Wrong Statistics Cited, But Opinion Still Stands

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In a recent speech, Chief Justice Warren E. Burger said that the Supreme Court is so over-burdened that it no longer can perform "in keeping with the standards the people of this country have a right to expect." The Court's handling of a recent case suggests how serious the situation may have become.

The case is Sautonby v. Kramer, 50 U.S.L.W. 4333 in which the Supreme Court reversed a New York court decision freeing for adoption three neglected children who, by the time of the Supreme Court's decision, had been in foster care for eight years. The court ruled that New York's law (similar to that in 16 other states) was unconstitutional because it allowed parental rights to be terminated based on a "fair preponderance" of the evidence. Instead, the court ruled, "clear and convincing" proof is required.

Given the high stakes involved — for the parents and the children — courts should be quite sure of the need to terminate parental rights before doing so. However, most observers believe that this higher standard of proof will make it much harder to free for adoption children who, because of their parents' abuse or neglect, have been in foster care for long periods of time. Nationwide, more than 500,000 children are in foster care. More than 50 percent of these children have been in this "temporary status" for over two years; over 30 percent for more than six years.

In previous cases, the court had ruled that the Constitution allows the preponderance of the evidence standard if both sides have a major, or roughly equivalent, interest in the outcome of the case. This case is different, however. The Court has not only reversed the lower court's decision but also has rejected the lower court's reasoning. The court's opinion states that the lower court erred in finding that the state's interest in the children was not sufficiently compelling to override the parents' interest in retaining custody.

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In previous cases, the court had ruled that the Constitution allows the preponderance of the evidence standard if both sides have a major, or roughly equivalent, interest in the outcome of the proceeding. Certainly, the parents have a substantial interest in preventing the termination of their parental rights. Thus, the court had to decide whether the child's interest in being freed for adoption overcomes, or at least equals, this parental interest.

The court ruled that "clear and convincing" evidence is needed because that being freed for adoption is not likely to advance the child's welfare. According to the court, the termination of parental rights does not necessarily ensure adoption. Even when a child eventually finds an adoptive family, he may spend years moving between state institutions and "temporary" foster placements after his ties to his natural parents have been severed.

To support this conclusion, the court cited an amicus brief which, in turn, cited a 1980 report to New York Mayor Edward I. Koch, "Redirecting Foster Care," for the proposition that "in 1979, only 12 percent of the adoptable children in foster care in New York City were actually adopted, although some had been waiting for years.

Unfortunately, the court got its facts wrong — badly wrong — and seriously underestimated the child's interest in being legally freed for adoption. Only the termination of parental rights allows a child to be removed from indefinite foster care and placed for adoption. According to the New York State Department of Social Services, more than 70 percent of the children actually freed for adoption are adopted. Many judges will not terminate parental rights until they are assured that the child will be adopted.

The 12 percent figure cited by the court was simply wrong. The court seems to have been misled by the amicus brief's ambiguous description of the New York statistics. Apparently, the actual report was not read by the court. For, the cited passage on page 69 reads as follows: "The discharge objective for a substantial number of black

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youngsters (4,178) is adoption. Yet during the year ending Sept. 30, 1979, [there were] only 499 black adoptions, roughly 50 percent of the total number of adoptions that year, or less than 12 percent of those for whom it is planned. Thus, the report refers to black children for whom adoption is planned. The actual adoptions did not refer only to children who have been freed for adoption by the termination of parental rights; it refers to all children for whom adoption is planned, no matter how remote the possibility.

When this mistake was brought to the court's attention, Justice Harry A. Blackmun, who wrote the opinion, authorized the reporter of decisions to say that the reference to the New York statistical data will be deleted when the opinion is published in the United States Reports." (Technically, the court's opinion is still "unofficial"; the "official" opinion will be published later this year.)

In effect, the court has admitted that the statistics previously cited to support its decision were not applicable. In fact, the actual data suggest that the case was wrongly decided. And yet, it appears that no effort was made to reassess the validity of the actual decision.

There is, of course, no way to know whether a correct knowledge of the facts would lead the Supreme Court to a different ruling. The majority might rule as it did, anyway. However, it was a 5-4 decision. If only one justice voted differently, the result would be reversed. Furthermore, the New York state courts, which had a more accurate view of the child's interests, had ruled against the clear and convincing standard.

One must also consider about the impact this case may have on the thousands of children caught in the "limbo" of foster care. But the court's handling of this case has much broader implications. For, it is evident that the concerns expressed by the chief justice (as well as other members of the court) require immediate attention. At a time when the court's rulings shape so many areas of public policy, everything possible must be done to assure that it performs its role competently.