation. The trial court made a number of findings concerning the family. These findings included the following:

Petitioner's [Michael's] relationship with the children was similar to those the children had with several other adults. There was no substantial difference in how the children related to Petitioner, as opposed to other adults familiar to the children, except that they had known him longer and so perhaps were slightly more familiar . . . . [Michael's] own description of his relationship does not rise beyond that of a child care provider, even an excellent child care provider. It is not essential for the best interest of children to maintain contact with his or her biological parent. It is not essential to the best interests of children who have a strong attachment to a parent to maintain a male role model, in that children receive gender identification from many sources.

would be unconstitutional if applied to a semen donor who had an agreement with the recipient/mother that he would function as a father to the child. In McIntyre, the parties disputed the existence of such an agreement, and the appeals court sent the case back to the trial court for a hearing on the nature of the agreement between the parties. In spite of his written agreement not to seek parental rights, Leckie attempted to build a constitutional argument based upon the McIntyre reasoning. Leckie, 875 P.2d at 522-23. The Leckie court explicitly declined to rule on this question. Id.

34. See OR. REV. STAT. § 109.119(5) (1993). The statute provides that a person who has maintained an ongoing personal relationship with substantial continuity for at least one year, through interaction, companionship, interplay and mutuality may petition the court . . . for an order providing for reasonable visitation rights. If the court determines from clear and convincing evidence that visitation is in the best interests of the child and is otherwise appropriate in the case, the court shall grant visitation to the person having the relationship described in this subsection.

Id.

35. Leckie v. Voorhies, No. 60-92-06326 at 3-4 (Or., Lane County Cir. Ct. Apr. 5, 1993) (order granting summary judgment).
The court concluded that Michael had not shown that visitation was in the best interests of the children.\textsuperscript{36}

The willingness of the trial court to make an individualized determination not grounded in Michael's biological connection to Maya is consistent with Oregon's overall statutory scheme. Oregon statutes provide both that a semen donor has no parental rights based upon biology alone,\textsuperscript{37} and that a nonbiological parental figure has the opportunity to obtain custody or visitation under specific circumstances.\textsuperscript{38}

Although the appellate court did not specifically so state, its willingness to enforce Michael's contractual waiver and its failure to base its decision on the method of conception may have been influenced by its knowledge that Michael had his day in court and that any biological father who waived his rights as a parent would still receive a hearing under section 109.119(5).

This Oregon scheme is very close to the position advocated by the American Civil Liberties Union in its amicus brief in \textit{Thomas S. v. Robin Y.} \textsuperscript{39} The ACLU Brief uncoupled biology and parental rights by formulating a means of both enforcing parental rights for nonbiological "functional" parents and waiving parental rights for biological parents. Specifically, it argued that an agreement to forego parental rights should be enforceable to the extent that it deprives the biological father of the ability to use his biological connection to the child as a basis to obtain parental rights.\textsuperscript{40}

A biological father\textsuperscript{41} who had relinquished entitlement to parental rights but who met the definition of a "functional parent" could still petition for rights based upon that status.

According to the ACLU definition, a functional parent

\begin{itemize}
  \item \textsuperscript{36} Id. at 4.
  \item \textsuperscript{37} See OR. REV. STAT. § 109.239(1) (1993).
  \item \textsuperscript{38} See id. § 109.119(5).
  \item \textsuperscript{39} Amicus Brief of the American Civil Liberties Union, Thomas S. v. Robin Y., 618 N.Y.S.2d 356 (App. Div. 1994) (No. P3884/91) [hereinafter ACLU Brief].
  \item \textsuperscript{40} Id. at 17.
  \item \textsuperscript{41} The brief refers to semen donors, but its analytical framework is not dependent upon method of conception. \textit{Id.} Indeed, neither the majority nor the dissent in \textit{Thomas S.} based its analysis on the fact that Ry was conceived through donor insemination. The majority relied on biology irrespective of method of conception, and the dissent explicitly rejected differentiating on the basis of method of conception, basing its ruling instead on "[petitioner's] failure for almost 10 years to manifest a willingness to assume the responsibilities of parenthood or to be a parent." Thomas S. v. Robin Y., 618 N.Y.S.2d 356, 368 (App. Div. 1994).
\end{itemize}
(1) will have spent considerable time with the child at some point in the child's life, typically by living with the child for some significant period(s) of time; (2) will have for significant periods of time been responsible for and called upon to make day-to-day decisions in the child's existence; (3) will have played a significant role in the broader decisions about a child's upbringing (such as where the child would go to school, whether he or she would be brought up in a particular religion, who would provide medical care for the child, etc.); and (4) will have come to play this de facto parental role with the consent of the existing parent or parents who have legal custody of the child. Additionally amicus curiae believes that the view of the child as to whether the petitioner is regarded as a parent figure and as to whether the child wishes to continue the relationship, tempered by consideration of the child's maturity, should be considered. 42

This approach supports the enforceability of agreements while providing the leeway to ensure ongoing contact between a child and a biological father if, in spite of an agreement, the conduct of the parties supports application of the functional parent criteria. Applying its test to the trial court's findings in Thomas S., the ACLU argued that Tom had not met the criteria for functional parenthood. The trial court's findings in Leckie suggest that Michael could not have met this standard either.

III. THE PREEMPTIVE STRIKE: VOLUNTARY COURT TERMINATION OF A FATHER'S PARENTAL RIGHTS

Thomas S. and Leckie exemplify court intervention upon the breakdown of agreements between unmarried biological parents. Thomas S. illustrates that such agreements may be completely unenforceable. The validation of private ordering epitomized in Leckie may be dependent upon Oregon's unique statute providing a hearing to a functional parental figure claiming a right to visitation with a child, and it may therefore be of little precedential value in other states. A series of other paternity cases in planned lesbian families43 supports the urgency of developing a method of providing security to

42. ACLU Brief, supra note 39, at 26.
43. See, e.g., Jhordan C. v. Mary K., 224 Cal. Rptr. 530 (Ct. App. 1986); In re R.C., 775 P.2d 27 (Colo. 1989).
the parenting arrangements initially created in such families.

Every state provides some irrevocable mechanism for both biological parents to relinquish their legal status. The entire adoption system depends on the existence of such a mechanism. Every state also provides some mechanism for a parent to voluntarily relinquish parental rights when the other parent’s spouse is adopting the child. If the two biological parents could use existing statutes to facilitate relinquishment by one parent, then the status of the family as one without a legal father would be secure. States regularly permit adoption of a child by a single parent who is not biologically related to the child. Logically, then, a procedure should exist that results in a child having a single biologically related parent.

The dramatic range of state termination of parental rights statutes does not support this logical result. One type of statute makes this kind of private ordering impossible because termination is permitted only if filed by a state agency or in contemplation of adoption. Another type of statute requires cause or a high standard that cannot be met by consent of the parents alone before termination can be granted. Finally, when a statute on its face does not prohibit termination that will leave a child with one parent, courts have split on whether such a result is permissible.

Arkansas exemplifies those states with statutes making the private ordering I describe impossible. Arkansas statutes provide for privately filed termination of parental rights only in the context of an adoption proceeding. Otherwise, only the State Department of Human Services may file a termination proceeding, and it may do so only when it is “attempting to clear a juvenile for permanent placement” and when it has physical or legal custody of the child.

The Delaware statute forbids termination of only one parent’s rights, in the absence of a contemplated adoption, “unless the Court shall find the continuation of the rights to be terminated will be harmful to the child.” Desired private ordering is unlikely to meet this “harmful to the child” standard.

When a statute does not prohibit a termination that will leave a child with one parent, courts have split on whether such a result is permissible. In *In re A.B.*, 47 the trial court granted a petition, agreed to by both parents, to terminate the parental rights of the father. 48 The parents were not married. When the mother had become pregnant, the father suggested marriage; she refused and he then suggested an abortion. The petition was filed when the child was twenty-one months old. The father had seen the child only two or three times. The mother had thought that visits were not in the child’s best interests. The father said that the mother was very capable, that he did not think the child should be put between him and the mother, and that his own negative experience living with his single mother with some involvement from his father made him want to avoid this situation.

The trial court granted the termination to foreclose uncertainty in the future. The judge found that this “uncertainty about his role by continuing his legal status” would be a hardship on the mother, but that it would also create a hardship on the child as she got older and asked questions. The appellate court reversed, holding that

[parents]ental rights may not be terminated merely to advance the parents’ convenience and interests, either emotional or financial.

This case is not one where termination would advance the prospects of a proposed adoption and a child's resulting passage from instability to stability. While the vicissitudes of life place many children in one-parent circumstances, it is generally better for children to have two parents. Termination of the father’s parental rights here would cut an actual financial support line for his daughter and would sever the potential for future emotional succor. 49

In an earlier Wisconsin decision, the appellate court affirmed a trial court’s denial of a joint petition to terminate the father’s parental rights. 50 The child was thirteen and the

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parents had divorced when the child was under two. The mother wanted the termination because she wanted to be sure that if she died the father would not be able to obtain custody. The trial court found this, and the father's "inattention," insufficient reasons to terminate his parental rights in the absence of an available "substitute parent," citing the severance of inheritance rights from the father and his parents. The affirmance stated that no evidence has been offered that the child will benefit from the termination.

By contrast, a California court interpreted its statutes to permit a termination of one parent's rights in the absence of an expected adoption. The parents had separated before the child was born and the father had never seen his son. The mother received public assistance, and the state had filed against the father for reimbursement. The mother, with the father's consent, filed to terminate the father's parental rights on the grounds of abandonment. The trial court found factual support for the allegations, but denied the petition, stating that a child's best interests are served by having two parents. The trial court said that the father need not take an active role in the child's life if he did not believe that it was in the child's best interests, but that "terminating the parental rights of one parent under circumstances that result in the minor child having only one legal parent is contrary to public policy." It would be ludicrous to conclude that a parent who is ineffectual, unfit and unsuitable is better than no parent at all.

The appellate court reversed. It found that facilitating an imminent adoption was not required and stated that

[...]

The dissent answered the majority's notation concerning single-parent adoptions by saying that such adoptions are

52. Id. at 224.
53. Id. at 225 (Wallin, J., dissenting).
favored because a child with no parents at least gains one loving, nurturing parent. This has nothing whatever to do with the majority's decision that Joshua, who already has his mother as a parent but who apparently lives in straitened economic circumstances, should be deprived forever of the financial support of his father.\textsuperscript{54}

Ignoring the benefits of a secure one-parent home, and echoing the private responsibility for supporting children in a culture that consistently refuses to make such support a matter of public priority, the dissent stated that

\[\text{[a]llowing the custodial parent to obtain an order which has as its only practical effect the termination of the noncustodial parent's financial obligations opens new frontiers for negotiation in family law cases. Many noncustodial parents will be eager to make other concessions in return for the custodial parent's cooperation in obtaining their release from the financial obligations of child support. But the children who need that financial support, and the taxpayers who frequently will have to provide it, will be the ultimate losers.}\textsuperscript{55}\]

\section*{IV. Conclusion}

In gay and lesbian families, terminating a biological parent's parental rights is the complement to obtaining a second-parent adoption for a nonbiological parent. Second-parent adoption solidifies the parental status of the nonbiological parent who would otherwise be a legal stranger to the child, regardless of the intent and conduct of the parties.\textsuperscript{56} Termi-

\begin{itemize}
\item \textsuperscript{54} Id. at 226 (Wallin, J., dissenting).
\item \textsuperscript{55} Id. at 225-26 (Wallin, J., dissenting).
nation of parental rights solidifies the absence of parental status of a biological progenitor who would otherwise have the rights and responsibilities of parenthood, regardless of the intent and conduct of the parties. Both options are critical to the creation and preservation of secure families in which children can be assured that the reality of their family structure will not be destroyed by subsequent imposition of definitions of parenthood that do not comport with their experience.

It would be ironic, however, if the current restrictions on termination of a biological father’s parental rights were loosened only to the extent that such termination could occur when the biological mother’s partner was ready to adopt the child in a second-parent adoption, but not when the mother, either lesbian or heterosexual, was single. When the two biological parents agree that a child will be raised in a stable family structure without a legal father, implementation of that agreement through a termination of parental rights proceeding should be available. In states without explicit statutory restrictions on application of the statute to such a proceeding, courts should adopt the approach of the Joshua M. majority.

Statutory and doctrinal impediments to legal validation of families without fathers constitute more than a rejection of private family ordering. State control of the definition of parenthood, as long as it demands that every child have a legal father, furthers both the explicit and implicit rhetoric of the fathers’ rights movement that a father belongs at the head of every household as the ultimate authority figure. Professor Martha Fineman observes that “[t]he success of


57. See generally Martha Albertson Fineman, The Neutered Mother, the Sexual Family, and Other Twentieth Century Tragedies (1995).
single mothers would be a blow to traditional masculinity." Legal validation of single mothers would be an even greater blow.

The imperative to find a legal father for every child provides a convenient smokescreen, a diversion of energy and resources from the possible solutions to children's real problems. Targeting single motherhood, therefore, serves the dual purpose of perpetuating patriarchal ideology and exonerating the state from its obligation to provide children with at least minimally adequate financial well-being, health care, education and physical safety. The court decisions in *Leckie* and in *In re Joshua M.* thus do more than legitimate families without fathers. By validating such families, the decisions implicitly demand that society look elsewhere for a solution to the real problems facing today's children.

58. *Id.* at 205.