

# A Supreme Court Error

## Wrong Statistics Cited, But Opinion Still Stands

BY DOUGLAS J. BESHAROV

Special to The National Law Journal

**I**N A RECENT speech, Chief Justice Warren E. Burger said that the Supreme Court is so overburdened 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 *Santosky 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

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Reporter of Decisions  
Supreme Court of the United States  
Washington, D.C. 20543

Dear Sir:

As suggested on the slip opinion, I am writing to inform you of an error in a recent Supreme Court opinion.

In *Santosky v. Kramer*, No. 80-5889, footnote 15 reads, in part: "Nor does termination of parental rights necessarily ensure adoption. See Brief for Community Action for Legal Services, Inc., et al., as Amici Curiae 22-23 (in 1979; only 12% of the adoptable children in foster care in New York City were actually adopted, although some had been waiting for years, citing Redirecting Foster Care, A Report to the Mayor of the City of New York 69, 43 (1980))."

However, the actual passage on page 69 of the report reads as follows: "The discharge objective for a substantial number of Black youngsters (4,178) is adoption. Yet, during the year ending September 30, 1979, CWIS reported 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." (I have enclosed a copy of page 69.)

Thus, the report refers to Black children for whom adoption "is planned." I should add that the word "planned" does 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. In fact, I am informed by the New York State Department of Social Services that over 70% of the children actually freed for adoption are adopted.

Please excuse my delay in bringing this matter to your attention. When I first read the Court's opinion, I thought that the facts cited were wrong. But I had great difficulty obtaining the report cited by the Court.

If I can provide any further information, please do not hesitate to contact me.

Sincerely,

Douglas J. Besharov

cc: Martin Guggenheim  
Steven Scavuso

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Supreme Court of the United States  
Reporter of Decisions  
Washington, D.C. 20543

October 1, 1982

Mr. Douglas J. Besharov  
The Brookings Institution  
1775 Massachusetts Avenue, N.W.  
Washington, D.C. 20036

Re: No. 80-5889, *Santosky v. Kramer*

Dear Mr. Besharov:

This is a followup to my letter to you of July 2, 1982, regarding footnote 15 of the majority opinion in the above case. Justice Blackmun has authorized me to inform you that the parenthetical notation following the citation of the Brief for Community Action for Legal Services, Inc., as Amici Curiae 22-23 will be deleted when the opinion is published in the United States Reports.

I have similarly notified Robert J. Schack, Assistant Attorney General of New York.

Sincerely yours,  
*Henry C. Lind*  
Henry C. Lind  
Reporter of Decisions

The court's handling of a recent case suggests that its case backlog is affecting its performance.

ban poor, immigrant and seasonal farmworkers continue to be underserved. We must focus special attention on the groups which account for the pluralistically and culturally diverse American society."

In his January 30, 1978 announcement of the White House Conference on Families, President Carter said: "This Conference will clearly recognize the pluralism in family life in America. The widely differing regional, religious, cultural and ethnic heritages of our country affect family life and contribute to its diversity and strength. This Conference will respect this diversity."

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 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 it found 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 understated 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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## REDIRECTING FOSTER CARE

*A Report to  
the Mayor  
of the City of New York*

*by the Mayor's  
Task Force  
on Foster Care Services*

*June, 1980*

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 word "planned" does 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 it originally cited to support its decision were not applicable. In fact, the actual data sug-

ban poor, immigrant and seasonal farmworkers continue to be underserved. We must focus special attention on the groups which account for the pluralistically and culturally diverse American society."

In his January 30, 1978 announcement of the White House Conference on Families, President Carter said: "This Conference will clearly recognize the pluralism in family life in America. The widely differing regional, religious, cultural and ethnic heritages of our country affect family life and contribute to its diversity and strength . . . This Conference will respect this diversity."

Ethnicity and cultural diversity have come to be recognized as crucial factors affecting values, attitudes and behavior. Foster care, as much as any other human service, must do a better job in addressing the specific and varied needs of its clients.

### ETHNICITY AND PLACEMENT

The ethnic composition of New York City's foster care population is currently more than 83 percent Black and Hispanic — 14,576 (52%) are Black, 5,789 (23%) are Hispanic,\* and 4,057 (16.1%) are White. White children, however, are more than twice as likely (25%) to be placed in foster care for their own problems — rather than for the problems of their parents — than either Black (12%) or Hispanic (12%) youngsters. Fifty percent of Jewish youngsters are placed because of their own emotional needs. Statistically, they will be released sooner than those in care primarily for parent-related reasons.<sup>1</sup>

CWIS/CCRS currently does not collect specific data on whether or not foster placements are made inside or outside of race, culture, and ethnic background. However, since a substantial proportion of placements are outside New York City (see Chapter Two), this may automatically remove many children from their own neighborhood, and most likely from their own social, cultural, and racial background.

*Adoption. The discharge objective for a substantial number of black youngsters (4,178) is adoption. Yet during the year ending September 30, 1979, CWIS reported 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. In addition, only 23 percent of those who are legally free for adoption are black children.*

In comparison, White youngsters — who account for 16 percent of all foster children and 16 percent of those legally free for adoption — were afforded 23 percent of the adoptions for the same year ending September 30, 1979. Thirty-nine percent of the number of legally free White children were actually adopted, nearly twice the Black rate.

It is clear from the statistics that services designed to provide permanent adoptive

\*Puerto Rican and other Hispanic.

gest 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 be concerned 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 evidence 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.