

U.S. HOUSE WAYS AND MEANS SUBCOMMITTEE
ON INCOME SECURITY AND FAMILY SUPPORT
HEARING ON RACIAL DISPROPORTIONALITY IN FOSTER CARE

July 31, 2008

Written Testimony
by Professor Elizabeth Bartholet
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My name is Elizabeth Bartholet. I am a Professor of Law at Harvard Law School, and Faculty Director here of the Child Advocacy Program. I have taught and written about child welfare issues generally, and child maltreatment and foster care issues specifically, for more than two decades. I am the author of two books and many articles addressing these issues, including *Nobody's Children: Abuse and Neglect, Foster Drift, and the Adoption Alternative* (Beacon 1999). I have focused significant attention during this time on issues of race in the child welfare system, and have authored many articles on such issues, including a leading article on race matching and transracial adoption entitled *Where Do Black Children Belong: The Politics of Race Matching in Adoption*, 139 U. Penn. L. Rev. 1163 (1991). Selected publications are listed on my website at www.law.harvard.edu/faculty/bartholet.

I am now at work on a major article addressing the issue of Racial Disproportionality in the child welfare system, the topic of your hearing. I am troubled by the nature of the Advisory for this Hearing, as it appears to buy into ideas about the nature of Racial Disproportionality that I think are fundamentally flawed. I hope that the Subcommittee will take into account a full range of views on the issues.

There is no question but that African American children enter and remain in the foster care system in disproportionate numbers as compared to their percentage of the general population and as compared to children of some other races and ethnic backgrounds. I will refer to this as Racial Disproportionality. I share the Subcommittee's view that this represents some kind of problem. But the question is, *what kind of problem*.

There is a large and powerful group of advocates promoting the idea that Racial Disproportionality results from racially discriminatory decision-making in the child welfare system, and that the solution is to stop removing as many black children from their parents, and to do more to reunify those removed with their parents. I'll refer to this as the Racial Disproportionality Movement. This Movement bases its assumption about discrimination on the claim that black and white rates of child maltreatment are the same, and relies as the Subcommittee Advisory does on the National Incidence Studies for support of this claim. The problem is that this aspect of the NIS studies has been persuasively debunked by respected scholars, and there are many reasons to conclude that blacks have higher child maltreatment rates because as a group they are disproportionately associated with characteristics that have been generally agreed to be valid predictors for child maltreatment, including poverty, single parent status, and serious substance abuse.

Assuming that black children are being removed to foster care because of actual serious maltreatment rather than discriminatory decision-making, it would be dangerous for black children to pursue the Movement's goal of keeping more black children at home – it would put more children at risk of ongoing serious abuse and neglect.

This does not mean we should do nothing. Racial Disproportionality is a problem even if it is better for black children at risk of maltreatment at home to be removed to foster care. Black children should not be maltreated in the first place, and although foster care serves as a protective institution for those who are at risk at home, it is still true that children maltreated and then removed to foster care, will as a group not do especially well in the future.

But the solutions for this problem are very different than those proposed by the Racial Disproportionality Movement. The appropriate solutions are to focus more efforts and resources on up-front child maltreatment prevention programs – programs such as Intensive Early Home Visitation which reach first-time pregnant women and give them the kind of supportive services that can prevent them from falling into the patterns that generate child maltreatment.

I hope that the Subcommittee will look into the Racial Disproportionality issue in depth, and not accept the simplistic analysis and related prescriptions for “reform” that will be pressed upon it at this Hearing, and that were uncritically adopted in the GAO July 2007 report addressing Racial Disproportionality.

I have attached hereto as requested my testimony on a related matter, in which I responded to the Donaldson Institute Report calling for amending the Multiethnic Placement Act. In this testimony I rebut the Donaldson Report's various claims, and I urge Congress to reject the call to amend MEPA.

**Response to
Donaldson Institute Call for Amendment of the Multiethnic Placement Act (MEPA)
to Reinstate use of Race as a Placement Factor**

**CCAI Briefing
6/10/2008
Dirksen Senate Office Building**

*by Elizabeth Bartholet
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I am here speaking on my own behalf, but I am also authorized to speak on behalf of the National Council on Adoption, the American Academy of Adoption Attorneys, the Center on Adoption Policy, and Harvard Law School's Child Advocacy Program, for which I serve as Faculty Director. We all join in urging you to resist any attempt to amend the Multiethnic Placement Act, an Act that took a hugely important step forward to protect black children from delay and denial of adoptive placement, an Act which the Department of Health and Human Services has only recently begun to vigorously enforce, an Act which has begun to make an important difference for children.

I have devoted a good deal of my professional life for more than two decades to studying issues of transracial adoption. I wrote what is generally considered the leading law review article, in which I dealt extensively with the social science related to transracial adoption, and also with the evidence as to the impact on black children of pre-MEPA race-matching policies, policies which resulted in holding children in foster care for months, years, and often their entire childhood, rather than placing them in other-race homes.¹ I have written many articles and book chapters since, bringing that research up to date.²

It is that research, and that evidence, which I have followed over the years to date, that led me to the position that we needed MEPA in exactly the form we have it today, in order to protect black children from the devastating damage that delay in adoptive placement causes.

As a result I worked closely with Senator Metzenbaum and those in Congress supporting him in the struggle to get MEPA passed in its current form. I'm very familiar with the goals of the MEPA legislation, both the 1994 version, which is the legal regime that the Donaldson Institute

¹ "Where do Black Children Belong? The Politics of Race Matching in Adoption," 139 U. Pa. L. Rev. 1163 (1991).

² "Commentary: Cultural Stereotypes Can and Do Die: It's Time to Move on With Transracial Adoption," 34 J. Am. Acad. Psychiatry Law 315(2006); "The Challenge of Children's Rights Advocacy: Problems and Progress in the Area of Child Abuse and Neglect," 3 Whittier J. Child & Fam. Advoc. 3 (2004); NOBODY'S CHILDREN: ABUSE AND NEGLECT, FOSTER DRIFT, AND THE ADOPTION ALTERNATIVE (Beacon Press, 1999); "Private Race Preferences in Family Formation," 107 Yale L.J. 2351 (1998); FAMILY BONDS: ADOPTION, INFERTILITY, AND THE NEW WORLD OF CHILD PRODUCTION (Beacon Press, 1999), originally published as FAMILY BONDS: ADOPTION & THE POLITICS OF PARENTING (Houghton Mifflin 1993).

wants us to return to, and the reasons that Sen Metzenbaum and others felt it essential in 1996 to amend MEPA to give us the law that we have today.

I have also testified at the Congressional hearing held to investigate problems with MEPA enforcement in the early years. And this past fall I testified at the hearing held by the U.S. Civil Rights Commission on the very same topic raised by the Donaldson Inst. Report – whether there is any need to amend MEPA. Notably the CRC has not called to date for any legislation amending MEPA, and I think, based on the tone of that hearing, it is exceedingly unlikely it will. I urge you if interested in the CRC's views to consult with the Chair at that hearing, Abigail Thernstrom.

The Donaldson Institute Report at issue in today's briefing (5/27/08) calls for a change in MEPA so that it would again allow what MEPA was designed to prohibit -- the use of race to delay or deny adoptive placement. Congress should ignore this Report, and I assume it will have the sense to do so. The requested amendment to MEPA would return us to a regime in which social workers try to "match" foster children waiting for homes with same-race parents, delaying and denying adoptive placement as occurred pre-MEPA.

By authorizing state officials to use race to decide important issues regarding family formation, this amendment would fly in the face of our nation's body of civil rights law, and almost surely be found unconstitutional by the courts. Federal and state civil rights laws uniformly forbid any use of race as a factor in official decision-making. MEPA in its current form is consistent with that great body of law. MEPA regulations make clear that race can only be used in truly exceptional cases and consistent with what is known in constitutional law as the "strict scrutiny" standard. This is exactly what is called for to satisfy the U.S. Constitution, which forbids the use of race by official decision-makers except in an extraordinarily small category of cases.

A great deal of work and thought went into the development of MEPA, and into the regulations and guidelines issued by the Department of Health and Human Services interpreting and applying MEPA. Similar work and thought has gone into implementing MEPA throughout the land, with the first major enforcement decisions issued in 2003 and 2005.³ We now finally have civil rights law governing foster care and adoption that is consistent with the rest of the nation's civil rights law and with the federal constitution. The burden of proof is on anyone who at this stage, when we are finally beginning to reap the rewards of this process, wants to roll the law back. The Donaldson Report has done nothing to meet that burden.

The Donaldson Report consists of little more than a series of false and misleading claims. First is that the Report is a "research-based" publication, and that the Institute is "the pre-eminent research" organization in the field. The Donaldson Institute is well-known in the adoption area as an advocacy organization committed to the idea that birth and racial heritage are of central importance, and this Report is an advocacy document, endorsed by organizations with well-known hostility to MEPA. There is nothing wrong with advocacy. But nobody should be

³ These decisions appear on my website at <http://www.law.harvard.edu/faculty/bartholet/> under Adoption Resources, MEPA Decisions.

deceived that this Report contains a fair-minded, unbiased assessment of the facts or the social science research.

A second Donaldson claim is that MEPA is not working to enable increased numbers of black children to find adoptive homes, as it was supposed to. The fact is that transracial adoptions have increased post-MEPA, although not yet as much as we might hope. But it takes time for laws to have an impact, and it is only recently that the federal government began serious implementation efforts, issuing its first enforcement decision in 2003, with that decision not upheld on administrative appeal until 2006.⁴ In any event, there is certainly no reason to think that recreating a barrier to transracial adoption as the Donaldson Report calls for will do anything other than make it harder to find homes for waiting children. The fact is that more than half the kids in foster care are kids of color, and the overwhelming majority of the population of prospective parents is not color-matched for these kids. Recreating race as a reason to disqualify prospective parents, and deter them from even applying, is not the way to find more homes for the waiting children.

A third claim is that MEPA harms black children by preventing social workers from adequately preparing transracial adoptive parents to raise black children. However MEPA allows such preparation as any fair reading of the law and the HHS Guidelines makes clear. Many many agencies throughout the land are currently engaged in educating and socializing prospective parents regarding racial issues pursuant to this law and these Guidelines. Nothing in the current law requires that social workers operate on a race-blind or color-blind basis in helping prospective parents understand the challenges involved in transracial parenting, or in preparing prospective parents to meet those challenges, or in enabling prospective parents to decide if they are capable of appropriately parenting other-race children. Nobody that I know in the large group of those who support the current MEPA regime do this because they believe in an entirely “race-blind” system or because they don’t think race matters. Of course race matters, and of course social workers should be free to talk about racial issues as they educate and prepare prospective parents.

What MEPA forbids is segregating the transracial from other prospective adopters, and subjecting transracial prospective parents to a pass-fail racial attitude test, a test in which they can be disqualified if they don’t give the state-determined “right” answer to complex issues about how to address children’s racial heritage. It also forbids otherwise using race as the basis for eliminating prospective parents. History tells us what would happen if social workers were again empowered to use race in making adoptive decisions, even if they were to be authorized only to use race as “a factor,” as the Report argues.

I’ll mention just two pieces of that history. First, the fact is that from the 1970’s until MEPA’s passage the federal Constitutional rule was that race could be “a factor” but not the determinative factor in adoptive decision-making, the same rule the Donaldson Report calls for, and in the name of that rule state agencies engaged in rigid race-matching, often locking black children into foster care for their entire childhood rather than placing them across racial lines. The 1994

⁴ Id.

version of MEPA forbid the use race to delay or deny placement, but permitted the use of race as “a factor.” Senator Metzenbaum came out of retirement to help pass the 1996 amendments to MEPA because he and others had concluded based on seeing how the 1994 MEPA was working, that it was *not* working, that allowing social workers to use race as “a factor” meant that they were continuing to use it systematically to delay and deny placement, and accordingly the 1996 amendment changed the law to forbid social workers from any use of race as a basis for decision-making.

The second bit of history I’ll mention are the cases in Ohio and South Carolina that triggered the Dept. of HHS’s first two MEPA enforcement decisions. I urge all who might even contemplate the idea of following the Donaldson recommendation to amend MEPA to read these decisions for themselves. These decisions show in horrifying detail how social workers who thought they had the power to use race as “a factor” in screening prospective transracial parents used that power. The decisions describe case after case in which black foster care children with serious disabilities were denied homes with eager transracial adoptive parents based on decisions that the parents had the wrong friends, or the wrong paintings on their walls, or went to the wrong church, or lived in the wrong neighborhood, with the children then relegated to waiting in foster care yet longer for that needed permanent home.

A fourth Donaldson claim is that there is new research demonstrating, in contrast to prior research, that transracial adoptees have “problems.” The fact is that the entire body of good social science still provides no evidence that children suffer in any way by being placed in a transracial rather than a same-race home, and it provides lots of evidence that children suffer by being delayed in finding permanent homes, as they are when we reduce the number of eligible homes by using race as a placement factor. The alleged “new and different” research relied on in the Report shows only that different parents may have different parenting styles, and that different parenting styles may have an impact on children’s attitudes including some of their ideas about racial matters. This is hardly surprising or new, and it says nothing about whether children are better or worse off by virtue of transracial as compared to same-race parenting. Indeed despite misleading claims in the Report’s Executive Summary, the relevant section in the body of the Report concedes that the research does “not provide sufficient basis for reaching conclusions about the level of problems experienced by Black children in foster care who are adopted transracially compared to those adopted by Black families.” (P. 29)

The Donaldson Report also expresses concern that there has not been enough recruitment of prospective parents of color so that their numbers would match the kids of color in the foster care system. The fact is that such recruitment has gone on for decades, with the result that black Americans adopt at the same or higher rates as whites, which is surprising given the socio-economics of race and the fact that it is usually the relatively more privileged who feel capable of stepping forward to do the volunteer parenting that adoption represents. In any event, MEPA in its current form already provides for the kind of recruitment that the Report calls for, so there is no need to amend MEPA in order to enable such recruitment.

The reality is that most of the children needing permanent homes in this country and in the larger world are children of color, while most of the people in a position to step forward to adopt are white. The additional reality revealed by the research on transracial adoptive families is that

love works across color lines. If we want children to have the permanent homes they desperately need, we must recognize these realities. I urge the CCAI and Congress to reject these calls to move backward in time, and instead to embrace MEPA in its current form.

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Education:

J.D. magna cum laude, Harvard Law School, 1965; Harvard Law Review, 1963-65
B.A. cum laude in English Literature, Radcliffe College, 1962

Employment:

Harvard Law School, Cambridge, MA, Professor of Law, 1983-present
Morris Wasserstein Public Interest Professor of Law, 1996-present
Faculty Director, Child Advocacy Program, 2004-present
Assistant Professor of Law, 1977-83

Founding Director and President, Legal Action Center, New York, NY, 1973-77
Counsel, Vera Institute of Justice, New York, NY, 1972-73
Staff Attorney, NAACP Legal Defense and Educational Fund, Inc., New York, NY, 1968-72
Staff Counsel, President's Comm'n on Law Enforcement & Admin. of Justice, Washington, DC, 1966-67

Selected Committee and Board Memberships:

Harvard Embryonic Stem Cell Research Oversight (ESCRO) Committee, 2007-present
Legal Action Center: Board of Directors, 1977-present; Vice-Chair of the Board, 1998-present
American Academy of Adoption Attorneys, Honorary Membership, 1992-present
Boston Fertility & Gynecology Association, IVF Ethics Committee, 1991-present
U.S. State Department Advisory Committee on Intercountry Adoption, 1990-2000
Brigham and Women's Hospital, Assisted Reproductive Technology Ethics Committee, 1990-present
NAACP Legal Defense & Educational Fund, Inc., New England Committee, 1994-98
Selection Committee for Harvard University Nieman Fellowship Program, 1996-97
American Association of University Professors, Committee A on Academic Freedom and Tenure, 1990-93
Society of American Law Teachers, Board of Directors, 1977-89
Civil Rights Reviewing Authority of the United States Department of Education, 1979-81
Board of Overseers of Harvard College, 1973-77
Executive Committee of the Association of the Bar of the City of New York, 1973-77
Overseers' Committee to Visit Harvard Law School, 1971-77

Bar Memberships:

Commonwealth of Massachusetts, 1978-present
United States Supreme Court, 1969-present
District of Columbia, 1967-99
State of New York, 1965-98

Arbitration and Mediation Associations and Panels:

American Arbitration Association (AAA)
Labor Panel, 1980-present
Commercial Panel, 1995-present
Massachusetts Commission Against Discrimination, Roster of Mediators, 1998-2002
American Postal Workers Union and U.S. Postal Service, Regular Arbitration Panels, 1988-1999

Federal Mediation and Conciliation Service, Roster of Arbitrators, 1991-present
Mediation Research & Education Project, Inc., Mediation Panel, 1995-present
JAMS, Alternative Dispute Resolution Panel, 1997-2004

Selected Publications:

"International Adoption: The Human Rights Issues," forthcoming chapter in Michelle Goodwin, ed., *BABY MARKETS*, (Cambridge Univ. Press 2008)

"International Adoption: The Child's Story," 24 *Ga. St. U. L. Rev.* 333 (2008)

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"Guiding Principles for Picking Parents," 27 *Harv. Women's L. J.* 323 (2004); also published in a slightly revised form as chapter in *GENETIC TIES AND THE FAMILY*, Rothstein et al, ed. (Johns Hopkins University Press 2005).

"The Challenge of Children's Rights Advocacy: Problems and Progress in the Area of Child Abuse and Neglect," 3 *Whittier J. Child & Fam. Advoc.* 3 (2004)

Book Review of Rachel F. Moran's "Interracial Intimacy: The Regulation of Race and Romance," 33 *Journal of Interdisciplinary History* 320 (2002)

Reply, "Whose Children? A Response to Professor Guggenheim," 113 *Harv. L. Rev.* 1999 (2000)

"Taking Adoption Seriously: Radical Revolution or Modest Revisionism?," 28 *Cap. U.L. Rev.* 77 (1999)

NOBODY'S CHILDREN: ABUSE AND NEGLECT, FOSTER DRIFT, AND THE ADOPTION ALTERNATIVE (Beacon Press, 1999)

FAMILY BONDS: ADOPTION, INFERTILITY, AND THE NEW WORLD OF CHILD PRODUCTION (Beacon Press, 1999), originally published as *FAMILY BONDS: ADOPTION & THE POLITICS OF PARENTING* (Houghton Mifflin 1993)

"Reporting on Child Welfare and Adoption Policies," 53 *Nieman Reports* 74 (1999)

"Private Race Preferences in Family Formation," 107 *Yale L.J.* 2351 (1998)

"International Adoption: Propriety, Prospects and Pragmatics," 13 *J. Am. Acad. Matrim. Law* 181 (1996)

"What's Wrong with Adoption Law?," 4 *The International Journal of Children's Rights* 263 (1996)

"Debate: Best Interests of the Child?," with Nerys Patterson, *Prospect*, no. 11, 18-20 (Aug./Sept. 1996)

"Beyond Biology: The Politics of Adoption & Reproduction," 2 *Duke J. Gender L. & Pol'y* 5 (1995)

"Race Separatism in the Family: More on the Transracial Adoption Debate," 2 *Duke J. Gender L. & Pol'y* 99 (1995), reprinted as "Debate 15: Should Transracial Adoptions Be Allowed?," *Controversial Issues in Social Policy*, Howard J. Karger et al, 2nd Ed., 220-27 (Pearson Education, 2003)

"Adoption Rights and Reproductive Wrongs," in *POWER & DECISION: THE SOCIAL CONTROL OF REPRODUCTION* 177-203 (Harvard Press, 1994)

Articles based in part on *FAMILY BONDS*: "Blood Knots," *American Prospect* 48-57 (Fall 1993); "Family Matters," *Vogue* 102-06 (Nov. 1993); "What's Wrong with Adoption Law," *Trial* 18-23 (Winter 1994)

"In Vitro Fertilization: The Construction of Infertility and of Parenting," in *ISSUES IN REPRODUCTIVE TECHNOLOGY I*, 253-60, Holmes, ed. (Garland Press, 1992, paperback ed. New York Univ. Press, 1994).

"International Adoption: Current Status and Future Prospects," in 3 *The Future of Children* No.1, 89-103 (Center for the Future of Children, Spring 1993)

"Parenting Options For The Infertile," in Frug, *WOMEN AND THE LAW* 523-30 (Foundation Press, 1992)

Book Review of Cheri Register's *ARE THOSE KIDS YOURS?*, 33 *Harv. Int'l. L. J.* 649-53 (Spring 1992)

"Where Do Black Children Belong? The Politics of Race Matching in Adoption," 139 *U. Pa. L. Rev.* 1163 (1991)

"International Adoption: Overview," chapter 10 in *ADOPTION LAW AND PRACTICE* (Matthew Bender 1988, Supp. 1997)

"Proof of Discriminatory Intent Under Title VII," 70 *Cal. L.Rev.* 5 (1982)

"Application of Title VII to Jobs in High Places," 95 *Harv. L. Rev.* 945 (1982)

Consulting and Advisory Arrangements:

Project Consultant to The Hastings Center, Reprogenetics Project, resulting in related report entitled "Reprogenetics and Public Policy: Reflections and Recommendations," by Parens and Knowles, Hastings Center Report Special Supplement (July - August, 2003).

Selected Honors and Awards:

Henry J. Miller Distinguished Lecture Series at Georgia State University, 2007
Sullivan Lecture at Capital University Law School, 1999
Massachusetts Appleseed Center, Award for Advocacy on Behalf of Foster Children, 1998
Radcliffe College Alumnae Recognition Award, 1997
Morris Wasserstein Public Interest Chair at Harvard Law School, 1996
Open Door Society, Friends of Adoption Award, 1994
Catholic Adoptive Parents Association, Media Achievement Award, 1994
Adoptive Parents Committee, Friends of Adoption Award for Adoption Literature, 1993