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A Child's Right to Protection from Transfer Trauma in a Contested Adoption Case

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A CHILD'S RIGHT TO PROTECTION FROM TRANSFER TRAUMA IN A CONTESTED ADOPTION CASE

SUELLYN SCARNECCHIA*

On August 2, 1993, I arrived at the home of Jan, Robby, and Jessica DeBoer¹ a few hours before the transfer. At 2:00 P.M. I would carry Jessica out of her home and deliver her to the parents who had won the case,² her biological mother and father. This task probably would have been easier had I not spent eight days in the trial court listening to the experts explain that this transfer from one set of parents to another would harm Jessica.³ It would have been easier had I not recently obtained affidavits from other experts to persuade the United States Supreme Court to delay the transfer until the Court could consider the case.⁴ The experts confirmed what I felt in my heart and what I saw in the faces and heard in the voices of thousands who protested the transfer—losing the parents she loved as her own would hurt Jessica. It would hurt her deeply now, and it might hurt her in various ways as she matured.⁵ Yet, I carried her outside that day, as she

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1. Jessica's name was changed by her birth parents after she left the DeBoers. She is now known as Anna Schmidt. Michele Ingrassia & Karen Springen, She's Not Baby Jessica Anymore, NEWSWEEK, Mar. 21, 1994, at 60. For a detailed summary of the factual and procedural history of the Baby Jessica case, see generally Joan H. Hollinger, Adoption and Aspiration: The Uniform Adoption Act, the DeBoer-Schmidt Case, and the American Quest for the Ideal Family, 2 DUKE J. GENDER L. & POL'Y 15 (No. 1 1995).

2. The Supreme Court of Michigan denied the DeBoers custody of Jessica based on the rights of her biological father, who had never consented to the adoption. In re Clausen (DeBoer v. Schmidt), 502 N.W.2d 649 (Mich. 1993). Her biological mother had not named the correct man as the father at the time of the adoption. Id. at 652.

3. The trial judge granted the DeBoers custody of Jessica; his opinion was later reversed due to lack of jurisdiction and the DeBoers' lack of standing. Justice Levin of the Michigan Supreme Court cited the trial judge's conclusion in his dissent: "We had different degrees of testimony from the experts. All the way from permanent, serious damage . . . down to the child would recover in time. But every expert testified that there would be serious traumatic injury to the child at this time." In re Clausen, 502 N.W.2d at 669 (Levin, J., dissenting).


5. The removal of a child from an established family has been likened to kidnapping. Jeree H. Pawl, Ph.D., Director of Infant-Parent Program at San Francisco General Hospital, who has more than thirty years of experience treating young children and their parents, wrote in her affidavit:

Jessica, in being removed from her current "parents," will be transported into a nightmare and it is one which will never end. The feelings she will experience cannot be resolved. Perhaps the most compelling way to try to imagine it is to think of it as a kidnapping. Legally it is certainly not a kidnapping, but psychologically, that is exactly what it is from the point of view of Jessica. . . . The most impor-
screamed for her mommy and daddy, and I delivered her to the people she
would need to learn to love as her new parents.

This introduction and the accompanying brief describe my argument
that a child like Jessica has a right to due process protections when she is
likely to suffer transfer trauma caused by a change of custody. Jessica was
not protected by the legal system. This is an argument meant to benefit
other children facing the loss of their established families.

Unfortunately, many children, including those who suffer abuse or
neglect and those whose parents die, experience separation from or loss
of their parents. When parents die, however, children often stay with their
family, comforted by the familiarity that grandparents, cousins, pets, and
well-known places provide. Children usually have the opportunity to re-
member their parents with love. In addition, children separated from parents
due to abuse or neglect often can visit their parents, and many children in
foster care receive services to help them cope with the separation, as well as
any former abuse, from their parents. In Jessica’s case, the DeBoers did not
die, nor did they abuse or neglect her. They were willing and able to con-
tinue their relationship with her. Yet, the legal system imposed on Jessica
the trauma associated with the death of her parents and deemed that her
interests were irrelevant to the case.

Excerpt from...
I do not recommend that other attorneys experience this tragedy. That heart-breaking day, however, motivated me and many others into action. We resolved that more children should not suffer Jessica's fate. Those concerned now focus media and public attention on cases involving the rights of children. Others advocate for constitutional amendments to provide a legal safety net for children. And many are asking state legislatures to eliminate the gaps in adoption laws that lead to such turmoil in children's lives.

Better legislation will prevent some of these tragic cases, but legislative change is not a panacea. Can we prevent a mother from lying about the identity of the birth father? Can we ensure that attorneys follow required procedures in every case? Will agencies and courts adequately pursue fathers' identities when required? There are fifty different state adoption systems and a variety of ways in which an unwed biological father's interests may be thwarted by mothers, attorneys, adoptive parents, or agencies. Litigation continues to pit the rights of a child against the rights of his or her birth father. Since Jessica left Michigan to live in Iowa, other state supreme courts have decided or are poised to decide: whose child is this?

10. Hear My Voice: Protecting Our Nation's Children (HMV) was formed on August 2, 1993; the organization was initially known as the DeBoer Committee for Children's Rights (DCCR). Since its formation, HMV has grown nationwide to include 56 chapters in 37 states. The organization engages in advocacy and support for families involved in cases in which courts refuse to consider children's interests. Employing the media and public action, HMV has kept the issue of children's rights in the public consciousness.

11. The National Task Force for Children's Constitutional Rights and the National Committee for the Rights of the Child are two organizations which advocate for constitutional amendments.

12. Several state legislatures have reformed their adoption statutes since Jessica's transfer. Notably, in August of this year, the National Conference of Commissioners on Uniform State Laws adopted a Uniform Adoption Act for submission to the states. The Act addresses many of the issues raised in cases like Jessica's. See generally UNIF. ADOPTION ACT (1994). For more information on the Uniform Adoption Act, see Hollinger, supra note 1, at 15. See also Act of May 12, 1994, § 2, 1994 Iowa Acts H.F. 2377 (to be codified at IOWA CODE § 144.12A) (establishing a paternity registry for birth fathers to register their right to notice if their child is placed for adoption); Act of May 12, 1994, § 14, 1994 Iowa Acts H.F. 2377 (to be codified at IOWA CODE § 600A.4) (providing criminal penalties for a biological mother who falsifies the father's identity on adoption papers).

13. In the Baby Jessica case, the attorney for the prospective adoptive parents obtained the birth mother's release of parental rights before the statutory waiting period, 72 hours, had passed. In re B.G.C., 496 N.W.2d at 243. The attorney for the prospective adoptive parents in the Baby Richard case failed to inform the court that the birth mother knew the identity of the birth father but that she refused to disclose it. In re Doe, 638 N.E.2d 181, 182 (Ill.), cert. denied, 115 S. Ct. 499 (1994). In the Baby Emily case, the attorney for the prospective adoptive parents learned of the father's intent to contest the adoption before the birth of the baby, but failed to reveal this information to the birth parents and the court. In re Adoption of Baby E.A.W. (G.W.B. v. J.S.W.), 647 So. 2d 918, 930-31 (Fla. Dist. Ct. App. 1994) (Pariente, J., concurring).

Baby Richard\textsuperscript{15} and Baby Emily\textsuperscript{16} are examples of thwarted father cases that have received significant media attention; however, other states have also reached decisions on this issue.\textsuperscript{17} These state decisions are based solely

15. In Illinois, Baby Richard’s birth mother placed him for adoption, claiming that the birth father was unknown. She told the birth father that the baby had died. The birth parents had been living together during much of the pregnancy, but separated shortly before the birth. When the birth father learned of the adoption, he came forward to contest it. Because he had not come forward during the time limits under Illinois law, the trial court granted the adoption over his protests. \textit{In re Doe}, 627 N.E.2d 648, 651 (Ill. App. Ct. 1993), \textit{rev’d}, 638 N.E.2d 181 (Ill.), \textit{cert. denied}, 115 S. Ct. 499 (1994). The Illinois Court of Appeals affirmed and stated:

Fortunately, the time has long past [sic] when children in our society were considered the property of their parents. Slowly, but finally, when it comes to children even the law has rid itself of the \textit{Dred Scott} mentality that a human being can be considered a piece of property “belonging” to another human being. To hold that a child is the property of his parents is to deny the humanity of the child. . . . In an adoption, custody or abuse case, however, the child is the real party in interest . . . . [It is his] best interest and corollary rights that come before anything else, including the interests and rights of biological and adoptive parents.

\textit{Id.} at 651-52. For a similar analysis, see Bennett v. Jeffreys, 356 N.E.2d 277 (N.Y. 1976).

The Illinois Supreme Court reversed and held that the child’s best interests “should never have been reached and need never have been discussed” by the court below. \textit{In re Doe}, 638 N.E.2d at 182. The U.S. Supreme Court denied certiorari to both Baby Richard and his prospective adoptive parents. Baby Richard v. Kirchner, 115 S. Ct. 499 (1994); Doe v. Kirchner, 115 S. Ct. 499 (1994). The birth father petitioned the Illinois Supreme Court for a writ of habeas corpus, and, on the same day that oral arguments were heard, the Illinois Supreme Court issued the writ of habeas corpus ordering the Does to surrender custody of Baby Richard. \textit{In re Kirchner}, No. 78101, 1995 WL 80012, at *1 (Ill. Feb. 28, 1995) (per curiam).

In an attempt to block the immediate transfer, counsel for Baby Richard and the Does applied for a stay in the U.S. Supreme Court. Justice Stevens denied the stay, O’Connell v. Kirchner, 115 S. Ct. 891 (1995), and, upon remplication, the full court denied the stay, O’Connell v. Kirchner, 115 S. Ct. 1084 (1995), with Justices O’Connor and Breyer dissenting. The birth father did not demand immediate transfer of the child; counsel for Baby Richard and the Does are considering filing a new petition for writ of certiorari to the U.S. Supreme Court, requesting review of the Illinois Supreme Court’s order of transfer. Telephone Interview with Laura A. Kaster, Attorney, Jenner & Block (Feb. 27, 1995) (Jenner & Block presently represents the Does).

16. The Baby Emily case presented similar issues to the Florida Court of Appeals. On first hearing, a panel of the court reversed the adoption and ordered the child transferred to her birth father because he had not properly received an opportunity to consent to the adoption. \textit{In re Adoption of Baby E.A.W. (G.W.B. v. J.S.W.)}, No. 93-3040, 1994 Fla. App. LEXIS 6137 (Fla. Dist. Ct. App. June 22, 1994), \textit{withdrawn}, 647 So. 2d 918 (Fla. Dist. Ct. App. 1994) (en banc). The court granted the adoptive parents’ request for rehearing en banc and affirmed the adoption, finding that the birth father had in fact abandoned the baby and his consent to the adoption was not required. \textit{In re Adoption of Baby E.A.W. (G.W.B. v. J.S.W.)}, 647 So. 2d 918, 919-20 (Fla. Dist. Ct. App. 1994) (en banc). The members of the Court of Appeals, however, struggled with the question of what weight \textit{emotional} abandonment by the birth father should be given in determining “abandonment” under the Florida Adoption Code. The court certified the following question to the Florida Supreme Court:

\textbf{IN MAKING A DETERMINATION OF ABANDONMENT AS DEFINED BY SECTION 63.032(14), FLORIDA STATUTES (SUPP.1992), MAY A TRIAL COURT PROPERLY CONSIDER LACK OF EMOTIONAL SUPPORT AND/OR EMOTIONAL ABUSE OF THE FATHER TOWARD THE MOTHER DURING PREGNANCY AS A FACTOR IN EVALUATING THE “CONDUCT OF A FATHER TOWARDS THE CHILD DURING PREGNANCY.”}

\textit{Id.} at 924.

17. The adoption of four-year-old Kassen Roth is at issue in New Mexico. The New Mex-
on the father’s actions, without an analysis of the impact of the decision on the child. I argue, however, that a determination in a contested adoption cannot be made without meaningful reference to the impact of the decision on the child.

When an unwed biological father has not consented to an adoption, some state courts have interpreted the constitutional rights of those fathers as requiring the denial of the adoption and immediate transfer of the child to the father. These courts fail to consider that the transfer affects the child. In response to such decisions, attorneys representing the adoptive parents and children argue that the father’s rights are not absolute. Citing Supreme Court cases interpreting the rights of unwed fathers, they claim that courts should balance children’s rights against any rights of the fathers. The Supreme Court, however, has never recognized a child’s independent right to maintain familial relationships with nonbiological parents and has previously declined to decide the issue. Thus, attorneys for adoptive parents and chil-

ico Court of Appeals reversed the trial court’s grant of the adoption, finding that the birth father had been thwarted in his efforts to contest the adoption at the earliest stages of the process and had not abandoned Kassen. In re Adoption of J.J.B. (Roth v. Bookert), 868 P.2d 1256, 1258-59 (N.M. Ct. App. 1993), cert. granted, 869 P.2d 820 (N.M. 1994). The New Mexico Supreme Court heard oral arguments on the case in June, 1994; a decision is pending.

The Arizona Supreme Court affirmed an adoption in a similar case, finding that the birth father had abandoned the child. In re Juvenile Severance Action No. 5-114487 (Father in Juvenile Severance Action No. 5-114487 v. Adam), 876 P.2d 1121 (Ariz. 1994). The court employed a very liberal definition of abandonment. Although the court did not find that a child had an independent right to have his interests considered, the justices noted the potential harm to the child in requiring a transfer of custody to the birth father. Id. at 1133.

In a case strikingly similar to Baby Richard, the adoption of Michael H. has been contested by his birth father for over four years. Adoption of Michael H. (John S. v. Mark K.), 29 Cal. Rptr. 2d 251, 254 (Ct. App.), review granted, 877 P.2d 762 (Cal. 1994). 18. The concurring opinion of Judge Pariente in the Baby Emily case articulates the court’s inability to consider the child’s interests, even though “the record in this case [indicates] that the child may possibly suffer serious psychological damage upon being removed from the only home she has ever known.” In re Baby E.A.W., 647 So. 2d at 925 (Pariente, J., concurring).

19. See, e.g., In re Doe, 638 N.E.2d 181 (Ill.) (holding that father’s interest in child was sufficient to require his consent for adoption and that child’s interests were irrelevant), cert. denied, 115 S. Ct. 499 (1994); In re B.G.C., 496 N.W.2d 239 (Iowa 1992) (holding that parental rights cannot be terminated solely because of child’s best interests); In re Clausen (DeBoer v. Schmidt), 502 N.W.2d 649 (Mich. 1993) (holding that child has no right to hearing on her own interests in custody case). But see In re Juvenile Severance Action No. 5-114487 (Father in Juvenile Severance Action No. 5-114487 v. Adam), 876 P.2d 1121 (Ariz. 1994) (holding that unwed father must persistently and vigorously assert legal rights to obtain full constitutional protection of parent-child relationship).

20. Lehr v. Robertson, 463 U.S. 248 (1983) (unwed father who had not established paternity of two-year-old child not permitted to vacate child’s adoption); Quillen v. Walcott, 434 U.S. 246 (1978) (unwed father who had no relationship with child not permitted to prevent child’s adoption); see also Michael H. v. Gerald D., 491 U.S. 110 (1989) (unwed biological father’s due process rights not infringed upon by legal presumption that child born to married woman living with husband is child of the marriage); Caban v. Mohammed, 441 U.S. 380 (1979) (distinguishing the rights of unwed fathers who participate in the rearing of their children from those who do not).

dren argue for recognition of the child’s right to protect his or her existing relationships with nonbiological parents.

In addition to this argument that children have the right to protect their established families, I offer the transfer trauma theory. This argument is based on a child’s right to due process when state action, in the form of a transfer of custody, is likely to cause substantial harm to the child. It is based on the predicted harm to the child, the violation of the child’s own liberty, not on the child’s right to protect an established family relationship. In short, I argue that children have a constitutionally protected right to liberty in the form of security from state-imposed harm, including substantial harm to their psychological and emotional welfare.

While representing the DeBoers, I repeatedly thought about the fact that if Jessica were an adult, she would have a right to a hearing considering her interests. Justice Levin of the Michigan Supreme Court also recognized that Jessica’s inability to speak for herself denied her the legal process that any adult would demand. The state deprives adults of their family and liberty under only two circumstances: when involuntarily committed to a mental health institution and when incarcerated. Even in these instances, adults may correspond with the outside world, visit with family members, and perhaps return home. The state, however, permanently isolates children in Jessica’s position from the homes they have known and loved. Some might blame the Schmidts for denying Jessica contact with the DeBoers after the transfer of custody. But it is the legal system that should take responsibility for ensuring the availability of continued contact.

The Child Advocacy Law Clinic at the University of Michigan has developed a legal argument concerning the constitutional rights of a child in a contested adoption. This argument has been presented before the United States Supreme Court, as well as the Florida and Illinois Supreme Courts.

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22. The term “transfer trauma” was used to describe the harm a patient was likely to suffer if moved from one nursing home to another. O’Bannon v. Town Court Nursing Ctr., 447 U.S. 773, 784, 802-03 (1980).

23. Justice Levin wrote:

If the danger confronting this child were physical injury, no one would question her right to invoke judicial process to protect herself against such injury. There is little difference, when viewed from the child’s frame of reference, between a physical assault and a psychological assault.

... It is only because this child cannot speak for herself that adults can avert their eyes from the pain that she will suffer.

In re Clausen, 502 N.W.2d at 689 (Levin, J., dissenting) (emphasis added).

24. The Schmidts have denied the DeBoers contact with Jessica. However, they are under no legal obligation to consider the needs of the child for continued contact with her first family. The court gave them “ownership.” If they cannot or will not permit contact between the DeBoers and the child, because of distrust, hatred, discomfort, fear, or any other reason, they are not compelled by any law to do so. And, while she is a minor, Jessica cannot assert her own right to contact the DeBoers.

25. See Appendix at 48 (brief at i).

We hope the argument will be of interest and practical value to attorneys representing children in such cases. Children involved in contested adoptions have the right to be considered persons who may be significantly affected by the loss of their established families. It is imperative that this children's right be explicitly recognized and aggressively protected.

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APPENDIX

INTRODUCTION

The following is a sample argument,¹ in the form of a brief² directed to the United States Supreme Court, appealing the decision of the Supreme Court of State X which ordered the transfer of a child³ from his prospective adoptive family to his biological family due to the birth father's failure to consent to the adoption. The birth mother had consented to the adoption.

1. The sample arguments presented have been developed with the assistance of students at the University of Michigan Law School, including Kate Northrup, Mark Carbonell, John Clappison, Lisa O'Malley, Kristina Entner, Anne Auten, Kristin Donoghue, Keri Goldstein, Lara Hutner, Kacy Kleinhans, David Schwartz, Gregory Stanton, and Luis Fuentes-Rohwer. Professor Richard H. Pildes has provided helpful advice. Professor Joan H. Hollinger has worked with me on various forms of the argument featured in the appendix and her assistance has been invaluable.

2. As this appendix is written in brief format, citations are included in the text and follow the typeface conventions used by practitioners.

3. For the purposes of this brief, I have called this hypothetical child "John." However, I have not created additional hypothetical facts. I note throughout the brief where further development is needed.
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ARGUMENT

I. FAILURE TO BALANCE THE RESPECTIVE RIGHTS OF UNWED FATHERS AND CHILDREN VIOLATES THE DUE PROCESS RIGHTS OF CHILDREN.

The Supreme Court of X has expanded the rights of unwed fathers in contested adoption cases beyond the authority provided by the previous decisions of this Court and, as a result, has violated the Constitutional rights of John. The courts of other states are divided over the issue of how a father's right to a child should be balanced against the child's right to stay with his adoptive parents. Compare In re Juvenile Severance Action No. S-114487 (Father in Juvenile Severance Action No. S-114487 v. Adam), 876 P.2d 1121 (Ariz. 1994) (holding that unwed father must persistently and vigorously assert legal rights to obtain full constitutional protection of parent-child relationship) and In re Adoption of Reeves, 831 S.W.2d 607 (Ark. 1992) (holding that a putative father with substantial relationship to child may be denied notice of an adoption proceeding if he fails to register with the state's putative father registry) and Appeal of H.R. (In re Baby Boy C.), 581 A.2d 1141 (D.C. 1990) (preference for fit unwed father who has "grasped his opportunity interest" may be overridden only by clear and convincing evidence that it is in the child's best interest to be placed with nonrelatives) and In re Adoption of Baby Boy W., 831 P.2d 643 (Okla. 1992) (holding that child can be adopted without consent of birth father if he fails to exercise parental rights and duties) with In re Dog, 638 N.E.2d 181 (Ill.) (holding that father's interest in his child was sufficient to require his consent for adoption), cert. denied, 115 S. Ct. 499 (1994) and In re B.G.C., 496 N.W.2d 239 (Iowa 1992) (holding that termination of parental rights requires statutory grounds, not solely consideration of the child's best interest) and In re Clausen (DeBoer v. Schmidt), 502 N.W.2d 649 (Mich. 1993) (holding that biological parents' right to custody is not to be disturbed absent showing of parental unfitness, irrespective of child's preferences) and In re Adoption of J.J.B. (Roth v. Bookert), 868 P.2d 1256 (N.M. Ct. App. 1993) (holding that termination of parental rights on grounds of child's interest alone, absent showing of parental unfitness, does not satisfy constitutional due process), cert. granted, 869 P.2d 820 (N.M. 1994). This Court should provide guidance as X and other states struggle with striking the appropriate balance between competing intrafamily interests.
A. A Child Who is at Risk of Losing His Established Family Relationships Has Constitutionally Protected Rights.

In reversing an order for adoption in a similar case, the Illinois Supreme Court stated:

[T]he appellate court, wholly missing the threshold issue in this case, dwelt on the best interests of the child. Since, however, the father's parental interest was improperly terminated, there was no occasion to reach the factor of the child's best interests. That point should never have been reached and need never have been discussed.

In re Doe, 638 N.E.2d at 182 (emphasis added); see also In re B.G.C., 496 N.W.2d at 245 (holding that parental rights cannot be terminated solely because of child's best interest); In re Clausen, 502 N.W.2d at 665 (holding that child has no right to hearing on her own best interests in custody case). Under these decisions, a child of a legally defective adoption must relinquish completely his relationship with his established family with no reference to how the change of custody will affect him. This outcome treats the child as an object to be possessed and not as a person under the Constitution.1 A child is a person with constitutional rights in the context of decisions concerning his custody.

1. The child has a right to due process under the Fourteenth Amendment.

John’s status as a minor does not deprive him of constitutional protections afforded adults. “Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights.” Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 74 (1976). “[N]either the Fourteenth Amendment nor the Bill of Rights is for adults alone.” In re Gault, 387 U.S. 1, 13 (1967). This Court must recognize that a child faced with the imminent loss of everyone he knows is a person with due process rights.

The child in this case has two different grounds for asserting a right to due process. First, John’s liberty, in the most traditional sense, is at stake when it is argued that the court should remove him from his home and family, and physically move him somewhere else. The Fourteenth Amendment protects a citizen’s right to be free from state-imposed removal from

1. In his dissent to In re Clausen, Justice Levin wrote:

I would agree with the majority’s analysis if the DeBoers had gone to Iowa, purchased a carload of hay from Cara Clausen [Schmidt], and then found themselves in litigation in Iowa with Daniel Schmidt . . . .

But this is not a lawsuit concerning the ownership, the legal title, to a bale of hay. This is not the usual A v. B lawsuit. . . .

There is a C, the child, “a feeling, vulnerable, and [about to be] sorely put upon little human being” . . . .

In re Clausen, 502 N.W.2d at 668-69 (Levin, J., dissenting) (quoting Lemley v. Barr, 343 S.E.2d 101, 104 (W. Va. 1986)).
one’s home without due process of law. See U.S. Const. amend. XIV. The second ground for claiming due process protection for this child is his protected liberty interest in his relationship with his adoptive parents, see discussion infra part I.A.4. Thus, both John’s right to live free from state-imposed infringements on his physical liberty without due process of law and his right to protect his family relationship with his adoptive parents are at stake here.

2. The child is likely to suffer grievous harm if his relationship with his adoptive family is terminated.

The reversal of John’s adoption by the Supreme Court of X, with no acknowledgment of his interests, will require this child to lose his established family. In a similar case, a Michigan trial court concluded at the close of a hearing on the best interests of the child that separation from the child’s established family would be traumatic. Later, the Michigan Supreme Court reversed the trial court opinion for lack of jurisdiction and standing; however, the trial judge’s opinion was cited with approval in the dissent: “[w]e had different degrees of testimony from the experts. All the way from permanent, serious damage . . . down to the child would recover in time. But every expert testified that there would be serious traumatic injury to the child at this time.” In re Clausen, 502 N.W.2d at 669 (Levin, J., dissenting). Justice Levin further articulated the risk of minimizing a child’s psychological injury:

If the danger confronting this child were physical injury, no one would question her right to invoke judicial process to protect herself against such injury. There is little difference, when viewed from the child’s frame of reference, between a physical assault and a psychological assault.

The law . . . has recognized that persons who suffer psychological injury are entitled to the protection of the law. It is only because this child cannot speak for herself that adults can avert their eyes from the pain that she will suffer.

Id. at 689. The risk to John’s psychological and emotional welfare posed by this contested adoption mandates protection of his constitutional right to security from state-imposed harm.

3. The threat to the child’s well-being posed by a judicial determination that does not take his interests into account triggers his Fourteenth Amendment right to due process.

A child has a Fourteenth Amendment liberty interest in avoiding the trauma caused by a state-imposed removal from his established family. This Court has previously recognized that, when the state physically transfers an

individual from one residence to another and the individual is in danger of suffering harm due to that transfer, the individual has a due process right to be heard before the transfer occurs. See *Addington v. Texas*, 441 U.S. 418 (1979); see also *Vitek v. Jones*, 445 U.S. 480, 488 (1980) (holding that "grievous loss" in transfer to mental hospital entitles prisoner to the procedural protections of the opportunity for notice and an adequate hearing before transfer).

In *Addington*, appellant's mother filed a petition for his indefinite and involuntary commitment to a mental institution. The Texas Supreme Court concluded that application of a preponderance of the evidence standard was sufficient to commit appellant. *Addington*, 441 U.S. at 422. This Court reversed, holding that it would deprive appellant of procedural due process to commit him merely on the basis of the preponderance standard. Id. at 432. Appellant's due process right stemmed from the adverse social consequences he would suffer if committed. "Whether we label this phenomena 'stigma' or choose to call it something else is less important than that we recognize that it can occur and that it can have a very significant impact on the individual." Id. at 426. On these grounds, the Court held that appellant had a due process right to at least a clear and convincing finding that he should be institutionalized. Id. at 433.

While the Court did not rule on the validity of the "transfer trauma" claim in *O'Bannon v. Town Court Nursing Ctr.*, 447 U.S. 773 (1980),3 Justice Blackmun in his concurring opinion acknowledged that an individual who may suffer trauma as a result of being transferred from his or her state-appointed home is entitled to a due process hearing. He wrote that:

[A] governmental decision that imposes a high risk of death or serious illness on identifiable patients must be deemed to have an impact on their liberty. . . . [W]here such drastic consequences attend governmental action, their foreseeability, at least generally, must suffice to require input by those who must endure them.

Id. at 803 (Blackmun, J., concurring) (footnote omitted). After noting that the threat of transfer trauma could require due process protections, Justice Blackmun concurred in the holding that the plaintiffs did not have a right to a pre-transfer hearing. However, he based his concurrence on the plaintiffs' insufficient proof.4

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3. The senior citizen plaintiffs argued that they had a right to a hearing on their interests before being transferred from their nursing home to another due to decertification of their home by Medicaid. According to experts, the patients would suffer "transfer trauma" if moved; they argued that this harm was state-imposed. The Court held that the trauma, if valid, only resulted indirectly from the regulations. *O'Bannon*, 447 U.S. at 788-90.

4. He reasoned that the plaintiffs' proof of transfer trauma had not been fully developed below, *O'Bannon*, 447 U.S. at 802 n.10 (Blackmun, J., concurring), and found that they had not "establish[ed] that transfer trauma is so substantial a danger as to justify the conclusion that transfers deprive them of life or liberty." Id. at 804.
The term "transfer trauma" is appropriate for the case at hand. Distinguishable from O'Bannon, the transfer trauma suffered by a young child when his home and family are at stake is predictable and substantial. John is likely to suffer significant harm as a direct result of government action if he is taken from his established adoptive family. If the child is transferred now, he will be cut off from everyone he has known throughout his life and from every well-known place. He is too young to call or visit on his own, and as a result, he will suffer a complete loss of his established family. State action never isolates adults so completely from everyone they know and love. Even an incarcerated or institutionalized adult is typically afforded the right to communicate and perhaps to visit with family members. A child must be afforded a hearing in which his particular interests are considered, before he is forced to suffer such a trauma.

4. The child has a constitutionally protected interest in protecting his established familial relationships with his adoptive family.

Apart from his right to protection from the state-imposed harm caused by a change of custody, John has a separate and distinct right to protect his established family relationships. This Court has previously declined an opportunity to determine whether a child has an independent due process right to protect his familial relationships. As the issue remains unresolved, this case presents an opportunity to recognize a child's right to protect his established relationships. Here, John has never lived in a unified biological family and was voluntarily placed for adoption by his birth mother. In addition, the adoptive parents had every expectation of being the child's permanent family.

From the child's perspective, his relationship with his adoptive family is no different from the most traditional family relationships protected in the past from state interference by this Court. "There does exist a 'private realm of family life which the state cannot enter,' . . . that has been afforded both substantive and procedural protection." Smith v. Organization of Foster Families for Equality & Reform, 431 U.S. 816, 842 (1977) (citations and footnotes omitted). This Court should recognize that John has at least an equal right to protection of his established family as his birth father has to "possession" of the child.

5. Author's Note: Citations to proof of harm in the record below, expert affidavits, or secondary sources should be added here.

6. "We have never had occasion to decide whether a child has a liberty interest, symmetrical with that of her parent, in maintaining her filial relationship. We need not do so here because, even assuming that such a right exists, [the child's] claim must fail." Michael H. v. Gerald D., 491 U.S. 110, 130 (1989).
B. The Constitutional Rights of an Unwed Father Do Not Support an Absolute Right to Veto an Adoption.

In denying a Petition for Rehearing in the case of In re Doe, Justice Heiple of the Illinois Supreme Court wrote:

In 1972, the United States Supreme Court, in the case of Stanley v. Illinois, ruled that unmarried fathers cannot be treated differently than unmarried mothers or married parents when determining their rights to the custody of their children. The courts of Illinois are bound by that decision. In re Doe, 638 N.E.2d 181, 188 (Ill.) (Heiple, J., supplemental opinion in support of denial of rehearing) (citations omitted), cert. denied, 115 S. Ct. 499 (1994). The Illinois court misstated the holding in Stanley, which merely gave Mr. Stanley, who had a long-term relationship with his children, the right to notice and a hearing before the children's removal from his custody. Stanley v. Illinois, 405 U.S. 645, 658 (1972). In the instant case, the X court also relied heavily on the constitutional rights of the father to deny an adoption. This analysis ignores the Court's decisions subsequent to Stanley, each clearly treating unmarried fathers differently than other parents in the context of adoptions. See Lehr v. Robertson, 463 U.S. 248 (1983) (holding that unwed biological father was required to register with putative fathers' registry to preserve his right to notice of the adoption proceeding); Caban v. Mohammed, 441 U.S. 380, 392 (1979) (distinguishing the rights of unwed fathers who participate in the rearing of their children from those who do not); Quilloin v. Walcott, 434 U.S. 246 (1978) (upholding statute preventing unwed father from blocking adoption unless he had legitimated the child); Cf. Michael H. v. Gerald D., 491 U.S. 110, 127, 129-30 (1989) (holding that due process rights of unwed biological father are not infringed upon by legal presumption that child born to married woman living with husband is a child of the marriage). These cases established that while fathers may have certain rights in the adoption process, they do not always have an absolute right to veto the adoption.

The facts in Lehr are particularly illuminating. The unwed biological father claimed that the biological mother concealed the whereabouts of the newborn child. Lehr, 463 U.S. at 269 (White, J., dissenting). The biological father claimed that he continued his efforts to locate the child, with little success, and when he did finally locate her, he visited her to the extent the mother allowed. Id. After achieving "sporadic success" in finding the child during the child's first two years of life, he was unable to contact her at all. Id. A detective agency then helped him locate the child, and by that time, the mother had married. He allegedly offered to provide financial assistance for the child and to set up a trust for her, but the mother refused. She also refused to allow the biological father to see the child and soon commenced an adoption action against him. Id.

The Court held that the biological father's relationship with his daughter did not trigger constitutional protection where the father had "never established any custodial, personal, or financial relationship with her." Lehr.
Indeed, the Court denied the father's right to intervene in the adoption despite the fact that the biological mother had attempted to conceal the child's whereabouts and had allegedly refused the father's offer of financial support. Id. at 269. This Court has clearly distinguished "between a mere biological relationship and an actual relationship of parental responsibility." Id. at 259-60.

The necessity of an existing relationship to trigger constitutional protection was reinforced by the Court in Quilloin v. Walcott, 434 U.S. 246 (1978). The Quilloin Court distinguished the father's situation from the father in Stanley, noting that in Quilloin the biological father had never been a member of the child's family unit. Id. at 253. The Court placed great importance on the fact that this was not "a case in which the proposed adoption would place the child with a new set of parents with whom the child had never before lived. Rather, the result of the adoption in this case is to give full recognition to a family unit already in existence . . . ." Id. at 255. In Quilloin, the best interests of the child could be considered, because no relationship existed between the unwed father and the child. "Whatever might be required in other situations, we cannot say that the State was required in this situation to find anything more than that the adoption . . . [was] in the 'best interests of the child.'" Id.

Other state courts have granted an adoption over the objection of a thwarted biological father who has established good cause for not having acted sooner or more effectively to establish an actual relationship with his child. See, e.g., In re Adoption of Reeves, 831 S.W.2d 607 (Ark. 1992) (holding that a putative father with substantial relationship to child may be denied notice of an adoption proceeding if he fails to register with the state's putative father registry); Appeal of H.R. (In re Baby Boy C.), 581 A.2d 1141 (D.C. 1990) (preference for fit unwed father who has "grasped his opportunity interest" may be overridden only by clear and convincing evidence that it is in the child's best interest to be placed with nonrelatives); In re Adoption of Baby Boy W., 831 P.2d 643 (Okla. 1992) (failure to provide child support, even in absence of court order, was sufficient to terminate father's parental rights).

Most recently, the Arizona Supreme Court in In re Juvenile Severance Action No. S-114487 (Father in Juvenile Severance Action No. S-114487 v. Adam), 876 P.2d 1121 (Ariz. 1994), allowed the termination of an unwed father's parental rights to free a child for adoption by applying a liberal definition of "abandonment" to the case. The court relied heavily on Lehr.
The ultimate question must be whether the father has, in fact, created a relationship. Even if this father had taken all possible steps to bond with his child and failed, Lehr’s message is that to protect his interest, and the child’s well-being, he must do more. For in the child’s eyes, a valiant but failed attempt to create a relationship means little. Severing long-established bonds with others is equally harmful to the child, regardless of whether the father first attempted to create a relationship.

In re Juvenile Severance Action No. S-114487, 876 P.2d at 1133. Note that this reading of Lehr balances the rights of the child against the rights of the father. The Lehr line of cases perhaps can be read to imply that the interests of the child must be weighed against those of the unwed father.

Finally, the Uniform Adoption Act allows termination of even a thwarted father’s parental rights. Unif. Adoption Act § 3-504(c)-(e) (1994). Those rights may be terminated if the adoptive parents can prove, by clear and convincing evidence, that failure to terminate would be detrimental to the child. Id. § 3-504(d). “Detrimental” is defined through the consideration of various factors,8 including the comparative fault of the parties involved.

The Supreme Court of X improperly overstated respondent’s right to block the adoption at issue in this case. The constitutional rights of an unwed father do not include the absolute right to veto an adoption. However, until this Court explicitly recognizes a child’s right to due process in this setting, other courts will continue to exaggerate the relative weight to be given an unwed father’s rights. The interests of the child must be weighed against those of the unwed father.

C. The Constitutional Rights of an Unwed Father Do Not Provide an Absolute Right to Custody of a Child if an Adoption Fails.

States have treated an adoption decision, which requires the termination of biological parents’ rights, differently than a custody decision, permitting the trial court to consider the prospective adoptive parents as the child’s custodial parents even after an adoption has failed. See, e.g., Cal. Fam. Code § 3041 (West 1994); In re Bistany, 145 N.E. 70 (N.Y. 1924) (denying adoption by custodial parents on grounds that abandonment by natural parents had

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7. At the annual meeting of the National Conference of Commissioners on Uniform State Laws on August 4, 1994, forty-eight states, the District of Columbia, Puerto Rico, and the Virgin Islands approved the Uniform Adoption Act for submission to the states for enactment.
8. Section 3-504(e) provides:

The court shall consider any relevant factor, including the respondent’s efforts to obtain or maintain legal and physical custody of the minor, the role of other persons in thwarting the respondent’s efforts to assert parental rights, the respondent’s ability to care for the minor, the age of the minor, the quality of any previous relationship between the respondent and the minor and between the respondent and any other minor children, the duration and suitability of the minor’s present custodial environment, and the effect of a change of physical custody on the minor.

Unif. Adoption Act, § 3-504(e).
not been shown); Lemley v. Barr, 343 S.E.2d 101 (W. Va. 1986) (requiring custody arrangement to serve best interests of child; although adoption had been invalidated, court remanded for custody proceeding on appropriateness of transfer from established, adoptive home to biological parents); Joan H. Hollinger, Consent to Adoption, in 1 Adoption Law and Practice § 2.01 (Joan H. Hollinger ed., 1988 & Supp. 1994). No opinion of this Court has ever given an unwed biological father an absolute right to the custody of his child. Instead, the father’s interest in custody should be weighed against the child’s interests as described below.

D. Where the Rights of an Unwed Father and Child Are in Conflict, the State Must Provide a Remedy That Recognizes and Balances the Respective Rights of Father and Child.

Even though John is being removed from his established family with no acknowledgment of his interests; therefore, the child has not been provided due process. This Court does not face an evaluation of whether existing process is adequate, because no process was afforded the child. He will simply go to live with respondent as though he were “a bale of hay,” In re Clausen (DeBoer v. Schmidt), 502 N.W.2d 649, 668 (Mich. 1993) (Levin, J., dissenting), a piece of property not affected by the change of families.

Instead, John should be guaranteed a hearing considering his interests to determine whether the adoption should be granted, notwithstanding his biological father’s efforts to stop the adoption. At the hearing, the trial court should determine whether or not failure to grant the adoption will be detrimental to John. See Unif. Adoption Act § 3-504(c)-(e) (1994).

Other due process protections may also be warranted. The conflict between the welfare of the child and the interests of the biological father is often caused, in these cases, by the amount of time the litigation consumes.

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9. Author’s Note: This section needs further development. I offer my thoughts and raise the following questions: Should the father be granted any presumption? Should there first be a hearing to determine adoption, then custody? Should the alternative of custody be argued at this juncture in the case? What facts should be considered relevant at the hearing? Is a hearing the best way to balance the rights of father and child, or should there be a presumption based upon the child’s age or the length of time in a parent’s care that obviates the need for a hearing?

10. A similar hearing should be available to determine the custody of John if the adoption ultimately fails. A trial court could potentially make a finding as to the adoption as well as to custody after a thorough hearing, eliminating the need for two hearings and further delay.

11. Rather than employing “the best interest of the child test,” the “detriment” test focuses on the needs and interests of the child and not on the comparative wealth and education of the adults. See Unif. Adoption Act § 3-504(e).
Each year the child is in the custody of the adoptive parents makes losing those parents more traumatic for the child. Imposition of time limits on state courts for finalizing adoptions (where no party may reopen the case for any reason after the final appeal) would aid in guaranteeing a fair process for the child. Another possible protection would be a “bright line” rule which places biological parents on notice that no adoption can be re-opened more than one year after the child’s birth for any reason. Setting such time limits might drastically reduce the number of cases that would require a hearing as set out above.

II. CONCLUSION

Where a child is a member of an established, loving family, he should not be removed from that family by the state without due process of law. Automatically denying an adoption and removing a child from his established family, with no acknowledgment of the effect of that removal on the child, violates the child’s constitutional rights. He has a right to due process because of the significant risk of transfer trauma upon his removal from his established family. In addition, he has a right to due process to protect his established relationship with his prospective adoptive parents.

The child should not be the prize granted to the winner of the litigation. He is a person with the right to have his personhood meaningfully considered by any court with the power to change his life forever. Therefore, John respectfully requests remand to the trial court for a hearing to balance his rights against the rights and interests of his biological father to determine whether or not the adoption should be granted. If the adoption is denied, John respectfully requests a hearing to determine legal custody (short of adoption), again balancing his rights and interests with those of his biological father.