

**H.R. 1855, TO AMEND TITLE 11, DISTRICT OF
COLUMBIA CODE, TO RESTRICT THE AUTHOR-
ITY OF THE SUPERIOR COURT OVER CERTAIN
PENDING CASES INVOLVING CHILD CUSTODY
AND VISITATION RIGHTS**

HEARING

BEFORE THE

SUBCOMMITTEE ON THE
DISTRICT OF COLUMBIA

OF THE

COMMITTEE ON GOVERNMENT
REFORM AND OVERSIGHT
HOUSE OF REPRESENTATIVES

ONE HUNDRED FOURTH CONGRESS

FIRST SESSION

ON

H.R. 1855

TO AMEND TITLE 11, DISTRICT OF COLUMBIA CODE, TO RESTRICT THE
AUTHORITY OF THE SUPERIOR COURT OVER CERTAIN PENDING
CASES INVOLVING CHILD CUSTODY AND VISITATION RIGHTS

AUGUST 4, 1995

Printed for the use of the Committee on Government Reform and Oversight



U.S. GOVERNMENT PRINTING OFFICE

36-561 CC

WASHINGTON : 1997

For sale by the U.S. Government Printing Office
Superintendent of Documents, Congressional Sales Office, Washington, DC 20402

ISBN 0-16-054004-6

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CONTENTS

	Page
Hearing held on August 4, 1995	1
Text of H.R. 1855	4
Statement of:	
Foretich, Eric; Hollida Wakefield, Institute of Psychological Therapies, accompanied by Ralph Underwager; and Jonathan Turley, professor of law, George Washington University	17
Gill, Charles D., Superior Court Judge, State of Connecticut; David Harmer, esquire; Susan Hall, vice president, Alliance for the Rights of Children; and Nieltje Gedney, Committee for Mother and Child Rights	73
Morgan, Antonia and Robert	68
Letters, statements, etc., submitted for the record by:	
Daen, Phyllis, clinical psychologist, Virginia Psychological Institute, Fairfax, VA, prepared statement of	106
Davis, Hon. Thomas M., a Representative in Congress from the State of Virginia, prepared statement of Ellen Morgan	14
Durant, Mary Ellen, co-founder, Purple Ribbon Project, prepared statement of	107
Froning, Mary L., psychologist, prepared statement of	104
Gedney, Nieltje, Committee for Mother and Child Rights, prepared statement of	81
Gill, Charles D., Superior Court Judge, State of Connecticut, prepared statement of	74
Hall, Susan, vice president, Alliance for the Rights of Children, prepared statement of	79
Michel, Judge Paul R., prepared statement of	102
Molinari, Hon. Susan, a Representative in Congress from the State of New York, prepared statement of	9
Morella, Hon. Constance A., a Representative in Congress from the State of Maryland, prepared statement of	7
Morgan, J. Elizabeth, MD, Ph.D., prepared statement of	98
Norton, Hon. Eleanor Holmes, a Representative in Congress from the District of Columbia, prepared statement of	12
Strongman, Kenneth T., professor of psychology, prepared statement of ...	105
Strongman, Thelma, prepared statement of	105
Turley, Jonathan, professor of law, George Washington University, prepared statement of	19
Van Derbur, Marilyn, Marilyn Van Derbur Institute, Inc., prepared statement of	105
Wakefield, Hollida, and Ralph Underwager, Institute for Psychological Therapies, joint prepared statement of	36

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THORITY OF THE SUPERIOR COURT OVER
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FRIDAY, AUGUST 4, 1995

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON THE DISTRICT OF COLUMBIA,
COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT,
Washington, DC.

The subcommittee met, pursuant to notice, at 9:30 a.m., in room 2318, Rayburn House Office Building, Hon. Thomas M. Davis (chairman of the subcommittee) presiding.

Present: Representatives Davis, Gutknecht, McHugh, and Norton.

Present: Representatives Wolf, Morella, and Molinari.

Staff present: Ron Hamm, staff director; Howard Denis, counsel; Roland Gunn, professional staff member; Judith McCoy, chief clerk; Cedric Hendricks, minority professional staff; and Jean Gosa, minority staff assistant.

Mr. DAVIS. Welcome to this hearing on H.R. 1855. I'm honored to sponsor this legislation with my good friends and colleagues, Congresswoman Connie Morella, Congresswoman Susan Molinari, and Congressman Frank Wolf. This bill is a product of my own deepest feelings and knowledge. Although caused by entirely different circumstances, I know how it feels to be filled with pain as a child.

Though years have passed, my memories have not dimmed. In fact, they're as vivid in my mind now as they were in my formative years. As a society, we are far more sensitive to the pain that children can feel than we were when I was coming of age. Legislative bodies across this great land at every level have recognized the importance of listening carefully to what children say.

The laws that we have passed arise from an enormous and growing body of evidence that, in many cases of domestic strife and conflict, it's too easy to lose sight of who is being harmed. Common sense actions to slice through the knot of pride and anger can often prevent permanent emotional damage and allow wounds to heal as quickly and completely as possible.

That's what H.R. 1855 attempts to do. It's all that H.R. 1855 is intended to do. Domestic conflict and stress can take many forms. Its victims are too often unintended and innocent. As a local jurist has said in connection with the very situation that has given rise

to this bill, "when elephants fight, the grass suffers." So I believe that I would not be true to the great lessons I have learned in life if I were to just take the easy way out when confronted with a difficult situation involving a child's life.

Yes, it would be easy for me to just ignore Ellen Morgan, a soon to be 13-year-old American child who is afraid to come back to our country unless this bill is passed. It might be easy for us to ignore her, to wash our hands of her unusual tragic situation. But I think it would be wrong. I believe very strongly that I owe it to the 13-year-old child still within me to at least try; try to intervene to break the truly vicious cycles that have impacted Ellen Morgan's life.

What I want to do, and what this bill does, is to permit Ellen Morgan to be and to feel free to return to the United States with no cloud of legal intervention over her head. She deserves to have that choice. In the real world, she does not have that freedom now. This bill is an opportunity—perhaps the last chance—to heal the wounds that are still all too fresh in Ellen's life.

If there were another approach that Ellen could take, I know that she would take it. If there were another approach that Congress might take, I would take it. If Ellen felt free to return to her country, I'd do nothing. This bill represents the best approach that can be taken under all the circumstances. The bill itself is straightforward. It seeks to make only a very minor and temporary change in Title 11 of the D.C. Code.

Under the Home Rule Act, the District government cannot amend Title 11, and thus cannot legislatively affect this case. Only Congress can make these changes. These changes are only temporary, and will sunset when Ellen reaches the age of majority, when custody and visitation issues would be moot. H.R. 1855 reflects the common sense basic principle that the law ought not to compel one who has reached the age of reason into being forced to be unsupervised with someone whom that person asserts has been sexually abusive.

As a practical matter, such visitation cannot be enforced, and would create even more danger if it were. Permitting a child of 13 and above to choose whether or not such custody and visitation should occur under the strict and limited strictures of this bill is the only sensible course. The basic facts which form the necessary background of this bill bear repeating.

There's an outstanding court order in the Superior Court of the District of Columbia, dated August 28, 1987, in the case of Elizabeth Morgan versus Eric Foretich. Under that order, Dr. Morgan was jailed for civil contempt in the District of Columbia, after she hid her child, Hilary—now known as Ellen, and refused to give the child up for court-ordered unsupervised visitation with her father.

Dr. Morgan spent over 2 years in the District of Columbia jail. In September 1989, Congress enacted H.R. 2136, the District of Columbia Contempt Imprisonment Act of 1989, sponsored by my colleague, Frank Wolf. This act limited to 12 months the amount of time that the individual may be imprisoned for civil contempt in the family division of D.C. Superior Court.

The legislation, in essence, freed Dr. Morgan from jail. That law itself sunsetted in 1991. Upon her release from jail, Dr. Morgan ul-

timately joined her daughter, who was living with relatives in New Zealand. Mother and daughter reside in New Zealand to this day. The court order, though dated, is still in effect. Under its terms, Ellen is subject to be taken into custody and brought to the social services division of the District of Columbia Superior Court for placement until further order of the court.

So Ellen Morgan, an American citizen, has a legal burden weighing on her spirit which is preventing her from freely returning to her native land. Dr. Morgan is subject to arrest and further incarceration. This bill does not bar any court from revisiting the issue at any time, and weighing the markedly changed circumstances since the original court decree. It merely removes the existing impediment, which is de facto preventing her return.

This hearing will not retry the case. The D.C. Court has stated that it will not consider issuing any further orders in this case until Ellen Morgan is back in its jurisdiction. This creates a classic catch-22 situation, and makes the bill necessary. The fact of the matter is that Ellen Morgan will not return to this area as long as the underlying order is in effect. The status quo is simply intolerable.

Thus, there is no alternative to this bill. I am advised that the various court transcripts have consumed more than 4,000 pages and millions of dollars in legal fees. This subcommittee is not a court and will not sit as a court. I must insist that all witnesses respect these limits. The purpose of this hearing is to elicit information and views on the bill. It is not the purpose nor the intention to point fingers at anyone.

But the permanent healing of any wounds cannot begin until the matter comes to closure. This bill provides the best hope, in my judgment, for achieving that objective. We will keep the record open for those who may want to forward submissions for possible inclusion in the permanent record. A number of statements have already been submitted, and I will include them at the end of this hearing. And that will include witnesses testifying today who would like to supplement their testimony for the record as well.

Again, this bill is my best effort to help a child who has suffered great pain. When I was a child, it would have helped to know that people in positions of authority cared enough to respect my feelings. Now that I'm in a position of responsibility myself, I simply will not turn my back on Ellen Morgan.

I would now yield to Mr. McHugh from New York for an opening statement.

[The text of H.R. 1855 follows:]

104TH CONGRESS
1ST SESSION

H.R. 1855

To amend title 11, District of Columbia Code, to restrict the authority of the Superior Court of the District of Columbia over certain pending cases involving child custody and visitation rights.

IN THE HOUSE OF REPRESENTATIVES

JUNE 15, 1995

Mr. DAVIS (for himself, Mrs. MORELLA, and Mr. WOLF) introduced the following bill; which was referred to the Committee on Government Reform and Oversight

A BILL

To amend title 11, District of Columbia Code, to restrict the authority of the Superior Court of the District of Columbia over certain pending cases involving child custody and visitation rights.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. TREATMENT OF CERTAIN PENDING CHILD CUSTODY CASES IN SUPERIOR COURT OF DISTRICT OF COLUMBIA.

(a) IN GENERAL.—Subchapter II of chapter 9 of title 11, District of Columbia Code, is amended by adding at the end the following new section:

“§ 11-925. Rules regarding certain pending child custody cases

“(a) In any pending case involving custody over a minor child or the visitation rights of a parent of a minor child in the Superior Court which is described in subsection (b)—

“(1) at any time after the child attains 13 years of age, the party to the case who is described in subsection (b)(1) may not have custody over, or visitation rights with, the child without the child’s consent; and

“(2) if any person had actual or legal custody over the child or offered safe refuge to the child while the case (or other actions relating to the case) was pending, the court may not deprive the person of custody or visitation rights over the child or otherwise impose sanctions on the person on the grounds that the person had such custody or offered such refuge.

“(b) A case described in this subsection is a case in which—

“(1) the child asserts that a party to the case has been sexually abusive with the child;

“(2) the child has resided outside of the United States for not less than 24 consecutive months;

“(3) any of the parties to the case has denied custody or visitation to another party in violation of an order of the court for not less than 24 consecutive months; and

“(4) any of the parties to the case has lived outside of the District of Columbia during such period of denial of custody or visitation.”

(b) CLERICAL AMENDMENT.—The table of sections for subchapter II of chapter 9 of title 11, D.C. Code, is amended by adding at the end the following new item:

“11-925. Rules regarding certain pending child custody cases.”

(c) EFFECTIVE DATE.—

(1) IN GENERAL.—The amendments made by this section shall apply to cases brought in the Superior Court of the District of Columbia before, on, or after the date of the enactment of this Act.

(2) CONTINUATION OF PROVISIONS UNTIL TERMINATION.—The provisions of section 11-925, District of Columbia Code (as added by subsection (a)), shall apply to any case described in paragraph (1) until the termination of the case.

Mr. MCHUGH. Thank you, Mr. Chairman. I commend you for both convening this hearing and for introducing this legislation,

and add my words of appreciation and compliments to our colleagues, Representatives Wolf, Morella, and Molinari, for their efforts in this regard.

As the facts of the case and as your opening statement clearly illustrate, this is a very difficult situation—one that can fairly be described as murky. What is not murky, though, Mr. Chairman, are the dedication and clarity of purpose and the compassion that you and our three colleagues bring to this issue. If we ran the business of the Federal Government on a day-to-day basis with the same concern and compassion that you four have brought to this issue, we'd have a far better government.

I'm pleased to be here, and I thank you again for your efforts, and I yield back.

Mr. DAVIS. I thank my colleague. I ask unanimous consent for the Members who are not on this subcommittee to sit with the subcommittee for this hearing. Without objection, it is so ordered. I want to welcome my colleagues, Frank Wolf, Connie Morella, and Susan Molinari, co-sponsors of this legislation. I've asked to yield now to my colleague, Mr. Wolf, for any statement he may make.

Mr. WOLF. This is absolutely the right thing to do, and I just want to thank Congressman Davis. Because it was my bill that helped get Dr. Morgan out. She had been in prison for a long, long time. And I just thought, clearly, somebody in authority, somebody that has something to do with power to make things better for people, is going to get involved. It was clear that somebody wasn't going to let this thing go on—some judge, somebody, somewhere; but nobody did.

And finally, I spoke to Chuck Colson about this issue. And frankly, it just seemed like, hey, maybe I was here to do it. And it made a difference, and Dr. Morgan is out and now doesn't have to go through what she had to go through. Keep in mind we don't want to get into what happened in the past.

All we're doing here, under Mr. Davis' bill, is allowing Hilary—now called Ellen Morgan—to return home, whereby she can be here to see her grandmom, her grandfather, her stepfather; to be back where she ought to be.

I don't know why Judge Dixon didn't do anything. Again, it took Mr. Davis to do it. Why didn't Judge Dixon ask? What is wrong with them? Why didn't somebody come in and allow this young girl to be reunited back here in the United States? This is the right thing to do. Now, Mr. Davis may get one or two people out there that are going to criticize. This is clearly the right thing to do, and I was really proud to co-sponsor the bill.

If you criticize Tom Davis, you criticize me. But I think this is clearly the right thing. Hopefully, she'll be home before the end of this year. Also, I might say, because of Dr. Morgan wants to stay in New Zealand with her daughter, her husband has to travel to New Zealand to see his wife. That's crazy. You would think somebody would have done something by now.

So it's a good bill. I hope it's reported out. I hope it comes under suspension of the rules. I hope it pops right out. I hope the Senate takes it, and before Thanksgiving, that they can come together. Again, it doesn't deal with the merits or demerits or the charges and countercharges that went back and forth. It merely allows

Hilary, now Ellen, to return home to be with her mom, but also to be with her grandparents.

And quite frankly, one of the greatest things for a child is to have grandparents around. So thank you, Tom, and I hope the bill moves quickly.

Mr. DAVIS. Thank you. Mrs. Morella, the gentlelady from Maryland.

Mrs. MORELLA. Thank you, Mr. Chairman, and I want to thank you for the opportunity to testify this morning; and also for the leadership you've taken in following up on this very important issue. I certainly agree with the comments not only that you made, but of course, the succinctness of Congressman Wolf's comments about this issue.

I believe that your bill, H.R. 1855, which I've co-sponsored, represents an opportunity to put an end to one of the most contentious and highly publicized child custody cases in recent times. We can all go back to that Summer of 1987, when Dr. Elizabeth Morgan was jailed by the Superior Court of the District of Columbia for contempt of court. We need not go back into the facts of the case.

But she took what she considered to be the only recourse available to her as she saw it, to protect her child. After having been incarcerated for several years, she arranged transportation for her daughter, Hilary, to leave the country, out of reach of the court and, more importantly, out of the reach of her father. And she faced the consequences for her actions, spending more than 2 years in jail in contempt of the court order.

And she was freed in September 1989, when Congress passed the legislation that I co-sponsored with the author of the legislation, Congressman Wolf. Mr. Chairman, Dr. Morgan has now joined Hilary in New Zealand. They've been living there for the past 5 years. And while they're no longer bound by the court, they're not really free. They may not travel abroad without the permission of the New Zealand Government, which is holding their passports.

New Zealand has become the Morgans' Elba. We can go round and round debating the evidence in the case—the personalities involved; the charges; the countercharges—and we still wouldn't be able to convincingly determine the truth. And in my opinion, for the purposes of today's hearing and the legislation under consideration, it doesn't matter.

The main issue which we should be considering here is the best interest of the child, Hilary, now known as Ellen Morgan. When this case was first brought to the courts, Ellen was 5 years old. I have a picture in my office of her with her mother. She was not able to be an active participant in the decisions being made about her life. Today, Ellen is a 13-year-old young woman who, while not old enough to be fully responsible for herself, is certainly capable of deciding for herself where she would like to live and with whom she wants to spend her time.

From what I've read and from what I've learned from you, Mr. Chairman, it is clear that Ellen wants to live in the United States. And while she is apparently adamant that she doesn't want to see Dr. Foretich, she does want to see other members of her family. She would like to see snow at Christmas. She'd like to have a nor-

mal life; a house she can call a home; someplace where she fits in and belongs.

The original court order on this case is now more than 7 years old. It's clearly outdated, and no longer addresses Ellen's best interest, if it ever did. H.R. 1855 would vacate the penalties arising from court orders in this case, thereby removing legal obstacles to Ellen and her mother returning to the United States. The bill would not prevent the initiation of new proceedings, which would take place under circumstances much different from those existing at the time of the original court order.

Mr. Chairman, we as Americans and Members of Congress too often find ourselves wringing our hands, trying to figure out how we're going to bring home fellow citizens who find themselves trapped abroad. This legislation offers us the opportunity to resolve one of those cases, and to bring home an American girl who's been away too long. So again, I thank you for the opportunity to testify before you today.

I congratulate you again for introducing the bill and for your interest in this controversial and humane case. I look forward to working with you and other members of the subcommittee in bringing the bill to the floor for consideration.

[The prepared statement of Hon. Constance A. Morella follows:]

PREPARED STATEMENT OF HON. CONSTANCE A. MORELLA, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MARYLAND

Mr. Chairman, thank you for the opportunity to testify this morning regarding H.R. 1855, legislation to restrict the authority of the Superior Court of the District of Columbia over certain pending cases involving child custody and visitation rights. I am an original cosponsor of this legislation, which you introduced in June.

H.R. 1855 represents an opportunity to put an end to one of the most contentious and highly-publicized child custody cases in recent times. In the summer of 1987, Dr. Elizabeth Morgan was jailed by the Superior Court of the District of Columbia for contempt of court. She had refused to abide by a court order directing her to present her five-year old daughter Hilary to Dr. Eric Foretich, Hilary's father, for unsupervised visitation.

Dr. Morgan was convinced that Dr. Foretich had sexually abused their daughter; Hilary confirmed this. Doctors found evidence indicating such abuse, but could not determine who was responsible. Dr. Morgan took the only recourse available to her, to do what she had to as a responsible parent to protect her child in any way possible—she arranged transportation for Hilary out of the country, out of the reach of the court and, more importantly, out of the reach of an abusive father. And she faced the consequences for her actions, spending more than two years in jail in contempt of the court order. Dr. Morgan was freed in September 1989 when Congress passed legislation limiting to twelve months the time which one may serve for civil contempt. I was a cosponsor of that legislation, which was introduced by our colleague from Virginia, Mr. Wolf.

Mr. Chairman, Dr. Morgan has now joined Hilary in New Zealand, where they have been living for the past five years. But while they are no longer bound by the Court, they are not really free, either. They may not travel abroad without the permission of the New Zealand government, which is holding their passports. New Zealand and has become the Morgans' Elba.

We can go round and round debating the evidence in this case, the personalities involved, the charges and the counter-charges, and we still wouldn't be able to convincingly determine the truth. And, in my opinion, for the purposes of today's hearing and the legislation under consideration, it doesn't matter. The main issue which we should be considering here is the best interest of the child, Hilary, now known as Ellen Morgan.

When this case first was brought to the courts, Ellen was five years old. She was not able to be an active participant in the decisions being made about her life. Today, Ellen is a thirteen-year old young woman who, while not old enough to be fully responsible for herself, is certainly capable of deciding for herself where she would like to live and with whom she wants to spend her time.

From what I have read, and from what I have learned from the Chairman, who has spoken to Ellen, it is clear that Ellen wants to live in the United States. And while she is apparently adamant that she does not want to see Dr. Foretich, she does want to see other members of her family. She would like to see snow at Christmas. She'd like to have a normal life, a house she can call home, someplace where she fits in and belongs.

The original court order on this case is now more than seven years old; it is clearly outdated and no longer addresses Ellen's best interests, if it ever did. H.R. 1855 would vacate the penalties arising from court orders in this case, thereby removing legal obstacles to Ellen and her mother returning to the United States. The bill would not prevent the initiation of new proceedings, which would take place under circumstances much different from those existing at the time of the original court order.

Mr. Chairman, we as Americans and as Members of Congress too often find ourselves wringing our hands trying to figure out how we are going to bring home fellow citizens who find themselves trapped abroad. This legislation offers us the opportunity to resolve one of these cases, and bring home an American girl who has been away too long.

I thank you again for the opportunity to testify before you today, and I congratulate you again for introducing the bill and for your interest in this controversial case. I look forward to working with you and other members of the subcommittee in bringing the bill to the floor for consideration.

Mr. DAVIS. Thank you very much. Now I'd like to recognize the gentlelady from New York, Ms. Molinari.

Ms. MOLINARI. Thank you, Mr. Chairman. I ask that my entire statement be submitted for the record. Let me just state briefly that I do want to commend you for bringing forth this legislation. And I'm honored to sit here with Connie Morella and Frank Wolf, who, I remember many years ago reading about this case and their intervention.

And since then, I think I speak for most Americans when I state that it is a story that has haunted absolutely all of us. And I thank you for your perseverance in bringing justice and satisfaction to one little girl who can only be claimed as a victim. There's many times we find ourselves in this House of Representatives trying to deal with the inadequacies of the court system.

And clearly, once again, we are here. This is not one unique case. It is one case that's been brought to our attention. And perhaps in bringing justice to this family, we can send an inspiring wake-up call to judges all over this country to take more into account—the rights and the wishes of children in the areas of their decisions; and that not all grown-ups are always right, particularly when they are professionals and respected members of the community.

Again, this sends a chilling signal to all other victims out there. Let me just state, in the last crime bill, we changed a piece of legislation called prior rules of evidence, that States now that in Federal cases—and just recently, California adopted this—other instances of child molestation may be entered into the record based on the discretion of the judge if the judge determines that the information is more probative than prejudicial.

If this law were in effect 8 years ago, the decision of the judge may very well have been different. We've made some improvements in the court system in the U.S. House of Representatives. And now we come together to try and correct an injustice. And I guess, for the life of me, as my colleagues have stated, whatever the real truth is, who could possibly be against bringing Ellen back to this country?

If you truly love this child, if you truly think that this is the right thing to do, then that is the only thing and the only conclusion we can come to. As Frank and Connie said, if there ever was a right thing for the Congress to do, it is allowing this bill to pass. And assisting in the reunion of this family would be at the top of the list. We provide all Americans with the opportunity to reach their dreams and to see their hopes through, but we can't guarantee it.

Today, we can for one little girl. Today, we can begin the process to say to Ellen, you can have your dream of being raised in America, surrounded by the people that love you. The Congress and this government would do as much for any citizen that is being held by a foreign government. It is time to bring this family home to the United States. I have tremendous, tremendous admiration for Dr. Morgan and what she has done to save her daughter.

If we can help save this little girl, to grow up and live free in this country, then I think we have worked hard to make this family happy, and to make this Congress look a lot better than it ever has in the past. Chairman Davis, Congresswoman Morella, Congressman Wolf, again, I'm honored to be a part of this effort. Thank you.

[The prepared statement of Hon. Susan Molinari follows:]

PREPARED STATEMENT OF HON. SUSAN MOLINARI, A REPRESENTATIVE IN CONGRESS
FROM THE STATE OF NEW YORK

Thank you Chairman Davis and members of the D.C. Subcommittee for inviting me to testify here today on behalf of H.R. 1855. I commend the Chairman for his commitment to the safe return of the Morgan family and am honored to be a cosponsor of this important piece of legislation.

The Morgan case was once again brought to my attention at a recent MTV congressional screening of "Fight Back", a documentary dealing with the horror of child abuse and sexual molestation in our society. This film encourages young people to speak out and fight those who have tried to take away their childhood. Ellen Morgan has heeded this advice and this morning you heard, in her own words, how and why Ellen is fighting for her childhood and her safe return to the United States.

By now you are all intimately familiar with the specifics of the Morgan case: the alleged abuse and child molestation, the exile of the child and mother and their fight against a judicial system which has failed to take their best interests into consideration. Chairman Davis's legislation would dismantle the legal obstacles blocking the return of the Morgans to the United States. The current court orders relating to the penalties to the mother and visitation by the father would no longer be applicable and the entire Morgan family could be reunited. A court could revisit this issue at any time, but the child and her family would be allowed to come back to their homeland safely.

There is much that the federal government can do, and is currently doing, to protect our children and families. After working the past four years on the Sexual Assault Prevention Act and having many of my provisions signed into law, I took a great interest in the Morgan case. Just last month, the Dole-Molinari Rules of Evidence provisions of SAPA were enacted to make it easier to convict repeat rapists and child molesters.

The Federal Rules of Evidence were changed to establish a general rule of admissibility in sexual assault cases for evidence of the defendant's prior sexual offenses. While this language would not require the admission of prior incidences to be admitted, it could be allowed to show a pattern of abusive behavior. It is believed that rapists and child molesters do not act out in an isolated incident.

Changes to Rules of Evidence are pertinent to this case. In fact, excerpts from the 4th U.S. Circuit Court of Appeals decision in the Morgan case state, ". . . had the jury been allowed to hear of the other sister's very similar injuries, the doctor's (Ellen's father) explanations would no longer have been so plausible. Given the similarities of the injuries and the fact that only the defendants had access to both girls, the identity of the perpetrators becomes clearer. And given this evidence, the defenses of self-infliction, fabrication or abuse by Dr. Morgan become quite implausible."

This case brings to light the devastation of child abuse and the failure of our justice system. H.R. 1855 marks a new beginning for the Morgan family. Chairman Davis's bill builds on the same principals of the Sexual Assault Prevention Act: protection of the rights of a child to grow up in a healthy environment, surrounded by those who love them and nurture them.

If ever there was a right thing for the Congress to do, allowing this bill to pass and assisting in the reunion of this family would be at the top of the list. This Congress and this government would do as much for any citizen who is being held by a foreign government. It is time to bring this family home to the United States. I look forward to working with this committee to ensure this bill becomes law.

Mr. DAVIS. Thank you very much. Are there any other Members who wish to make any statements at this point? At this point in the hearing, we had hoped to have Hilary Foretich, now known as Ellen Morgan, to be our first witness via teleconferencing. Regrettably, we have been informed that the judge overseeing Ellen's case in New Zealand has issued an order which reads in part as follows:

I make an order forbidding the child now known as Ellen Morgan from being made available for any video or teleconference with the U.S. Congressional committee or its counsel in relation to the bill under consideration by the D.C. Subcommittee until further order of the court.

There's no doubt that a foreign court lacks authority to prevent this hearing from proceeding as planned. However, in view of the fact that Ellen Morgan and her mother, Dr. Elizabeth Morgan, are within the physical jurisdiction of the New Zealand court, I'm reluctant to proceed with the video conferencing as planned. I do not want to take any action that could result in adverse consequences for Ellen Morgan or Dr. Elizabeth Morgan.

At the same time, I think it's important to note that the action of the New Zealand court, which is truly disappointing and unfortunate, nevertheless emphasizes the vulnerability of Ellen Morgan and Dr. Elizabeth Morgan, who are American citizens, to the actions of a foreign court. It's my strongly held view that this development reinforces the heart and soul of this bill, which is to provide an opportunity and option for the safe return of these parties.

While the teleconferencing will not now proceed, I do have a statement from Ellen Morgan, in her own writing, that I will now read in its entirety and then submit for the record. Ellen Morgan's statement is as follows:

Hi, my name is Ellen Morgan. My legal name is Hilary Foretich. My birthday is August 21. This August, I turn 13. I am an American citizen. I was born in Sibley Hospital in Washington, DC.

My mom hasn't seen this or told me what to write. I don't remember very much from home, only what my house looks like a little, some of my friends, and my preschool and my mom's office. Ever since I came to New Zealand, I have been craving Oreo cookies, ice cream sandwiches, and candy corn. They don't sell them here. In New Zealand, they don't celebrate the 4th of July or Thanksgiving, and they don't do much of anything about Halloween or Christmas. And I always love parties.

I want to come home because I miss all of my cousins—three of them I haven't met—my stepdad, my other relatives, and my friends. I also miss America because it's my home. America is important to me because my friends and family live there and I love it. Congress should do this because I don't like living in New Zealand without all the people I love, and I want to do junior high and high school in America.

My birth father's last name is Foretich. I last saw him in 1990. I've had no contact with him since then. I don't want to see him again, at least until I'm 30. I wouldn't go home if I had to see him. I wouldn't want any contact with him at any time. My mom hasn't told me anything about him. This is what I feel. I miss all my family, except my real dad. I miss the freedom of America and my friends.

It's very hard to say goodbye to my stepdad all the time. I really want my family back again. I also miss my accent and feeling like an American. I try to stay an

American as much as I can but it isn't easy because there aren't a lot of Americans out here. We are so far away. I have a few American friends, but they are mostly from the Navy base. My best is an American who just left New Zealand to go home with the Navy.

We had also submitted some questions that we would have asked her on teleconference. I'd like to read them as she wrote. She has a handwritten answer, which I'll also put in the record. The first question was, when is your next birthday and how old will you be? And she said, my next birthday is August 21, 1995, and I turn 13. Question: Who do you live with now? She says, I now live with my mom and grandmother.

Three: Are you in good health? She says, I am very healthy. Four: Do you want to come back to the United States with your mother? Yes, I want to go back to the U.S. with my mom. Five: Why do you want to come back to the U.S.? I want to go back to the U.S. because I want to see my friends and family. I want to go to an American high school, and I want to live a normal American life for once.

Six: Would you feel safe in returning to the United States now? If not, why not? No, I wouldn't feel safe going home now because I'm not protected by the American family court and I would have to visit my real dad. Seven: Are you afraid to be in the presence of your natural father? Yes, I'm afraid to be in the presence of my real dad because he is real sick, sorry, and because of the things he did to me.

Eight: Do you understand what this hearing is about? Yes, I do understand about this hearing. This is the first step to passing the bill H.R. 1855, which would let me come home without forcing me to see anyone that I don't want to see. Nine: If Congress passes the bill, would you then feel safe in coming back to the United States? Yes, if Congress passes the bill, I would feel safe going home.

Ten: Tell us about your ice skating. Would you like to compete in the Olympics? Would you like to represent the United States? I started skating in 1990 when I was seven, and last year I started competing. I competed in the Donovan Challenge clubs and South Islands. And this year I am doing clubs and nationals. I have placed in three and won two. Yes, I would like to go to the Olympics, and yes, I would love to represent the U.S.

Eleven: Tell us about your school. Do you study American history, American culture, American society, or the American way of life? What do you study? Answer: At my school, we don't study American history, culture, society or the American way of life because they are not available. Instead, we study New Zealand and English history and culture. Twelve: Tell me about your friends. Do you have any American friends?

Answer: I have a lot of friends at school and skating. But my closest friends are American from the Navy base. But they are all going back in the next year—not the whole base, just my friends. My best friend is from Silverdale, Washington State, but she has gone back already. Question: Do you have family in America that you would like to see? She says, I would love to see all of my family except Eric. I haven't even met one half of my cousins.

Fourteen: Do you know the Pledge of Allegiance to the flag of the United States? Can you recite it, would you like to recite the

pledge? She says, I don't know all of the pledge, but my mom has taught me some of it; and yes, I would like to say it in America. Then she adds, I really want to come home. If there are any more questions, please ask me.

I see that the ranking minority member is here, and I will ask Ms. Norton if she cares to make any statement at this time.

Ms. NORTON. Thank you, Mr. Chairman. I apologize for being late. It was my impression this was at 10 a.m., and I understand it had all along been at 9 a.m. I regret it.

Mr. Chairman, my predecessor, Delegate Walter Fauntroy, facilitated a hearing on this matter 6 years ago. I'm sure that he regretted that the Congress had to consider the matter then, and I regret that it must be revisited now.

I have special regrets as a lawyer because this matter surely represents failures and deficits in the vehicles available for reaching closure on delicate matters affecting children. Only because a child continues to be at the center of an unresolved family tragedy can there be any justification for the reappearance of this matter in the Congress. The fact that it is here at all points to a flaw in the home rule charter that gives the Congress, rather than the District of Columbia City Council, jurisdiction to address the issues involved.

The U.S. Congress that must consider world resounding issues, such as whether the embargo of arms to Bosnia should be lifted, and national priorities, such as how to reduce the deficit, should not have to sit on a child welfare issue that local courts did not fully resolve. However, Hilary Foretich, already an innocent caught up in a struggle adults have been unable to settle, should not be further victimized and entangled—this time with jurisdictional flaws affecting home rule.

For the moment, the sole jurisdiction to further address the matter rests with the Congress. However, if the subcommittee finds that relief is appropriate, it must do so definitively and indicate that whatever flows from today's hearing is as final resolution. Thank you, Mr. Chairman.

[The prepared statement of Hon. Eleanor Holmes Norton follows:]

PREPARED STATEMENT OF HON. ELEANOR HOLMES NORTON, A REPRESENTATIVE IN
CONGRESS FROM THE DISTRICT OF COLUMBIA

My predecessor, former Delegate Walter Fauntroy, facilitated a hearing on this matter six years ago. I am sure that he regrets that the Congress had to consider the matter then. I regret that it must be revisited now. I have special regrets as a lawyer because this matter surely represents failures and deficits in the vehicles available for reaching closure on delicate matters affecting children.

Only because a child continues to be at the center of an unresolved family tragedy can there be a justification for the reappearance of this matter in the Congress. The fact that it is here at all points to a flaw in the Home Rule Charter that gives the Congress rather than the District of Columbia City Council jurisdiction to address the issues involved. The United States Congress, that must consider world resounding issues such as whether the embargo of arms to Bosnia should be lifted and national priorities such as how to reduce the deficit, should not have to sit on a child welfare issue that local courts did not fully resolve.

However, Hilary Foretich, already an innocent caught up in a struggle adults have been unable to settle, should not be further victimized and entangled, this time with jurisdictional flaws affecting home rule. For the moment, because of the requirements of Title 11 of the District Code, the sole legislative jurisdiction to further address this matter rests with the Congress. However, if the Subcommittee finds

that relief is appropriate, it must do so definitively and indicate that whatever flows from today's hearing is a final resolution.

Mr. DAVIS. Thank you very much. I also want the subcommittee to know that I spoke with Ellen personally, and she made the same points to me over the phone that she made in her written statement. I ask unanimous consent that Ellen Morgan's written statement be entered into the record at this point as well as the questions and answers that I read.

[The information referred to follows:]

4.

Ellen Morgan
 23 July 1996
 4 Freiberg Ave
 Christchurch 8004
 New Zealand

Hi my name is Ellen Morgan
 my legal name Hilary Forelich
 my birthday is August 21
 this August I turn 13
 I am an American citizen.
 I was born in Sibley hospital in Washington
 D.C.
 My mom hasn't seen this or told
 me what to right.

I don't remember very much from
 home only what ~~to~~ my house looks
 like a little, some of my friends &
 my pre-school & my mom's office.

Ever since I come to N.Z. I have been
 craving Oreos cookies, ice-cream sandwiches &
 candy corn, they don't sell them here.

In N.Z they ~~celebrate~~ don't celebrate
 4th of July or Thanksgiving & they don't
 do much of anything about Halloween or
 Christmas & I have always loved parties.

I want to come home because I
 miss all my cousins (3 of them I
 haven't met) my step-dad, my other
 relatives & my friends I also miss.
 I also want to go home because
 America is my home.

2.

Ellen Morgan

America is important to me because my friends & family live there & I love it.

Congress should ~~do~~ this because I don't live in N.Z. ~~without~~ without all the people I love & I want to do Junior high & high school in America.

My birth fathers last name is Foreich. I last saw him in 1990. I've had no contact with him since then. I don't want to see him again at least until I'm 30. I wouldn't go home if I had to see him. I wouldn't want any contact with him of any kind.

My mom hasn't told me anything about him this is all what I feel.

I miss all my family except my real dad. I miss the freedom of America & my friends. It's very hard to say goodbye to my stepdad all the time. I really want my family back again. I also miss my accent & feeling like an American.

I try to stay an American as much as I can but it isn't easy because there aren't a lot of Americans out here & we are so far away.

I have a few American friends out

Ellen Morgan.

3.

they are mostly from the Navy
~~have~~ my best is an American who
 just left N.Z. to go home with the
 Navy.

~~Ellen~~
 23 July 1945

Mr. DAVIS. I would also say to all of the witnesses that any written statements they have will appear in the record. I ask unanimous consent that such statements become part of the record. We will now proceed with the balance of the hearing as planned. And I would like to call to testify, Dr. Eric Foretich; Dr. Hollida Wakefield, from the Institute of Psychological Therapies, accompanied by her husband, Dr. Ralph Underwager; and Dr. Jonathan Turley, professor of law at George Washington University.

Now, it's the policy of this committee that all witnesses be sworn before they testify. Would you please rise with me and raise your right hands.

[Witnesses sworn.]

Mr. DAVIS. The subcommittee will carefully review any written statements you care to submit. As I said before, if you want to supplement any testimony following the testimony you may hear today or any future occurrence, we'll be happy to include that as a part of the record.

It may be necessary during the course of the hearing today to take a recess to go over and vote, for as long as a half an hour. The subcommittee will review any written statements, but I would like to insist that all testimony be limited to 5 minutes each. Dr. Foretich, you can start. Thank you.

Mr. FORETICH. I would request that Professor Turley precede me, if that's possible.

Mr. DAVIS. Without objection.

Mr. FORETICH. Thank you.

STATEMENT OF ERIC FORETICH; HOLLIDA WAKEFIELD, INSTITUTE OF PSYCHOLOGICAL THERAPIES, ACCOMPANIED BY RALPH UNDERWAGER; AND JONATHAN TURLEY, PROFESSOR OF LAW, GEORGE WASHINGTON UNIVERSITY

Mr. TURLEY. Thank you, Mr. Chairman. I appreciate the opportunity to address the committee today. I realize this committee takes this matter quite seriously. My name is Jonathan Turley. I'm a law professor at George Washington University, and I direct two national public interest organizations that deal with legislative and litigation matters. My students and I work with Congress and private citizens on a pro bono basis on a variety of areas of legal reform.

I'm here today, however, as someone with background in legislative matters and an interest in H.R. 1855, the proposed amendment to Title 11. I will abbreviate my remarks because of time limitations, and submit my written remarks to the committee for inclusion later. In one sense, I may be unique among the witnesses today.

I have no past involvement in this case or, frankly, current interest in its outcome. I believe this disclosure is important for a number of reasons that I will address later in testimony. I'd like, therefore, to be clear on how I came to testify. Last week, a copy of this bill was given to me by a former student who is working as a volunteer with Dr. Foretich. The student was aware that I had consulted with Congress in the past, though I have no position on custody questions or family law decisions.

After reading the bill, I decided to testify on the legislation under four conditions. First, I would not speak to either party or their counsel. Second, I would testify only to what I considered legally relevant, and would not guarantee my testimony would be favorable or unfavorable to either party. Third, I would not review any material associated with the case itself. Finally, I would testify to my own honest legal appraisal of the legislation, and not to the merits of the custody case. All these conditions were discussed with the committee staff and conveyed in my letter.

My interests today are exclusively Constitutional in policy and orientation. I'm generally viewed as someone with an expansive view of congressional authority. Despite that personal bias, I have fundamental problems with H.R. 1855. After reading this bill and its legislative history, I'm convinced that H.R. 1855 is fatally flawed on both a legal and a policy basis.

While I understand that there are many good intentions behind such legislation, the most unconstitutional measures begin with the best intentions. H.R. 1855 is an effort to legislatively change a prior judicial custody ruling by reversing the relative legal positions of the parties. That was made evident today. Certain Members have a disagreement with what the court did. As such, H.R. 1855 can be challenged as a bill of attainder. And I believe that challenge was well founded.

I must confess, when I read H.R. 1855, I was a bit taken aback because in law school, a bill of attainder is something that is discussed as an historical anomaly. Testifying on a bill of attainder is something like arguing against legislative grants of titles of nobility—it's not something you expect to be doing on a Friday afternoon.

It is rare that Congress will consider legislation that interferes with or restricts the rights of a particular citizen. The reason is found in Article I of the U.S. Constitution. That article states that no bill of attainder or ex post facto law shall be passed. An identical prohibition applies to the States. A bill of attainder is a concept that was imported to this country from England, when the early colonists found themselves subject to death writs by Parliament. We're not talking about that today. I hope not, at least not for the witnesses. In 18th century England, a person could be sentenced to death by Parliament. A bill of attainder prevented the heirs of that individual from inheriting property. In reality, non-capital offenses were actually called bills of pain and penalty. So technically, at least, H.R. 1855 could be more accurately referred to as a bill of pains and penalties, that is a non-capital bill.

The prohibition on bills of attainder applies to both Congress and the States. The Supreme Court has isolated three components, which I'd like to bring to your attention briefly. One is specificity; one is punishment; and one is the circumvention of judicial process. I believe that all three components are present in this case, and are remarkably documented.

I will not go into the cases where the Supreme Court has struck down legislation in the past. There have been five such cases, but those cases actually involved groups as small as a number of three. This bill actually targets a smaller number of people. This bill,

frankly, is meant, in my view, to punish a single individual; and that's the individual to my right.

I have never met Dr. Foretich until this morning. And I don't particularly know what the basis of his claim is. I don't actually care about that, and I don't mean to be callous. I'm quite sympathetic.

Mr. DAVIS. We need to try to hold close to the 5-minute rule. Your whole statement will be in the record. We'll give you an extra minute to try to summarize your statement. I'm reading it now as you go through it. I think the other Members are doing the same. But we're going to try to keep it as close to 5 minutes as we can.

Mr. TURLEY. I understand, Mr. Chairman. There's no question that the denial of a father's right to visitation is punitive. That should be evident from the two parents in this case. They fought very hard to retain these privileges. But there is no easier confirmation of the judicial function involved in this room than a glance at its witnesses. These are witnesses who should appear at a trial.

A bill of attainder is like a dormant virus in a democratic body. Periodically, individual cases will present important symbolic elements for legislatures. I recommend that this committee let that temptation pass. I believe that this bill is unconstitutional, not because of bad motives and not because this committee considers the Constitution as a trivial matter. I know that not to be true.

But I believe that this bill belongs somewhere else, this matter belongs somewhere else, and not the U.S. Congress.

[The prepared statement of Mr. Turley follows:]

PREPARED STATEMENT OF JONATHAN TURLEY, PROFESSOR OF LAW, GEORGE WASHINGTON UNIVERSITY

Thank you, Mr. Chairman. I am Jonathan Turley. I am a Professor of law at George Washington University and I am the director of two national public interest organizations at the law school dealing with legislation and litigation. My students and I work with Congress and private citizens on a pro bono basis in a variety of areas of legal reforms. I am here today, however, as someone with a background in legislation and an interest in H.R. 1855, the proposed amendment to Title 11 of the District of Columbia Code.

I. INTRODUCTION

In one sense, I may be unique among your witnesses today. I have no past involvement with this case or current interests in its outcome. I believe this disclosure is important for a number of reasons that I will address later in testimony. I would like, therefore, to be clear on how I came to testify today. Last week, I was given a copy of H.R. 1855 by a former student who is working as a volunteer with Dr. Foretich. The student was aware that I had consulted with Congress in the past, though I have no prior position on custody questions or family law decisions. After reading the bill, I agreed to testify on the legislation under four conditions. First, I would not speak with either party or their counsel. Second, I would testify only on what I considered relevant and I would not guarantee that my testimony would be favorable or unfavorable to either party. Third, I would not review any material associated with the case. Finally, I would testify as to my own honest legal appraisal of this legislation and not to the merits of the custody case. All of these conditions were also discussed with committee staff and conveyed in my letter agreeing to testify.

My interests today are exclusively the constitutional and policy implications presented by this legislation. I am generally viewed as someone with an expansive view of congressional authority. Despite that personal bias, however, I have fundamental problems with H.R. 1855. After reading this bill, its legislative history, I am convinced that H.R. 1855 is fatally flawed on both a legal and a policy basis. While I understand that there are many good intentions behind such legislation, the most

unconstitutional measures begin with the best intentions. H.R. 1855 is an effort to legislatively change a prior judicial custody ruling by reversing the relative legal positions of the parties. As such, H.R. 1855 can be challenged as a Bill of Attainder and, I believe, that challenge would be well-founded.

II. BILLS OF ATTAINDER

I should confess that when I read H.R. 1855 I was at bit taken aback by the language. In law school, the Bill of Attainder is generally discussed as something of a historical anomaly. Testifying on a Bill of Attainder is something akin to arguing against legislative grants of "titles of nobility." It is rare that Congress will consider legislation that interferes with or restricts the rights of a particular citizen. The reason is contained in the first Article to the United States Constitution.

Article I states: "No Bill of Attainder or ex post facto Law shall be passed." U.S. Cont. art. I, §9, cl. 3. A similar prohibition is contained in section 10 of the Article I and restricts all states from "pass[ing] any Bill of Attainder." U.S. Cont. art. I, §10. The immediate question is whether H.R. 1855 constitutes such a bill and I believe that it does.

A. Brief Legal History of Bill of Attainders

The Bill of Attainder is a concept that was imported to this country from England. The early colonists were all to familiar with this oppressive legal device, which was used by Parliament to punish both individuals and their heirs. In Eighteenth century England, a person could be sentenced to death without trial by an act of Parliament. A Bill of Attainder also prevented the heirs of that individual from inheriting property. Originally, a Bill of Attainder only referred to capital sentences of Parliament. In England, a parliamentary act imposing a sentence of less than death was referred to as a "Bill of Pains and Penalties." Thus, H.R. 1855 may be more accurately referred to as a "Bill of Pains and Penalties."

The prohibition to Bills of Attainder applies to both the state and federal legislatures. The prohibition is violated when the Congress, or its state counterparts, attempt to punish a particular person or group without the procedural and substantive protection accorded by a trial. Justice Black defined the meaning of this clause in *United States v. Lovett*, 328 U.S. 303, 315-16 (1946), when he wrote that legislative acts, no matter what their form, that apply either to named individuals or easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial are bills of attainder prohibited by the Constitution.

The Bill of Attainder provision has led to five cases where the Supreme Court struck down legislation. The first such case was *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277 (1866), in which the Court reviewed amendments to the Missouri Constitution. These amendments required that citizens take an oath that they had not supported the Confederacy as a precondition to vote, hold office, hold property, or teach in a religious organization. In striking down the amendments, the Court noted that the Constitutional prohibition was far broader than its historical predecessors and thus adopted what is called the "functional view" of the Bill of Attainder. Thus, the Court held in *Cummings* that the Constitution was designed to prevent the "evils" wrought by such personalized legislation and not the specific historical bills of criminal sanctions of England. See also *Ex Parte Garland*, 71 U.S. (4 Wall.) 33 (1866).

The Supreme Court has generally isolated three components in its Bill of Attainder analysis: specificity, punishment, and the circumvention of judicial process. For example, in *United States v. Brown*, 381 U.S. 437, 438-39 & nn. 1-3 (1965), the Supreme Court struck down section 504 of the Labor-Management Reporting and Disclosure Act of 1959. Under this law, Congress barred any individual from assuming a leadership position in a labor union who was a member of the communist party or had been a member in the prior five years. 29 U.S.C. 504 (Supp. IV 1958). The Court found this to be a Bill of Attainder.

These prior bills were efforts to change legislatively the legal status or conditions of unpopular individuals or groups. The popularity of such bills is always in direct correlation to the unpopularity of their targeted subjects. That is the insidious quality of Bills of Attainder. They are forms of collective judgment visited on individual citizens without trial or legal recourse. Majoritarian abuse or caprice is most frightening when practiced on an individual rather than national scale. This is why the Constitution addresses the danger specifically with an express prohibition.

B. Analysis of H.R. 1855

The more narrow a piece of legislation the more likely that it constitutes a Bill of Attainder. The clearest examples of such legislation can be found in cases where

Congress acts with particular individuals in mind. For example, in *United States v. Lovett*, 328 U.S. 303 (1946), Congress passed legislation to bar three named individuals from holding any government position because they were viewed as subversives. The Supreme Court quickly struck down the law as a Bill of Attainder. Justice Black wrote with his characteristic clarity:

[L]egislative acts, no matter what their form, that apply either to named individuals or easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial are bills of attainder prohibited by the Constitution.

These decisions raise significant questions about H.R. 1855.

Specificity

In finding that legislation is specific or particularized, it is not necessary for the Congress to actually name the targeted individual or group. The Supreme Court has held that “[t]he singling out of an individual for legislatively prescribed punishment constitutes an attainder whether the individual is called by name or described in terms of conduct which, because it is past conduct, operates only as a designation of particular persons.” *Selective Service System v. Minnesota Public Interest Research Group*, 468 U.S. 841, 847 (1984) (quoting *Communist Party of the United States v. Subversive Activities Control Board*, 367 U.S. 1 (1961)). The requisite specificity exists for a Bill of Attainder whenever the legislation establishes by context or “past activity” that a particular person or group is targeted. *Cummings v. Missouri*, 4 Wall. 277, 324 (1867).

The question of specificity of this legislation is rather clear and, to their credit, the sponsors of the bill have not attempted to disguise the specific target of this legislation. In the introduction of the legislation on the floor, it was made clear that H.R. 1855 is designed to accommodate Dr. Morgan by restricting Dr. Foretich:

[HR 1855] would allow Hillary Morgan, now known as Ellen Morgan and her Mother, Dr. Elizabeth Morgan to return safely to the United States. . . .

Pending court orders pertaining to both the mother and the child place unacceptable obstacles in the path of their safe return. This bill seeks to remove those obstacles. . . .

We should not and can not allow the judicial system’s antiquated order to continue to punish this child or force her to grow up away from her family or her country. The legislation I introduce today will remedy the situation and allow this child to come back to the United States and pursue her dreams.

Unfortunately, judicial proceedings and media coverage tended to focus on disputes between two well-known parents. The court order, now over 7 years old, does not address the current circumstances of the welfare of a young teenage child.

Under the provisions of this bill, the current orders relating to the penalties to the mother and visitation by the father, would no longer be operable . . . Congressional Record, E 1273 (June 16, 1995) (statements of Congressman Thomas Davis). There can be little question that this bill is specifically focused on this case and the “obstacle” described in the introduction of the bill is the father, Dr. Eric Foretich.

Punishment

The second component of a Bill of Attainder is punishment. The concept of a Bill of Attainder in the United States is broad and encompasses both criminal and civil penalties. The Supreme Court has expanded the meaning of punishment in Bill of Attainder cases to go far beyond the historical definition. In *Cummings*, the Court noted that

[t]he deprivation of any rights, civil or political, previously enjoyed, may be punishment, the circumstances attending and the causes of the deprivation determining this fact. Disqualification from the pursuits of a lawful avocation, or from positions of trust, or from the privilege of appearing in the courts, or acting an executor, administrator, or guardian, may also and often has been, imposed as punishment.

Cummings, 4 Wall. at 320. Likewise, in *Brown*, the Supreme Court stressed that “[i]t would be archaic to limit the definition of ‘punishment’ to ‘retribution.’” *Brown*, 381 U.S. at 458. While the Court has not addressed whether the loss of custody or visitation rights to a parent is punitive, it has recognized that civil restrictions on employment and personal status can satisfy the punishment requirement of this test. *United States v. Brown*, 381 U.S. 437 (1965) (barring union membership); *United States v. Lovett*, 328 U.S. 303 (1946) (salary cuts); *Cummings v. Missouri*, 4 Wall. 277 (1867) (barring practice as priest); *Ex Parte Garland*, 4 Wall. 333 (1867) (barring practice as lawyer).

The Supreme Court has repeatedly stressed that punishment for purposes of the Bill of Attainder go beyond the historical definition. The courts will often consider "the type and severity of burdens imposed" or, alternatively, whether the legislative record "evinces a congressional intent to punish." *Nixon v. Administrator of General Services*, 433 U.S. 425, 473, 475-476 (1977); see also *Selective Service System v. Minnesota Public Interest Research Group*, 468 U.S. 841, 851 (1984). These are sometimes called the "functional" and "motivational" tests to distinguish them from the "traditional" or "historical" test for Bills of Attainder. There is no conventional legislative purpose to a bill that favors one party in a custody dispute based on allegations of criminal conduct by the other party.

In my view, there can be little question that the denial of a father's right to visitation or custody is punitive under the past cases in this area. While the purpose may be well-meaning as to the child, the impact will be felt exclusively by the father in a denial of rights that he clearly views as substantial and vital. Moreover, there is considerable evidence today that this bill is meant to "right a perceived wrong."

The nature of the offense alleged here is criminal and despicable. Designed to address this circumstance, the legislative background to H.R. 1855 evidences all the passion and contempt inherent in those charges. Mr. Foretich is clearly a "disfavored person" in this House and the legislation is meant to restrict his activities to prevent his alleged (but unproven) propensities. *Landgraf v. USI Film Products*, 114 S. Ct. 1483, 1497 (1994) ("The prohibitions on 'Bills of Attainder' in Art. I, §§ 9-10, prohibit legislatures from singling out disfavored persons and meting out summary punishment for past conduct.").

While the bill has been introduced to remove "obstacles" or to benefit one party, there is little question that these obstacles are removed and benefits bestowed at the cost of the other party. A Bill of Attainder can always be framed as a benefit or protection of another party. The question is the punitive effect on a single individual or group. Given the sentiment and express purposes of this legislation, all parties in this dispute must at least agree on one salient point: the loss of access to one's child is perhaps the greatest punishment for any individual.

Circumvention of Judicial Process

The third component of a Bill of Attainder is also present in this bill. As evidenced by the introduction of H.R. 1855, the purpose of the bill is to negate past decisions and void legal rights secured in those prior proceedings. There is no question that this dispute is one that ordinarily would be adjudicated in a trial at the state level. This bill is in fact unique in that it is directed at undoing a judicial decision in favor of one party. The bill itself, therefore, is expressly designed to void one standing court order and shift the relative legal position of the prior litigants. Thus, unlike past Bill of Attainder cases, this bill actually starts with an adjudicative history and seeks to accomplish by legislative fiat what was not accomplished by judicial review.

There is no easier confirmation of this judicial function than a brief glance around this committee room. Sitting around us are witnesses and experts who would ordinarily appear in a trial subject to procedural safeguards and legal process. Instead, they are testifying as to the merits of a case in the hopes of a "legislative ruling." This ruling is heavily dependent on the Committee's legislative determination that this child is endangered by a court-ordered visitation with her father. This is a judicial function performed by a legislative body. Such decisions not only help establish the third component of the Bill of Attainder analysis but also raise significant Separation of Powers and Home Rule questions.

III. ANALYSIS OF ALTERNATIVE LEGAL AVENUES

Without getting into the facts of this case, I am unsure why Congress has taken this occasion to delve into family law matters, particularly the legal status of a single family. There are obviously important issues to be resolved by these parents and serious allegations to be addressed by the court. This law, however, will not remove "obstacles in the path of the[] safe return" of this child. In all honesty, this child can return tomorrow without an immediate threat to her custody or safety. The mother's attorney can easily file a protective or restraining order to require a judicial decision before any change of custody or visitation occurs. Dr. Foretich will have to go to court to receive an order for such changes and cannot engage in unilateral efforts to seize custody once it has been refused. We fortunately live in a nation of laws and those laws are enforced under a judicial process of review.

Once the child returns home, I would expect Dr. Foretich to demand visitation and be denied. He will then proceed to a court of law and ask for the enforcement of the prior court order. The court will then be able to hear argument on all of these questions in the proper forum. This legislation will only create a dangerous and un-

necessary precedent for a democracy. There will always be a strong temptation to yield to constituent demands for individualized legislation. The Supreme Court recently warned that “[t]he Legislature’s unmatched powers allow it to sweep away settled expectations suddenly and . . . [i]ts responsiveness to political pressures poses a risk that it may be tempted to use retroactive legislation as a means of retribution against unpopular groups of individuals.” *Landgraf v. USI Film Products*, 114 S. Ct. 1483, 1497 (1994). The Bill of Attainder is like a dormant virus in a democratic body. Periodically, individual cases will present important symbolic elements for legislators. These triggering events can produce an immediate impulse to correct a perceived wrong or reestablish a balance in interests. However, federal legislation is neither surgical nor precise in its impact. It is by its very nature an overwhelming and potentially destructive device for assisting individual citizens. Yielding to such temptations, however, rarely advance the stated goals of the legislation and more often than not produce negative consequences for all of the interested parties.

IV. CONCLUSION

The Constitution affords this body with tremendous legislative powers and few restrictions. In the past, I have been someone who has testified in support of the widest interpretation of those powers. This bill, however, goes well-beyond the permitted constitutional authority of this body and ventures deeply into the private life of a single individual.

I encourage you first to consider these threshold legal and policy questions. This is a dispute between two parents. It belongs in the courts. I am perfectly agnostic as to who should ultimately prevail in this dispute. The resolution of this dispute, however, will not be advanced by the intervention of a nation into the already confused family tragedy. I strongly suggest that this Committee take what is perhaps the most difficult option for a legislating body: to accept that this case must be resolved on its own terms, in its own time, and without federal legislation.

PREPARED SUPPLEMENTAL STATEMENT OF JONATHAN TURLEY, PROFESSOR OF LAW, GEORGE WASHINGTON UNIVERSITY

On August 4, 1995, a congressional hearing was held on the enactment of H.R. 1855, a proposed amendment to Title 11 of the District of Columbia Code that would “restrict the authority of the Superior Court of the District of Columbia over certain pending cases involving child custody and visitation rights.” I testified at that hearing on the constitutionality of the legislation. At the time of my testimony, Chairman Thomas Davis extended the courtesy of allowing witnesses to add supplemental statements to the record. This opportunity was specifically extended to allow the first panel to respond to any comments made by later panels on legal or factual matters relevant to the legislation or underlying case.

At the hearing, other legal experts testified on the constitutionality of H.R. 1855 and sharply disagreed with my conclusion that the legislation constituted a Bill of Attainder.¹ I would now like to respond briefly to those comments and further update the committee on the *Foretich/Morgan* case since the hearing.

During the hearing, two expert witnesses testified on the constitutional issues raised by this legislation. First, the Honorable Judge Charles Gill of the Connecticut Superior Court testified in support of H.R. 1855. In his testimony, Judge Gill gave the Committee the conclusion of his constitutional analysis, stating that “[he does] not believe, after research, that this is a case of Bill of Attainder at all.” Judge Gill, unfortunately, did not share the basis, analysis, or precedential support for this conclusion. Accordingly, I can only respectfully disagree with Judge Gill’s conclusion and rely on my prior research submitted to the Committee.

The second witness, Mr. David Harmer, offered more substantive testimony on the question and explained why, in his view, H.R. 1855 could not be a Bill of Attainder. Mr. Harmer cited various reasons for this legal conclusion, which should be addressed to complete the record for Congress. These are novel questions and I do not wish to cast any dispersions on Mr. Harmer. However, I believe that Mr. Harmer’s constitutional analysis of this legislation is critically flawed in the definition of what constitutes a Bill of Attainder and its discrete components. While there is obviously much room for debate on these novel questions, there are established points that should not be casually disregarded in the consideration of this legislation.

¹Since I was not present for this testimony, I asked for a copy of the transcript but was told that the transcript could not be copied. I am, therefore, responding to these comments based on notes taken by one of my law students at the hearing and later confirmed by a law student who was allowed to read the transcript in the committee.

1. THE SIGNIFICANCE OF PRIOR LEGISLATION TO THIS QUESTION

Mr. Harmer's first point of analysis was to note that Congress has passed prior legislation relating to this case and "[t]hey were not Bills of Attainder." Mr. Harmer cites to an article that he authored in the Brigham Young University Journal of Public Policy on this point to show that, if prior legislation on this case was constitutional, H.R. 1855 is presumptively constitutional.

The analysis here is misplaced. The constitutionality of prior legislation in this case is immaterial as to whether the instant legislation is unconstitutional. It is doubtful that a court would place any legal significance on the mere fact of prior enactments in reviewing the constitutionality of H.R. 1855. In the past, Congress has often legislated repeatedly in areas before transgressing a constitutional line. When a constitutional challenge comes (if at all) it is a matter of circumstance. The mere fact that prior legislation has not been challenged is no more evidence of constitutionality than the absence of a prior IRS audit is evidence of later proper tax filings.

Moreover, Mr. Harmer stated to the Committee that "there were Bill of Attainder objections to H.R. 2136 and S 1163 six or seven years ago and those objections were overruled." A review of the record, however, has failed to show any legal challenge, let alone any overruling of prior constitutional challenges as Bills of Attainder. As far as I can determine from the record in this case, the prior legislation was never challenged as a Bill of Attainder and, thus, there is no judicial opinion upholding this prior legislation.²

Even if prior legislation were considered material, these bills would be a poor basis for comparison. Mr. Harmer's comments refer to the congressional amendment of the D.C. Code §§ 11-944 & 11-741, to limit that period of incarceration for any individual found in civil contempt in a child custody case. This prior legislation is manifestly different from H.R. 1855 and, if anything, highlights the constitutional problems with the current legislation. The 1989 legislation was designed at most to *benefit* one party to the case—Dr. Elizabeth Morgan. Releasing Dr. Morgan from jail is not a punishment on Dr. Foretich or a legislative change in his rights in the ongoing litigation. The legislation did not make any conclusions as to the relative merits of the claims or the potential dangers imposed by Dr. Foretich to his daughter, Hilary Foretich/Ellen Morgan. Congress can always benefit individuals without triggering a Bill of Attainder. It is when Congress disadvantages an individual through a punitive legislative measure that a Bill of Attainder issue arises.

Unlike prior legislation, H.R. 1855 is directed at protecting the safety of a child by preventing contact with her father. The bill is, effectively, a legislative finding of probable dangers presented by Dr. Foretich to his daughter. Moreover, the bill characterizes these dangers to be so great as to compel a national legislative act to prevent harm to this little girl. This point was made clear at the bill's introduction on the floor by Chairman Davis, who stressed that this was a question of safety and the unnecessary endangerment of a child. Chairman Davis noted that "[HR 1855] would allow Hilary Morgan, now known as Ellen Morgan and her Mother, Dr. Elizabeth Morgan to return *safely* to the United States [and remove] unacceptable obstacles in the path of their *safe* return." Congressional Record, E 1273 (June 16, 1995) (statements of Congressman Thomas Davis, chairman of the District of Columbia Subcommittee, Committee on Government Reform and Oversight) (emphasis added). During the hearing, this concern was again stressed by Chairman Davis and his colleagues. These members expressed outrage that the court had issued the standing order and exposed this child to dangers. Congresswoman Susan Molinari stressed in her formal statement that "Ellen is fighting for her childhood and her safe return to the United States."

As Chairman Davis noted, H.R. 1855 is designed to "remove the obstacles" to the "safe" return of this child. Those obstacles appear to be the current legal rights of one person. H.R. 1855 would directly change the rights of Dr. Foretich based on a public legislative concern for his child's safety. The comparison of such legislation to the prior enactment is legally and factually without foundation.

²Ironically, as a sponsor of the Senate bill, Senator Dole expressly warned about further amendment of the D.C. Code or intervention by Congress into the case. Senator Dole noted that Congress should not "amend the District of Columbia Code every time it believes that a single individual is entitled to relief from the sometimes tough requirements imposed by the laws of our Nation's Capital." 135 Cong. Rec. S. 10809, 10816, Sept. 7, 1989.

2. WHETHER CONGRESS IS ACTING AS A STATE OR NATIONAL LEGISLATURE IS NOT RELEVANT TO THE INSTANT QUESTION

In his testimony, Mr. Harmer also stressed the fact that Congress was not acting as the national Congress but as the District's legislature. He specifically noted that "Congress is DC's city council . . . [it] determines the jurisdiction of the District of Columbia Superior Courts." The Constitution, however, has two Bill of Attainder provisions: one applicable to the federal legislative branch and one applicable to state legislative branches. Even if Congress were considered as acting as a state legislature in such matters, the congressional act would simply fall under the alternative provision. This is clearly an act of Congress, which is fully subject to the Bill of Attainder provision. The suggestion that Congress can pass a possible Bill of Attainder, so long as it is directed at the District or District citizens, is without merit.

3. THE CONSTITUTIONALITY OF H.R. 1855 IS NOT DEPENDENT ON WHETHER CONGRESS IS USING A LEGITIMATE CONGRESSIONAL POWER BUT RATHER WHETHER THAT POWER IS USED IN A CONSTITUTIONAL FASHION

Mr. Harmer correctly notes that Congress has the authority to change the jurisdiction of the courts. However, Mr. Harmer further suggests that, because Congress has this authority, the exercise of that authority can never be a Bill of Attainder. This is incorrect. Most Bill of Attainder cases involve legislative acts done with proper jurisdictional authority but improper focus or purpose. For example, in *United States v. Brown*, 381 U.S. 437, 449-50 (1965), the Supreme Court noted in passing that Congress "undoubtedly possess[es] power under the Commerce Clause to enact legislation" to restrict union officials from holding office but still found a Bill of Attainder in legislation barring Communist Party members. Likewise, in *United States v. Lovett*, 328 U.S. 303, 313 (1946), the Court held that Congress's power to control appropriation was not in question but still held that Congress could not withhold compensation from government employees who did not meet certain conditions when those conditions were directed toward a select group of persons. If Congress does not have authority in an area, a challenge under a Bill of Attainder would not be needed since there would be no lawful enactment in the first place.

4. THE IMMEDIATE ENFORCEABILITY OF A RIGHT HAS NEVER BEEN A CRITERION FOR A BILL OF ATTAINDER

Mr. Harmer next argued that H.R. 1855 could not be a Bill of Attainder because Dr. Foretich's "rights are unenforceable" with Dr. Morgan and her daughter out of the country. Once again, this criterion has not appeared in any past Supreme Court case. More importantly, Dr. Foretich's rights are immediately enforceable upon the appearance of Dr. Morgan in this jurisdiction. His rights are legally vested and protected under the Court Order. According to this theory, if this legislation is a Bill of Attainder with the child in the jurisdiction, it would become instantly constitutional by moving the child temporarily into another jurisdiction during enactment. To suggest that such rights can be constitutionally severed by Congress so long as they are not enforceable immediately would create a ridiculous incentive for individuals to move chattel or parties out of the jurisdiction as an enabling measure for Bills of Attainder. There is no logical reason why a court would adopt such a technical approach to a constitutional protection designed to prevent special legislation against individuals. If the Supreme Court did allow such an approach, Congress could act opportunistically against individuals. The mere crossing of a border or a temporary legal barrier to enforcement would allow Congress unlimited legislative powers in the area. The presence of the child outside the jurisdiction is irrelevant to the instant question.

5. THE STRUCTURING OF A BILL OF ATTAINDER AS A GENERAL JURISDICTIONAL CHANGE HAS BEEN PREVIOUSLY REJECTED BY THE SUPREME COURT

Mr. Harmer next argued that H.R. 1855 is not a Bill of Attainder because he interprets the legislation as "changing the law under which the matter would be decided" as opposed to a legislative penalty of a single party. This point, however, is insupportable under past Supreme Court cases making jurisdictional or eligibility changes to disadvantage one party or group. According to Mr. Harmer's implied theory, Congress could punish individuals or insular groups so long as it did so through jurisdictional means. Obviously, Congress could restrict the jurisdiction of the D.C. police department or hospital staff with the same specificity to deprive individuals of protection or health services. These acts, however, would be equally unconstitutional. The question is one of intended purpose and selective impact.

There is no question as to the specificity of purpose and impact of this Act. While the bill refers to "certain pending cases," the sponsors made clear that their interests exclusively involved the pending matter, *Morgan v. Foretich*, C.A. No. D-684-83, and drafted the law to limit its application to these particular facts. The bill specifically incorporates critical facts from *Morgan v. Foretich* to restrict language to this single controversy. In order for the law to apply, the following facts must be present:

1. "the child asserts that a party to the case has been sexually abusive with the child;"
2. "the child has resided outside the United States for not less than 24 consecutive months;"
3. "any of the parties to the case has denied custody or visitation to another party in violation of an order of the court for not less than 24 consecutive months" and;
4. "any of the parties to the case has lived outside the District of Columbia during the period of denial of custody or visitation."

All four of these conditions must be met for this law to restrict the Court's jurisdiction. A search has failed to locate a single case ever filed in the District of Columbia that meets these conditions, save one: *Morgan v. Foretich*. In the pending case:

1. Hilary Foretich/Ellen Morgan has accused Dr. Foretich of sexual abuse;
2. Hilary Foretich/Ellen Morgan has resided outside the United States (in New Zealand) for over eight years;
3. Dr. Morgan denied custody or visitation to Dr. Foretich in violation of an order of the Court for over eight years and;
4. both Dr. Morgan and Hilary Foretich/Ellen Morgan have lived outside the District of Columbia during the period of denial of custody or visitation."

The law further requires that the minor have attained 13 years of age. Hilary Foretich/Ellen Morgan attained the age of 13 this year.

To further narrow the bill to the pending case, Congress only restricted the Court's jurisdiction in cases with the identical claims or potential liability of the parents in *Morgan v. Foretich*. Under the law,

1. "at any time after the child attains 13 years of age, the party to the case . . . may not have custody over, or visitation rights with, the child without the child's consent;" and
2. "if any person had actual or legal custody over the child or offered safe refuge to the child while the case (or other actions relating to the case) was pending, the court may not deprive the person of custody or visitation rights over the child or otherwise impose sanction on the person on the grounds that the person had such custody or offered such refuge."

In the instant case, involving a 13-year-old child, Dr. Foretich has a standing Court Order giving him the right of visitation without the prior consent of Hilary Foretich/Ellen Morgan. Furthermore, Dr. Morgan (1) has had actual or legal custody over Hilary Foretich/Ellen Morgan or offered safe refuge to the child while the case was pending; (2) faces a loss of custody and visitation rights, and (3) faces possible sanctions for the removal of herself and the child from the Court's jurisdiction. H.R. 1855 is a jurisdictional change targeted against one party. The use of a jurisdictional vehicle, as a threshold matter, is of no significance for the purposes of the constitutional analysis in this case.

6. THE ACQUIESCENCE OF A TARGETED PARTY IS MORE COMPELLING EVIDENCE OF COMPULSION THAN CONSTITUTIONALITY

Finally, Mr. Harmer argued that the acquiescence of a target of a Bill of Attainder effectively vitiates the violation. According to Mr. Harmer, since Dr. Foretich has offered to "yield his rights," no Bill of Attainder is possible. Once again, this argument would establish a perverse incentive for Congress. If acquiescence were the test, Congress could avoid challenge by forcing acceptance on threat of stiffer punishment. The potential for majoritarian abuse by Congress would be significantly magnified in such a case. A Bill of Attainder is a coercive and punishing act. The fact that an individual may not resist such pressures does not mitigate the violation. This would allow Congress to justify unconstitutional means if in the end resistance falters or fails. This would be akin to saying that a crime is not a crime if a victim drops charges against an assailant. Whether Congress has imposed punitive measures against an individual or group is a legal question that is not dependent on the response of the individual or group to the measures. While Mr. Harmer may have questions of standing, acquiescence to a Bill of Attainder does not vitiate its unconstitutional status.

7. H.R. 1855 RAISES A HOST OF CONSTITUTIONAL QUESTIONS BEYOND THE BILL OF
 ATTAINDER ISSUE

As my testimony indicated, I believe that H.R. 1855 raises a host of additional constitutional and home rule problems that should be addressed by the Committee. These issues were not addressed by the later panel but should be addressed by the Committee before moving forward with this legislation.

Whenever a legislative body calls a party or witness to a pending judicial action to discuss changes in pending orders, there are obvious separation of powers problems. Congress is the ultimate legislative body for the District and may restrict the Court's jurisdiction, but it may not attempt to influence a pending case. In furtherance of state and federal separation of powers principles, both state and federal courts have held that legislatures cannot enact laws altering or undermining judicial decisions. Furthermore, legislatures may not interfere with judicially created or enforced rights, and the Supreme Court has held that custody of one's child is such a right. On its face, H.R. 1855 would appear to undermine the standing Court Order in this case.

The Supreme Court has held that Congress cannot legislate in a manner that will interfere with final judicial decisions. *Plaut v. Spendthrift Farm*, 115 S. Ct. 1447, 1452 (1995) (citing *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871)). *Plaut* states that "[a] legislature without exceeding its province cannot reverse a determination once made, in a particular case." *Id.* at 1455 (quoting *The Federalist* No. 81, at 545 (Alexander Hamilton) (J. Cooke ed., 1961)). Furthermore, an "act of congress cannot have the effect and operation to annul the judgment of the court already rendered, or the rights determined thereby . . . especially as it respects adjudication upon the private rights of parties." *Id.* at 1456 (quoting *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 58 U.S. (18 How.) 421, 431 (1856)). The Supreme Court, therefore, has held that legislative infringement into judicial decisions is a violation of the separation of powers. *Id.*

State courts, in accord with separation of powers principles, have also prevented state legislatures from interfering with judicial determinations. The Illinois Supreme Court held that an amendment to section 401(3) of the Illinois Marriage and Dissolution of Marriage Act, Ill. Rev. Stat. ch. 40, para. 401(3) (1977), could not be retroactively applied to affect a prior decision of an Illinois appellate court. *In Re Marriage of Cohn*, 443 N.E.2d 541, 546 (Ill. 1982). In that case, an Illinois appellate court reversed a trial court judgment that not only granted a dissolution of marriage, but also reserved issues of child custody and property rights for later decision. *Id.* at 543. The appellate court held that the trial court could not, in accordance with Illinois state law pursuant to section 401(3), bifurcate its judgment between dissolution and custody. *Id.* In response to the appellate judgment, the Illinois state legislature amended section 401(3) of the Act to allow courts to hand down bifurcated judgments. *Id.* at 546. Through the amendment, the legislature permitted section 401(3) to apply in the case even though that case had already been decided. *Id.* at 547. In affirming the decision of the appellate court, the Illinois supreme court relied upon the legislative history of the amendment to section 401(3) and held the amendment unconstitutional.

The history of the section 401(3) amendment showed it to have been enacted as a legislative response to the *Cohn* decision. Specifically, section 401(3) was enacted "in response to a . . . recent court decision in the *Cohn* Case . . . [to clarify] the . . . validity of bifurcated divorces so that . . . a judge could validly . . . dissolve a marriage . . . and reserve the question of child custody." *Id.* at 546 (citing Illinois Senate, Senate Debates of May 20, at 189 (1981)). The Illinois Supreme Court held that section 401(3) was in "contravention of the principle of separation of powers . . . of the Illinois Constitution" to the extent that it reversed a prior decision of a court, namely the judgment of the appellate court in the *Cohn* case. *Id.* at 547. Thus, both the Illinois Supreme Court and United States Supreme Court have ruled that legislatures should not legislate to reverse judicial decisions.

District of Columbia courts have also decided that a legislature cannot infringe upon judicial decisions or judicially-created rights. For instance, the District of Columbia Court of Appeals held that "[c]ivil laws retroactively adding to the means of enforcing existing obligations are valid" . . . as long as vested or substantive rights are not altered." *Edwards v. Lateef*, 558 A.2d 1144, 1146 (D.C. 1989) (quoting 2 Norman J. Singer, *Statutory Construction* § 41.09 (1986)). This rule prohibiting legislative interference with judicially-created rights has been upheld also by the Southern District of New York, which stated that "the legislature may not . . . take away rights which have been once vested by judgment." *Hyundai Merchant Marine Co. v. United States*, 888 F. Supp. 543, 551 (S.D.N.Y. 1995) (quoting *Rabin v. Fivzar Ass'n*, 801 F. Supp. 1045, 1055 (S.D.N.Y. 1992)). Neither federal nor state

legislatures, therefore, can legislate in ways that contravene the intent and instructions of judicial decisions and judicially-created rights.

The Supreme Court has held that the granting of either custody over, or visitation, with one's child is a parental right "far more precious than any property right." *Rivera v. Minnich*, 483 U.S. 574, 580 (1987) (quoting *Santosku II v. Kramer*, 455 U.S. 745, 758-59 (1982)). The District of Columbia Court of Appeals has affirmed that right, holding that "[a] noncustodial father has a 'constitutionally protected . . . interest in developing a relationship with his child.'" *In Re J.F.*, 615 A.2d 594, 597 (D.C. 1992) (quoting *Lehr v. Robertson*, 463 U.S. 248 (1983)).

In this situation, the court previously granted Dr. Foretich a right of visitation with his child, a right of visitation that has been protected by both the District of Columbia courts and the Supreme Court. As previously noted, the Committee left no question that H.R. 1855 was designed to influence the outcome of this pending action. The Court Order was attacked on both the House floor and in the Committee hearing as a danger to the safety of the minor and a barrier to her return. See Congressional Hearing August 4, 1995 Transcript ("[t]he Morgans cannot return to the United States because of the outstanding Court Order, and things have changed since the Court Order.") (Chairman Davis); *id.* ("I don't know why Judge Dixon didn't do anything. Congressman Davis had to do it.") (Congressman Wolf). The interest in compelling Dr. Foretich to file a motion changing the Court Order was pressed repeatedly and, under questioning from Congresswoman Molinari, Dr. Foretich expressly promised "I will go back to Judge Dixon and make that announcement to him . . . to save passage of the bill." *Id.*

This agreed entry of a motion was made as a direct consequence of the threatened use of legislation that Dr. Foretich clearly did not want enacted. Chairman Davis actually dismissed Dr. Foretich by promising to follow up on the agreement and noting that "we'd certainly be interested in working with you to try to achieve the result in a different way." The result was a change in the status of this case before the Court and, with this change, the sole need for the legislation would be moot. There could be no clearer nexus between a proposed legislative bill and a pending judicial case.

On a general level, the decisions of the court cannot, in accord with the *Plaut* and *Klein* decisions, be overturned by a law reversing the purpose and effect of the Court Order. By introducing H.R. 1855, Congress has stated its intention to bar Dr. Foretich from exercising his rights under the Court Order. As such, the proposed legislation is a violation of the separation of powers principle not only because it legislates in a judicial matter, but also because it withdraws a right already given to one party in the judicial branch.

8. RECENT DEVELOPMENTS IN THE FORETICH CASE

Following the hearing, Dr. Foretich did file a motion with the court. On September 5, 1995, Dr. Foretich attempted, as a pro se litigant, to file a Motion for Modification of Visitation Order with Court (hereinafter "the Foretich motion."). The Clerk's office refused to file the material on the grounds that it was not in conformity with local rules, specifically Rule 12-1(e) requiring a memorandum of points and authorities. After learning of the attempted filing, on September 12, 1995, I filed a Motion for Leave to Appear as Amicus Curiae. The purpose of the motion was to request consideration by the Court of certain extrinsic factors before any ruling is made on the Foretich motion to change the standing Court Order in this case. Shortly after the filing of the amicus motion, Dr. Foretich filed a second pro se motion asking for a modification of the Court's August 28, 1987 Order.

The entire purpose of the entry of amicus curiae in this case is to inform the Court of the serious questions underlying the filing of the Foretich motion to modify the standing Court Order. The amicus motion is designed to guarantee that significant factors are brought to the Court's attention before dispositive questions are resolved. See, e.g., *Giammalvo v. Sunshine Mining Co.*, 644 A.2d 407, 409 (Del. 1994) ("[A]micus curiae are called upon for the purpose of . . . drawing the court's attention to broader legal or policy implications that might otherwise escape its consideration in the narrow context of a specific case"); *Briggs v. United States*, 597 A.2d 370, 375 (D.C. 1991) (defining the role of amicus curiae).

As stated earlier to the Committee, I do not represent, and have not represented, any party to this action. Moreover, I have no interest in the action beyond the congressional actions precipitating the pending Foretich motion. Thus, the petitioning amicus in this case will not advocate any position as to the outcome of this family dispute. The intervention by an amicus in this case is limited to a threshold question concerning extrinsic matters and the need for a preliminary judicial inquiry. Once such an inquiry has been made with a complete record supplied by the amicus,

the purpose of the intervention will be satisfied. Briefing on this motion was completed on October 16, 1995, and a Motion for Oral Hearing was requested by Petitioner.

In the interests of full disclosure, however, I feel that it is necessary to notify Congress that my prior testimony of neutrality has been challenged by a member of the Morgan family. Following the completion of briefing, the President of The George Washington University received a letter from Mr. William Morgan, grandfather of Hilary Foretich/Ellen Morgan and father of the Plaintiff, Dr. Elizabeth Morgan. See Exhibit A. This letter was written on letterhead from both Mr. Morgan and his wife, Mrs. Antonia Morgan, a witness at the August 4, 1995 hearing. In his letter, Mr. Morgan lodges "a formal complaint of unethical conduct" against Petitioner. *Id.* at 1. The letter challenges my neutrality, alleges that the amicus curiae motion is an effort "to legitimize [petitioner's] status as an amicus curae [sic] so that he can further protect Eric Foretich," suggests misrepresentations to both the Court and Congress, and asks the University President to discipline or censure me for misconduct. *Id.* at 2.

I was informed of the letter as part of the University's inquiry into the relevant facts behind the complaint. Because the letter contains serious allegations from a party close to the pending litigation, I asked for a copy from the University. Since the letter directly challenges my impartiality on this matter, it was clear that my obligation was to submit the letter to the Court and Congress. While I unequivocally deny the factual representations and ethical allegations in the letter, the Committee should be aware of any suggestion that a witness has misrepresented his connection or affiliation with parties to the litigation.

In conclusion, I would like to thank Chairman Davis for this opportunity to supplement my comments. Although we obviously disagree on these questions, Chairman Davis exercised his discretion to permit these comments to be added to the record in fairness to a witness. I would also like to stress that I do not wish to be critical of the motivations for this legislation. My objections lie outside the merits of the case. I realize that these questions present challenging issues for the Committee and for the witnesses. H.R. 1855 is an effort by congressional leaders to address what they perceive is a great wrong and injustice. There are, however, significant constitutional questions raised by the actions of the Committee that must be considered. While there are checks and balances in this system, our constitutional balancing is preserved primarily by acts of self-restraint among the branches. This self-restraint is all the more important when the impulse for action is as personal and compelling as the future of a single child.

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*William J. Morgan, Ph.D.
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14 October 1995

President Stephen Trachtenberg
George Washington University
2121 Eye Street, NW
Washington, DC 20052

Dear President Trachtenberg:

By this letter I lodge a formal complaint of unethical conduct against Professor Jonathan Turley, Professor of Law at George Washington University. He is cooperating with a psychopathic pedophile pervert, Eric A. Foretich, DDS, in trying to prevent the enactment of a law which would permit Eilan Morgan, 13 years of age and also known as Hilary Foretich, and her mother, Elizabeth Morgan, M. D., Ph.D. from returning to the United States with freedom and in dignity. Professor lacks a sense of moral balance, and he is consorting with a known child molester and trying to help that notorious child molester to defeat humanitarian justice.

BACKGROUND: Dr. Elizabeth Morgan, a prominent plastic surgeon, practicing in Northern Virginia but living in DC, went to the DC Superior Court to ask that the court no longer force her child Hilary to go on unsupervised visitations to her father, Dr. Eric Foretich, a dentist. There was plenty of evidence that Eric and his father Vincent were sexually molesting Hilary in brutal ways. They raped the child both ways, front and back. While Vincent held her, Eric would shove his penis into her mouth. Eric would sweep her body with an electrical stimulator. He even tried to lobotomize her by inserting wires into her nasal cavities.

But the judge, Herbert B. Dixon, Jr., refused to protect the child. In spite of expert testimony that she had vaginal wounds from forced penetration, Judge Dixon insisted that she go on unsupervised visitations to the Foretichs. After one of these unsupervised visitations, Hilary bleeding vaginally and in great pain was taken to the George Washington University Hospital where the physician believed that she had been sexually molested and called in a DC detective. The DC detective gained Hilary's confidence and then went to Judge Dixon's court, asking to testify. But Judge Dixon would not let the detective testify, probably because at that time Judge Dixon was heavily involved in a conspiracy to defame and degrade Dr. Elizabeth Morgan. Also, Judge Dixon refused to admit into evidence that Hilary's half-sister had also been sexually molested by Eric Foretich and that the court in Fairfax County had ordered that Eric Foretich and his parents could no longer communicate with Hilary's half-sister.

To: President Trachtenberg from WJM

In his insistence that Dr. Morgan subject Hilary to unsupervised visitations, Judge Dixon thrice jailed Dr. Morgan, the third time for 759 days. She was released from jail by an Act of Congress. When Dr. Morgan was jailed for the third time, my wife Antonia and I with Hilary, travelled the universe with her in order to protect her from further harm. She insisted that she no longer be called Hilary Foretich, and asked that she be known as Ellen Morgan.

There is no doubt that Judge Dixon is morally corrupt. In my opinion, he has also been on the take. Also, he may have favored Dr. Foretich, because Eric Foretich interned at the Harlem Hospital and at one time taught at Howard University. As with Simpson, with Johnia Cochran's pleading, Judge Dixon was "sending a message" long before anyone heard of Johnia Cochran.

Dr. Morgan and her daughter Ellen have been living in New Zealand, where the court there refuses to let the Foretich family see or talk or communicate with Ellen in any form. Having been a refugee from injustice in DC for almost nine years now, Ellen wants to continue her education in The States and to be with her cousins and other relatives. My Congressman, Thomas M. Davis, III, has put together HR 1855 to permit Dr. Morgan and Ellen to return without fear and in dignity. But Professor Turley is doing everything he can, with the assistance of Sampax P. Garg, to defeat HR 1855.

PROFESSOR TURLEY: Professor Turley appeared at the Hearing for HR 1855 on 4 August 1995. He said that he was a disinterested person, did not know Eric Foretich, and that he was unaware of the Morgan vs. Foretich litigation. Yet, he wished to object to HR 1855, because he considered it a bill of attainder. Judge Gill, an esteemed jurist, said that HR 1855 was not a bill of attainder; so did David Harmer, Esq., a lawyer who has served a long time in Congress and who worked with Senator Hatch in passing legislation for Dr. Morgan's release from jail. Professor Turley is seemingly unaware that Congress passes many laws for DC and that Congress has passed many laws similar to HR 1855.

I have read Professor Turley's remarks at the Hearing and I have also read his *amicus curiae* to Judge Dixon and there is no doubt in my mind that Professor Turley is a friend of Eric Foretich, giving him plenty of advice, and that he is a partisan advocate of Eric Foretich. He wants Judge Dixon to legitimize his status as an *amicus curiae* so that he can further protect Eric Foretich. Also, Professor Turley keeps strange company, indeed. At the Hearing he was flanked by Hollida Wakefield and her husband Ralph Underwager, both of whom are prominent professional promoters of pedophilia. They also testified in behalf of Eric Foretich. I suppose Professor Turley will now say that he did not know that Wakefield and Underwager are professional promoters of pedophilia perversions. Really?

To: President Trachtenberg from WJM

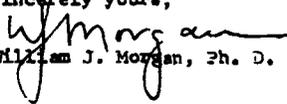
3.

Professor Turley is a partisan promoter of Dr. Foretich's abnormal and pathological interests. By his gratuitous inter-meddling, Professor Turley is hindering the return of Ellen to her Native Land. He professes to know nothing about the notorious case, but a reading of his voluminous remarks, with many pseudo-legal citations, proves otherwise. The same question that was put to the discredited Senator McCarthy can be asked of Professor Turley, "Have you no decency?" Perhaps Professor Turley is in a haste to make a name for himself but he should not do so by destroying the lives of two innocent persons, who only ask to be permitted to live in the land of their births, free from tyrannical control of a corrupt judiciary. Professor Turley, if he had the guts, could better devote his time to investigating the corruption endemic in the courts of DC, with especial reference to Judge Dixon. We all know that DC is a highly corrupt city but the gaze of inquiry has not yet been set upon the courts in DC, both Superior and Appeal.

His intense interest in HR 1855 raises the possibility that Professor Turley is himself a pedophile. Certainly, there is no doubt that he is an advocate of pedophile causes by helping Dr. Foretich and sitting as a witness alongside the publicists for pedophilia, i. e., Hollida Wakefield and Ralph Underwagar.

I strongly recommend that Professor Turley be disciplined. He should be instructed to apologize to Congressman Davis and to let Congressman Davis know that he has withdrawn from partisan promotions of the interests of psychopathic pedophile perverts and their ilk, professional promoters of pedophilia. His vacuous defenses of his legal interests sound shallow, indeed. He should have a higher code of morals. His technical gibberish is not in keeping with the good name of George Washington University. He should behave as a decent human being. If he continues to persist in his nefarious activities, he should be told to seek a sponsor other than George Washington University.

Sincerely yours,


William J. Moran, Ph. D.

Mr. DAVIS. Thank you very much. Dr. Foretich, would you like to proceed?

Mr. FORETICH. I'll go now, thank you.

Mr. DAVIS. OK.

Mr. FORETICH. I thank Congressman Davis and those on the subcommittee for allowing me to be here today. I feel a little like Custer and Sitting Bull. We're a little bit out numbered here today. There are three of us on this panel, and there are, I think, nine others who are going to testify. But I guess I'm sort of used to that. I would like to make some corrections in the record.

Only Congresswoman Norton was accurate. My daughter's name is not Ellen Morgan; it is Hilary Foretich. And I am her father. My daughter—the letter that you just read into the record, that is not the same child that I knew in 1987. That's clear; there's no question of that. And I want to make one point quite crystal clear. It is not my intent to ever compel myself upon her.

If she doesn't want to see me, that's clearly her prerogative. But it is not the prerogative of Congress to dismember that relationship. This bill is designed for one purpose and one purpose only, and that is to remove me from my daughter's life; to sever a relationship between a daughter and her father. Probably unprecedented in history, that Congress would give sanction to that kind of an endeavor.

The issue, the underlying issue, the ruse of this bill is clearly alleged sexual abuse. And I didn't want to bring it up, but unfortunately it's been brought up by the committee itself. And Congressman Davis, as I told you in your office the day I was there, as I've said in my letter to you, because it's so difficult to disprove a negative, I've offered to take a polygraph test and whatever other tests you or the U.S. Government would be willing to provide to put that fear aside.

The bill isn't necessary. It's unnecessary because after Judge Dixon made his order, and prior to his order as well, I offered to accept mediation and I offered to accept the advice of a multi-disciplinary panel that would make the best and cogent decisions about my daughter. There is no question but that a panel of genuine child experts—this is something that Linda Holman, the guardian for my daughter wanted, and quite frankly, I originally objected to because I thought it was too much on my daughter.

But clearly, it's well beyond that point. The better approach would be if my daughter were to return and, quite frankly, obviously I want my daughter back, but I do not want nor do I think it's Constitutional or in my daughter's best interest for Congress to sanction a severance of my relationship with her. Rather, why doesn't she return; why don't we have a panel constructed that will look and make cogent decisions about her.

And I will abide by any decision they make, even if it means that I have no contact with her. This bill, frankly, I've heard a lot of talk amongst the committee members about justice and justice for Ellen and justice for Elizabeth Morgan. What about justice for fathers? Why do we have two groups here today, for example, Mothers for Children and the Alliance for Children—the former Friends of Elizabeth Morgan?

Why isn't there any group called Parents for Children or Fathers for Children? This bill disenfranchises me. It takes away my United States citizenship, essentially. It's an invasion, it's an affront to my own civil liberties and civil rights. And it dissects and dismembers the most important relationship known to man—that is the relationship between a parent and his child.

I fought hard not because I wanted to win a battle, but because my daughter begged me to stand by her. The last thing my daughter told me when I saw her, the last visit, was, Daddy, please don't send me home because I am afraid you'll never see me again. Indeed, that was the case. This child is no longer the child she used to be.

I implore this panel to be wise and use the wisdom of Solomon, a wisdom that is oriented to my child's best interest and not to the interests of those who are politically connected; but rather to consider what is in the best interest of my child not only now, but long term. And long term means that she has some relationship with not only myself, but with her paternal grandparents who sit over there, who also love her, who are similarly accused by her mother.

So I'm asking you, Congressman Davis and others, if you want to have a bill, fashion a bill that will give some orientation to what will happen to Hilary when she returns. Put this little girl in the hands of an esteemed panel that you can choose or the court can choose, that can mediate and make decisions that are in her best interest. I close and I ask that I be allowed to comment briefly, depending upon that which is stated by those that will follow me if it reflects on any issues of the case that are personally involved.

Mr. DAVIS. Thank you. I hope that future witnesses will not go into personal issues in the case. If so, I will use the gavel. But you will have an opportunity to certainly respond with any written comments in the record for anything that's said. And that goes for all the witnesses today. Now we'd like to call on Dr. Wakefield.

Ms. WAKEFIELD. We have the written statement.

Mr. DAVIS. Correct, and the Members are reading the whole statement. They may have questions for you.

Ms. WAKEFIELD. And this is prepared by both Ralph Underwager, who is my partner and my husband, and myself. We are forensic psychologists in Northfield, MN, who have consulted in well over 600 cases of child sexual abuse, have written books and articles in this area. However, I want to say, we have not been involved professionally with this particular case.

We have not read documents on this case. And we are here at our own expense; we have not been paid to be here. Of the cases we've been involved in, over 300 have involved sexual abuse allegations that arise in conflicted divorce and custody cases. These are particularly difficult cases. They have to be looked with unusual caution. Most experts agree that the largest proportion of false allegations of sexual abuse occur in conflicted divorce and custody cases.

We've been involved in several where the courts would rule that there was no abuse, but the accusing parent would not accept that and would flee into the underground railroad and disappear with the child. In one case, the man hasn't seen his daughter for 10 years, doesn't know where she is. And important factor is the cur-

rent research that shows that children are suggestible. They can, through professionals who repeat questions, non-professionals and informal interviews, such as parents, come to believe they were abused when they are not.

This is something that does happen, can happen. In a custody dispute, children are particularly vulnerable because if one parent believes there was abuse, they will have a powerful influence over what the child thinks if you question the child and talk to the child long enough. A young child—4, 5, 6—who goes through this process not only may make statements about abuse, but will develop actual memories that are subjectively real, just as real to the child as it would be if the child were really abused.

It's extremely important to understand that a child who goes through this process, this is damaging to the child. A child that's involved in a false allegation is emotionally damaged. If adults make a mistake and treat the child as though she was abused when she wasn't, this can be severe and long-lasting. We're familiar with one case in which the child as a teenager realized—her mother finally told her that the allegations made against her father had resulted in the father going to prison and the father had died.

The girl was so upset by what she had done under the influence of the mother that she killed herself. We're familiar with the cases in Scott County, MN, 10 years ago now—how damaged these children were by being embroiled in a false allegation. Now, when this happens in a divorce and custody situation, the best way to heal the child is for the child to have some time with the accused parent and learn that the accused parent is not a terrible abusive monster.

If the child is resistant, it could be done under the supervision of qualified professionals so the child would feel safe. But a child who has gone through this process at age 13 is simply not capable of making a decision about her best interest vis a vis seeing her father. The whole—that's one issue. The other issue is the whole child protection system that we have set up in this country has set up a system where there is immediate response to an allegation of abuse.

The person making the allegation gets a lot of pay-offs, gets a lot of reinforcement. In most cases, visits are promptly stopped. If they resume, they may be only under supervision. But there's no cost. There's a handful of cases in which custody is transferred, but that's the vast minority. The fact that there's no cost to making a false allegation means that it encourages such a thing.

Now, I should quickly add that most allegations in divorce and custody situations that are false are not deliberate efforts to manipulate the system in order to get an advantage, although certainly some are. No one knows just how many. One study estimated 15 percent.

Mr. DAVIS. Why don't you take a few seconds to sum up your statement.

Ms. WAKEFIELD. Yes. If this bill passes, and I would say that if it passes, it's a terrible mistake. It should not pass, because it would open the door to more manipulation by people. It would remove the limited consequences that are actually imposed on people

who make such allegations and choose to disregard court orders. The chances are it wouldn't be limited just to this place here.

It could influence other States, other jurisdictions. It would make it possible for a parent, just on the basis of an accusation, to win everything in a custody battle, with no cost.

[The joint prepared statement of Ms. Wakefield and Mr. Underwager follows:]

JOINT PREPARED STATEMENT OF HOLLIDA WAKEFIELD AND RALPH UNDERWAGER,
INSTITUTE FOR PSYCHOLOGICAL THERAPIES

We have just returned from the first International Conference on Child Protection and Clients, held in the Netherlands, June 28-30, 1995. Professionals and families from US, Canada, Australia, New Zealand, England, Ireland, Scotland, Germany, Netherlands, Luxembourg, Denmark, Sweden, Norway, Finland, France, Argentina, Hungary, and Belgium met and dealt with the same issues the proposed amendments address. The amazing worldwide similarity of deep concerns and serious problems with how authorities respond to allegations of child abuse makes it abundantly clear that we have exported our problematical US system around the world.

We have built a system that, while intended to protect children, often does more harm to children and families than good. From 1979 to the present every scientist who has investigated the level and type of error committed by the child protection system has concluded there is an unconscionable level of false positives, that is, saying there is abuse when there is not. The conference unanimously endorsed the need for much more attention to accuracy of decision making than has heretofore been given.

If a child is involved in allegations of abuse that are ill-founded and erroneous, it is not an innocuous or benign experience. A child involved in a false allegation of abuse is subjected to damaging and destructive emotional abuse. The harm done to children when adults make a mistake and treat a nonabused child as if there has been abuse is severe and likely long lasting. Therefore, it is essential to work towards increasing the reliability and accuracy of decisions made.

Allegations of child abuse arising within the context of a bitter and acrimonious divorce, where custody of children is made a battleground between spouses, must be treated with particular caution. We have personally dealt with approximately 300 such cases. In several of these, when the courts did not agree that the children were abused, a parent (usually the mother, but sometimes the father) has disappeared with the child. We know how tragic this is for both the parent and the child. In one case we worked on, the mother fled with the child and the father has had no knowledge of where his daughter is for the last 10 years. Our research on the personality factors of parents who bring false accusations of abuse during a divorce conflict, first presented at the American Psychological Association, 1990, shows that it is often emotionally disturbed parents who bring false accusations during a divorce battle.

The research literature now shows conclusively that young children are suggestible and can be led to produce erroneous accounts of abuse. The research also demonstrates that children may come to believe in mistaken memories and experience them as subjectively real when they are not. A young child caught in a custody battle is particularly vulnerable to this since parents are powerful agents of influence in children's lives. A troubled and angry parent, along with professionals who believe the abuse happened, can produce a child who believes abuse happened when it did not.

When this is done, that parent has subjected the child to severe and harmful emotional abuse. We are familiar with one case in which the child learned as a teenager that her false allegation made years before at the instigation of the mother had resulted in her father's imprisonment and death. She then suicided.

If a false accusation results in the child being prevented from seeing a parent, the most effective way to heal the harmful effects is to allow the child to spend time with the accused parent and learn that he or she is not, in fact, a terrible, abusive monster. A 13-year-old child who has learned to believe a false allegation is not capable of making an informed decision that she does not want to have contact with the falsely accused parent.

The San Diego County Grand Jury thoroughly and extensively investigated the child protection system in San Diego County. Their carefully documented review shows the damage that can be done to children by false accusations and mistaken intervention by authorities. Representatives from that Grand Jury have recently

testified before congressional committees. Among other conclusions their reports also find that interfering with visitation and contact with an accused parent prior to a determination and disposition is harmful to the children.

The child protection system responds to abuse allegations with much reinforcement for making an accusation but has no accountability. An allegation produces large and immediate payoffs and has no cost if it is false. This makes it very vulnerable to manipulation and distortion that can produce the unintended consequence of serious, long-term harm to children. This ability to manipulate the system is evidenced, at an extreme, by the behavior of parents and other adults who are unwilling to accept decisions of the justice system and flee into the network of those who conceal, hide, and evade the authorities and proper jurisdiction and court ordered dispositions.

While there is no research evidence because it is ethically impossible to conduct similar experiences experimentally, the anecdotal evidence from specific cases of children who have been concealed for long periods of time suggests the likely impact is serious damage to children.

The proposed amendments to the District of Columbia Code, would, in our opinion, increase the already wide opportunity for mischief and malevolence. The proposed changes make the system even more vulnerable to manipulation by troubled and distressed persons pursuing their own private purposes. The provisions making an alleged statement of a child the trigger for imposing sanctions on an accused parent open the door to a great increase in false accusations. An angry parent can severely punish a hated spouse just by making a claim. The amendments would increase the probability that angry and conflicted parents would inflict severe damage on their children in the battle. They would remove even the limited accountability courts may impose upon divorced parents who disobey court rulings.

Passage of these amendments would encourage scofflaws to continue and to expand their contemptuous disregard of the justice system, the only place we have appointed to resolve matters in dispute between citizens. They would make people who assist them in the commission of crimes immune from any prosecution. They would encourage the proliferation of false accusations by parents who can influence young children to make erroneous statements about the other parent. The potential damage to children and families is immense.

These amendments make it possible for an accusation alone, without any investigation or adjudication, to result in the destruction and ending of a child's relationship with a parent. They make fairness and due process nigh impossible. As such the amendments constitute an attack by the law upon the institution of the family. Throughout history, any nation state that has attacked the family has committed suicide. These amendments to the laws of the capital of the most powerful nation in the world, if passed, would also likely affect the international transmission of our practices and procedures to other countries and generate ever widening circles of potential damage to children throughout the world.

SELECTED GENERAL REFERENCES ON ALLEGATIONS OF SEXUAL ABUSE BY WAKEFIELD AND UNDERWAGER

Underwager, R., & Wakefield, H. (1990). *The Real World of Child Interrogations*. Springfield, IL: CC Thomas

Wakefield, H., & Underwager, R. (1988). *Accusations of Child Sexual Abuse*. Springfield, IL: CC Thomas.

Wakefield, H., & Underwager, R. (1994). *Return of the Furies: An Investigation into Recovered Memory Therapy*. Chicago: Open Court.

Wakefield, H. & Underwager, R. (1990). Personality characteristics of parents making false accusations of sexual abuse in custody disputes. *Issues in Child Abuse Accusations*, 2(3), 121-136.

Wakefield, H., & Underwager, R. (1991). Sexual abuse allegations in divorce and custody disputes. *Behavioral Sciences and the Law*, 9, 451-468.

Wakefield, H., & Underwager, R. (1994). Abusive behaviors alleged in two samples of likely false allegations. *Issues in Child Abuse Accusations*, 6(2), 72-86.

Wakefield, H., & Underwager, R. (1994). The alleged child victim and real victims of sexual misuse. In J. J. Krivacska & J. Money (Eds.), *The Handbook of Forensic Sexology*, Amherst, NY: Prometheus Books.

SELECTED REFERENCES ON THE EFFECTS OF FALSE ALLEGATIONS

Robson, B. (1991, March). The Scars of Scott County. *Mpls./St. Paul*, pp. 48-53, 123, 125-131.

Robson revisited the families caught in false allegations in Scott County, Minnesota, in 1984. Robson reports that "Seven years later, the legacy of Scott

- County has been one of children crying for their parents in the middle of the night; of divorce and dysfunction among nearly all of the families involved; of perhaps permanent emotional damage to the accused and accusers alike."
- Marcotty, J., & Peterson, D. (1994, October 16). Ten years after: The legacy of Jordan. *Star Tribune* (Minneapolis), p. 14A, 15A.
- Ten years after the first couple was acquitted and charges were dismissed against the others in the Scott county cases, one boy told them, "I get this sick feeling in my stomach when I think there are some people out there who still think I was an abused child." This boy, 11 at the time and now 22, remains troubled, distrustful and confused by his experience. For another family, "nothing was ever normal again."
- Fincham, F. D., Beach, S. R. H., Moore, T., & Diener, C. (1994, July). The professional response to child sexual abuse: Whose interests are served? *Family Relations*, 43, 244-254.
- Fincham, F. D., Beach, S. R. H., Moore, T., & Diener, C. (1994, July). Child sexual abuse: Finding common ground. *Family Relations*, 43, 264-266.
- The authors discuss the trauma resulting from a child abuse investigation and note the large number cases of suspected sexual abuse that are not substantiated. They stress that professionals should be aware of the potential harm done to nonabused children when there is professional intervention that assumes abuse has occurred.
- Davis, S. M., & Reppucci, N. D. (1992). *Accusations of child sexual abuse: A study of process and consequences*. Revision of a paper presented at the American Psychology-Law Society 1992 Biennial meeting. San Diego, CA.
- People claiming to be falsely accused of child sexual abuse reported significant stress from the accusation and investigation.
- Gardner, R. A. (1992). *The Parental Alienation Syndrome*. Cresskill, NJ: Creative Therapeutics.
- Gardner describes how some children learn, under the influence of one parent, to be irrationally hostile and angry towards the noncustodial parent. Gardner calls this the *parental alienation syndrome*. Some false allegations of sexual abuse occur during this process. Gardner describes the importance of reestablishing the relationship with the alienated parent as part of the therapy process for such families. He stresses that "doing what children profess they want is not always the same as doing what is best for them. Therapists who believe they must 'respect' their child patients and accede to their wishes [to not see the hated parent] will be doing these children a terrible disservice" (p. 236).
- Patterson, D. H. (1991-92). The other victim: The falsely accused parent in a sexual abuse custody case. *Journal of Family Law*, 30, 919-941.
- Patterson describes the significant harm done to the falsely accused parent in a sexual abuse custody situation. An immediate consequence is often that visitation is immediately suspended. Whether this is the result or whether there is contact under supervision, there is a strain on the relationship between the child and the accused parent. Even if this is later rectified, the parent has lost valuable time with the child. The author concludes: "We can never serve a child's best interest by denying him or her the love and affection of a parent who has himself been victimized by a lie" (p. 941).
- Richardson, D. W. (1990). The effects of a false allegation of child sexual abuse on an intact middle class family. *Issues In Child Abuse Accusations*, 2(4), 226-238.
- The family in this case was destroyed and the parents and children all suffered depression, stress, rage, distress, hurt and alienation.
- Schultz, L. (1989). One hundred cases of unfounded child sexual abuse: A survey and recommendations. *Issues in Child Abuse Accusations*, 1(1), 29-38.
- Families were negatively affected by false allegations in a variety of ways.
- Smith, J. (1991). Aftermath of a false allegation. *Issues in Child Abuse Accusations*, 3(4), 203.
- This is the account of the girl who suicided that is attached to this statement.
- Wexler, R. (1990). *Wounded Innocents: The Real Victims of the War Against Child Abuse*. Buffalo, NY: Prometheus Books.
- Wexler believes that the war against child abuse "has become a war against children." He argues that our child abuse system is hurting the children that it is attempting to help.
- Besharov, D. J. (1990). Gaining control over child abuse reports. *Public Welfare*, Spring 1990, 34-41.
- Besharov discusses the high proportion of unfounded reports which make up an estimated 55% to 65% of all reports. This endangers children who are really abused since these unfounded reports drain resources and child protective agencies are less able to respond effectively to children who are in serious danger.

SELECTED REFERENCES ON CHILDREN'S SUGGESTIBILITY

These discuss the research on the suggestibility of children. The ones by Ceci and Bruck describe recent research demonstrating how children can be led through suggestive and leading interviews to make statements about abuse that never happened and to even develop subjectively real memories for false events.

- Bruck, M., & Ceci, S. J. (1994). *Amicus Brief* for the case of *NJ v. Kelly Michaels*.
 Ceci, S. J., & Bruck, M. (1993). The suggestibility of the child witness: A historical review and synthesis. *Psychological Bulletin*, 113(3), 403-439.
 Ceci, S. J., & Bruck, M. (1995). *Jeopardy in the Courtroom: A Scientific Analysis of Children's Testimony*. Washington, DC: American Psychological Association.
 Doris, J. (Ed.). (1991). *The Suggestibility of Children's Recollections: Implications for Eyewitness Testimony*. Washington, DC: American Psychological Association.

SELECTED REFERENCES ON CHILD PROTECTIVE SERVICES INVESTIGATIONS

These address the trauma and distress that families experience when there is a child abuse investigation.

- Diorio, W. D. (1992, April). Parental perceptions of the authority of public child welfare caseworkers. *Families in Society: The Journal of Contemporary Human Services*, pp. 222-235.
 Luza, S., & Ortiz, E. (1991). The dynamic of shame in interactions between Child Protective Services and families falsely accused of child abuse. *Issues In Child Abuse Accusations*, 3(2), 108-123.
 Prosser, J., & Lewis, I. (1992). *Child Abuse Investigations: The Families' Perspective*. Parents Against Injustice. 3 Riverside Business Park, Stansted, Essex CM24 8PL, United Kingdom. (Westminster College study).
 Prosser, J. (in press). A case study of a UK family wrongly accused of child abuse. *Issues in Child Abuse Accusations*.
 Prosser, J. (in press). An ethnographic case study approach to studying the process of child abuse investigation in the United Kingdom. *Issues in Child Abuse Accusations*.
 San Diego County Grand Jury. (1992, February 6). *Families in Crisis*. Report No. 2. San Diego, CA.
 San Diego County Grand Jury (1992, June 29). *Child Sexual Abuse, Assault, and Molest Issues*. Report no. 8: San Diego, CA.

AFTERMATH OF A FALSE ALLEGATION

[Issues in Child Abuse Accusations, Vol. 3, No. 4, 203]

BY JOHN SMITH*

On her fourth visit, 17-year-old Stephanie (a pseudonym) brought me this letter:
July, 1987

DEAR DR. SMITH, I am so miserable, Dr. Smith, I need your help now. As you know, I have told you how my mother and I just don't like each other. We fight and argue all the time. But I have never told you why. When I was little, six I think, I dearly loved my dad. I think he and I were very close and did many things together. I knew my mom and dad didn't get along but somehow things were all right between me and my parents.

Then one day, my mother told me my father was very sick and needed to go to a doctor to get well. She told me I would have to say that my dad had hurt me by touching me (in) places that were nasty. She said if I would say this Dad would have treatment and get better and be a nicer Dad to me and bring me more presents.

My mother rehearsed with me what I was to say and then took me to a doctor in another city and practiced with me again what I was to say and I said what she told me to say.

Later my mom said that Dad had to go to a hospital to get the help he needed, but when I was twelve I found out he was in prison because he had molested me.

Once I got to go see Dad in prison. He told me he had written me many times, but Dr. Smith, I never received any of those letters. I think Mom burned them. Later Mom told me that Dad was living in another state.

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Just last night my mom and I got in a big fight and she told me Dad had committed suicide. I feel so bad. I'm to blame because I lied for my mom. I hate her and I hate myself. I can't stand myself. I can't wait to leave home when I get older.

Please help me Dr. Smith.

Love,

Stephanie

Footnote: At the time of the session in which I was given the letter, I discussed with Stephanie as to whether she should go to the hospital. In this state a person who is 16 years of age is entitled to obtain mental health care without parental consent. She told me that she felt better and I made arrangements to see her two days later since I was to be out of town the following day. The very next night, after I spoke to her, Stephanie died after taking an overdose of her mother's sleeping medication.

Possibly some professionals would not want to think that Stephanie had been abused. But in my judgment, this is one of the worst kinds of abuse and in this case the abuse came from the mother.

SEXUAL ABUSE ALLEGATIONS IN DIVORCE AND CUSTODY DISPUTES

[Behavioral Sciences and the Law, Vol. 9, 451-468 (1991)]

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Child sexual abuse allegations arising during divorce and custody conflicts are complicated and difficult. Most professionals believe that the highest percentage of false allegations occurs in this circumstance, but there is disagreement over just how many of these allegations are false. In evaluating cases of suspected sexual abuse, the professional must remain open and objective, carefully examine each case, and take an empirical stance. Assessment and evaluation must be done with rigorous adherence to the highest standards of the profession, and professionals must attend to the characteristics of real versus false allegations. They must not immediately dismiss an allegation as false because the parents are in the midst of a divorce but must also guard against presuming guilt and aligning themselves with the reporting parent's agenda.

Child sexual abuse allegations arising during a divorce and custody dispute present unusual difficulties. Any professional response to the accusations is complicated by the young age of the children involved, possible motivations of adults, and the need to protect the rights, interests, and welfare of the child and the accused parent. Mantell (1988) observes that child sexual abuse allegations tend to develop a life of their own that resist satisfactory resolution. He suggests that the process of evaluating an accusation may result in more damage to the interests of the child and to the child's primary relationships than the original act in question. The potential consequences to child, parents, family and society are massive, long-lasting, and may be either beneficial or devastating. At all stages of the process accurate and correct decisions are imperative.

Mental health professionals and attorneys report seeing more accusations during marital conflict in the past few years although the increase may be no greater than the dramatic increase in sexual allegations in general over the past 10 to 15 years. Many professionals believe that false accusations of sexual abuse are also increasing. Although there is a disagreement as to the frequency and nature of false claims, many believe that false accusations have become a serious problem in vindictive, angry custody and visitation battles. Consequently, false accusations in divorce have received extensive media and professional attention (see for example, Ash, 1985; Benedek & Schetky, 1985a, 1985b; Bishop & Johnson, 1987a, 1987b; Blush & Ross, 1987 & 1990; Brant & Sink, 1984; Bresee, Stearns, Bess, & Packer, 1986 Dwyer, 1986; Ekman, 1989; Everstine & Everstine, 1989; Ferguson, 1988; Gardner, unpublished, 1987a; Goldzband & Renshaw, unpublished; Gordon, 1985; Green, 1986; Green, & Schetky, 1988; Guyer & Ash, 1986; Hindmarch, 1990; Jones & Seig, 1988; Levine, 1986; Levy, 1989; MacFarlane, 1986; Murphy, 1987; Ross & Blush, 1990; Schaefer & Guyer, 1988; Schuman, 1986; Sheridan, 1990; Sink, 1988b; Spiegel, 1986; Thoennes & Pearson, 1988a, 1988b; Thoennes & Tjaden, 1990; Underwager & Wakefield, 1990; Wakefield & Underwager, 1988, 1989, 1990 Yates & Musty, 1988).

There have been major changes in attitudes and laws concerning divorce over the past several years. Along with media attention, these changes have created an environment that makes sexual abuse allegations more likely. Divorces have increased

in all age groups, including young adults with young children. As the divorce rate has increased, much of the stigma associated with divorce has disappeared. Many states enacted "no-fault" divorce laws. These changes, however, have not reduced the anger and frustrations of divorcing spouses. Geffner and Pagelow (1990) note that with the trend toward no-fault divorce and community property laws, many angry and hostile couples have nothing left to fight over except the children. Therefore, although most couples who divorce do not become involved in litigation, there has been an increase in the number of disputes over custody.

In addition to no fault divorce laws, there have been changes in custody laws. No longer is the mother always given the presumption of custody; fathers are more likely to get custody if they seek it, and there has been a strong movement toward establishing joint custody (Ash & Guyer, 1986; Derdeyn, 1983; Ekman, 1989). Once joint custody is agreed upon, it is extremely difficult to get it changed. One of the few clear and immediate reasons for changing a custody order is an accusation of sexual abuse by one parent.

It is difficult to determine just how often sexual abuse accusations occur in custody and visitation disputes. Thoennes and her colleagues (Thoennes & Pearson 1988a, 1988b; Thoennes & Tjaden, 1990) attempted to determine the incidence and validity of sexual abuse allegations through telephone interviews and mail surveys of 290 court administrators, judges, custody mediators, and child protection workers throughout the United States. They then conducted 70 in-depth interviews at five sites, and then finally tracked cases of sexual abuse allegations over a 6-month period from eleven court systems. This latter procedure yielded a pool of 160 cases of sexual abuse allegations.

Thoennes and her colleagues report the initial survey and interviews at the five sites revealed a general consensus that sexual abuse allegations in custody disputes occur in "a small but growing" number of cases (Thoennes & Pearson, 1988a). They estimate that accusations of sexual abuse are found in approximately 2% of contested custody cases (the range across court sites was 1% to 8%). They state that there are approximately one million divorces annually, and of these, about 5% or 550,000 involve minor children. About 15% of these (82,500) result in court involvement due to custody and/or visitation disputes. Thus, their estimate of 2% translates into 1,650 cases of sexual abuse accusations annually within the context of a divorce/custody dispute.

The actual frequency may be higher than Thoennes and Pearson's estimate. Guyer and Ash (1986) noted a marked increase in the number of sexual abuse allegations in contested custody cases: 33% of 400 court-ordered evaluations in the preceding 5 years. Many matrimonial attorneys report that they are now handling more custody cases with sexual abuse allegations (Fisk, 1989; Kaser-Boyd, 1988). Ekman (1989) reports that according to some judges, sexual abuse is alleged in 10% or more of all custody disputes reaching their courts. Raskin reports that since 1974 he has conducted polygraph examinations on persons accused of sexual abuse of children. Test outcomes consistent with truthful denial of sexual abuse have increased from 50% in the 1974-82 period to 79% truthful in 1983-87. A large proportion of those allegations arose in domestic relations disputes (Raskin & Yuille, 1989).

There is disagreement over how many of these accusation are false, although most estimates range between 20% and 80%. Thoennes and her colleagues report that in 33% of the cases in their survey no abuse was believed to have occurred. Abuse was believed likely in 50%, and in 17% no determination could be reached (Thoennes & Pearson 1988a, 1988b; Thoennes & Tjaden, 1990). However, the criterion for determination was the opinion of custody evaluators and child protection workers rather than the decision of the justice system.

In over 500 cases of sexual abuse allegations where we have provided expert consultation over the past 6 years, 40% have been in divorce and custody disputes. Of the divorce and custody cases that have been adjudicated, in three-fourths there was no legal finding of abuse. That is, charges were dropped, never filed, the person was acquitted in criminal court, or there was a finding of no abuse in family or juvenile court.

Dwyer (1986) reports similar statistics, concluding that 77% of the divorce-linked allegations of sex abuse cases coming to the Human Sexuality Program at the University of Minnesota have turned out to be "hoax" cases. This conclusion was based on the opinion of the staff that the allegations were not accurate. Although other estimates are lower, most professionals agree that the proportion of false allegations is likely to be highest when the allegation surfaces in a conflict over custody and visitation.

Others, however, caution professionals not to conclude immediately that an allegation is false simply because it arises in a divorce and custody dispute. Proponents

of this view believe that, although there may be a disproportionate number of false accusations in divorce and custody disputes, most accusations of sexual abuse in this context are true. Faller (1990b) gives three possible reasons why a truthful allegation might surface initially during a divorce: (1) the nonoffending parent finds out about the sexual abuse and decides to divorce the offending parent; (2) there is long-standing sexual abuse that is revealed only in the context of divorce; or (3) sexual abuse is precipitated by the marital dissolution.

Several authors (Berliner 1988; Corwin, Berliner, Goodman, Goodwin, & White, 1987; Faller, 1990b; MacFarlane, 1986; Sink, 1988b) suggest other reasons why valid allegations of sexual abuse may not surface until the time of a divorce. A child who is being abused may be afraid to disclose the abuse while the family is still together. Similarly, a child who has been threatened with the dissolution of the family may be able to tell once these consequences are happening anyway. It is more difficult for the abusing parent to enforce secrecy once he or she is not living with the child. Also, a child may become genuinely terrified at the prospect of spending time alone with the abuser and therefore finally disclose the abuse in order to avoid a visit.

A few writers claim some parents are more likely to begin sexually abusing their children after the divorce, either to retaliate against the divorcing spouse or because the stress of the divorce results in more impulsive behavior. MacFarlane (1986) believes that a parent who is feeling rejected may be vulnerable to the acceptance and affection of a very young child and use the child to fulfill emotional needs. A man who has a history of only heterosexual behavior may reach out to his child sexually under the stress and loneliness of the divorce. Corwin *et al.* (1987) assert that the various stresses in a divorce are more likely to lead to actual abuse than to false allegations. They suggest the losses, stresses, and overall negative impact of separation and divorce may lead to regressive acting out by parents, including sexual abuse. At least one article suggests that women may sexually abuse children when there has been a significant experience of loss which could be a marriage dissolution (Wakefield, Rogers, & Underwager, 1990).

Faller (1990a) reports on her clinical experience with 196 stepfathers, biological fathers, and noncustodial fathers. The noncustodial fathers are said to begin abusing their children after the separation, during visitation. Faller believes an angry, bewildered, and/or emotionally devastated father may seek affection and comfort from his child that this interaction may become sexualized. The father may regress under the stress of the divorce and may therefore feel more comfortable with an immature sex object. In addition, an angry father may retaliate against his wife by sexually abusing the child.

Faller's study illustrates a major difficulty in the research in this area—the criteria for real versus false allegations. Although half of the biological fathers and stepfathers admitted to the abuse, only 20% of the noncustodial fathers did. Since these cases were all “validated,” Faller assumed that the abuse was real and that those who did not admit were denying. However, there is no discussion of what is meant by “validated.” Is it substantiation by a social worker, a statement by a child, suspicions of a caretaker or custodial parents, a finding by the justice system, Faller's opinion, etc.? When the criterion for the reality of the alleged abuse is simply an opinion by a mental health or law enforcement professional, there is little or no scientific evidence to support the validity and reliability of that opinion (Levine & Battistoni, 1991). Therefore, it is likely that an indeterminate number of false allegations are included among these subjects. Any study using this low and doubtful validity criterion must be regarded cautiously (Meehl, 1989).

DEFINITIONAL ISSUES

Disagreement over the proportion of false allegations in divorce and custody disputes is partially due to differing definitions of a false allegation. The terms substantiated and unsubstantiated create confusion. Corwin *et al.* (1987), Paradise, Rostain, and Nathanson, 1988, and Quinn (1988) observe that unsubstantiated is not the same as false. It can always be argued that a different approach or more information would have allowed the allegation to be substantiated. At the same time, however, substantiated does not necessarily mean the allegation is true.

Also, the definition of terms such as substantiated, founded, and indicated varies from jurisdiction to jurisdiction. For example, the Pennsylvania Department of Human Services calls a report indicated if there is substantial evidence that the alleged abuse actually occurred; the report is founded if there is a courtroom adjudication that the child was abused (Paradise *et al.*, 1988). However, in the literature these terms are not always defined and sometimes used interchangeably.

What is meant by false allegation also differs. The category of false allegations sometimes includes all cases which cannot be substantiated. At other times this category is limited to cases in which the accuser is purposefully deceiving. It is more appropriate to differentiate between false and fabricated (or fictitious) allegations of sexual abuse. A false allegation refers to all situations in which abuse is judged not to occur. A fabricated allegation is a purposeful and deliberately false allegation. When an accusation of sexual abuse is false, this does not mean that it was deliberately fabricated. Most false allegations in divorce and custody disputes are not the result of deliberate fabrications (Guyer & Ash, 1988; Wakefield & Underwager, 1990).

If the definition of false allegation excludes cases that are unsubstantiated but not deliberately fabricated, there will be a much smaller proportion of such cases. This was done by Jones and McGraw (1987) who reported that only 8% of all sexual abuse allegations (not just those in the divorce and custody context) were false. Examination of their data indicates that only 53% of the allegations were founded, even including cases where the allegation of abuse was later recanted. Of the rest, there was insufficient information to make a determination in 24%; 17% were unsubstantiated; and 6% were deliberately fictitious. The 8% figure comes from dropping out the cases with insufficient information and recalculating the percentages. This procedure also inflates the percentage defined as founded, with the result that Jones and McGraw state that 70% of the reports are "reliable."

If actual abuse is defined in terms of substantiated cases, and false allegations are limited to deliberate fabrications, there will be only a small number of false allegations. There will be a greater number if a false allegation is defined as any case that is not substantiated. There will be a still larger number if the criterion is the justice system's finding of abuse, since not all allegations substantiated by social services result in a finding of abuse by the court.

It must also be kept in mind that the use of these concepts obfuscates the basic question of whether the abuse actually happened. These concepts are not dealing with whether or not the alleged abuse occurred but with the opinions of people involved and the determination of the justice system.

FACTORS BEHIND FALSE ALLEGATIONS

A false accusation is seldom a deliberate fabrication made for the purpose of obtaining custody. Instead, media coverage of sexual abuse, widespread publication of so-called "behavioral indicators," and proliferation of child sexual abuse prevention programs may result in a parent becoming hypersensitive to the possibility of abuse. In an acrimonious custody conflict, a parent may be ready to jump to premature conclusions when presented with minimal data. Any suspicious circumstances may lead to suggestive questioning and inadvertent reinforcement of a young child. Statements about abuse may be unknowingly shaped and developed. Also, mandatory child abuse reporting laws mean that if a parent mentions suspicions to a health professional, the suspected abuse will have to be reported to the police and/or child protection services.

In a bitter divorce, not only is the child likely to undergo significant stress, but the parents are likely to blame the child's anxiety and distress on the other parent (Wallerstein & Kelly, 1975, 1980). Individuals going through a divorce often feel victimized and wronged, and their hostility, distrust, and anger may predispose them to believe the worst about their former spouses. They therefore may react to an ambiguous situation, such as masturbation, regressive or anxious behavior following a visit, or redness in the genitals, by immediately concluding that the other parent has sexually abused the child (Schaefer & Buyer, 1988; Wakefield & Underwager, 1988, 1990).

Still, in some cases a parent may deliberately foster a false accusation as a way to get custody (Wakefield & Underwager, 1989). Thoennes and Pearson (1988b) report that in 15% of the cases they studied, the case worker expressed doubt that the report was offered in good faith.

The system that responds to sexual abuse accusations rewards making such accusations. The hated former spouse is punished. There is social approval for making the accusation. Custody of children is immediately given to the accusing parent, and the other parent is prevented from any contact with the child. There may be free legal counsel along with support and encouragement from social workers, therapists, friends, family, and neighbors. There is no response cost for making an accusation. As Green and Schetky (1988) observe:

A small number of parents caught up in custody battles or visitation disputes have exploited the epidemic of sexual abuse by using such allegations to promote their own interests at the expense of their child and their

former spouse. Allegations have become a surefire way of getting a judge's attention of cutting off visitations. They have the same emotional impact that issues of adultery once had in custody battles a decade or more ago (p. 104).

Gardner (unpublished) notes that an accusation of sexual abuse is a powerful weapon in a divorce and custody dispute. The vengeful parent may exaggerate a nonexistent or inconsequential sexual contact and build up a case for sexual abuse. The child, in order to ingratiate himself or herself with the accusing parent, may cooperate. On this basis of such observations, Gardner describes a "parental alienation syndrome" in which the child identifies with the vilifying parent and communicates absolute hatred toward the other parent. A false accusation of sexual abuse may develop in this situation (Gardner, 1987a).

Gardner (unpublished) also observes that in some cases a mother obsessed with hatred toward the father may bring the child to the point of having paranoid delusions about the father. A "folie à deux" relationship may evolve in which the child acquires the mother's paranoid delusions (Ferguson, 1988; Kaplan & Kaplan, 1981; Rand, 1989, 1990). Green (1986) reports that such women are usually diagnosed as histrionic or paranoid personality disorders, or paranoid schizophrenics.

Blush and Ross (1987) and Ross and Blush (1990) gathered social, psychological, and legal data related to child sexual abuse allegations arising in a court clinic setting in Michigan. These data suggested patterns characterizing accusations that are more likely to be false. Important variables were the escalation and timing of the cases, the personality characteristics of the adults involved, and the behavior of the children. Blush and Ross (1987) termed the typical pattern of false allegations the SAID (Sexual Allegations in Divorce) Syndrome characteristics of which include:

1. The accusations surface after separation and legal action begins.
2. There is a history of family dysfunction with unresolved divorce conflict and hidden underlying issues.
3. The female (accusing) parent often is a hysterical or borderline personality or is angry, defensive and justifying.
4. The male (the accused) parent is generally passive, nurturing, and lacks "macho" characteristics.
5. The child is typically a female under age eight.
6. The allegations surfaces via the custodial parent.
7. The mother takes the child to an "expert" who confirms the abuse and identifies the father as the perpetrator.
8. The court reacts to the experts information by terminating or limiting visitation.

Wakefield and Underwager (1990) reviewed their files from contested divorce and custody cases including false allegations of sexual abuse. In many of the files, there were mental health diagnostic opinions about the individual's personality characteristics. The personalities of 72 falsely accusing parents and 103 falsely accused parents were compared to each other and to a control group of 67 parents who were involved in equally bitter custody disputes but without allegations of sexual abuse. Although most of the falsely accusing parents were women and the falsely accused parents men, there were four falsely accusing men and four falsely accused women.

The falsely accusing parents were much more likely than the other two groups to have a diagnosis of personality disorder such as histrionic, borderline, passive aggressive, or paranoid—74% had personality disorder diagnoses and 3% other diagnoses while 24% were judged to have no psychopathology. In comparison, 66% in the custody control group and 70% in the falsely accused group were assessed as normal.

Wakefield and Underwager (1990) suggested a topology of parents who make or encourage false accusations of sexual abuse in divorce and custody battles:

1. The highly disturbed individual whose personality disorder interferes with functioning, judgment, and sometimes the ability to differentiate between fact and fantasy. Such individuals often have a history of psychiatric involvement and unstable relationships. They are seen as unstable, moody, impulsive, and over reactive. Under the stress of the divorce, they are apt to over-react and misinterpret events and jump to premature conclusions about abuse.

2. The individual (who may or may not have a personality disorder) who is obsessed with hatred and hostility toward an estranged or former spouse. This person does whatever he or she can to hurt the spouse, and their child becomes a pawn in the ongoing battle. Gardner's (1987a) concept of a "parental alienation syndrome" is often applicable here.

3. The individual who is obsessed with the possibility that the child has been or may be sexually abused. This person may have been sexually abused or raped or

may have simply overreacted to the media attention to abuse, becoming hyper vigilant about the possibility of this happening to the child. Such a parent may question the child repeatedly, examine genitals following visits with the other parent, and repeatedly take the child to doctors until some professional affirms the suspicion. There may be one or more unsubstantiated reports of abuse in the records of the child protection system.

4. The individual who reacts fairly appropriately to an ambiguous situation by seeking guidance from a therapist or physician, who prematurely and immediately tells the parent that the child has been sexually abused. When a high status professional says authoritatively that the child has been sexually molested, a normal, loving parent may be intimidated or coerced into believing it. In this fourth type, the parent may be a victim of the system along with the accused and the child.

Bresee *et al.* (1986) assert that an allegation of child abuse is clear evidence that the child is at risk, whether or not the allegation can be proved. If the parent is over reacting or fabricating an allegation, the child's emotional health is also threatened. Wakefield & Underwager (1988) believe that a parent involved in developing a false allegation may not be qualified to be a custodial parent.

LEADING AND SUGGESTIVE INTERVIEWS

Although repeated and/or suggestive interviews and flawed investigations do not mean that a child has not been abused, they make it very difficult to sort out what, if anything, may have happened. Suggestive interviews, especially if repeated, result in mistakes on both sides. Children who have not been abused are treated as though they were and innocent parents are prevented from having contact with their children. At the same time, a coercive interview can be used by the defense as support for the lack of credibility of the child, and an actual abuser may go unpunished. It is therefore extremely important that professionals conduct careful and thorough evaluations and proper interviews.

The goal of investigatory evaluation in cases of suspected child sexual abuse is to gather uncontaminated data. Contamination occurs when the child's recollections become altered through poor interview techniques, an adverse interview environment, the interviewer's inappropriate behaviors, or influences outside the interviewer's control (Quinn, White, & Santilli, 1989; White, 1990). The child's memory of any actual experience may be significantly altered by the questioning about the incident (White, 1990; Clarke-Stewart, Thompson, & Lepore, 1989) and the child may even develop a memory for events that never happened (Lofrus & Ketcham, 1991; Underwager & Wakefield, 1990).

Hall (1989) observes that there are few formal guidelines for the psychological assessment of child abuse by professional psychologists. However, psychologists should follow the ethical guidelines concerning custody evaluations and these evaluations should be very carefully conducted. Techniques such as the penile plethysmography are questionable from the perspective of determining whether abuse occurred. The use of other procedures with doubtful or nonexistent reliability and validity will increase the chance of an erroneous decision. These unsupported procedures include drawings, projective tests, play therapy, and anatomically detailed dolls (Dawes, 1988; Levy, 1989; Mantel, 1988; Terr, 1988; Underwager & Wakefield, 1990; Wakefield & Underwager, 1988). Weiner (1989) says flatly that if psychologists use procedures not supported by empirical evidence in assessing alleged sexual abuse they are behaving unethically by being incompetent.

Several professionals have suggested how to conduct an unbiased evaluation and noncontaminating interviews (e.g., see Daly, 1991; Quinn *et al.*, 1989; Raskin & Yuille, 1989; Slicner & Hanson, 1989; Wakefield & Underwager, 1988). Recently, information and initial American research on Criterion Based Content Analysis Statement Validity Analysis has become available. This is a European procedure for interviewing children suspected of being abused and for analyzing the resulting interview. This technique assumes that an account based on a real memory of an actual event will differ in content and quality from accounts based on fabricated, reamed, or suggested memory. The procedure requires a relatively complete statement obtained as soon as possible after the child has disclosed an incident. It is not intended for eliciting the initial report in cases where abuse has only been suspected because of clinical or behavioral indices. The interview must be designed to obtain as much free narrative as possible, and leading questions and suggestions must be avoided, except at the end when deliberately used to assess the child's susceptibility to suggestion. The entire interview is tape-recorded and transcribed for later analysis (Kohnken & Steller, 1988; Raskin & Esplin, 1991; Rogers, 1990; Undeutsch, 1988).

A professional is often asked to assess a case after others have interviewed the child. If the initial evaluation and interviews have been conducted by someone else, careful examination of the procedures is necessary in order to assess possible contamination (Wakefield & Underwager, 1988; White & Quinn, 1988). When children have been subjected to leading and coercive interviews, the contamination is likely to have altered their recollections so that it becomes extremely difficult to sort out the truth.

BEHAVIORAL INDICATORS

A frequent trigger for suspicion of possible sexual abuse is one of the so-called behavioral indicators. Lists of behaviors believed to be caused by sexual abuse have been widely publicized with the result that suspicious behavior following visitation may lead a parent to question a child in a way that inadvertently elicits statements suggesting abuse. Television programs, workshops, newspapers, pamphlets, and magazines encourage parents, relatives, teachers, physicians, clergy, day-care workers, and neighbors to be alert to the physical and behavioral signs of sexual abuse in children and to report their suspicions to medical or legal authorities.

Lists by various experts (e.g., Council on Scientific Affairs, 1985; Cohen, 1985; Sgroi, 1982) have included a large number of behavioral signs said to indicate possible sexual abuse. Nearly every problem behavior ever detected in children has been offered by someone as a sign of possible child sexual abuse. The difficulty is that such behaviors are known stress responses. There is a high probability that any normal child might at some point in childhood exhibit one or more of these behaviors. In addition, not all sexually abused children are symptomatic following sexual abuse (Gomes-Schwartz, Horowitz, & Cardarelli, 1990). Thus, the absence of behavioral symptoms cannot be used to rule out sexual abuse.

Reliance upon behavioral indicators in assessing possible sexual abuse is likely to result in mistaken decisions. Levine and Battistoni (1991) point out that it is not established that any of these indicators, in any combination, are valid without a direct statement by the child about sexual involvement or sexual knowledge. Besharov (1990) observes, "Behavioral indicators, by themselves, are not a sufficient basis for a report" (p.39).

It is of interest that in the 1890s John Kellogg, M.D., originator of corn flakes, published manuals for parents instructing them on how to deal with masturbation by children. Among the behavioral indicators of masturbation listed by Kellogg are many of the same behaviors listed today as indicators of sexual abuse (Legend, Wakefield, & Underwager, 1989). This leads Money (1985) to remark that:

Kellogg's listing of suspicious signs has been given a new lease on life currently by the professional detectives of sexual child-abuse. Here is an example of those who have not reamed from history being condemned to repeat it, replete with all its dreadful consequences (p. 97).

The symptoms of children whose parents are divorcing are similar to the alleged behavioral indicators of child sexual abuse. This is not surprising since such behavior symptoms are found in many different situations, including conflict between parents, divorce, economic stress, wartime separations, father absence, natural disaster, and almost any stressful situation children may experience (Emery, 1982; Hughes & Barad, 1983; Jaffe, Wolfe, Wilson, & Zak, 1986; Porter & O'Leary, 1980; Wallerstein & Kelly, 1980; Wolman, 1983).

Children who are distressed, whether by bitter conflict between parents, by physical or emotional but nonsexual abuse, or by any number of troubling events, may reflect their distress in many different ways. Which behaviors develop in a particular child will be an interaction of the predispositions and the reaming environment of that child. There is no behavior or set of behaviors that occur only in victims of child sexual abuse.

Age-inappropriate sexual play or knowledge appears to be a more reliable sign than other behavioral indicators. However, there is evidence that what children normally do sexually is more frequent and involved than most people assume (Best, 1983; Gundersen, Melas & Skar, 1981; Martinson, 1981). When interpreting observed sexual behavior by a child, the antecedent probability of the behavior must be considered. Friedrich, Grambsch, Broughton, Kuiper, & Beilke (unpublished) asked mothers of 880 nonabused 2- to 12-year-old children to complete questionnaires concerning sexual behavior. Although behaviors imitative of adult sexual behaviors were relatively rare, the children exhibited a wide variety of sexual behaviors at relatively high frequencies. Thus, while precocious sexual activities of young children may be more indicative of sexual abuse than are other behavioral signs, such activities should still be interpreted cautiously.

Base rates for the presence of problem behaviors in normal children, in troubled children, in nonabused children, in children whose parents are divorcing, and as part of the developmental process for all children, are so high that any attempt to use these behaviors as signs indicating abuse will result in a high rate of error. This does not mean that adults should not try to identify and aid children who show signs of distress. But the professional must not immediately conclude that sexual abuse is the cause of the problem behaviors.

DIFFERENTIATING BETWEEN REAL AND FALSE ALLEGATIONS

The justice system makes the ultimate determination about whether or not abuse occurred, but the response of the professional early in the case can affect the outcome. Also, when there is a sexual abuse allegation in a custody dispute, the findings of fact about the abuse itself must be made separately from and prior to the court's consideration of custody and visitation; the judge cannot make a decision concerning custody until there is a finding about the alleged abuse (Brooks & Milchman, 1991). Few family court judges, however, are prepared to address allegations of sexual abuse. Thus, when there is an accusation, the justice system solicits opinions and information from mental health and medical professionals to help it make a determination of fact. Professionals therefore should learn possible indicators of a false accusation of child sexual abuse.

Although there is no checklist or test, there is a growing body of literature on the criteria for assessing the validity of an allegation of sexual abuse (see e.g., Benedek & Schetky, 1985a; Berliner, 1988; Blush & Ross, 1990; Bresee *et al.*, 1986; Brooks & Milchman, 1991; de Young, 1986; Failer, 1988; Gardner, 1987a, 1987b; Green & Schetky, 1988; Jones & McGraw, 1987; Klajner-Diamond, Wehrspann, & Steinhauer, 1987; Kohnken & Steller, 1988; Mantell, 1988; Paradise *et al.*, 1988; Quinn, 1988; Raskin & Esplin, 1991; Raskin & Yuille, 1989; Rogers, 1990; Ross & Blush, 1990; Sink, 1988a, 1988b; Steller, Raskin, & Yuille unpublished; Wakefield & Underwager, 1988; Wehrspann, Steinhauer, & Klajner-Diamond, 1987; Yates, 1988).

The Origin of the Original Disclosure

Allegations of child sexual abuse are less likely to be correct when the parent, rather than the child, initiates the disclosure (Yates & Musty, 1988; Yates, 1988). Young children almost never initiate false allegations without influence from an adult. The child is influenced by an adult who already believes the suspected abuse is true. The child is unable to concoct elaborate lies but is suggestible to suggestions and influence of the adult. False allegations are most likely the result of adult indoctrination rather than childhood fantasy (Klajner-Diamond *et al.*, 1987). A spontaneous disclosure made by a young child without evident adult influence is more likely to be true.

The Timing of the Allegations

Although false accusations of sexual abuse may occur at any stage in a bitter and acrimonious divorce (Underwager & Wakefield, 1988; Blush & Ross, 1987), Benedek and Schetky (1985a) report that they are especially common in disputes about child custody arising after a divorce has been granted and centering around issues of visitation. There is a difference between an accusation that appears in a marriage that may be troubled but is continuing and an accusation that first appears in the midst of an acrimonious custody battle. It is therefore necessary to examine carefully the chronology of the development of an accusation and attend to other events such as legal maneuvering, new relationships, and therapeutic contacts.

If it can be determined that the divorce occurs as a result of the abuse disclosures, the alleged abuse is more likely to be true. Sirls and Lofberg (1990) studied 128 families in which sexual abuse occurred and approximately half of these families ended in separation and/or divorce.

The Age of the Child

Some writers believe allegations that turn out to be false involve very young children. Schaefer and Guyer (1988) report that the children in their false cases were most often under 5 years old. Everstine and Everstine (1989) note that in a divorce case, the younger a child is, the more emotionally dependent he or she is on a parent. The very young child therefore may be more vulnerable to the manipulations of an angry and vengeful parent.

Behavior of the Accusing Parent

Does the parent making the accusation initially report not believing the abuse, or thinking that the child was mistaken? Or is the initial reaction one of "I knew

it all along" (Failer, 1990b). Gardner (1987a) notes that in real abuse, the accusing parent is upset, secretive and embarrassed, whereas in false cases, he or she has the need to tell everyone and expresses no shame. Jones and Seig (1988) observe that in a false allegation there is apt to be an accusing parent who is prematurely convinced and unwilling to "hear" any other possibilities.

Bresee *et al.* (1986) note that in cases of actual abuse, the accusing parent is willing to consider other possible explanations for the behavior or statements that aroused his or her suspicions. In false allegations, the accusing parent is more likely to be unwilling to consider any other explanations for the child's behavior or statements. In real cases, the parent is willing to have the child interviewed alone, but when the accuser is primarily interested in attacking the accused, he or she is more apt to insist on being present when the child is interviewed.

In false cases, when the original professional says that abuse is unlikely, the falsely accusing parent may shop for other professionals who will verify his or her suspicions. Such parents may involve the child in multiple examinations, and demand that the investigation continue, regardless of the impact on the child (Bresee *et al.*, 1986; Rand, 1989, 1990; Schaefer & Guyer, 1988).

Some parents continue believing their child was abused even after the court makes a determination of no abuse and orders that contact with the accused parent be restored. Sometimes such parents take their children and disappear with the help of a supportive network of persons who maintain that most allegations in custody disputes are true. This "underground railroad" asserts that the mother of an abused child is victimized by a disbelieving court system supported by mental health professionals who agree the allegation is false. Therefore, the only thing a mother can do to protect her child is to disappear (Failer, 1990b; Fisher, 1990; Gest & Galtnev 1988; Podesta & Van Biema, 1989). Obviously, everyone, most of all the child, loses when this happens (Lloyd, 1990).

Nature of the Allegations

Schaefer and Guyer (1988) note that in cases involving false allegations of sexual abuse, the allegations are usually vague and not easily amenable to being verified or refuted. In one-third of the families in their sample, the allegation involved no concrete or specified parental behavior. Rather, there was a vague assertion that "something is happening," or "something is just not right, I know it." However, this had little effect on the level of subjective certainty. Often there was a pairing of an adamant and sure assertion with a description of a vague and ill-defined behavior. Frequently, it was a parent's perception of a child's behavior that provoked the suspicions.

Another consideration is the nature of the behaviors alleged. Are the behaviors alleged consistent with what is known about the behavior of actual sexual abusers and incest perpetrators? (Wakefield & Underwager, 1988). Or are the behaviors simply not probable? It is important to look at what is known about what actual sexual abusers do. Bizarre allegations including multiple adults, sadism with feces and urine, and satanic rituals are likely to be false.

Characteristics of the Child's Statement

Does the child's statement have the characteristics of true accounts of abuse? Jones and Seig (1988) point out that in a false allegation there is apt to be an inconsistent, sparse, or unrealistic account from the child. De Young (1986) suggests looking for specific action as well as details, especially affective and contextual details. In a false allegation, the child is unlikely to give elaborated details. Sink (1988a) notes that real accounts contain contextually descriptive information, given spontaneously. Jones and McGraw (1987) report that valid accounts include an appropriate level of detail given the child's age, unique or idiosyncratic details, emotion congruent with the topic discussed, and reports of secrecy, coercion, or threats.

Strong hatred expressed toward the accused, based upon trivial and vague reasons, may be the result of learning from the accusing parent rather than from actual abuse (Gardner, 1987a). Also, a child who is very eager to talk about the abuse may have learned that adults reward such talk (Wakefield & Underwager, 1988).

Failer (1988) examined three characteristics said to be associated with true allegations: (1) information about the context of the sexual abuse; (2) description or demonstration of the sexual victimization; and (3) the victim's emotional state. She reviewed 103 cases in which the perpetrator had confessed to some level of abuse. A description of the sexual behavior and an emotional reaction to the abuse was found in over four-fifths of the statements. Contextual details were found in over three-fourths. Over two-third of the allegations contained all of these characteristics. Failer concludes that these data support the clinical assumptions concerning these criteria.

These characteristics of a statement based on an actual event are similar to those looked for in the Criterion Based Content Analysis/Statement Validity Analysis procedure described earlier (Kohnken & Steller, 1988; Raskin & Esplin, 1991; Rogers, 1990; Undeutsch, 1988). The agreement among professionals concerning the nature of the child's statement suggests these criteria are useful. However, the statement must be obtained as soon as possible from a child who has made a spontaneous and must be based upon the child's narrative account and not on responses to leading questions.

Personality Characteristics of the Parties Involved

When accusations of sexual abuse surface in a bitter divorce and custody dispute, the personality characteristics of the parties involved should be considered in evaluating the allegations. Parents making false allegations are likely to have personality disorders and/or other psychiatric problems (Ross & Blush, 1990; Green & Schetky, 1988; Jones & McGraw, 1987; Rogers, 1990; Klajner-Diamond *et al.*, 1987; Wakefield, & Underwager, 1990). Failer (1990b) notes that a childhood history of abuse in the mother may result in distortions of events or hyper vigilance.

Therefore, in the absence of corroborating evidence, when the parent making the accusation is disturbed and the accused is psychologically normal, a false accusation should be considered. However, as Bresee *et al.* (1986) point out, even histrionic or combative women who make allegations with vengeful motives may have discovered genuine evidence of sexual abuse.

Behavior of the Professionals Involved

In evaluating cases of suspected sexual abuse, it is necessary to remain open and objective and guard against either a presumption of guilt or of innocence. Klajner-Diamond *et al.* (1987) say one factor suggesting a false accusation is a professional committed prematurely to the truth of the allegation. Blush and Ross (1990) observe that false cases are characterized by a loss of control early on when professionals decide that abuse is real before doing a careful investigation. Unfortunately, there are a few professionals who may be willing to collude with parents to develop false accusations (Wakefield & Underwager, 1989).

In cases that turn out to be false, a professional often very quickly reaches a decision that abuse has occurred, the decision is made on the basis of limited data, disconfirming data are ignored, and no alternative options are examined. Often, the conclusion is reached without talking to the person accused, even if that person wants to be interviewed.

CONCLUSIONS

Mistakes on either side regarding allegations of child sexual abuse have significant and long-lasting ramifications for all parties involved. Much attention in the professional and popular literature has been given to the plight of the abused child who is not believed, may be pressured to retract, and may not be protected from an abusing parent. Therefore, some professionals assert that they choose to "err on the side of the child" by not taking any chances when abuse is alleged. However, when a false accusation is judged to be true, the child is also hurt. The nonabused child has been subjected to a process of interrogation and often to sexual abuse therapy that is confusing and potentially iatrogenic. The relationship with a formerly loved parent may be irretrievably damaged. If the adults make a mistake and treat a nonabused child as if the child has been abused, the consequences can be long-term and disastrous. The need to improve the accuracy of adult decision-making in this area cannot be ignored.

There are no easy answers. These cases are extremely difficult for everyone. Professionals must remain open and objective and attend to what is known. They must carefully examine each case and not immediately dismiss an allegation as false because the parents are in the midst of a divorce. But they must also guard against a presumption of guilt, and resist aligning themselves with the reporting parent's agenda.

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ADDITIONAL JOINT PREPARED STATEMENT OF HOLLIDA WAKEFIELD AND RALPH UNDERWAGER, INSTITUTE FOR PSYCHOLOGICAL THERAPIES

We understand that this statement is made under the sworn oath administered by the chairman of the subcommittee, The Honorable Mr. T. Davis, when we appeared as witnesses before the subcommittee on Friday, August 4, 1995.

We are thankful to the subcommittee and the chairman for affording us this additional opportunity to provide testimony on the proposed H.R. 1855, amendments to the Washington, D.C. code. This additional testimony is offered after being present for the entire hearing on August 4, 1995, and hearing both the statements of several members of congress and the testimony of witnesses other than ourselves.

We wish to repeat our assertion made at the hearing that we have no prior involvement with Dr. Foretich’s case. We are not being paid by anyone for our expenses or our time in providing testimony for this subcommittee.

We are attaching our CVs so that the committee will have access to our qualifications and experience as it considers our testimony.

Dr. Eric Foretich either sexually abused his daughter, Hilary Foretich, or he did not. That is an issue of historic fact.

It is also fact that the justice system has repeatedly made a finding that there has not been sexual abuse of Hilary Foretich by her father. In our society the institution which is appointed to make decisions on what is fact and what is not is the justice system. No other institution is accorded that responsibility. For this reason

judges are the only citizens in our society who have the right to imprison other people for being disrespectful, discourteous, or scofflaws.

At the hearing the initial statements of several members of congress attempted to avoid this question of facticity and claim that it was simply and alone a matter of the welfare of the child, Hilary Foretich. There were protestations of caring only for the best interest of a child who is an American citizen who wants to return home.

The proposed legislation falsifies those claims. The proposed legislation makes sense only if the subcommittee, and the Congress if this legislation is ultimately passed, have accepted the allegations and believe Dr. Foretich sexually abused his daughter. The opening statements of the members of congress included an egregious and astonishing usurpation of the prerogatives of the justice system when Rep. Molinari referred to allegations of prior bad acts and said if they had been considered the result of the legal process may well have been different. It is our understanding that these "prior bad acts" referred to separate allegations which the court ruled were without foundation. But the proposed legislation itself proves that the congressional sponsors and drafters accept Dr. Foretich's guilt. The need exists to protect the child from the father, to deny the father contact with his daughter, and to remove any consequences from the mother and those who assisted her in defying and evading the orders of the court only if the sexual abuse is actual abuse. This proposed legislation would have the congress function as a new, 20th century Star Chamber, a court of royal prerogative above and superior to the justice system.

If Dr. Foretich did not sexually abuse his daughter, then the mother and her family, including the grandparents and the brother, have in the past and are continuing to abuse this child. The abuse being inflicted upon Hilary Foretich by her mother and her family is grievous, severe, and likely destructive of the child's ability to develop into a normally happy, fully functional person. If Dr. Foretich did not sexually abuse the child, then she has been forced by her mother and the mother's family to come to believe in the truthfulness of horrendous, bizarre events that never happened. This is an assault upon the child's ability to discern reality from fantasy and runs the risk of training her to be psychotic. If the allegations are not true, then Elizabeth Morgan taught this child at an early age about sexually deviant behaviors that most adults have little familiarity with but which the mother forced the child to believe happened to her.

The mother and her family are enforcing upon this young child a change of her given name so they deliberately and provocatively call her Ellen Morgan. Such a change of name is not a trivial matter psychologically. Courts have determined that behavior by a parent of forcing a name change on a child is sufficient basis to change custody.

To train a child to believe abuse has occurred when it did not is to victimize the child just as if the abuse had occurred but the perpetrator is the parent coercing a false accusation from the child. The evidence cited in our initial written statement on the effect of coercing false accusations of child sexual abuse demonstrate this negative outcome for the child. We are not familiar with the details of this case other than what is public knowledge concerning it. However, testimony presented in the August 4 hearing makes evident the degree to which Hilary has been taught to hate and fear her father. This is destructive for any child.

If this subcommittee accepts this proposed legislation, the subcommittee is colluding with the mother and her family to emotionally abuse this child. This reality is a far cry from the claim of being deeply concerned and committed to the best interests of this child.

If the members of congress were truly as committed to the welfare of Hilary Foretich as they would have the public believe, and if Dr. Foretich did not sexually abuse her, then the most strenuous efforts should be made to get her out of her mother's control and away from the mother's family. This is the only hope to remove her from a destructive and abusive environment. At the very least, the existing court orders should be the basis for any action or public statements by members of congress. If the child was not sexually abused by Dr. Foretich, her best hope for recovery from the grievous damage done by the mother is to be reunited with her father with the help of objective, qualified therapists who do not presuppose sexual abuse.

This proposed legislation also involves the congress in collusion with scofflaws to evade duly constituted authorities. In effect, to many of the public the congress may appear to be engaged in a conspiracy to commit felonious actions. Setting such a precedent in the moral climate of our time, with the heightened sensitivity to crime, and the apparently strong sense of distrust of politics and politicians, on the face of it, does not look to be a very smart move.

We must also say as forthrightly and openly as we can that we are outraged by what appeared to be emotional blackmail of Dr. Foretich by the subcommittee. When the testimony of Professor Turley indicated the likelihood that the proposed legislation was unconstitutional, some members of the subcommittee began to look for a way to encourage Dr. Foretich to actively initiate what amounts to termination of his parental rights as a way to avoid passing the bill. Several times we heard members of the committee say if he agrees not to see his child unless she wants it, then the proposed legislation is not necessary.

Dr. Foretich deeply loves his daughter. He is also exhausted and worn down by the effort to advance the fact that he did not abuse her and that the courts have so found. He is truly concerned with her welfare and he is willing to surrender his own love and fatherhood to do what he hopes may be best for her. Some of the questioning of the committee members about why he had not done this already and why he had not filed a motion or taken other legal steps were accusatory and put him in the role of being the bad guy. The responsible, honorable, prudent, and probative action to take if the proposed legislation is likely to be ruled unconstitutional is to admit it, vote against it, and drop it.

Mr. DAVIS. Thank you very much. Let's start with questions for the panel. I'm going to start with the vice chairman of the committee, the gentleman from Minnesota, Mr. Gutknecht.

Mr. GUTKNECHT. Thank you, Mr. Chairman. I vaguely remember hearing about this story. I may be the only member of this committee who comes to this with relatively clean hands. And I didn't really see a local angle to this story until Dr. Wakefield told us that she's from Northfield, which is in my district. So, welcome to the Capital. Dr. Wakefield, could you share with the committee, relatively briefly, I am familiar that there has been some litigation in Minneapolis as it relates to a psychiatrist who has been sued over this.

Could you just share some of that information briefly with the committee?

Ms. WAKEFIELD. Certainly. This is the psychiatrist named Humaninsky—what's her first name, I can't remember. Humaninsky, who did recovered memory therapy with some patients, and persuaded them that they had been abused in ritualistic satanic cults, including all of the infanticide crazy things, by their parents. And when they realized this had never happened, they sued the psychiatrist. And the jury awarded, I believe, \$2.5 million.

I should add that although—and I believe one of the witnesses from the statement makes a brief mention of this—there is a belief that there is this conspiracy of ritualistic satanic cults in which high members of the community, parents, join in these satanic cults where they abuse children, chant, have sex with animals, kill babies. The FBI's behavioral science unit, and Kenneth Lanning of that unit, have investigated over 300 of these cases and have not found any physical evidence. Such cults simply do not exist.

Mr. GUTKNECHT. And so this particular psychiatrist—there's been a very large award. And further, aren't there a number of other cases like this pending?

Ms. WAKEFIELD. Yes, there are. The recovered memory cases, this is something that isn't relevant to this bill. But yes, this is something that has created a great controversy in the psychological community—whether people can repress memories of sexual abuse and not remember them until a therapist helps them uncover them and they're accurate memories. I obviously don't believe such memories are accurate.

Mr. GUTKNECHT. And also, Dr. Wakefield, could you share with the subcommittee, your reference of the Scott County cases.

Ms. WAKEFIELD. Yes.

Mr. GUTKNECHT. And I suspect I'm more familiar with that than most Members here.

Ms. WAKEFIELD. Right.

Mr. GUTKNECHT. Could you just briefly talk a little bit about that?

Ms. WAKEFIELD. Yes. In 1984, in Scott County, MN, in the town of Jordan, some 25 adults were accused of sexually abusing 40 children in two interlocking sex rings. By the time the dust settled, one case had gone to court, and Dr. Underwager was the expert for the Bentses, for the one case that finally went to trial. They were acquitted. The charges were dropped against the others.

The county attorney said she was dropping it because the sexual abuse cases were compromising a murder investigation. And the FBI and the Attorney General's office took over the investigation. In the meantime, during the allegations, the children were taken away from home; put in foster homes where they had no contact with their parents; interrogated frequently by therapists, the county attorney, Kathleen Morris, social workers; in some cases, told that if they didn't say that abuse occurred, they would never see their parents again.

Finally, the charges remained dropped. There was no evidence of the ritualistic satanic abuse or the sex with animals or the orgies or the murders. One person, everybody acknowledges, did abuse children—a single man in a trailer court. There are a couple of other adolescents who did. But none of the 24 parents were found to have done so, none of the ones that we knew.

We knew about half of them. There have been some retrospective accounts in the newspapers, a follow up—Scott County 7 years later, Scott County 10 years later. And the University of Minnesota studied some of it. The children who were involved in this were really quite damaged. The families were destroyed. But the children, now who are teenagers and some in their early twenties, were affected very, very badly by this whole experience. They have not come out of it.

Mr. GUTKNECHT. Thank you, Doctor. I also want to get back to Professor Turley. You said there were three points that you wanted to make about bills of attainder. And you began to run out of time, and you really didn't get back to that. Can you share those with us?

Mr. TURLEY. Thank you, Congressman Gutknecht. The three points identified by the Supreme Court in this area begin with specificity. The court looks at whether the statute is specific or particularized to an individual or a group. The Supreme Court has said that it is not necessary for the legislation to actually name an individual. That is, if the individual is described in terms of current or past conduct, or in a way that isolates the legislation to his case, that is all that is required for the requirement of specificity.

There is little question, when this bill was introduced, and I say this to the credit of the sponsors, there was no attempt to disguise the fact that this legislation is focused entirely on this case and is

designed to accommodate Dr. Morgan by restricting Dr. Foretich. At least that's what I gather from the record.

The second element is punishment. The Supreme Court has stated that it is not required for a statute to involve a criminal punishment or a traditional punishment, but rather it need only be some loss of status by legislative means. The loss of custody or visitation rights of a parent would be viewed as punitive by most people in this room.

The final component that you inquired about, Congressman, is the circumvention of judicial process. On this point, we seem to be relatively clear. In this case, the Congress has a great deal of problems with what the courts have done in this area. I may ultimately agree with the members of this committee; I might disagree. I don't know; I haven't looked at the underlying facts to the case. But the disagreement is with what the courts are doing. That is a very strong indicator for a court to consider whether the committee is doing a judicial function under the guise of a legislative function. The question I think that the committee has to answer is why?

Why get involved in this one family? Why get involved in this one case? I know that sponsors of this bill have been on the forefront of protecting children, and I think that it's a terrific cause. And I think that they've done terrific work. But you can legislate family values without going family by family. When you legislate against an individual, that is what the founders put the bill of attainder prohibition into the Constitution about.

Majoritarian caprice and abuse is far more terrifying when it is practiced on an individual basis than on a national scale. That's what this provision is supposed to prevent. There is no question that the benefits in this case, that the obstacle referred to, is Dr. Foretich. He's the obstacle. Now, I'm not his advocate and I have no intention to become his advocate. But the fact remains that there is a major problem with Congress getting involved in an individual's case, because it sets troubling precedent. That is what I meant by the three components.

Mr. DAVIS. Thank you very much. The gentleman's time has expired. I would just note that Congress has been involved in this case once before. This is not the first time. Ms. Norton.

Ms. NORTON. First, a question to Mr. Turley. Would you regard this as a bill of attainder if all that occurred was that the child was allowed to come home?

Mr. TURLEY. That's an interesting question, Congresswoman Norton. I think you can bestow a benefit, as in some past cases where Congress intervened to benefit a party, and not have a punitive element. That would negate that prong. But in this case, the benefit bestowed is sort of a zero-sum game. The benefit bestowed is the loss to another party.

The question also is whether the benefit in this case by Congress is really the best alternative. There's no question that Dr. Foretich cannot grab custody of this child or force visitations. The mother's lawyer or the child's guardian can go to court and this would be litigated in a court of law. So not only is this a troubling precedent, I'm not entirely sure why it's a necessary precedent.

Ms. NORTON. For that very reason, his rights to pursue custody if he desired would not be affected by a bill that allowed the child to come home.

Mr. TURLEY. I think the punitive element here—and I agree that this would be something that the court would have to look at. The Supreme Court has not actually handled a bill of attainder case dealing with custody rights. They've dealt with employment rights; they've dealt with practicing as a lawyer. So this is something the court would have to deal with.

I think—at least my view of this is that the punitive character is clear because of the nature of the allegation. There are allegations of criminal conduct here, the basis of this whole piece of legislation.

Ms. NORTON. No, that's not the basis of this piece of legislation.

Mr. TURLEY. But the statement made on the floor to introduce this legislation was to protect this little girl from harm; to make it safe for her to return. Well, what are we talking about here? We're talking about to protect her from an individual. While the individual is not mentioned, the individual is clearly the purpose, or at least part of the intent of the underlaying legislative history.

Ms. NORTON. I can understand, Mr. Turley, that the underlying matter involves allegations that would go to safety. But my question to you, regardless of what this bill says, since you raised the bill of attainder issue, my question was solely the following—and this is not my bill, I didn't word this bill: my question is, if there's a bill that said there was a child who wanted to come home and the child can come home, would that be a bill of attainder?

Mr. TURLEY. If the bill simply said that this child can come home, I don't know the basis of the bill, but that would not be a bill of attainder unless the return of that child to the country had a punitive impact. I don't think it would. If the bill simply said you could come home, that would not be bill of attainder.

Ms. NORTON. Dr. Foretich, do you believe that the child wants to come home?

Mr. FORETICH. I have some doubt about it, Congresswoman. And my doubt is based upon her own statements. I have not spoken to her personally. I have—my daughter was quoted on the CBS Connie Chung show about 3 months ago, February or so, in which she said—and also in a larger Washington Post article of I believe November or December 1994. So in the recent past few months, she said that she wanted to skate in the Olympics for New Zealand; and if not New Zealand, she wanted to skate for, I think she said Sweden or Switzerland and a couple of other European countries. She did not mention the United States.

Ms. NORTON. So you give that statement, which you read in a publication, credence over her own words in the letter and in answers to the questions?

Mr. FORETICH. No, I don't. But let me get to that, because that's what I was going to mention next. I have—that letter to me is really—I mean, first off, we don't know what shrouds that letter. We don't know in what circumstances that letter was written.

Ms. NORTON. Just like you don't know what circumstances surrounded the single statement in the periodical.

Mr. FORETICH. Absolutely, no question about it. But that, Congresswoman Norton, is the thrust of what I said earlier this morning. None of us really know what's going on with Hilary, which I think is important. And it's a sacrifice for me. I'm willing to drop, I'll tell the Congress right now, absolutely, I will drop my request for visitation and custody. And as this committee may know, the real reason my daughter was abducted was just before a custody order was to have been given.

I'll obviate that. My daughter needs to—I want my daughter back. But she needs to come back and be attended to by those who can really find out what Hilary wants. If not here—in the courts in New Zealand very recently, again, have addressed that issue. Dr. Karen Salis there is supposed to make recommendations to the court in New Zealand regarding the mental well-being, psychological well-being of my daughter.

I think what this bill—this bill has no—doesn't even allude to that. I mean, there's not even a scintilla of mention in this bill about what ramifications would occur to my daughter if she is allowed to persist in the environment that she is in without any psychological/psychiatric therapy. I'm saying this child needs a broader perspective. We don't really know what she says. In fact, in this letter, she spelled her name, Hilary, with one l in one place, and two l's in another.

I'm not really sure.

Ms. NORTON. Much like a child, Dr. Foretich.

Mr. FORETICH. Right.

Ms. NORTON. You say that you would not ever force yourself on a child who did not wish to see you.

Mr. FORETICH. That's correct, Your Honor, correct.

Ms. NORTON. Would you be willing to say that in a court of law and allow this child to come home then under those circumstances?

Mr. FORETICH. Yes, yes.

Ms. NORTON. Why haven't you gone into court and indicated that you would not claim custody, and indeed the child can come home free from the existing order?

Mr. FORETICH. Well, essentially I've done that, Congresswoman. I've told, in Judge Dixon's court, on several occasions, during the contested period, that I would accept court-ordered mediation.

Ms. NORTON. But I'm asking another question.

Mr. FORETICH. All right.

Ms. NORTON. I'm asking another question. And I am saying that all that stands between this child coming home, all that stands in the way of this child coming home is a court order that would deliver her into the custody of the court and essentially resume the present or the last custody battle. One way to keep the—you understand, and this is even before I came to Congress, that Congress overwhelmingly approved the last bill that was before it.

One way, of course, to proceed in this matter is to proceed where it should be in the first place, in the courts of the District of Columbia. Given the fact that you have said that you would not, in fact, desire custody or even to see the child if that was not her desire, in the best interest of the child, are you willing to represent that in this matter in a court of law?

Mr. FORETICH. Yes, I am, with one proviso. That is that someone look in on my daughter to make sure that she is healthy both physically, and especially mentally. I, as her father, will not leave her in a vacuum. That's completely different from saying that I demand visitation or custody with her. Even if I don't see her, she is going to need help. And I also do not believe that it is necessarily in her best interest to sanction a severance of the relationship between my daughter and myself.

Yes, I am willing to make that statement to the court. I have not gone back to the court and asked for any further court orders for change of custody, et cetera. And I will tell you, yes, rather than this bill being passed, a much more logical approach would be for there to be some addressment in a court of law in the best interest of my child. And I would make such a statement.

Ms. NORTON. Dr. Foretich, all I can say is, you've known this bill has been pending for some time. You've come to see the chairman concerning the bill. There was an obvious way to block this bill. There are a number of different ways to do so. The matter needs to be—I don't want this here any more than you want it here. It shouldn't be in the U.S. Congress.

But the fact is, to allow the bill to come here without taking some action that comports with your own statements that you only wish to make sure that the child is healthy, and you yourself have no desire to force custody or even visitation on her, I submit to you, sir, that that is within your power to do and it is therefore within your power to block this bill. Thank you, Mr. Chairman.

Mr. DAVIS. Thank you, Ms. Norton. I concur with your comments and question. I find your comments today, Dr. Foretich, refreshing. I think all of us would prefer not having to do this through legislation. As I said in my opening statement, that appears to be the only avenue that we have because of the current court order. Perhaps we can have further discussion on this.

I'm going to yield, at this point, to my colleague from Maryland, Mrs. Morella.

Mrs. MORELLA. Thank you. I will be brief, Mr. Chairman, because we have several other panels, too. But I just wanted to make certain that I understood from what's been stated, Dr. Foretich. You have said that you would like to see Hilary/Ellen be able to come back to the United States to live; is that correct?

Mr. FORETICH. Congresswoman Morella, I have stated that if it is indeed the desire of my daughter to return to the United States—frankly, I really don't know personally what her desire is. But if it is indeed her determined desire to come back, I for one would do nothing to hinder that return.

Mrs. MORELLA. Who would make that decision about whether it is her desire, in your estimation?

Mr. FORETICH. I really am not privy to all that is going on in New Zealand at the present time. It's my understanding that the family court in New Zealand is attentive to that request by her mother and Hilary, and have instructed the court appointed psychiatrist for Hilary to determine if indeed this is what Hilary desires to do, and to report back on that and other issues to the court.

I have not instructed my solicitor in New Zealand in any way to block her return to the United States. And I'm here before telling

you Members of Congress that it is not my intention to compel my daughter to see me, even though I did not abuse my daughter.

Mrs. MORELLA. That was the next question I was going to ask, because you did mention it earlier, too. If she deemed that she did not want to have visitation, you would not object.

Mr. FORETICH. My daughter is not the same child now that she was when I last saw her. And I just wish, for the record, that someone on this committee would give me a little credit for the fact that I am her father and love her, instead of being the alleged abuser. I love this little child. She may not love me anymore for whatever reasons. But if she doesn't want to see me, I have no intent of compelling her to do so.

And I'll go on the record now and for all time to say that.

Mrs. MORELLA. Thank you, sir. That's really what I wanted to get clarified, and you have done that. I wanted to ask Dr. Wakefield, you made a statement that troubled me. You said that there is no cost to making allegations. Wow. When you really think about the consequences and the obstacles, the crucibles that people go through in making these allegations, it appears to me that the history that you've looked at and the cases, you would be able to outline tremendous costs.

It takes an awful lot to be able to even think about formalizing these allegations. Would you like to comment on my response to that?

Ms. WAKEFIELD. Certainly. Referring specifically to the allegations in a divorce and custody dispute as opposed to, say, a teenager who finally discloses. I wasn't clear on that. But in the divorce and custody situation, what we have seen in the over-300 cases we've made, one parent makes the allegation. All of a sudden, there's a restraining order against the other parent. Visitation is cutoff. There may be criminal charges.

The accused parent hires a lawyer, goes through months of court, maybe doesn't see his child again for a year or more. But the parent making the allegation, there's very seldom any bad thing that happens to that parent. Occasionally, they've lost custody. But it's a small handful of cases. For the most part, they retain custody. They often get counsel provided to them through the social services, et cetera.

And they seem to have much less cost than does the person who's accused—both financially, emotionally, in terms of the visits with the child.

Mrs. MORELLA. I don't know about that kind of comparison, but as a Member of Congress and as a woman, I have found that there is a tremendous cost that people pay when they make these allegations. Just a final point to Dr. Turley. You said you just met Dr. Foretich this morning.

Mr. TURLEY. Yes.

Mrs. MORELLA. That's very interesting. Dr. Foretich, do you not have a lawyer?

Mr. FORETICH. Yes, I have a lawyer. Is that your question, Congresswoman?

Mrs. MORELLA. Yes, it was, because if you just met him this morning, it just seemed as though he had not been involved in your case for a period of time. It's just curious.

Mr. FORETICH. Well, the other issues that Professor Turley has raised with you clearly are the issues of our Constitution. And I don't feel that I'm qualified to raise those issues. I have personal concerns as a layperson. Professor Turley is an esteemed professor of law at the George Washington University. And I frankly don't have a lawyer who is a professor or involved in academia. I thought that would be more appropriate.

Mr. TURLEY. I should note that my sole purpose in coming here was to address the Constitutional questions, which I've done. I haven't addressed the aspects of the case. It's something that happens at a lot of hearings, and I've testified before in the same capacity.

Mrs. MORELLA. I'm not questioning your—or anything like that. I just wondered, because you were giving it from that point of view. It appeared as though you didn't personally be involved in all this case.

Mr. TURLEY. How was that? I didn't mean to give that impression, that I was personally involved in the case. I find the legislation—I'm sort of agnostic as to how the case turns out. I find the bill, although it's perfectly well-meaning, I find the bill to be Constitutionally troublesome. I think that the precedent is a rather bad one. And, if I seem passionate, it may be because of that.

Bills of attainder are an extremely dangerous element within a democratic body, even when they're done for the right reasons.

Mrs. MORELLA. Thank you. I think you can see what this committee is looking at, and that is looking at the well-being of the child in this situation. I thank the three of you.

Mr. DAVIS. Thank you. Before I recognize my colleague from New York, I just want to ask, what about the original bill? Did you look at the original bill that set a limitation on the time of personal incarceration for contempt? Would that have been a bill of attainder, too?

Mr. TURLEY. You're talking about the bill that was introduced in the last session?

Mr. DAVIS. No, the original bill that freed Elizabeth Morgan. Have you looked at that?

Mr. TURLEY. I only looked at the bill that is before Congress now. I'm aware that there have been previous bills enacted, which, by the way, may not be bills of attainder—there's a difference between having addressed the case and having a bill of attainder.

Mr. DAVIS. OK, that's fine. I understand. It seemed that the same type of issues are raised, but that's fine. I'm going to recognize my colleague from New York, and then I have some questions.

Ms. MOLINARI. Thank you, and I'll be very brief. I just have two quick questions. Dr. Wakefield, I'm very interested in your testimony and in your response to my colleague's questioning, where you stated—and I recognize that you've studied a series of cases and you have concluded that seldom does anything bad happen to the parent who makes the accusation.

Is it then safe to conclude that this case really does prevent quite a drastic comparison, where you have the parent who's making the accusation go to jail for 2 years, be the parent that is estranged from the child, and then in fact basically moves around the world. That's quite a cost.

Ms. WAKEFIELD. Yes, but in the end of this particular case, she didn't go to jail for 2 years for making the allegation.

Ms. MOLINARI. No, that's true.

Ms. WAKEFIELD. She went to jail for 2 years for violating a court order.

Ms. MOLINARI. Absolutely.

Ms. WAKEFIELD. And I would think that what makes this case the cost to her greater was her choice to violate a court order, an attempt to circumvent our justice system.

Ms. MOLINARI. But the underlying reason was the same.

Ms. WAKEFIELD. The underlying reason was, she claimed to believe that her child had been abused.

I would agree that when a parent goes into the underground railroad, when they're finally caught, there may be a cost to them at that point. Although we were involved in one case in which the man, in this case, didn't agree with the court. He believed his wife was in a blue diaper cult. This is a cult in which everybody wore blue Pampers that they urinated in while they did the ritualistic, satanic abuse.

The court didn't believe this, so he fled with his child and hid out in Canada. It took the mother 2 years to find the child. Custody was eventually then transferred back to the mother. So now, he's not in contact with his child. He finally got cost. The greatest cost, however, was to the child, who was abducted and hid out in Canada.

Ms. MOLINARI. Clearly, clearly it is the children that we're concerned about.

Ms. WAKEFIELD. Yes, I was speaking of prior to circumvention of a court order. Obviously if you violate a court order and the court acts—although there are countless cases that I'm familiar with in which court orders are violated at a—for example, the children aren't presented for visitation. They go back to court and there's really very seldom anything that's done.

The judge just says, oh, well, you've got to let him see the kid.

Ms. MOLINARI. Very similar to child support court orders.

Ms. WAKEFIELD. Yes.

Ms. MOLINARI. I just wanted to make the point that while I understand that Dr. Morgan was penalized as a result of her violation of that court order, that there was a substantial cost that makes this a bit of an exceptional case, relative to the cases that you've studied.

Ms. WAKEFIELD. Right, the cost for violating the court order, not for making the allegation.

Ms. MOLINARI. Clearly. From a parental and, I think, an oversight standpoint, though, the underlying reason is something we have to take into account.

Dr. Foretich, I just have one question for you. Clearly, it is—no, it's not clear to you because obviously you have more access to information than we would. But to those of us who followed this case, it seems clear that Dr. Morgan has no intention of bringing her child back to these United States, and has made that intention clear over the last 8 years, while there was any possibility that you would claim visitation.

At any point during those 8 years, have you approached the courts to state that if your child were brought back to the United States—what you're suggesting that you're going to do today. Have you tried to do it in the past so that your daughter would be free to come home?

Mr. FORETICH. Well, your question is somewhat similar to the question that Congresswoman Norton asked me earlier. And I think I better use this opportunity, in answering your question, to rephrase what I had told the court in Washington again. On several—during the many hearings in that court, at an enormous cost to me—and by the way, I think I maybe should add that we're talking about pain Elizabeth Morgan suffered. How about the pain that I suffered?

I haven't seen my daughter for 8 years, OK? I've suffered a lot, too. For 2½ years, I didn't know that she was alive. Does anybody care about that? I mean, you're a lady congressman, and I'm a man. Let me tell you, I feel for mothers, but mothers should feel for fathers. So when I saw my daughter in 1990, found her in February, when I went and visited her school and talked to her head mistress and talked to her teacher, I made the determination at that point that I was going to end any litigation with respect to Elizabeth Morgan.

And I cried that night, and I walked away from New Zealand. I called the guardian and told her that I was leaving. The next day, I flew up to Auckland, and I left the country. I didn't contest custody in New Zealand with Elizabeth Morgan, and I haven't gone back to court here. I just—it was really within—from my perspective, there was no reason to go back to court.

Elizabeth Morgan was free to come back whenever she wanted. I had really nothing to do with it. I told the court that I would accept mediation, that I would accept a multi-disciplinary approach. It was very clear to me that the court wasn't going to give this child back to me. That was preposterous. So with that in mind, I went about my life, as painful as it was—my practice has suffered, my good name has suffered. I've paid a hefty penalty, as have my parents.

I mean, we've paid an enormous price. Hundreds of thousands of dollars have virtually bankrupted me. I didn't have pro bono attorneys. I'm not politically connected. But I thought, in the interest of my child, I walked away and let it be. I assumed Elizabeth Morgan wanted to stay in New Zealand. In fact, she tried to get a license there, I understand. I know she did, because I was informed of that.

And I understand she just finished her Ph.D., in psychology. Now she wants to come back. Maybe you're asking the wrong person. Maybe we ought to be asking Elizabeth Morgan why it's now she wants to come back. My daughter, last I heard from reports, which is all I get because contrary to the court order—and I will add, contrary to the court order, I have no access to my child: no telephone contact; no letters; I didn't even have an address until recently; no way to access her at all.

So I would have no way of knowing what she wanted to do. And I would have no way of knowing what Elizabeth Morgan wanted to do other than through them. But I told the court here, and I told

the court there, that I wasn't going to be involved in seeking custody or anything again. I didn't think it was necessary for me to go back before the court to tell them that Elizabeth Morgan was free to come home.

To me, that was a non sequitur. She was indeed free to come home. But I will tell you now, Congresswoman, that if asked to do, if it is the intent of this committee—I mean, if it makes your job—if it takes you off the limb, I will go back before Judge Dixon and make that announcement to him. If it saves us from passing a bill which is kind of questionable Constitutionality, yes, I would do that.

But I want to again state one point in answering your question. I will do that, and I actually will do that. So I want you to know that I'm doing that out of love for my child. I want you to understand that I really do love her, and I did not molest her. Clear, on the record. I just want to get that clear.

Ms. MOLINARI. Thank you, I appreciate that. Thank you, Mr. Chairman.

Mr. DAVIS. Thank you, Ms. Molinari. Dr. Foretich, let me understand what you would do. Would you agree to vacate the order? If you do that, there's obviously no need for a bill.

Mr. FORETICH. Congressman Davis, I will agree to vacate the order with the provision I mentioned earlier—that there be some provision for the well-being of my daughter. And I say that for two reasons. One, because I'm her father. Of course I have the knowledge of the case. But second, because the people in New Zealand who have looked in on her have told me through my counsel there that they have concerns.

Listen, Congressman, I haven't made an issue of this. But I could read some of the things my daughter wants to do. She's been taught to shoot a pistol, drive a car, and she wants to do inhumane things to the Foretiches. She was quoted as having said that in the Washington Post article. I haven't gotten into that stuff.

Mr. DAVIS. I understand.

Mr. FORETICH. But I'm mentioning it now because it goes to your request to vacate the court order. Yes, I will. But this little girl harbors some really horrible thoughts about me now.

Mr. DAVIS. I understand.

Mr. FORETICH. And something—and this bill does nothing for that.

Mr. DAVIS. No, it does not.

Mr. FORETICH. Nothing.

Mr. DAVIS. No, it doesn't. Vacating the court order may. I think you show some goodwill and spirit by offering to do that. I would just add, everybody has suffered from this, you, Dr. Morgan, and the child. As I said in my opening statement, this has been a no-win situation all the way through. I think we'd like to explore that alternative. All I can say is if the order were vacated there would be no need for legislation. I think that's very clear, and we can agree on that.

Mr. FORETICH. I would be willing to work with you and your office in that regard if it would be of help to you.

Mr. DAVIS. I find that really refreshing. That is the goal I think everybody here wants, because we're all concerned about the child.

Whatever happens, no one can be unaffected by the events. I alluded to that in my earlier statement. My mother and father were divorced and then remarried each other four times. That's why I became a lawyer.

Obviously there are effects on children, then. We're all concerned about that, and rightfully as a father, you are, and the Congress is, and I'm sure Dr. Morgan is. The question is how we can help the child. We'd be happy to work with you on that. Clearly if that can be worked out, I don't think there would be need for legislation.

Understand that currently, with the pending court order, that none of that is possible. Let me ask you a couple of other questions, just for the record. You do have an attorney in New Zealand, don't you?

Mr. FORETICH. Yes, I do.

Mr. DAVIS. What's his name?

Mr. FORETICH. Gerard Winter.

Mr. DAVIS. As I understand it, one of the reasons that your daughter is not here today is that before the New Zealand court, your attorney was in contact with the judge there on the proceeding of her testifying here; isn't that correct?

Mr. FORETICH. All I know about what happened in New Zealand is one fact. I have not followed the proceedings in New Zealand carefully at all; I will tell you that for a fact.

Mr. DAVIS. It would be perfectly legal to do whatever you wanted to on this.

Mr. FORETICH. No, I did not block and I did not instruct my solicitor in New Zealand to block any testimony of Hilary before this committee today. In fact, I fully expected her to testify this morning. I was surprised that she wasn't allowed to do so. I can tell you my personal belief is that is the feeling of Isabelle Mitchell, who is the child's court appointed attorney in New Zealand, who steadfastly, who is adamant that she will not testify in any hearing.

And I think the court in New Zealand probably has her ear. But the one issue I raise with the court there, I had the solicitor raise with the court there, had to do with the certain specific psychiatrist who was suggested by Elizabeth Morgan. And he is a gentleman who had a prior role in this case. And he is not someone who I felt comfortable or I felt would fairly be able to render any advice with respect to the well-being of my child.

And I don't think his advice, in my opinion, would have been edifying to this committee. And so I instructed my counselor in New Zealand to only place my objection to him being a mediator; that's all. And the court listened to that and respected it.

Mr. DAVIS. Thank you very much. I wanted that on the record at this point. Mr. Gutknecht had another question for our legal expert. I wanted to ask Mr. Turley, how would you construct legislation differently to achieve the end that everybody in this room seems to agree to, at least all the people that are testifying?

Mr. TURLEY. Well, Mr. Chairman, I think that's very difficult.

Mr. DAVIS. Without sending me a bill for it.

Mr. TURLEY. Fortunately, I am a pro bono attorney, so I come cheap. Business is always good when you don't charge. It's very difficult to draft legislation in a custody battle where any degree of

change in the relative rights will be of proportionate loss to the other party. It is particularly difficult in this case, when you've got a standing court order.

Mr. DAVIS. So you'd agree with me that the best way to resolve this is to deal with that court order on a consent decree basis and move from there.

Mr. TURLEY. Honestly, my advice is that alternative avenues for relief are available. A court will have to make a decision before any change in custody or visitation occurs. A court will have to make a decision, it is not going to be immediate. There is a standing court order which has laid dormant for years.

Mr. DAVIS. Well, in fact, the judge here is not going to change that order or entertain any motions until the child is brought before the court.

Mr. TURLEY. Well, the court will have to address any effort for any temporary restraining order or protective order. Such a motion can be brought by the mother, the mother's lawyer, or any guardian. The court will then have to rule on that motion, I think is the alternative form of relief.

But if you fear that Judge Dixon will not give you what you consider to be the right results in this case, then you are impermissibly venturing into a judicial area. And so I don't know how much I can help on this, except to say, when you narrow legislation down to a single case, you're faced in a very troubling area with a bill of attainment.

Mr. DAVIS. The legislation is drawn more broadly than that, which I think you can see.

Mr. TURLEY. Well, the legislation doesn't refer to the parties. But the court doesn't require that it refer to the parties.

Mr. DAVIS. There could be other people who qualify under this legislation as well.

Mr. TURLEY. There may be.

Mr. DAVIS. We don't know of any but there could be.

Mr. TURLEY. That's true, but the legislation is pretty narrow.

Mr. DAVIS. That's a compliment to our drafters. I think you've answered my question and I appreciate it. Let me ask, at this point, are there any other questions from any of the panelists? Any of the members? Let me just thank the panel. And Dr. Foretich, if it's all right with you, if you want to supplement your testimony at the end of this hearing, we'd be happy to add it to the record.

Second, along the lines that we have discussed here, we'd certainly be interested in working with you to try to achieve the result in a different way. So thank you very much, we appreciate it. I call our next panel to testify. The panel consists of Antonia Morgan and Robert Morgan. Antonia Morgan is Ellen Morgan's grandmother, and Dr. Elizabeth Morgan's mother. And Robert Morgan is Ellen Morgan's uncle, and Dr. Elizabeth Morgan's brother.

As you know, it's the policy of this committee that all witnesses be sworn before they may testify. Would you please rise with me and raise your right hand.

[Witnesses sworn.]

Mr. DAVIS. Thank you, you may be seated. Again, the subcommittee will carefully review any written statements you care to submit. I would insist that oral testimony be limited to 5 minutes

each. Once again, I caution you, to keep on the issues of the legislation. We don't need to get into some of the earlier allegations. Thank you. Who would like to proceed first?

Mrs. MORGAN. Me.

Mr. DAVIS. Antonia? Yes.

STATEMENT OF ANTONIA MORGAN AND ROBERT MORGAN

Mrs. MORGAN. Well, I am Antonia Morgan. I am the maternal grandmother of Hilary/Ellen. And she cannot come here to speak for herself, so I have come to speak in her behalf. First of all, I would like to thank the people who have undertaken to sponsor this bill. We are very grateful to them. Now, I know Hilary extremely well. I have lived with her ever since she was born 13 years ago.

Ever since she began to talk, she has confided in me. And her accounts have been, over the years, consistent. I've not had reason to disbelieve the things she's told me. As you know, protection was sought for her in the courts which was not forthcoming. Although the Virginia courts did afford complete protection to her half-sister who is 2 years older in a similar situation. However, be as it may, this custody and divorce—it was not a divorce case.

The divorce was settled before. Custody had been given to my daughter by the D.C. courts. And it was again reaffirmed in New Zealand. Now, I was not aware of any custody order, change of custody order by the D.C. courts when I and my husband took Hilary out of the country to protect her, just before her fifth birthday. We traveled around; it seemed the only thing to do.

We traveled around a bit, and then we settled in New Zealand, and I have lived in New Zealand with Hilary for the past 7 years. I've come over here occasionally. Her mother joined us 2 years later when she was freed from jail. My husband, for health reasons, had to return to the States. Now, I do know Hilary, as I said, very well. And I do not quite understand Dr. Foretich's statement that she is not the same child. She's considerably happier than she was when she left. But as far as her temperament, her personality, her attitudes, even, I might say, her appearance, her development has been what you would expect; it's been along the same lines. She is the same person as she always was. Of course, she's 13 now, not 5. Dr. Foretich, I understood him to say—unless I misunderstood him—that he did not seek custody in New Zealand. While I was not present at the hearings in New Zealand, it was my understanding that he did. He certainly announced to the press that he had come to rescue his daughter.

One or two other things on which his memory may not be quite clear. Hilary has not learned to shoot a gun; she's merely held a gun in her hand. We don't have a gun in the house. As far as driving a car, well, I expect a great many of you have been in a parking lot, let your child of 7 or 8 hold the wheel and manipulate the levers and go back and forth and make them feel very important. And I wouldn't say she hasn't done that. But as for driving a car, of course she doesn't. She hasn't the slightest idea how to do it. But she's eager to get her driver's license, as they all are.

And another matter which I think he's not remembering accurately is the last occasion he saw her. This was in 1990 at a court

ordered supervised visitation in a psychiatrist's office. It was very distressing to her. She sobbed throughout. Her last words to him were, I want you to go away.

I also am not clear about his reference about the psychiatrist chosen by my daughter, whom he does not want to be involved. My daughter has had no choice of psychiatrist in New Zealand. The only psychiatrist we have had any dealings with, to my knowledge, is the court appointed psychiatrist to whom he referred.

And he raised another question, does she want to come back to the States? Yes, she wants to very much, and so does my daughter. My daughter was not able to work as a doctor because although her credentials were approved, there is a ruling that you have to spend a year practicing in a public hospital in New Zealand before foreign doctors can work. And in Christchurch, the numbers of jobs available in the public hospital for foreign doctors are limited. And quite frankly, the local plastic surgeons didn't want anyone else in. So they just didn't give her a job. Well, she's not the kind of person to sit and twiddle her thumbs.

Mr. DAVIS. The red light is on. If you could try to move to sum up for us.

Mrs. MORGAN. Have I gone over the time?

Mr. DAVIS. You're right at the brink. We'll give you just a few seconds to summarize.

Mrs. MORGAN. Well, I will sum up and say that Hilary—I would simply quote her—Hilary very much wants to come home. She's very proud of being an American. And just before I left, she said to me, "Mama, I'm sure we will be back home in the United States by Christmas." And I said, "Well, darling, that would be lovely, but I don't know if it's going to be as soon as that." And she took a hold of my hand and said earnestly, "Have faith, Mama, you must have faith." And I'm here to plead to the Congress to justify her faith and let her come home safely.

Mr. DAVIS. Thank you very much. Now we'll hear from Robert Morgan.

Mr. MORGAN. Mr. Chairman and Members of the Congress, thank you very much for supporting this bill and taking an interest in it. It would mean a great deal to my family. My family is very close, and up until 1987, when Hilary went into hiding, we saw a great deal of each other. In particular, my daughter Erica, played a great deal with Ellen, and looked on her as an older sister. They're fairly close in age.

They played a lot together, and after Ellen went into hiding, we lost touch with Ellen and my parents completely. Although, ironically, for the next 2 years, I saw a great deal of my sister while she was in jail. Then in 1990, when Ellen was discovered in New Zealand and Elizabeth went to join her there, we tried to stay in touch by telephone and by writing. But it's very difficult across 12,000 miles.

But in 1992, my wife, my daughter and I did take 3 weeks. We went to New Zealand, and it was great to spend time with my sister and my mother and Ellen again. And we had Thanksgiving dinner together. And we had a lot of hope that it wouldn't be that long before we could see them again, but we weren't able to say when that would be. It was also wonderful to see how, after a brief hesi-

tation, Erica, my daughter, and Ellen formed a close bond again and spent a lot of time together.

Erica and Ellen have written to each other and have talked occasionally on the telephone. But across 12,000 miles, it's very difficult to stay in touch. When Erica asks when she'll see Ellen again, we can't tell her. It seems to me it would be very important, especially at this time in Ellen's life, when she's just starting on her teenage years to be able to come home; to go to an American high school; to have American friends; and to be able to form a close and lasting bond with my daughter, Erica, and her other cousins in New York, with whom we're also close.

So I have great hopes now, and I look forward again to having Thanksgiving dinner with Ellen and Elizabeth in America. I would like to respond to one thing that the committee has taken a great interest in, and that is Dr. Foretich's somewhat equivocal statements about what he would go to this court and say. In fact, I think the Congresswoman was right that he has not been back to the D.C. court since 1987.

He says now, perhaps as a last-ditch attempt, that he would say anything to block the legislation. In fact, if the order were vacated, that is, the outstanding order that's currently in effect in DC, that would not stop the order from being imposed a month later on Dr. Foretich's request, or on the court's own motion. Simply vacating the order would not have the effect that I think this bill aims for. Thank you very much.

Mr. DAVIS. Thank you very much. We're going to take a recess in just a minute. I think we just have a couple questions for this panel. Let me just ask a question. If you vacate the court order, and you can do a consent decree on that, you'd have to have a whole new hearing to reinstitute it?

Mr. MORGAN. You have a hearing at every point, I think, Congressman.

Mr. DAVIS. Let's just assume for a minute that if the order was vacated at this point, and the mother and the daughter were back here. The court in order to reimpose it, would require a hearing and it would have to go through the whole rigmarole. Who wants to go through that?

Mr. MORGAN. Well, I'm not sure that the—I hope the court wouldn't want to. But I don't think the court would have to hold anymore of a hearing than what was necessary in the case. We heard a lot of testimony.

Mr. DAVIS. I understand. Let me just speak from my perspective as a sponsor of the bill. If the court vacated the decree, it would not provide the same protection that legislation would. But even if the legislation passed, there would be nothing to stop Dr. Foretich or anybody else from going back in and opening it up. Because, as you know, changed circumstances and the welfare of the child are always supposed to be paramount. The court vacating the decree, particularly a consent decree, would be very, very powerful. That would be my reaction. I'd be happy for any comments you have on that.

Mr. MORGAN. Congressman, I don't read the bill that way, actually. I read it to say that Hilary, at the age of 13, which she's almost reached, can choose whether or not to have visitation with

her father; and the D.C. Superior Court has no jurisdiction to overrule her choice. I don't see that that's—until she's 18 she would be safe.

Mr. DAVIS. That would be true in the District. But if she resided somewhere else, in another jurisdiction, it would be able to be re-litigated, would it not?

Mr. MORGAN. In theory, that would be the case. It would be a brave judge, I think, who defied the expressed will of Congress.

Mr. DAVIS. I think anybody would be brave to revisit this issue if the order were vacated. But we can have further conversation on this. I just wanted to get your understanding of it, and I think it's correct. I don't have any further questions. Any questions?

Ms. NORTON. I just want to state that when an order of this—obviously, when you're dealing with a minor child, a court can always revisit a matter if there are changed circumstances, if they are alleged and shown. I don't think there's anything Congress could do to keep that from occurring. I would hope that the parties would seek a final disposition of this matter.

The notion that the Congress had to be in here in the first place, and now it's having to come in here in the second place, means that there's come to be a dependence on the legislative process that I must tell you, as a Constitutional matter, is not at all free of doubt. I urge the parties to consider the kind of disposition that we have been talking about, because I don't think that you would either want to face a possible bill of attainder problem.

And I can tell you, as a Constitutional lawyer, that I am concerned with possible bill of attainder problems, because I believe that we are going beyond what we did last time, in essence we would be acting to finally adjudicate the rights of the mother, the father, and the child. And the notion that there is no punitive aspect to that, I think is very difficult to sustain if it would mean that the father could never see the child again while she was a minor.

One of the reasons—and I do not know the answer to that. I would hate to think that somebody would want to adjudicate that, given all that this child has gone through. If in fact an arrangement of the kind that should have been worked out before—I am ashamed to be a lawyer and to be sitting here dealing with a matter of this kind that should never have spent as much time in court, much less have gotten all the way to the Congress of the United States.

But I would think that if everybody has in mind the best interest of this child that the best way to do it would be to settle it in a way free of Constitutional doubt that protects her rights but allows her to come back to her homeland. Thank you very much, Mr. Chairman.

Mr. MORGAN. May I respond to that very briefly?

Mr. DAVIS. Sure.

Mr. MORGAN. I think that one risk of that approach, Congresswoman, is that unless Ellen feels entirely safe in coming back, that the court can't reverse what it said one month the next month. Unless she can be assured that she will be safe from having to see her father, she won't come back.

Mr. DAVIS. I understand. We'll have further discussion. I think Ms. Norton just stated her views very candidly on that, and I think we need to weigh that as we work our way through this legislation. Mrs. Morella, any questions?

Mrs. MORELLA. I just associate myself with the comments that were made by the members of the subcommittee, because we all seek the end result of making sure that the child is going to be happy. I wanted to ask, Mrs. Morgan, do Hilary and her mother—Ellen and her mother—live with you in New Zealand?

Mrs. MORGAN. We all live together.

Mrs. MORELLA. You all do live together.

Mrs. MORGAN. Yes, we have for the past 5 years, ever since Elizabeth came out.

Mrs. MORELLA. Again, the anguish on the entire family has just been enormous.

Mrs. MORGAN. Well, it's a question of punishing. It seems to be living in exile is a punishment.

Mrs. MORELLA. Indeed, indeed, right. Well, I want to thank you very much.

Mr. DAVIS. Thank you very much. Ms. Molinari.

Ms. MOLINARI. I just have one quick question because I think it is important to determine the intent here. During the 8 years that Ellen and her mom have been out of the country, Dr. Foretich had basically given me the impression that the reason why he didn't move to vacate the order or to try and make some changes in court to provide the desired result, rightly or wrongly, from your daughter and your granddaughter, that he did not do that because he really never understood or got the impression that they were interested in returning to the United States.

Could you comment on that? And at any point, did you revisit Dr. Foretich and ask him, or did your lawyers ask him to vacate that order and make it quite clear that the family was willing to come back and would do so under those circumstances?

Mrs. MORGAN. I think that has been clear right along through my daughter's attorney in New Zealand. Her desire has always been—well, quite clearly, she can't practice her profession in New Zealand. She's a long, long way away from the family. I think it's apparent to everybody that we all very much want to go home to the United States. And Ellen would be eager to represent anybody in the Olympics.

Mr. DAVIS. Thank you very much. I thank this panel. I will dismiss the panel at this point. Again, you can supplement any comments; we'll keep the record open. I'm now going to recess this meeting. We have a series of votes on the House floor. We'll probably reconvene in about a half an hour. Thank you.

[Recess.]

Mr. DAVIS. We'll reconvene the meeting of the subcommittee. I would like to call our next panel to testify. This panel consists of the Honorable Charles D. Gill, Superior Court Judge for the State of Connecticut; Mr. David Harmer, who's an attorney from Northern Virginia; and Susan Hall, Vice President of the Alliance for the Rights of Children; and Ms. Nieltje Gedney, of the Committee for Mother and Child Rights.

As you know, it's the policy of this committee that all witnesses be sworn before they may testify. Would you please rise with me and raise your right hand.

[Witnesses sworn.]

Mr. DAVIS. The subcommittee will carefully review any written statements you care to submit. I will insist that oral testimony be limited to 5 minutes each. Judge Gill, would you like to go first? We appreciate you being here.

STATEMENT OF CHARLES D. GILL, SUPERIOR COURT JUDGE, STATE OF CONNECTICUT; DAVID HARMER, ESQUIRE; SUSAN HALL, VICE PRESIDENT, ALLIANCE FOR THE RIGHTS OF CHILDREN; AND NIELTJE GEDNEY, COMMITTEE FOR MOTHER AND CHILD RIGHTS

Mr. GILL. Thank you, Chairman Davis, distinguished Members of Congress. I'm very happy to be here this morning to discuss our only national treasure, our children. And for a moment, I would like to speak about the 13-year-old that's inside of each one of us in this room. For 31 years I've been directly involved in the American justice system as a trial lawyer, chief public defender for the State of Connecticut, and for the past 12 years as a Superior Court judge.

There's not a single nook or cranny of the justice system which affects children in this country that I have not seen. I visited 35 States; I've spoken in as many States; I've given courses to judges, lawyers, law enforcement personnel, including the FBI on the treatment of children in courts. I've come to some conclusions. One is that our judicial system, based upon law, presently treats children merely as pieces of property rather than human beings and citizens.

This is particularly true in divorce and custody proceedings. With the very best of intentions, the justice system can provide daily mementos of man's inhumanity to child. In every State in this union on a daily basis, the so-called best interests of the child are never even reached by courts, no less considered by them. And unlike our neighbor, Canada, we in America still tend to treat children as a Constitutionally protected property owned by adults, rather than Constitutionally protected people owned by no one, except perhaps their creator.

I've learned by repetitious experience that American courtrooms in custody disputes are not childproof. They're adult arenas for adult wars. The only certain victims are children. The adult winners get the trophies—the automobile, the bank account and the chattels that breathe, children. To the eyes of a child, the justice system is not only a scary place, but a dangerous place.

One basic problem is that in all disputes within those courts, they're viewed as disputes between two adults or two sets of adults. I suggest there's a triangle that has to be looked at—the interests of the adults on one side, the adults on the other side, and then finally, through the eyes of the child. This legislation is an attempt to recognize that at last this American child has been punished enough.

Regardless of what we know or we think we know about the adults in this case, we must all agree that this American child has

done nothing wrong; that this American child is totally innocent. It appears that the legislative intent and purpose of this bill is to allow this American child to return to America with her mother, free of the threat of imprisonment, free of forced separation from mother, free of forced, unsupervised visitation with father.

The result of this bill, in effect, I would suggest, is that it is an appropriate legislative party for a child that has committed no crime. State and Federal legislators have historically enacted legislation when there isn't even just one apparent beneficiary of the bill. This is done in the interest of justice. One aspect of this bill would require this 13-year-old American child to give consent to custody and visitation.

In view of her depravation of a normal childhood by adults thus far, it would seem appropriate to allow the child to salvage the remainder of her childhood in her own country in peace of mind, in safety, and with her dreams—one of them being the American Dream, hopefully. Frankly, this bill states the eventual reality of the situation anyhow. In a few years, still as a teenager, this child will have the right to make choices anyhow.

So I would suggest that today we should not let her be a child without her country. For the first time in her life, perhaps she deserves justice. Three final and quick observations. One is, in my view, and personal view, this is not a case that involves false memory syndrome one iota. I submitted to the committee a report, a scholarly, credible report on that issue, prepared by people of great significance in this area.

Second, with all due respect to Congresswoman Norton and Professor Turley, I do not believe, after research, that this is a case of bill of attainder at all. I've submitted two or three academic pieces on that to the committee. And third and finally, as a lawyer, as a judge, I have to caution the view that the answer to this case is in the Superior Court of the District of Columbia.

If that were the answer right there, then it would have been answered long ago. When I handle cases in courts and the lawyers tell me it's all worked out, they're going to work out the details later, I say, withdraw the case then. There's nothing in writing here or that could be composed that would give closure to this child, other than this bill. Thank you, Mr. Chairman, members of the committee.

[The prepared statement Mr. Gill follows:]

PREPARED STATEMENT OF CHARLES D. GILL, SUPERIOR COURT JUDGE, STATE OF CONNECTICUT

For 31 years I have been directly involved in the American justice system, as a trial lawyer, as the Chief Public Defender for the State of Connecticut, and, for the past twelve years, as a Superior Court Judge.

There is not a single nook or cranny of the justice system which affects children that I have not seen. I have spoken about children in the justice system in 35 States and soon at two international conferences in Canada and Europe. I have watched court proceedings in a dozen States, read about court proceedings in all 50 States, and have done training of judges, lawyers and law enforcement personnel, including the F.B.I., on the treatment of children in court.

I have seen children treated as merely pieces of property in many ways, including divorce and custody proceedings. Tragically, I observe nationally, an official judicial disregard for their health. (Physical, intellectual, moral, sexual.)

I have sentenced over 3,000 adults and older children to jails and prisons. I have read their background of childhood abuse by irresponsible, criminal, and sometimes powerful and educated adults. (Physical, intellectual, moral and sexual.)

I have watched courts and agencies grapple and struggle blindly with the lives of innocent children. I have drawn several conclusions after 31 years in the justice system, and as a parent of three children for an equal number of years.

1. With the very best of intentions, the justice system can provide daily examples of man's inhumanity to child.

2. That in every nook and cranny of the justice system, there is daily evidence that the American promise of "liberty and justice for all" has not yet been extended to children, not unlike the systems initial exclusion of slaves and women.

3. That in every State in this Union, on a daily basis, the so-called "best interests of the child" is never even reached by courts, no less considered by courts.

4. And, unlike our neighbor Canada, we in America still tend to treat children as a constitutionally protected property owned by adults, rather than constitutionally protected people owned by no one, except perhaps their creator.

5. Today's legislation focuses on but one thin slice of large pie. But the focus is important. I have learned by repetitious experience that American courtrooms in custody disputes are not child proof. American courtrooms are adult arenas for adult wars.

The only certain casualty there, as in most wars, will be the innocent victims, the children.

A. The adult winner gets the trophies, the automobile, the bank account and the chattels that breathe, the children.

B. I have also learned that those adults with large wallets or large egos can be the worst contestants.

About 3,000 children per day see their parents marriages end in divorce. (Over 1 million per year)

You will undoubtedly hear today from various viewpoints. It may be problematical at times to discern who is really speaking for children or who is a wolf in sheep's clothing pretending to care for children. Through the eyes of a child, the justice system is not only a scary place but a dangerous place as well.

Some people who testify before legislative bodies understandably have a personal or professional interest in appearing. Perhaps the proposed legislation affects them directly or perhaps they are paid professionals who market their beliefs commercially on one adult side or the other. I am not here to speak for adults. I am here to speak for a child. I am not here because I receive fees as a hired professional gun in cases where adults are accused of criminal acts. I am here at my own expense to do my level best to present the child's side in this legislation. (Recently, I spoke with a Chicago reporter who told me he had not yet made up his mind as to which side he favored in the tragic baby Richard case in Chicago, the adoptive parents or the biological parents. I said do you only see two sides. Doesn't the child have a side, isn't this a triangle?)

This legislation is an attempt to recognize that at last this American child has been punished enough. Regardless of what we know, or think we know, about the adults in this case, we must all agree that this American child has done nothing wrong. That this American child is totally innocent.

It appears that the legislative intent and purpose of this bill is to allow this American child to return to America with her mother, free of the threat of immediate imprisonment, free of forced separation from mother, free of forced unsupervised visitation with father. I say the "immediate" threat because I see no future bar to other legal proceedings involving this legal triangle.

This bill is in effect an appropriate legislative pardon for a child that committed no crime. State and Federal legislators have historically enacted legislation where there is but one beneficiary. Usually in the interest of justice.

One aspect of this bill would require this 13 year old American child to give consent to custody and visitation. In view of her deprivation of a normal childhood by adults thus far, it would seem appropriate to allow the child to salvage the remainder of her childhood in her own country, in peace of mind, in safety and with her dreams. Hopefully, one of them being the American dream.

Frankly, the bill states the eventual reality of this situation anyhow. In a few years, still as a teenager, this child will have the right to make such choices anyhow.

The adult litigation may continue into the next millennium—let them sue each other for damages—let them be cross examined—let them take polygraph test—let them parade their expert witnesses into courtrooms—but let this child go. For her sake. For God's sake.

Let her not be a child without her country. For the first time in her life, give her justice.

Mr. DAVIS. Judge Gill, thank you very much. Mr. Harmer.

Mr. HARMER. Mr. Chairman, Delegate Norton, Mr. Gutknecht, I think all of us are honored at the time that so many Members of Congress have spent here this morning. It is a rare thing to see five or six committee members simultaneously, not only here for their opening statements, but to engage in colloquy with the witnesses and to attempt to work out an extremely troublesome and difficult matter.

I appear here not as an advocate for either party, and not as someone who pretends to understand what really happened and the facts underlying this case. I come for three simple reasons. First of all, to explain the legal consequences of Ellen Morgan's return to the United States absent the passage of H.R. 1855. Second, to explain the public policy reasons for passage of H.R. 1855.

Third, to give some historical perspective on what brought us here; specifically on Congressman Wolf's and Senator Hatch's bills from 7 years ago—H.R. 2136 and S. 1163—that resulted in freeing Dr. Elizabeth Morgan from the District of Columbia jail where she had spent more than 2 years. First of all, the legal consequences of Dr. Morgan's return and Ellen's.

On August 26, 1987, Dr. Morgan was adjudicated in civil contempt of the District of Columbia Superior Court for failing to comply with the court's order of unsupervised visitation. Based on that, an order dated August 27, 1987, provided that Dr. Morgan be incarcerated—quoting now from the order—“until such time as she purged herself of contempt by delivering the child for summer visitation.”

Dr. Morgan refused to comply with that order, and again spent more than 2 years in jail. Now, this was a woman who was educated at Oxford, Yale, Harvard; who had written four books and numerous columns; who was a successful plastic surgeon with a flourishing practice. But more importantly than that, a woman who had never, ever been convicted of or even accused of a crime. She was incarcerated ostensibly for civil contempt.

The Senate of the United States and the House of Representatives considered that an abuse of the contempt power, and rightly so. I began my legal career as an attorney on the Senate Judiciary Committee staff. And as a result of the work we did on S. 1163, I wrote a law review article entitled, *Limiting Incarceration for Civil Contempt in Child Custody Cases*, published in the *Brigham Young University Journal of Public Law* in 1990.

It includes a review of this case and explains why the Senate and the House took the extraordinary measures that they did. Those measures were justified; they were not unprecedented; they did not constitute a bill of attainder; and they worked. The second item of the court order is this, quoting again, “that any duly authorized law enforcement officer forthwith takes into custody the subject child, Hilary Antonia Foretich, and bring said child to the social services division of the Superior Court of the District of Columbia for placement in accordance with further order of the court.”

In simple English, the instant Ellen Morgan returns to the United States, she becomes subject to the court's authority and is in

fact supposed to be picked up by uniformed officers who will deliver her to the child protective division of social services. With all due respect for the valiant people who do extraordinary work there, I wouldn't wish that fate on my worst enemy, let alone a daughter I loved.

Ellen simply cannot return to the United States as long as that threat exists. I was gratified to hear, after repeated questioning from four separate members of the panel, Dr. Foretich's assurance that he would be willing to dismiss the case. While that is encouraging, nothing prevented that from occurring in the past 5 years. Had this hearing not been convened this morning, I doubt that that offer would have been made.

Now, if it comes to pass, that will be gratifying. But there is no assurance that it will come to pass. Even if this order is vacated, that doesn't dismiss the underlying case. And even if the case is dismissed with prejudice, nothing prevents this court or another from revisiting the issue. I do believe that this legislation is imperative. Finally, the third effect of the order—Dr. Morgan was fined \$5,000 a day until the \$200,000 bond had disappeared, along with her home, her medical practice, her association with her family, and ultimately, her freedom.

I don't think there is much more that the court can take. Let me turn now to a quick historical perspective. This is not a bill of attainder. The same objection was raised to H.R. 2136 and S. 1163 6 or 7 years ago. First of all, if a court were to find that this bill is too specific—and I don't think it would—the solution to that is to make it more general.

There is no punishment here, the second element of a bill of attainder, because Dr. Foretich has explicitly offered to yield whatever rights he may have to visit the child. In other words, not to compel himself upon her. Third and finally, there is no circumvention of the judicial process. Regrettably, until the District of Columbia is able to operate under the same principles of representation that govern the rest of the country, Congress is in some cases its city council.

And here it is Congress' job and no one else's to define the jurisdiction of the courts. Hard cases make bad law, it is sometimes said. I think in this case, a very hard case is showing law at its finest; and I commend the committee.

[The prepared statement of Mr. Harmer can be found in the subcommittee files.]

Mr. DAVIS. Thank you very much. Susan Hall.

Ms. HALL. Good morning, good afternoon it is now. I want to thank you for the privilege of participating at this hearing on H.R. 1855, and I'm proud to be able to testify for those behind me and those who couldn't come today. We're part of a national grass roots organization, and we pride ourselves on uniting others, regardless of our differences on many issues. This hearing is an inspiration and is evidence of your commitment to citizen rights. And we thank you for listening to our testimonies.

Alliance for the Rights of Children began as a group of individuals deeply concerned about what was happening in the Morgan case, and wanting to do something about it. As we got—as the case became national and international, attention wise, our organization

began to get deluged with letters and phone calls from other parents and grandparents from all over the country, whose stories were similar to the Morgan case.

When they reported suspected abuse, they were disbelieved and punished by the system. We decided to form Alliance for the Rights of Children as a nonprofit grass roots organization to network with those organizations and individuals, working to educate ourselves about the issues, and to help discover solutions. We have worked as volunteers; we've traveled at our own expense; and we've stayed in the homes of other volunteers; and we listened to those anguished parents.

I've held in my arms broken, sobbing children who are being abused during court ordered visitation. I witness angry, vehement children who beg for a judge to talk or at least listen to them. I've seen children who have been withdrawn into silence and disassociation because of continuing abuse. They have told, but no one has protected them.

I speak from personal knowledge. My stepfather robbed me of what should have been every child's birthright—innocence and protection. To the community, he was an upstanding citizen. But he was a thief who stole my right to self-respect and to safety. I spent my childhood little and trapped. And when I finally told, nothing was done. Crimes against children create an ongoing cycle.

My only daughter became a victim at the hands of my husband. To the community, he was an upstanding citizen. He was a person that I thought walked on water, a person I adored, and who I thought was a good father. In therapy, I went through the painful deprogramming of those victim years. And I learned that if there is to be any hope in breaking the cycle, it had to start with me.

My own personal experience and my work in the last few years with ARC, has brought me to this realization—children are not private property that parents can do with as they wish; but rather, children are a privilege and a responsibility. Nor should children be divvied up and parceled out by the courts or social services with total disregard for their feelings or their wishes.

But anyone who works with children, either inside or outside the system, knows that we as a society do terrible things to children both in the family and in our public decisions. A 5-year-old little boy in California who reported to his mother that he was being sexually abused by his father was taken out of his home and put in a group for boys—a terrifying and traumatic experience.

And why wasn't the alleged abuser separated out? We treat children as if they are property without feeling. Hilary Morgan has been mistreated by the legal system since she was a baby. She has been a fugitive from her own country since she was five. And in a few days, she will turn 13. She wants to come home. She is proud to be an American. She wants to start junior high school here and be with her favorite cousin.

If she could be here, she would tell us all of this and more. She wrote a letter to you, Congressman Davis, and this is a result of your efforts and her effort of that letter. And I stand before this subcommittee and ask you to pass this bill. If we fail by example to teach children that they have a right to receive respect phys-

ically, emotionally, spiritually, and sexually, how on Earth can we expect ever that those children will respect us?

Violating these boundaries destroys the souls of children. And left unattended, the destroyed soul of a child can be fatal. We witness these fatalities every day—street crime, family violence, teen suicide, addictive/compulsive behavior that demands abnormal power/control and promotes self-loathing. Our children and these children lack a desire for education often.

And as they grow and develop, they develop a multitude of health problems. We are all paying the bills for our lack of interference. Thank you. I urge the subcommittee to vote for H.R. 1855, and to bring Hilary home. By validating one child, we can begin to validate all of the others. Thank you for helping Hilary to live the remainder of her childhood years peacefully with a vision of health and hope for her productive life.

She's an American original. She and Elizabeth love this country; they love this city; they have respect for it, and they have respect for the law. Thank you.

[The prepared statement of Ms. Hall follows:]

PREPARED STATEMENT OF SUSAN HALL, VICE PRESIDENT, ALLIANCE FOR THE RIGHTS OF CHILDREN

Good Morning (or afternoon) Mr. Chairman and honorable members of the Subcommittee. I am Susan Barker Hall, vice president of Alliance for the Rights of Children (ARCH).

Thank you for the privilege of participating in this hearing on H.R. 1855. I'm proud to be part of a national grassroots effort to help Dr. Elizabeth Morgan and her daughter, Hilary, to return to their home free of fear.

This hearing is an inspiration and is evidence of your commitment to citizen rights and we thank you for listening to our testimony.

Alliance for the Rights of Children began as a group of individuals deeply concerned about what was happening in the Morgan case and wanting to do something about it. As the case got national and international attention, our organization began to be deluged with letters and phone calls from other parents and grandparents from all over the country whose stories were similar to the Morgan case: When they reported suspected abuse, they were disbelieved and punished by the system.

We decided to form Alliance for the Rights of Children as a nonprofit grassroots organization to network with other organizations and individuals working to educate ourselves about the issues and to find solutions. We've worked as volunteers, traveling at our own expense, staying in the homes of other volunteers and listening to anguished parents.

I have held in my arms broken, sobbing children who are being abused during court-ordered visitation. I've witnessed angry, vehement children who beg for a judge to talk to them and listen to them. I've seen children who have withdrawn into silence and dissociation because of continuing abuse. They have told, but no one has protected them.

I speak from personal knowledge. My stepfather robbed me of what should be every child's birthright—innocence and protection. To the community he was an upstanding citizen. But he was a thief who stole my right to self respect and safety. I spent my childhood little and trapped. When I finally told, nothing was done!

Crimes against children create an ongoing cycle. My own daughter became a victim at the hands of my husband, a person whom I thought walked on water, a person I adored and who I thought was a good father. In therapy I went through the painful deprogramming of those victim years. I learned that if there's to be any hope in breaking the cycle, it had to start with me.

My own personal experience and my work these last few years with ARCH has brought me to this realization: Children are not private property that parents can do with as they wish, but rather, children are a privilege and a responsibility. Nor should children be divided up and parceled out by the courts or social services with total disregard for the child's feelings or wishes.

But anyone who works with children either in or outside the system knows that we as a society do terrible things to children, both in the family and in our public decisions. A five-year-old boy in California who reported to his mother that he was being sexually abused by his father was taken out of his home and put in a group home for boys, a terrifying and traumatic experience. Why wasn't the alleged abuser separated out? We treat children as if they are property without feeling.

Hilary Morgan has been mistreated by the legal system since she was a baby. She has been a fugitive from her own country since she was five. In a few days she will turn thirteen. She wants to come home. She is proud to be an American. She wants to start junior high school here and be with her favorite cousin. If she could be here she would tell us all this and more. She wrote a letter to Congressman Tom Davis asking him to help her come home. As a result of his effort, we have a bill before this subcommittee that will do that.

If we fail by example to teach children they have a fight to receive respect physically, emotionally, spiritually, and sexually, how can we expect they will ever offer that respect to others? Violating these boundaries destroys the souls of children, and left unattended, the destroyed soul of a child can be fatal.

We witness these fatalities every day. Street crime, family violence, teen suicide, addictive compulsive behavior that demands abnormal power control and promotes self loathing. Our children lack a desire for education and as they grow develop a multitude of health problems. We're paying the bills for our lack of indifference.

We're in the middle of a social revolution and the world is designing a new era of human understanding and law. If we in the United States don't promote safety and equality for women and children no one will.

Not just the nation, but the world is watching to see how the U.S. Congress handles this situation. I attended and spoke at an international conference on incest and child abuse in Geneva, Switzerland, in 1992. I was overwhelmed at the hunger for leadership that I sensed in the people there. They are looking to the United States to lead the way on this issue of children's rights. They have the same problems that we do. However, we are talking openly about the problems. This hearing is a shining example.

I urge this Subcommittee to vote for H.R. 1855 and bring Hilary home. By validating one child we can begin to validate all our children. It is truly the right thing to do and the right time to do it.

Thank you for helping Hilary come home to live the remainder of her childhood years peacefully with a vision of health and hope for her productive life. Hilary is an American original she and Elizabeth love their country, and this city, and we'll all benefit from their return. They've sacrificed enough.

Mr. DAVIS. Thank you very much. Ms. Gedney.

Ms. GEDNEY. Chairman Davis and members of the committee, thank you for inviting me here today to come and speak before you about the importance of passing H.R. 1855. My name is Nieltje Gedney. I am both a survivor of childhood violence and the parent of a child who has also survived acts of violence. You'll note that I use the word violence. I will never use the word abuse. If the acts of violence that were perpetrated upon my child and the hundreds of children that I heard from had happened to a stranger on the street, it would have caused community outrage.

But because these acts of violence were perpetrated in the home, it is labeled abuse. And I will not demean this act by calling it abuse; it is violence. Violence is violence is violence. My child's violence began at the age of three, and was perpetrated upon her during periods of court ordered visitation. It did not stop until she was 12, when she was hospitalized for almost a year with little hope that she might ever leave an institution.

Today, at the age of 18, after several hospitalizations and 7 years of intensive treatment, costing well over \$1 million, my daughter will enter college this Fall. I come before you today as an advocate for children's rights. Children, including Ellen Morgan, should have the inalienable right to live and grow in an atmosphere free from violence.

I come before you today, speaking for the hundreds of victims, survivors, advocates, professionals, and grass roots organizations who are striving to improve the plight of children in today's society. One of those children is Ellen Morgan. I urge you to support H.R. 1855, a bill to amend Title 11 of the District of Columbia Code, that will allow Ellen Morgan to return to the United States from New Zealand.

Ellen, formerly known as Hilary, has been a fugitive from her own country since she was 5 years old. She is now 13, and she wants to come home. From all that I have read, clearly, Dr. Elizabeth Morgan believed her daughter when she alleged that she was being sexually victimized by her father during periods of court ordered visitation. She vowed that she would remain in jail until her child was 18 in order to protect her.

If I had known enough to recognize that my child was being victimized, I also would have gone to extraordinary lengths to protect her, at all costs. Had I not believed my child when she alleged similar acts of violence, she would not be alive today. Dr. Morgan and Ellen are not alone in their ordeal. This is no longer a case about custody, visitation, nor even the alleged acts of sexual violence.

This case is about the rights of the child, Ellen Morgan, to be allowed to live free from the fear of violence in the country of her birth. She is a political refugee who sought asylum in New Zealand. The New Zealand courts believed that Hilary was at risk, and have protected her for the past 7 years. It seems only just that her own country of origin should do the same.

In September 1989, President Bush signed a law allowing Dr. Morgan's release from jail after serving almost 25 months on contempt charges. It took an act of Congress, although a very unusual act in all respects, to right this wrong. It is 1995, and the same D.C. ruling remains in effect. Nothing short of a second act of Congress will allow Ellen to safely return to the country of her birth to live and grow free from the fear of violence. The passage of H.R. 1855 will allow just that.

In concluding, I'd like to share one of my own sources of inspiration with you. When I feel overwhelmed by the tragedies that have occurred in so many of these young lives, including Ellen's, I look at a plaque that sits over my desk. A mother whose 3-year-old child was being ritually abused during periods of court ordered visitation sent it to me. It reads, "100 years from now, it will not matter what my bank account was, the sort of house I lived in or the kind of car I drove. But the world may be different because I was important in the life of a child."

The children of America need you. Ellen Morgan, especially, needs you. Please do not let her down. Thank you.

[The prepared statement of Ms. Gedney follows:]

PREPARED STATEMENT OF NIELTJE GEDNEY, COMMITTEE FOR MOTHER AND CHILD RIGHTS

Chairman Davis and members of the committees, thank you for inviting me to come before you today to speak about the importance of passing H.R. 1855, a bill to amend title 11, District of Columbia code, to restrict the authority of the Superior Court of the District of Columbia over certain pending cases involving child custody and visitations rights.

My name is Nieltje Gedney. I am both a survivor of childhood violence and the parent of a child who has also survived acts of violence. This violence, beginning at the age of three, was perpetrated upon her during periods of court ordered visitation. It did not stop until she was 12, when she was hospitalized for almost a year, with little hope that she might ever leave an institution. Today, at the age of 18, after several hospitalizations and seven years of intensive treatment costing well over a million dollars, my daughter will enter college in the fall.

I come before you today as an advocate for children's rights. Children, including Ellen Morgan, should have the unalienable right to live and grow in an atmosphere free from violence. I come before you today speaking for the hundreds of victims, survivors, advocates, professionals and grassroots organizations who are striving to improve the plight of children in today's society. One of those children is Ellen Morgan.

I urge you to support H.R. 1855, a bill to amend title 11 of the District of Columbia Code that will allow Ellen Morgan to return to the United States from New Zealand. Ellen, formerly known as Hilary, has been a fugitive from her own country since she was five years old. She is now 13 and she wants to come home.

From all that I have read, clearly Dr. Elizabeth Morgan believed her daughter when she alleged that she was being sexually victimized by her father during periods of court ordered visitation. She vowed that she would remain in jail until her child was 18 to protect her. If I had known enough to recognize that my child was being victimized, I also would have gone to extraordinary lengths to protect her, at all costs. Had I not believed my child when she alleged similar acts of violence, she would not be living today. Dr. Morgan and Ellen are not alone in their ordeal.

This is no longer a case about custody, visitation, nor even the alleged acts of sexual violence. This case is about the rights of the child, Ellen Morgan, to be allowed to live free from the fear of violence in the country of her birth. She is a political refugee who sought asylum in New Zealand. The New Zealand Courts believed that Hilary (Ellen) was at risk, and have protected her for the past seven years. It seems only just that her own country of origin should do the same.

In September 1989 President Bush signed a law allowing Dr. Morgan's release from jail after serving almost 25 months on contempt charges. It took an act of Congress, although a very unusual act in all respects, to right this wrong.

It is 1995, and the same DC ruling remains in effect. Nothing short of a second act of Congress will allow Ellen to safely return to the country of her birth, to live and grow free from the fear of violence.

The passage of H.R. 1855 will allow just that.

In concluding, I'd like to share one of my own sources of inspiration with you. When I feel overwhelmed by the tragedies that have occurred in so many of these young lives, including Ellen's, I look at that plaque that sits over my desk. A mother whose three year old child was being ritually abused during periods of court ordered visitation sent it to me it. It reads:

. . . A hundred years from now it will not matter what my bank account was, the sort of house I lived in, or the kind of car I drove. . .
 . . . but the world may be different because I was important in the life of a CHILD.

The children of America need you. Ellen Morgan especially needs you. Please do not let her down.

Thank you.

Mr. DAVIS. Thank you all very much. I need to point out for the record, that no court of law has ever found anyone guilty of abusing the child in this case.

I want to ask a question, particularly on this legislation. As you know, under the limited circumstances of this bill, a child of 13 or older could not be compelled to have visitation with an individual the child believes to be an abuser. From your experience, do you believe that such a child is capable of making that type of decision at that age?

Ms. HALL. I not only feel, yes, that the answer is yes, but I think a much younger age. I would be willing to put my money on a child who was 4 or 5 years old, 3 years old, 2 years old. We don't need a lot of clues when children are telling us. They tell us with their symptoms and their behaviors. We don't have to have words.

Mr. DAVIS. OK. Thank you very much. Let me ask Mr. Harmer a little bit about the law review article that you wrote and the bill of attainder issue. Do you want to discuss that in any greater length?

Mr. HARMER. Certainly, and I appreciate the opportunity. Many members of the Senate were extremely concerned that the legislature here was acting in a way that made it look like a court of law. That was a legitimate concern, and one with which, as an attorney and as a lover of the Constitution, I sympathized. Congress cannot escape, until it determines how it is going to let citizens of the District of Columbia be represented, its current responsibility to function in some respects as the city council.

That is unfortunate, but as Delegate Norton pointed out, that is where we find ourselves. For whatever reason, that issue has not been dealt with, and so Congress is in charge directly of determining the jurisdiction of the District of Columbia Superior Courts.

Mr. DAVIS. Ms. Norton has a bill that will try to rectify what she feels is a longstanding wrong to the city, which we plan to hold a hearing on later this year.

Mr. HARMER. I realize that on that matter, as on this bill, there are differing opinions. And I'm certainly not telling the subcommittee what to do. I'm just saying, until it decides what to do, it has an inescapable and uncomfortable responsibility of functioning not as part of the national legislature, but as the government of a mid-sized city which didn't directly elect it.

In exercising that responsibility, it needs to determine the jurisdiction of the courts. It is not all unprecedented for the Congress either in its national or in its local civic capacity to determine the jurisdiction of the courts. Nor is it unprecedented for a legislature to enact—to limit incarceration for civil contempt. In fact, civil contemptors are denied the protections routinely afforded to criminal contemptors.

Civil contempt is one of the few instances, perhaps the only instance, where someone can be incarcerated without a definite term, where they can be held indefinitely. Congress, in considering these issues, examined carefully the question of whether this was a bill of attainder. And it concluded that the legislation was drafted to be of general applicability, not specific.

Even if only one person specifically was affected by it, the legislation was not drafted to be restricted to one person. In fact, the sunset on the bill was reluctantly added as a last-minute compromise to make sure that the thing could pass. The majority of members appeared to feel that this was a wise way to shape public policy indefinitely.

The second requirement of a bill of attainder, or element of a bill of attainder, is that it must impose some kind of punishment. Again, nothing changed in the relationship of the parties. Dr. Morgan clearly was not being persuaded by her continuing incarceration to reveal the whereabouts of the child. So Dr. Foretich was not disadvantaged by her release.

Mr. DAVIS. Let me ask you, do you think this bill imposes a punishment in this case because Dr. Foretich currently has certain rights under the D.C. order; albeit, he's not able to exercise those

rights because the child is in New Zealand. Are those rights taken away in terms of visitation?

Mr. HARMER. Because the rights are unenforceable with Dr. Morgan and Ellen out of the country, and because Dr. Foretich has offered—if I understood the proceedings earlier correctly—to yield those rights and let the child herself determine visitation and custody, then I don't see how he is disadvantaged.

Mr. DAVIS. If that happens, then we don't need any legislation. OK, that's fine. Let me ask, Judge Gill a question. I understand you're the co-founder and the current president for the National Task Force for Children's Constitutional Rights.

Mr. GILL. That's correct, sir.

Mr. DAVIS. Can you tell us about the task force functions and the role you play in its deliberations?

Mr. GILL. Yes. The task force is a multi-disciplinary task force founded at the University of Pennsylvania in 1988. I was a co-founder, along with Dr. Ann Burgess, professor of psychiatric nursing at Penn, and considered one of the foremost authorities on child sexual abuse in courts in the country. We're active in all 50 States. Our goal is to have the people of the United States to re-examine and explore the feasibility of providing more protective Constitutional rights for children.

Our sense is that certain people are left out of the Constitution. We know African Americans were. We know women were. And most certainly now it appears that children are in many different contexts. So what happened in a number of the cases we see of high prominence today, like the Baby Richard case in Chicago, where a 4-year-old child was ordered to go back to the biological father.

Things like that don't happen, for example, in Canada, where children are no longer treated as chattels. And I think that's sort of one of the basic problems here.

Mr. DAVIS. OK. If the members will permit me to ask one other question of you, Judge. Even if the child had not been molested, but they perceive in their own mind that they have been, is the damage the same, the relationship the same; since the mind set of the child is a dispositive thing in terms of the psychological effects? Perhaps not the reality of the situation, but if it's part of their world perception.

Mr. GILL. It may be the reality.

Mr. DAVIS. But it may or may not be. Even if it isn't, doesn't it carry the same kind of psychological baggage?

Mr. GILL. Well, that's not my area of expertise obviously. But I agree with the concept you're expressing, that regardless if anything occurred in this case or didn't, the child's perception of what happened is ruling what's occurring here. And I think when I heard Dr. Foretich testify, that he has no present inclination to change that.

Mr. DAVIS. Thank you very much. I will now recognize the gentlelady from the District of Columbia.

Ms. NORTON. Thank you very much, Mr. Chairman. Judge Gill, you are a judge on the Superior Court in Connecticut?

Mr. GILL. Yes.

Ms. NORTON. Is that a court of primary jurisdiction?

Mr. GILL. Yes, it is.

Ms. NORTON. Have you had any cases that are similar to the case that has been before us?

Mr. GILL. Every case is slightly different, but I suppose I've had a number of cases in front of me. This is a real battleground, as you probably know, Congresswoman.

Ms. NORTON. Judge, I should make myself clear—a case in which in order for the matter to be settled, the Connecticut legislature or some other Connecticut legislative body had to intervene?

Mr. GILL. No, actually, no. As a matter of fact, in cases I've held people in contempt of court as well. Usually it's a matter of a day, 2 days, a week.

Ms. NORTON. This is not a contempt matter before us now.

Mr. GILL. I understand that.

Ms. NORTON. You submitted a memorandum, a kind of definitional memorandum from your law clerk and a Xerox of a treatise on Constitutional law, both of which I will ask to be entered into the record.

Mr. DAVIS. Without objection.

Ms. NORTON. Thank you, Mr. Chairman. I wonder if you have ever yourself written any scholarship on the matter.

Mr. GILL. The matter of bill of attainders?

Ms. NORTON. Bill of attainder, yes, on which you submitted these memorandum.

Mr. GILL. I don't think that's an area that many people are writing a lot about. I've written several scholarly pieces on the Constitutional rights of children, first published in 1991; another one at the New York School of Law's Journal of Human Rights in 1993. I've written forwards to three books on children's rights, representation of children.

And I have to be a full-time judge, so I don't have the liberty of doing more. But, no, as a matter of fact, when we had this researched, it's such an esoteric area, I think one or two Supreme Court cases in the last 10 or 15 years on this subject. It's not an every day occurrence.

Ms. NORTON. No, you're right about that, because legislatures seldom get involved in matters that are pending or have been pending before a court of law. Mr. Harmer, you have spoken mostly about the civil contempt case. And I just want to say for the record that the civil contempt case raised the most serious implications.

Because it appeared that we had a case in which a person could have stayed in jail in perpetuity, and there was a real question about that case. And I think that is why, frankly, the Congress of the United States acted, that they thought that this mother was virtually being left in jail to rot, and that even civil contempt did not allow that.

And that really is not the matter before us. We have a tougher matter before us. And you have said that this is not a bill of attainder. Do you know of any case similar to this in the reports?

Mr. HARMER. No.

Ms. NORTON. Do you agree that the bill before us purports to be a full adjudication of the matter, with benefit to one party and denial to another?

Mr. HARMER. Your own committee counsel probably can offer a more informed opinion than my own. I have read the bill, and I did not interpret it as deciding the matter. I interpreted it as changing the law under which the matter would be decided.

Ms. NORTON. So you agree, then, that even if this bill were passed, the matter still, if it depended entirely upon the wording of this bill, would not have been completely decided.

Mr. HARMER. You're correct.

Ms. NORTON. I just want to say for the record, because that was my last question, that as I urge the parties, and as the chairman has, to find a permanent resolution of this case, that the operative words on page two are "may not have custody over or visitation rights with the child without the child's consent." And as I heard it, the father conceded that here under oath.

And then I ask you to look further down in the discussion of this bill, at words that say, "The court may not deprive the person of custody or visitation rights over the child or otherwise impose sanctions on the person on the grounds that the person had such custody or offered such refuge." Now, if the grounds were, however, that there were changed circumstances of any kind involving the child, then of course this wouldn't be worth the paper it's written on.

Somebody's got to speak in the best interest of the child here. Even a court itself could not remove itself eternally from jurisdiction if there was some harm to this child in some way. I would hope that between Dr. Foretich and Ms. Morgan that as true a resolution as is possible in our form of government would be sought.

If both parties were to memorialize what Mr. Foretich said here and to agree that only changed circumstances involving the welfare of this child should or would lead to further adjudication of the matter, then I think we would have come as far as the law allows to a final resolution. What cannot occur, if both parties have the interest of the child at stake, is a final surrender of one party or the other.

In that case, any party that demands that the other party's rights be totally extinguished shall reveal herself or himself as not working in the best interest of this child. And it's time that those parties stepped forward and said that to the fullest extent possible, I raise my hand and say, what this child wants is the end. And if it takes something like some third party to just make sure that the mother or the family—that we have a healthy child here.

The notion that there would be any human being that would say that that's an improper thing to do is also unthinkable. Let's try to resolve this matter. And I will work with the chairman. He and I are of different parties. I will work with the chairman so that a resolution of that kind, if the parties themselves are willing to work with us. Thank you, Mr. Chairman.

Mr. DAVIS. Thank you very much. Mrs. Morella.

Mrs. MORELLA. I just simply want to point out that the panel has a common interest, in looking at your testimonies and listening, the welfare of the child. And I think that's why this bill was introduced. I hope that we can, resolve it without legislation; and if not, with legislation.

So I thank the panel. I thank you, Mr. Chairman. I think that the hearing has been conducted in a very civilized, appropriate, reasonable manner, and I congratulate you.

Mr. DAVIS. Thank you. I think the panelists have all contributed to that on all sides of the issue. We thank all of you; you're dismissed. I would ask unanimous consent to enter into the record a letter to the subcommittee from Councilman William Lightfoot, Chairman of the Judiciary Committee of the District of Columbia Council. Mr. Lightfoot's letter is helpful to this subcommittee.

Part of it states, "I am writing to express my support for Dr. Elizabeth Morgan and her daughter Ellen Morgan. Since only Congress can amend Title 11, I think it's appropriate for the Subcommittee on the District of Columbia to hold public hearings on H.R. 1855." I will now enter into the record an article that appeared in the Washington Post, dated November 13, 1994, entitled Prisoners in Paradise.

I will also enter into the record a written statement submitted by the following individuals: Dr. Elizabeth Morgan; Judge Paul Michel, Dr. Elizabeth Morgan's husband; Dr. Mary Froning; Marilyn Van Derbur; Dr. Kenneth T. Strongman and Thelma Strongman of Christchurch, New Zealand; Dr. Phyllis Daen of the Virginia Psychological Institute; and Mary Ellen Durant of the Purple Ribbon Project.

[The information referred to follows:]

COUNCIL OF THE DISTRICT OF COLUMBIA,
Washington, DC, August 2, 1995.

Hon. THOMAS M. DAVIS, III,
Chairman,
Committee on Government Reform and Oversight,
Subcommittee on the District of Columbia,
House of Representatives,
Washington, DC.

DEAR CONGRESSMAN DAVIS: I am writing to express my support for Dr. Elizabeth Morgan and her daughter, Ellen Morgan (formerly Hilary Foretich), in their efforts to return to the United States. Ellen Morgan has been living in virtual exile in New Zealand since the late 1980s and now wants to return home. No one can deny that this is a tragic case. A truly innocent child has been forced to live outside the country of her birth; denied the opportunity to know her neighborhood, extended family, and friends. I am concerned, as many are, that some resolution be brought to this child's suffering.

I am also naturally concerned, as a member of the Council, that H.R. 1855, the legislative solution proposed by Congress, may interfere with Home Rule and may also violate the doctrine of separation of powers. In particular, I question whether it is sound public policy to legislate changes to Title 11 for the sole purpose of determining a judicial outcome, even under these special circumstances. However, since only Congress can amend Title 11, I think it is appropriate for the Subcommittee on the District of Columbia to hold public hearings on H.R. 1855, if only to highlight the devastation that prolonged parental disputes over child custody can create in children's lives.

I am more than willing to discuss this matter further with you and to work together on developing a solution that will bring Ellen Morgan home.

Sincerely,

WILLIAM P. LIGHTFOOT,
Chairman, Committee on the Judiciary.

PRISONERS *in* PARADISE

Elizabeth Morgan and Her Daughter Have at Last Found Peace and Quiet.
So Why Doesn't It Feel Like Victory?



BY JOHN MCCORMIE FOR THE WASHINGTON POST



BY BLENCHETT & DANE—THE BIRMINGHAM POST



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They can't go home again: *Top, 12-year-old Hilary, now Ellen Morgan, with her mother and grandmother, stroll through a park near their home in Christchurch, New Zealand. Above left, Elizabeth Morgan reads to 4-year-old Hilary Foretich in 1986, during the custody battle; right, the 7-year-old as a New Zealand schoolgirl in 1990; left, Elizabeth Morgan in jail in 1988, after refusing to divulge her daughter's whereabouts.*

By Laura Blumenfeld
Washington Post Staff Writer

CHRISTCHURCH, New Zealand

The day is always tomorrow, the fall is spring, the swans are black, and the little American girl crying on her mother's neck is big now, riding her bike through trees with strange leaves.

"Balance, Mum! Concentrate!" the 12-year-old calls, laughing. Her legs are strong, her accent tangy New Zealand. She speeds off. "You're doing well!"

Elizabeth Morgan's bike veers toward a tree trunk. She is new at this; she tries reasoning with her handlebars: "Okay, I know the theory of brakes. When you brake it stops. Okay, okay, okay."

But what Morgan has started, she cannot stop. Weaving through the park, she crashes again and again. In an hour's ride, she hits a tree, grazes a pole, tips down a river bank, tumbles into the gravel. She flies through the air and rag-dolls over a guardrail, legs kicking and arms flopping. After each fall, she gets up smiling. "Boy, am I proud of myself!" Grease and grass streak her cream-colored jeans. Her hands are muddy, socks ripped, ankle bleeding. And still: "This is terrific fun!"

It has been five years since a tense, gaunt Elizabeth Morgan emerged from the District of Columbia jail where she had spent 25 months for refusing to disclose her daughter's whereabouts. The plastic surgeon from suburban Virginia had waged Washington's most costly, nasty custody battle, alleging that her doctor-husband, Eric Foretich, had sexually abused their baby daughter, Hilary. When a court ordered unsupervised visitation for the father, Morgan instead sent Hilary, 5, into hiding.

Hilary was here, living in a motel with her grandparents. She had a new name, Ellen, and a new life in the flat, green, calm of Christchurch. Eventually her father tracked her down, but he could not bring her back. By then Elizabeth was out of jail and a New Zealand court awarded her custody.

Today, at first glance, Elizabeth Morgan seems happy. Ellen seems happy too. They are living in a place of tearooms and garden cottages, surrounded by deer farms and apricot orchards, a city of prim eccentricity where musicians with sorcerer's bells on their shoes roam the cafes playing flutes, where the official town wizard in black velvet robes preaches to a lunchtime crowd. Locals know the story of the American runaways, but few bring it up; Christchurchers do not pry.

It is a strange life. Elizabeth Morgan is a doctor who cannot practice medicine. She has drained her mother's savings account and has broken into her own retirement fund. They cannot leave the country without permission; their passports are under lock and key at the New Zealand family court. If Elizabeth returns to the United States, she could face the same contempt of court charges that put her in jail. Until 2000, when Ellen turns 18 and the custody case becomes moot, they are stuck here.

To Elizabeth, home is as concrete as Washington, D.C. To Ellen, home is less a city than a feeling, an untroubled state of mind she would like to know. For now, though, mother and daughter remain in their respective exiles. And beneath the tranquility of their days is something forbidding.

Still on their bikes, Elizabeth and Ellen meet up at the duck pond, where the wind is nicking ripples in the water. Ellen is used to the gusts, warm in one sweater with the sleeves pushed up. But Elizabeth is plump with layers, a coat, two sweaters and woolen long underwear, and, like most foreigners, she has that frozen, blown-about look. The wind mixes with people here in a way that never lets them forget:

They are on a raft of land in the middle of an icy ocean.

Locals like to tell the story of the winds. The first explorers floated over on a breeze from the east. They marveled at the jagged beauty of the island. But then it was time to go home and they couldn't. The winds blew only in one direction. They found Paradise; now they were trapped.

The truth of what happened nine years ago may never be known. Medical testimony was inconclusive. Doctors found physical trauma that was consistent with abuse, but if the girl was abused no one could say by whom. Hillary/Ellen names her father, with an unshakable conviction. The father denies it. Can a child be brainwashed into believing a lie? Can two children be brainwashed? In a separate custody battle, Ellen's older half sister also reported that her father sexually abused her. Later she recanted, and

See MORGAN, F4, Col. 1

F4 SUNDAY, NOVEMBER 13, 1994

Elizabeth Morgan's New Life

MORGAN, From F1

later still she accused him again. In that case Eric Foretich was denied visitation because the visits upset the girl. He was never charged with a crime, nor was there ever a ruling he had abused a child.

The truth may no longer even exist, reality having long ago been overtaken by perceptions. To many, Elizabeth Morgan came across as an unpleasant woman: vindictive, manipulative, mesmeric. But wouldn't any mother—convinced that such an unspeakable betrayal had taken place—behave just like that? The father seemed evasive, creepy, cold, filled with aggressive fury. But wouldn't any father—wrongly accused of raping a child—behave just like that?

The only accessible truth is what we see in Christchurch. Morgan has agreed to talk to a reporter at some personal risk. The local court has warned her not to speak to the press about Ellen. But once, public support helped free Morgan from jail. Maybe it could work for her again—she wants out.

Elizabeth is 47; her dramatic black hair now softened with gray. She is liberally unconventional, patient with her daughter, quick to admit to and sometimes laugh at the tumult that is her life. Ellen is a spirited child. She has grown six inches in the past year and a half and is filled with adolescent fix. She cuddles stray cats, goof's around with her girlfriends at the ice rink and peeks up at television kissing scenes.

There is a third Morgan living here, Elizabeth's mother, Antonia, 80. She wears good wool cardigans and carries floral handkerchiefs, looks frail but can still top a fence. It was Antonia who helped spirit Hilary away.

Twice a year, Elizabeth Morgan's new husband visits. He is a federal judge who lives in Washington, a white-haired, black-framed gentle man named Paul Michel. Distance tests their marriage: His month-long visits jangle with agency. He could never live here, he says. It's like living on Mars.

Until recently, the remoteness of Christchurch was precisely its attraction. It was a healing place for Ellen, for whatever trauma shook her years ago. But as Ellen becomes a teenager, her mother worries, it will become suffocating.

They live in a rented house on Rata Street, off Rimu Street, left on Titoki Road, left on Kahu. These are native trees, ancient species that survived here and nowhere else. Survival is the story of New Zealand, so remote there are almost no predators. The island has no snakes. Because of this, birds such as the kiwi evolved in a peculiar way. They developed hair instead of feathers, and their muscles wasted away. There was never the need to escape from danger, or even to spread their wings.

They were safe, but they could not fly.

The Flightless Bird

The three women are driving their 1981 Honda Civic on the left side of the road, below snow-covered mountains, past meadow after meadow of dosing sheep.

"Here 21 degrees is hot," Ellen says, in critique. "Here, it's 65, people complain," Elizabeth says, in Fahrenheit.

Ellen wrinkles her nose. "What's 65?"

Strange terms her mother uses: "What's Hispanic?" "What's kosher?" Pictures too: "Who's that?"

Abraham Lincoln. "Ah, yes, he looks a wee bit like a ghost, like a bebop as well."

Ellen doesn't know the Pledge of Allegiance. She doesn't know the Good Humor man. It's a constant challenge, keeping Ellen American. She wears a watch, next by a friend, with the White House on its face.

In many ways, Ellen is a typical Kiwi girl—athletic, uncomplicated. Unlike Elizabeth, a bookworm who by the age of 12 had skipped two grades, Ellen thrives on a new-found passion, ice skating. Her mother and grandmother's intellectual musings exasperate her. ("There's no need to philosophize about candy—just eat

The Father's Response

Eric Foretich declined to be interviewed for this story. He faxed a single paragraph and authorized its publication only if it were printed in full:

"Since locating my daughter in February of 1990, concluding a two and one-half year search, I have held no need for further media contact. Verification of my daughter's existence was an end unto itself, and brought closure to an unfortunate saga. To lend further comment at this time would be undignified, contrary to the order of the court of the country in which my daughter resides, and an unwarranted invasion of the privacy of both my daughter and myself."

it!" she teases.) Ellen's main goal is to skate in the Olympics, representing New Zealand.

"I'll go to college in Sweden," Ellen says.

"I'm not raising you in Sweden. I'm not learning Swedish."

"Start learning."

"I'm glad you've settled our life, Ellen."

"Okay, Switzerland. We'll train for the Olympics there."

"No, no! I want to go back to America."

But what of America does Ellen remember? Trick-or-treating once in a Care Bear costume, living near the White House, taking a nap one time in kindergarten—that's it, Ellen says, her hands in fists. Fiercer impressions, the ones she has shared with her mother and Antonia, she does not volunteer.

She receives a box of Cracker Jack, a gift from the States. Elizabeth had told a visitor they were a favorite of Ellen's: "She'll be your friend for life."

But soon it is clear Ellen has never seen Cracker Jack before. She picks at the top, peels off every bit of the foil wrapping, until it is only cardboard. Then she breaks the box in half, like a sandwich. Mystified: "Are there prizes inside?"

Ellen offers some of the caramel candy to her mother. "I love Cracker Jacks!" says Elizabeth, filling her mouth. "I remember when I was 5, I used to buy Cracker Jacks in Virginia for a quarter—"

"Mum," Ellen says, "calm down."

Spot the Differences

It's family night out. Morgan's husband, Paul Michel, is here on one of his visits. Michel, 53, looks like a slightly goofy aristocrat: a man of noble bearing who wears crimson socks and white sneakers and an expression of stubborn good cheer. He is a federal Court of Appeals judge, a man of formidable power. He is a puppy on Ellen's leash.

At the Cobb & Co. restaurant, a hostess shows Elizabeth, Paul, Antonia and Ellen to a table. She hands Ellen a place mat with the game "Spot the Difference": "Study the two pictures of Master Freeo fishing and see if you can spot the 10 differences between them." Ellen gets out a pen and begins.

"Ellen, I'll sit across from you," says Michel. *The first time I saw her, she was hiding under a table, facing the wall.*

"Can you survive without us?" Elizabeth jokes, as the adults head for the salad bar. Michel turns back. *There was a time Ellen couldn't go to the bathroom alone, she'd wake up five times a night, screaming.*

Ellen eats a potato wedge.

"Ellen, I like to see you enjoy yourself," Michel says. *Taking her to visitation with her father was like seeing her go through chemotherapy, stone-faced, pale. Halfway back, I stopped the car, Ellen wasn't breathing normal; I thought she might faint or die.*

"You go to a party," Ellen chatters. "And all they serve are scones, scones, scones, scones—scones with jam, scones without jam."

"Dessert?" suggests Michel. *We'd have to leave restaurants after one course. She'd lose, drop and break 10 things a day.*

Ellen is talking about the "queen witch," a schoolteacher: "I hope I don't get her next year, I'll kill myself." Michel laughs at this. *In the end she was suicidal. She asked her mother: If I throw myself down the stairs, will I be dead?*

"I was proud how you weren't intimidated by those big, hairy teenage boys at the rink today," says Michel. "I skate better than them," Ellen says. *She was so scared of anything male, she'd cross the street if she saw a man.*

Ellen explains how the restaurant got its name: Cobb & Co. was the New Zealand version of the Pony Express. She learned about it in school.

"Ellen has such a good memory," says Michel. *Frighteningly good.*

Has he said something wrong? Dinner ends the way most events in this family do. Abruptly. Each time, it is as if the girl is suddenly spooked and has to leave. Half the movies she has been to, she's walked out of.

"I'm ready to go," Ellen declares. She brisks out the door, leaving Spot the Difference behind, game over.

Hamburger Haven

For 2½ years, Ellen's only stable landmark was McDonald's. She wandered the world with her grandparents—Nassau, Toronto, Vancouver, Glasgow, England, Singapore, Auckland, Christchurch. Kids in the Bahamas called her "little white girl," kids in New Zealand called her "little English girl"; all the while her grandparents reminded her she was a little American girl, on the run from her daddy.

Bill and Antonia Morgan seemed perfect for the journey. Both are psychologists. He is a former spy for the Office of Strategic Services. They posed as a retired couple taking their granddaughter on a pleasure trip. In fact, they were a bleak threesome: a rheumatic British woman and the blustering American man who had divorced years before, and a 5-year-old clutching her pink blanket. "Quilty."

She called herself Ellen and sometimes Helen, until she got a cold and

went to the doctor and had to choose. Her accent kept changing. She hardly laughed, and when she did it was a high-pitched mirthless giggle. Bill tried to soothe her with sanitized Army songs, Antonia offered nightly recitations of "The Rime of the Ancient Mariner." But Bill was prone to rages, and Antonia's cataracts clouded so badly she was bumping into furniture.

"I hope this won't hurt you," Ellen told Antonia. "But I love my mummy a teeny bit more than you."

Ellen refused to have her hair cut—she was afraid Elizabeth wouldn't recognize her. She had to write her mother a letter for an assignment at school in England. Ellen asked the teacher: "How do you spell 'jail'?"

They had a pay phone installed in their Plymouth, England, apartment, so that overseas calls couldn't be traced. They saw an ad in the British press, offering \$50,000 for Ellen's return. "How much?" she asked, amazed. "For a girl like me?"

It was time to move on—to a country that hadn't signed the Hague Convention, where there was no fear of deportation, where America was far away enough to forget—New Zealand.

She told her new friends her father was on vacation and her mother was at work. Her mother, meanwhile, was in prison, writing letters to Ellen that she could never mail. Elizabeth kept secret "127 Papanui St.," Ellen's New Zealand address, by writing the digits 1, 2 and 7 inside three different books.

And then in February 1990, after all their precautions, the police rapped on the door of the Morgans' room at the Diplomat Motel. Eric Foretich had found them. The police were followed almost immediately by news photographers, who swarmed outside their ground-floor suite, banging on the windows.

Even today, Ellen is edgy about the Diplomat Motel. Though she lived here for two years, it is the one stop on a tour of Christchurch where she refuses to leave the car.

Elizabeth gets out and walks around the parking lot. "That was Ellen's bedroom," she says. "Those are the windows the journalists climbed in."

"Let's go," Ellen urges, seat belt tight. She doesn't relax, she isn't herself until they reach McDonald's.

The Magic Hairdo

In prison, Elizabeth kept a diary, handwritten on yellow legal pads. The stack is as high as a hedge. One winter morning in 1988, CBS television interviewed her. Afterward, Michel suggested she cut her hair, which she wore like a black silk cloak on her shoulders.

"What the hell does it matter?" she wrote that night. "I've had short

hair, medium hair, long hair, neat hair, messy hair, wavy hair, straight hair. Every single goddamned time, someone told me I'm not believable because of my hair . . .

"What is the mother's hairstyle entitles a child not to be raped? I'm short, I'm cold and unbelievable. If it's long, I'm crazy. Will Hilary be safe if it's in cornrows? I'm damn sick of being told that Hilary gets raped until I find the magic hairdo."

The Turning Point

Arms linked, backs bent, mother and daughter are quacking around the patio. "We're having a duck conversation," Morgan says to Michel. She and Ellen are feeding lettuce leaves to wild ducks.

The ducks reject the lettuce. "Maybe you didn't quack correctly," Michel says.

"I was quacking quite correctly," deadpans Morgan.

She is a black-and-white photograph: glossy black hair and matte white skin, dark lips and inkwell eyes.

"She's playful, not afraid to do things," Paul says warmly, looking up from a legal brief. "Other people would think she's bonkers."

Other people already do. As Morgan says it: "I have had to deal with the fact that most people assumed I was insane."

For 25 months she lived in a 6-by-11-foot cell, slept four hours a night, had to use a toilet in front of guards of both sexes. She sobbed into her blanket and cursed out loud the judge who put her there. She studied ballet from a textbook, gripping her bunk as a barre. She interviewed inmates about their childhood abuse, material she is now using for a doctoral dissertation in psychology. She scrawled in crayon on the dirty cinder-block wall, "*Was mich nicht zugrunde richtet, macht mich starker*." What doesn't kill me outright makes me stronger.

But Morgan was frailer than ever when a special congressional bill released her in September 1989. During her early days in Christchurch, she snapped easily, talked constantly, subsisted on chocolate and 13 cups of coffee a day.

Then, in the spring of 1991, there came a turning point. Morgan was weeping, sitting on a log by a flowering magnolia tree. "This is what you have," she said. "The tree is beautiful and our child is safe and what you do with . . . rest is up to you." If she didn't recover, she reasoned, neither would Ellen.

Two years ago, Michel arrived for a visit and saw a dark-haired woman at the airport, waving and laughing. "Attractive woman," he thought, and then he was stunned. It was his wife. He

didn't recognize her—she was smiling.

Elizabeth smiles a lot now—a smart, intense, grand-lipped smile. But melancholy is close to the surface. Walking through town one afternoon, she passes an ambulance: "I miss medicine. There was a time people had a problem and I could fix it." She still carries her card from the Medical Society of the District of Columbia to remind herself who she once was.

Ellen carries a reminder too, sometimes. This morning, at breakfast, it is the usual scene of a 12-year-old girl teasing her hopelessly foreign mother: "Ellen, would you like some Mandarin oranges?" "It's Mandareen, Mum" Ellen says, digging into pancakes that Paul has cooked. Almost unnoticed in Ellen's other hand, gray and fraying now, is a gingham blanket, Quilty.

Ghosts

From the beginning, it was a wartime romance. Michel proposed three nights before Morgan went to jail. For an entire year, they couldn't touch; they could only press their palms against a plexiglass partition. Sure that someone was recording their visits, they wrote sensitive messages on Post-Its; Michel stuffed them in his pocket and later burned them. They devised a revolving set of codes involving plants and animals: Ellen was a dolphin, Antonia was a tree etc.

Morgan despaired, wrote him farewell notes and ripped them up. Michel winced through a D.C. Bar Association dinner, seated at the same table as Judge Herbert Dixon, who had put Morgan in jail. Michel took over teaching Morgan's Sunday school class, consulted her lawyers daily, fed Ellen's gerbils, Hunca and Munca.

One gray day, Michel appeared in the graveyard outside the jail. Through a fingernail scratch in the painted-over window of Morgan's cell, she could see what Michel had done: Lining the cemetery wall were pots of red and gold chrysanthemums. When the pots blew over, he brought bigger flowering tubs, and when those fell, he hauled over a tree. Morgan signaled her delight, flicking the light switch on and off.

These days, Michel and Morgan keep in touch by fax, answering machine and one weekly phone conversation, at \$2 a minute.

Five years ago they were married; there was no honeymoon until this week. In the past, Morgan couldn't leave her daughter for even a quiet dinner out—Ellen was afraid she would not return. So Morgan gave Ellen her dissertation file as proof she would come back from her honeymoon.

The couple drove to Akaroa, a nearby whaling village where they took boat rides and watched penguins bobbing in the harbor. They went for long walks and talked about the threat that separation poses to their marriage. Then they returned to their hotel room overlooking the harbor, listened to the sea gulls and snuggled under a red blanket.

They slept well, oblivious to what stirred down the street, above a yellow clapboard art gallery. At night, local legend has it, tromping the attic stairs and clattering her toys, walks the ghost of a 5-year-old girl.

They say you can hear her cry, though no one is sure what is wrong.

Taped to the refrigerator is a story Ellen wrote for school. On its cover, she drew a picture of misshapen, disembodied eyes crying drops of blood. She got an A:

"Eyes of Horror,"

by Ellen Morgan

She screamed but no noise came out. The eyes had a kind of power over her. They were yellow eyes the size of coffee cups and getting larger. Six sharp knives whirled out and cut up her throat, neck and stomach. They sucked up all her blood, then tossed her body out the window. . . .

Nobody knew this, but they were all under a trance so that the eyes could do their next bad deed. The next bad deed was to be that very night. . . .

The Chill

It's Father's Day in New Zealand, and Michel is flying back to the United States.

By noon, the household is loudly unhappy. Ellen shuts herself in her bedroom. Morgan follows, agitated. Michel is muttering—"Now you have a father, now you don't. This is subtle, slow torture, atrocious, outrageous, a grotesque mistreatment of a 12-year-old . . ."

Antonia, still dressed in a lavender wool suit from church, spreads a napkin on her lap and takes quiet bites of cheese and bread. She sits near a space heater, to no effect. Bones show sharply through her legs. Some days she huddles for hours in a nearby greenhouse, trying to get warm.

She doesn't let much show. Just this: "Wasn't it Emily Dickinson who said parting is all we know of Heaven and all we've seen of Hell? I've never seen the Heaven part of it."

Michel is in the other room, packing gifts from Antonia to her four other grandchildren in the States. They hardly know her. She has to live here, she tells them—Ellen and Elizabeth both have no one else. (Bill M. An returned to the States three months after Elizabeth arrived.)

On the way to the airport, Michel says he dreams of getting bumped from his flight. "I have a fantasy," says Elizabeth, from behind a pair of dark sunglasses, "of being abducted together, taken hostage at the airport." Ellen is crying, cracking her knuckles, checking her White House watch repeatedly.

Only Antonia restrains herself, her gaze heavy, but her chin tilted up. This

See MORGAN, D6, Col. 1

Ellen Morgan

MORGAN, From D4

was how Antonia was raised. This is how it has always been—through the morning doorstep fights with Foretich, through the courtroom anguish, through the endless, hysterical goodbyes—Antonia was there, sensible, dignified. As she once put it: "I don't cry. I'm British."

They ride an escalator to the airport lounge, Ellen sobbing on Paul's shoulder. Antonia brings everyone tea. They head off to get some chocolate cookies, leaving the old woman alone on a couch. She waits in silence, her eyes the shade of a sky clouding over. She fights a chill, wrapping her fingers around her cup of tea. Then suddenly, apologetically:

"I don't like to say it when they're around, but time is running out on me."

And because the confession comes from Antonia, it turns the room hot. She longs for her sons and her grandchildren. She is afraid of dying so far away; "I want to go home."

The intercom: "Ladies and gentlemen, this is your final boarding call for Flight 814."

"Bon voyage, darling," Elizabeth says, kissing Paul.

"I don't want you to go," Ellen whispers tearfully.

Before he disappears, Paul rests a hand on Antonia's shoulder: "Stay warm, the spring is coming."

And Elizabeth digs for tissues and Ellen tugs at her sweater, and Antonia takes their hands and walks them straight out of the airport, chin up and saddest of all.

In the Driver's Seat

One week later, Ellen broke, as if suddenly she swallowed a dark piece of sky. The rages happen less often now, but Elizabeth could feel it building.

For 40 minutes, Elizabeth says, Ellen pounded the pillows on the brown velvet couch. She watched Ellen's mouth—nicely shaped, Eric's rosebud mouth—twist. She saw her eyes—a mix, rounder than mine, more startled than Eric's—turn red. She watched her hair—not as dark as mine, not as light as his—shake angrily. And Elizabeth hated the father of her child: "I would like to kill him."

The fit was hardly her worst. Other times, she has turned on herself, jabbing her arm with a pencil. This time, she turned on her mother: "I'm angry at you, because you abandoned me." There. She said in words what she says every day in other ways, in the barbs and looks and sass, mixed in with her obvious love for Elizabeth: her mother wasn't there to protect her.

Elizabeth says she tried to reason with Ellen, to snap her back to the present, reminded her of where she was, and of whom she was with—"then" wasn't safe, "now" is.

She took Ellen for a driving lesson at the university parking lot. They practiced circling another car, to get a sense of distance. Ellen was 7 when Elizabeth first put her behind the wheel. She wanted Ellen to master something scary, something that allowed her to feel she could escape. By 8, Ellen was backing up and down the driveway. And at 9, she was driving around the university. Now she knows how to park, how to reverse down the lot, though she's a little strong on the brake. Driving, Elizabeth says, helps Ellen focus on the moment. It makes her feel powerful. It gives her control.

That's why Elizabeth is planning an

other project for Ellen: how to use a gun.

The Sad Fax

A new plan for escape. Elizabeth sends Paul a fax: Maybe Ellen and Elizabeth could move closer to the States—England? Canada? They could buy a house in Washington and Antonia would spend the cold winters there, living with Paul.

"That's dreaming!" Paul says, back at his one-bedroom apartment in D.C., where faxes from Ellen and Elizabeth decorate the walls. "Poor Elizabeth is desperate to find some exit from this torture chamber."

Paul, meanwhile, is struggling through his own depression. He says it feels as though his family was on vacation and on the last day, the car crashed, killing everyone. For months after his visits, he feels rattled and disoriented.

He blocks all memories of their time together. He stays at work as late as possible, anything to avoid coming home, empty of family and full of faxes—*Dear Paul, I love you* ♡ *I miss you, Ellen*—which, he has noticed, are slowly turning yellow.

Ellen's Words

Spring break is over, back to school.

Ellen, in a kilt and blazer, runs down the schoolyard path, joining a group of classmates in straw derbies. They are nice to Ellen, but there's the sense that she isn't one of them. Her mother doesn't bake bread like the other mums. Her mother taught her to omit male references to God during prayers. Ellen's two best friends at school are outsiders too, one Chinese, one Hawaiian.

Most days, while Ellen is at school, Elizabeth works on her dissertation on childhood trauma. This day, she talks about her own daughter: "This case comes down to Ellen, whether she's a crazy, brainwashed robot and lied."

So this afternoon, Elizabeth agrees to try something new, to let Ellen speak publicly, for herself: "Now that Ellen is healed, it's a matter of her reputation." Elizabeth picks her up from school and they drive to Ellen's favorite—McDonald's, where a kiwi bird perches on the golden arches.

Ellen dissects a cheeseburger and chats happily about school. The best part of her day: The French teacher was absent. Then Elizabeth stammers, "Ellen, darling—"



BY JOHN MCCORMACK FOR THE WASHINGTON POST

Mother and daughter: Elizabeth and Ellen Morgan take to the ice in a Christchurch rink. "This is what you have," says the mother. "The tree is beautiful and your child is safe and what you do with the rest is up to you."

And something in her voice warns Ellen. "Yes," the girl says, in the haughty tone she adopts when she feels threatened.

"One reason the reporter is here is to let you speak for yourself. You can be mad at me if you want . . ."

Ellen looks more scared than angry. Her shoulders lock, her knees jog under the table, she cracks her knuckles, one by one. Finally, she speaks: "I would like to go back to America."

"Are there people in America you don't want to see? It could be me too." Now it's Elizabeth who looks frightened.

"Why wouldn't I want to see you?" Ellen says. Her cheeks redden and then: "There are lots of people I'd like to do some really inhumane things to."

"Well, sweetheart, so you don't feel pressed, I'm going to go get some more hot chocolate."

Elizabeth walks away. Ellen looks as if something inside is breaking apart. She jumps up and follows her

mother. A few minutes later, she returns on Elizabeth's arm.

"As I was saying," Ellen says, sitting very straight, "I'd like to go home and see my cousins. But I wouldn't like to see Judge Dixon, or the Foretiches."

She decapitates a french fry on "Foretiches."

The Happy Ending

How can this story end happily?

"You mean if I could wave a magic wand?" says Elizabeth, her face brightening.

"We would live in Maryland, Chevy Chase. We would live with Paul. Ellen would go to high school at Holton-Arms with her cousin. I would set up a clinic at the D.C. jail for the abused children of criminals. I would teach surgeons about psychological recovery from trauma. I would earn money and support us for a change.

"Paul would still be a judge and we'd meet for lunch every single day of the week at the grill at the ANA Westin Hotel. Antonia would live with us. She would be in good health and she would see all her grandchildren.

"We would go to church at St. Albans. Ellen probably wouldn't go. We would see my father. We would bike around the neighborhood, play tennis with friends. We would visit family in New York—on the shuttle if the wand is paying.

"For dinners, Paul would cook spaghetti, Ellen would make stir-fried chicken, no, basically, we'd have take-out from Sutton Place. Sunday afternoons, I'd take Ellen to the Smithsonian, the Lincoln Memorial and to see the jail, to introduce her to the people I knew.

"My most important wish is just to walk around the Tidal Basin with Ellen and Paul. I want to see the cherry blossoms again."

Later, Ellen is asked the same question, for her version of a hocus-pocus happy ending.

"That's a silly question," she says, taken aback. "I don't have a magic wand."



ASSOCIATED PRESS



BY LUCIAN PENNINO—THE WASHINGTON POST

Three scenes of togetherness: Counterclockwise from top, Grandmother Antonia, Ellen and Elizabeth Morgan at home, for now; upon her release in 1989, Elizabeth Morgan walks out of the D.C. jail with her fiancé, Paul Michel; mother and daughter the day they are reunited in New Zealand.



BY JOHN HACCOURT FOR THE WASHINGTON POST

PREPARED STATEMENT OF J. ELIZABETH MORGAN, MD, PH.D.

This statement is to support H.R. 1855 which would greatly benefit my daughter. She wants to come home to America. H.R. 1855 would make it possible for her to do so on terms she could live with.

My statement has been reviewed by my lawyers in New Zealand and the USA. so that I can be sure that my statements with regards to New Zealand and USA. legal matters respectively are correct and in keeping with sealing orders.

I have organized my statement as follows:

- 1) My Daughter, Ellen Morgan;
- 2) The USA Legal Chronology,
 - A. My Situation,
 - B. Ellen's Situation,
 - C. The Washington, DC Court Response;
- 3) A Review of the New Zealand Legal Position;
- 4) Ellen's Life in New Zealand;
- 5) My Life in New Zealand; and
- 6) The Effect of H.R. 1855 on Eric Foretich's Access to Ellen.

1. MY DAUGHTER, ELLEN MORGAN

My daughter is Ellen Morgan, Ellen being the name she prefers to use. Ellen turns thirteen this August on the 21st. Her legal name is Hilary Foretich.

Ellen is my only child. She was born in 1982, when I was thirty-five. She is now thirteen. I am forty-eight.

I love Ellen very much. Everything that I have done since she was born was in her best interests, to the best that I could manage.

2. THE USA LEGAL CHRONOLOGY

To put Ellen's position in perspective requires a brief review of the legal chronology that has led to her living in New Zealand and to this bill. It began over a decade ago.

2A. *My Situation*

I am an American citizen, born in Washington, DC and raised in the Washington area. My parents were psychologists in Northern Virginia from 1953-1980 when my mother retired.

I worked in Washington, DC and in Virginia as a private plastic surgeon from 1978 to 1987. My practice was very successful.

My second career was as a writer of non-fiction. This career began in 1971, when I became a medical columnist and continued in the 1980's with the publication of four books.

The third book was "Custody", published in 1986. It does not mention Eric Foretich. It deals with my experiences as a single career mother in the court system. The central issues in this case were not known to me when the book was submitted for publication in 1984. They are not mentioned in the book.

2B. *Ellen's Situation*

In August 1982, Ellen was born in Washington, DC. I no longer lived with her father, Eric Foretich. I have always been Ellen's sole custodial parent in America. My relationship with Eric then and since is not relevant here.

From the time Ellen was 9 months old, starting in mid-1983, she had court-ordered weekend visits with her birth father. Those visits continued virtually uninterrupted¹ for about three years, until February 1986.

The visits appeared distressing to her. At first I did not know why.

Then in January 1985, ten and a half years ago, when she was two and a half, Ellen told me that she did not want to see her father. She told me why. I found her reasons to be very very serious ones. I will not go into them here.

Ever since then, more than a decade, Ellen's position has stayed the same. She insists that she does not want to see Eric Foretich at all.

2C. *The Washington, DC Court Response*

In November 1985, nine months after Ellen First spoke of her reasons, the matter came before Judge H. Dixon in the Washington, DC Court. Various lengthy hearings on this matter were held from then until August 1987. Judge Dixon remains assigned to this case.

¹A few visits did not take place because of childhood illnesses, such as chicken pox.

By February 1986, the court in the face of court-approved evaluation but also court-orders for continuing unsupervised consultation. I refused to send Ellen on further unsupervised visits. This put me in civil contempt.

In August 1986, Judge Dixon jailed me for the first time for civil contempt. I was jailed for three days and released on appeal.

I did not enter contempt lightly. Nor was I treated lightly. The various imposed on me during 1986-1987 included my being fined, ordered to pay part of Eric Foretich's legal fees, my passport being taken, my not being allowed to leave the city and the deed to our home being taken to secure a \$200,000 bond. In late 1987, I was fined \$200,000. (That was overturned on appeal.) The deed of my home remains in the custody of the court.

In February 1987 Judge Dixon jailed me again for another three days. I was not in contempt, having agreed to supervised visits as ordered by the judge. The judge soon resumed unsupervised weekend visits of Ellen with Eric. These continued uninterrupted for about six months.

By late 1987 I had incurred legal and expert fees of approximately a million dollars. My parents had begun to help to support me. But the court orders remained the same as they had in 1984, before this matter arose.

My USA lawyers have represented my pro bono since late 1987.

(My lawyers in New Zealand have been paid from a legal defense fund, established for me by friends and family in 1989, when I was in jail. There is no more money in the defense fund.)

In 1987, Ellen was four. Her six months of unsupervised visits took place over her objections.

Her guardian ad-litem and I had asked that such visits not resume without neutral and/or multi disciplinary evaluation. The court refused this. During this time, the DC Appeals Court declined the emergency requests to stay the visits and review the evidence.

In the summer of 1987, while the unsupervised visits were taking place and more hearings were being held, the judge said that the risk of severe abuse to Ellen on visits was "in equipoise".² My lawyers advised me that this meant a risk to Ellen of 50%. I was told that the legal requirement for her protection was a 51% risk.

Soon after this ruling, the court increased unsupervised visits from two nights to two weeks, and increase of 700%.

After a thoughtful review of my duties to the court as a citizen, to my child as a parent and to myself as a Christian, I felt morally obliged to disobey any further orders of unsupervised visits. I knew my mind would not change. It has not.

In August 1987, Ellen had just turned five. Instead of sending her on the two week unsupervised visit, I sent her abroad with my parents. Having no passport, I was unable to travel with Ellen. This was difficult for all of us. As Ellen's custodial parent, I could find no better choice for Ellen.

Within the week, also in August 1987, Judge Dixon jailed me for civil contempt. This was to coerce my compliance with visitation orders. I have never been criminally charged.

I stayed in the Washington, DC jail, on the south one cell block (cell 20 and cell 37) from August 1987 to September 1989. We were allowed some paperback books, pens and paper, as well as a few personal possessions. I could not work as a doctor. Because of jail over-crowding in 1988, I was re-classified as an unsentenced misdemeanant. This enabled the jail to assign cellmates to me.

I received no special treatment. Like my fellow inmates, I left the jail only for hospital or for court. Like my fellow inmates, I did so in shackles and manacles, or in waist chains.

In 1988, when I had been jailed for 15 months, Judge Dixon ruled in a hearing that my coercion had "just begun". He was correct.

By September 1989, I had been jailed significantly longer than any other civil contemnor in US history. During those twenty-five months there had been legal proceedings as follows:

1. A petition to the Supreme Court;
 2. A hearing in the Washington, DC Federal District Court;
 3. Three hearings in front of Judge Dixon;
 4. Two appeals to the Washington, DC Court of Appeals Panel;
 5. An en banc hearing of the Washington, DC Court of Appeals.
- Nothing had been resolved.

²The ruling to which I refer is that of 2 July 1987 which reads, ". . . the Court is unwilling to make a finding that it is more probable than not that abuse did occur . . . Now with the evidence in equipoise . . ."

By this time, I had been in jail longer than I would have if convicted of manslaughter with a six-year sentence.

In September, 1989, because of the lack of any court resolution, the US Congress enacted a law that led to my release. The law had a sunset provision and expired in 1991.

Nothing changed with regards to Ellen. I remain her sole custodial parent. I am still required to deliver Ellen unconditionally to Judge Dixon. Were I to return to the city, I could be found in contempt for not doing so. Were Ellen to return, she would be taken into the custody of the court.

In one of its 1988/1989 rulings, the Washington, DC Appeal Court stated that Judge Dixon need make no further orders in this case until Ellen is brought back to the control of Judge Dixon. I will not do so as I do not believe it would serve her interests. A judicial resolution is not possible.

3. THE NEW ZEALAND COURT POSITION

In 1988 my parents and Ellen settled in New Zealand. My parents applied for permanent residence.

Around October 1989, because of my parent's application, Judge Dixon learned indirectly of Ellen's address in New Zealand. This is from State Department records released later.

In February 1990, Eric Foretich announced that he had found Ellen. He filed for custody of her in New Zealand. This began the New Zealand court proceedings.

As Eric has disclosed, he had a brief visit with Ellen in New Zealand in March 1990. The visit was supervised by a court appointed neutral expert. Eric left New Zealand soon after that.

During this time, Judge Dixon did not release my passport. After about a week, when my passport was returned, I joined Ellen in New Zealand at once. By then Eric had left the country.

In November 1990, I was made Ellen's sole New Zealand custodial parent. That has not changed. I am and always have been in full compliance with all New Zealand court orders.

4. ELLEN'S LIFE IN NEW ZEALAND

I think Ellen's statement shows how very much she wants to come home. It is hard for her to be unable to do so. It is hard for me as her loving mother to be unable to help her in this regard.

By mid-1988, when my parents and Ellen settled in New Zealand, she had been through a great deal. Despite her separation from me, she was able to settle down to a normal life, to begin recovery from her original complaint and to become secure and happy.

Since she was five, she has attended Selwyn House School. She graduates this September, at 13. She is a happy, well-rounded adolescent.

December begins New Zealand's summer holiday. Ellen does not want to go on to a New Zealand High School. She wants very much to come home to America to finish junior high school and go on the high school.

The educational system are very different. New Zealand education, for instance, emphasizes British and New Zealand literature, politics and history as well as Maori language and culture. The Maori people are the country's indigenous people. Ellen wants an American education.

Ellen feels increasingly as though she is losing America while, while feeling very strongly that her identity is American.

In January 1996, she would like to be home in America starting the second semester of 8th grade. She would like to do this to get used to America and go on to high school in September.

Friends are important to teenagers. Although Ellen is popular at school and at skating—her competitive sport—her circle of friends for three years has been an American one.

Her best friend for three years has been an American classmate at Selwyn House School. This friend's family was with the Navy at the American Antarctic Support Base in Christchurch. Ellen and her friend were close because they were American girls abroad and found they had a lot in common. Through this friendship, Ellen formed many more with American children and families at the base.

Her best friend returned to America this month as did several other American families with children of Ellen's age. This was devastating to Ellen, who felt not only their loss but her exclusion from the homeland she shares with them.

Ellen faces the daily trauma of many other losses, because she can not live safely in America. They include not being able to live a normal life with her step-father,

Paul Michel. He comes twice a year and then must leave us, saying "good-by" becomes increasingly hard for her, as well as for Paul and for me.

Ellen has four cousins, two step-sisters and a half-sister. She is forcibly separated from all of them. She has three cousins whom she has never met. They are now nine, seven and five.

The fourth cousin was Ellen's playmate until Ellen was five. When this cousin visited us in 1992. It was difficult for both girls that Ellen spoke with a strange accent. She tries very hard to "speak American" and is proud of this.

Ellen misses her uncles, my two brothers, and their wives. She misses my father, who returned to the USA in 1990. She has many extended family members—great-uncles, great-aunts and cousins, whom she wants to meet as well as the rest of Paul's family. He has nephews who are her age.

Despite her wish to return to America, Ellen's position remains unchanged. She will not do this if it entails contact with Eric Foretich.

5. MY LIFE IN NEW ZEALAND

Because of what I did for Ellen, I have lost a great deal. I have done this voluntarily and gladly for the sake of my child.

Nevertheless the losses are considerable. First, I am forced to live apart from my husband, Paul Michel. This was forced on us as fiancées during my twenty-five months' jailing. After my release from jail, we had five months together during which we married. We then had to part again in 1990 when I joined Ellen in New Zealand. I did this with Paul's full approval.

Paul is 54. I am 48. We would have liked to have had a child. The circumstances made that impossible. We still look forward to having, some day, a married life together. We have lost eight years with each other. I love Paul very much. It is hard to for both of us that we must lose each other by putting Ellen first.

I have also lost my family, except my mother who lives with us. She is now eighty. She too would like to be able to return home to be with all her family, not just Ellen and me, 13,000 miles away from her home.

I have two brothers. We are very close. I have not seen my older brother since 1990. I have not seen my younger brother since his visit in 1992. I really miss them and their families.

I have a five-year-old nephew I have not met and many relatives who I am unable to see, some of them, my dad, my uncles and my aunts, are far from young. I also have not been able to develop my relationships with Paul's family, to whom I am very much attached. I have also missed all my American friends who have nevertheless remained very supportive throughout these years.

Every day I miss being in America. It is difficult to lose the land, the culture and the people you know and love. This in no way detracts from my love of New Zealand, for giving us a second home. I have many friends there and it is a wonderful country. If I could return to America, I would still have a strong New Zealand bond.

I have also lost my career. In New Zealand, I can not work as a doctor. My credentials were approved for work only as a plastic surgeon. I was then required to complete a years retraining as a senior registrar. This has become a "catch 22". New Zealand has only 8 senior registrar posts in plastic surgery. Only one of these eight posts is in Christchurch where I am required to live.

The plastic surgeons here advised me from the outset that I would not be accepted for the senior registrar post. My first application was rejected. My second was ignored. I am not permitted to attend the teaching conferences at the local hospital.

This is the situation for me. It is not an implied criticism of New Zealand. New Zealand surgeons in my position in the USA would be required to complete a full residency.

Nevertheless, I have not been able to support Ellen or myself by working in New Zealand. She and I were fully supported by my mother from her retirement savings until late 1994. During those years, the recession here, the low Kiwi dollar and deflation made that possible. Those conditions no longer exist.

During that time, I completed a Ph.D. in Psychology at the University of Canterbury in Christchurch. The data for my thesis was derived from a detailed diary that I kept while in the DC Jail.

Paul, my husband, is unable to support us from America. As a judge, he has a limited salary. There is nothing left after his trips to New Zealand and his phone calls.

Since December 1994, I have been able to support my mother and Ellen from selling my IRA whose value unexpectedly increased, allowing money left over after taxes and penalty. I have yet to find a steady job.

The only New Zealand employment I have found has been part-time teaching of university level psychology at the US Naval Base for the University of Maryland. I have enjoyed that a lot.

My job difficulties probably reflect the American focus of my research. My Ph.D. analyzed the reasons for the failures of the correctional system in Washington, DC. I believe that my research is very helpful and relevant to the control of violent crime in America, but in New Zealand, this knowledge is of little relevance.

In the USA, I am confident that I could find employment and could use my knowledge to benefit my fellow Americans and my country.

I love my daughter very much indeed. Her happiness is my reward. But at the risk of sounding self-pitying, I have had to pay a very high price with my own life.

6. THE EFFECT OF H.R. 1855 ON ERIC FORETICH'S ACCESS TO ELLEN

August 1987 was the last time that Eric saw Ellen alone. He did not see her at all for the next two and a half years.

In February 1990, Eric saw Ellen briefly under supervision in New Zealand. He left the country soon thereafter and has not returned.

As Eric publicly acknowledged, the New Zealand court order allowed him no contact with her for two years. He has not sought to renew contact since the two years ended. He has not contributed to Ellen's support since 1986, approximately.

Despite not seeing Eric, Ellen has not expressed an interest in having contact with him. Indeed, her comments have been to the contrary. The subject rarely comes up at home. When it does, Ellen raises it. I feel strongly that Ellen's feelings about her father should be her own and no one else's. I am confident that they are.

If H.R. 1855 enables Ellen to return to America without contact with Eric, it will change nothing for him. It will maintain the status quo of eight years, beginning in August, 1987 when Ellen was four.

Is she can not return home, she will be devastated but she will survive. Yet I think her continued exclusion from her homeland and family will have enduring bad effects on her that nothing can erase and from which she will struggle to recover. As her loving mother, I would like this not to continue to happen to my child.

PREPARED STATEMENT OF JUDGE PAUL R. MICHEL

This statement is intended solely to assist the Subcommittee's efforts to understand the need for passage of H.R. 1855 and is submitted in response to the Chairman's letter of July 28, 1995, requesting such a statement. The statement addresses issues specified by the Subcommittees Counsel, the only staffer or Member with whom I have been in communication regarding this bill.

Since December 1989, I have been the step-father of Ellen Morgan, now nearly 13 years of age, and the husband of Dr. Elizabeth Morgan. Ellen had been sent abroad in 1987 by her mother because although deteriorating psychologically from visitation, she was still not protected by the family court in America. In February 1990, Ellen was located in Christchurch, New Zealand, by her birth father, Dr. Eric Foretich. He publicly announced her address in hiding and that he would immediately depart for New Zealand to seek custody, as he in fact did. With the end of safety for Ellen, my wife, who only a few months earlier had been released from the District of Columbia jail by Act of Congress following more than 25 months' incarceration, petitioned the court, successfully, for return of her passport, then departed for New Zealand herself. Elizabeth went to resume parenting her daughter, taking over from her own parents who were exhausted, having cared for Ellen, then a traumatized child, during and after Elizabeth's incarceration. Further, Elizabeth had to contest the custody claims filed in New Zealand by Dr. Foretich. In America, Dr. Morgan had always had sole custody but was required to send Ellen on visitations against Ellen's will and the advice of Ellen's therapist. In New Zealand, however, the court not only awarded Elizabeth sole custody but also barred visits or contacts by Dr. Foretich with Ellen.

Elizabeth, of course, had my consent and support in going abroad. Then only seven and still recovering, Ellen needed her more. Elizabeth has now been in New Zealand for nearly five-and-a-half years and Ellen for seven years. I am honored to belong to a family of such courageous women who sacrificed so much to save Ellen. But now our family needs reunification and I consider that only this legislation will suffice, for the reasons that follow.

The orders of the Family Division of the Superior Court of the District of Columbia, I am advised, have remained essentially unchanged since 1987. Therefore, neither my wife nor step-daughter has felt safe, nor feels safe today, to return home to Washington. Ellen spontaneously expresses herself as terrified of Dr. Foretich.

Any reference to him visibly shakes her. She insists she cannot abide contact with him. From what she told her therapist, family and police in America and the court-appointed psychiatrist in New Zealand, she has good reason. Accordingly, Dr. Morgan fears for her daughter's safety and sanity, should they return in the face of current court orders, for Ellen could be forced to visit Dr. Foretich or be put in foster care. Elizabeth herself faces a risk of reincarceration, since the statute that finally freed her, ironically, has expired, although the threat of jail has not. Therefore, until both can come back safely, neither will return home.

Nor can I easily join them there. As a judge on the United States Court of Appeals for the Federal Circuit, I am required by statute to reside permanently within 50 miles of Washington, D.C. I am unwilling to be driven out of country and career as a result of the local family court orders. My wife and step-daughter, on the other hand, feel they must stay in New Zealand for safety.

Although Ellen is protected in New Zealand by the New Zealand court, she is not permitted to leave without court permission. I understand, however, that from a conference with the New Zealand principal family court judge, Dr. Morgan's New Zealand lawyer expects the judge to allow my family to return home if the legislation is enacted.

Meanwhile, starting in 1990 I have traveled to New Zealand at least twice each year, usually staying for several weeks. While I am there, I must of course continue to perform my appellate court duties, mostly reading and writing opinions, which I can do via fax. But a few weeks is the maximum time I can be away from the court which sits year-round. I plan to go again in September. It will be my thirteenth trip. In addition, our family as worked hard to stay united through letters, cards, faxes, photographs and especially extensive telephone contacts—with phone bills exceeding most people's rent or mortgage. But it is difficult and my wife and step-daughter have suffered many deprivations.

From living and talking with her I am certain that Ellen, as much as Elizabeth, wishes to return to the United States. She clearly knows her own mind and speaks for herself. Incidentally, the Subcommittee's acceptance of Ellen's written statement is the first time any American court or public authority has let her speak. I know she would also have liked to testify to the Subcommittee by video conference and answer questions, but Dr. Foretich successfully petitioned the New Zealand court to block Ellen's testimony, at least for now.

In my judgment, Ellen, now mostly recovered from her trauma and soon a teenager, suffers increasingly from being kept away from her country, her home, her relatives, her church, her friends and a reunited, normal family. In my view, every additional year away will harm her more. She also suffers emotional reinjury every time I must leave, for during our time together we become close once again—only to have that renewed bond return upon my departure.

If the Congress passes H.R. 1855, my wife and step-daughter plan to return to their house in Northwest Washington where they lived, together with Elizabeth's mother, Antonia Morgan, prior to Elizabeth's incarceration and Ellen's flight. In that event, I would plan to join them there, as I expect Antonia might as well.

Perhaps members of the Subcommittee can imagine the difficulties for a family from being separated for over five years, and the harm that flows from such forced separation. Everyone is affected. I have known Ellen since she was four, but in the five-and-a-half years since she was hunted down, I have been able to be together with her for a total of only 12 months. Under these circumstances, how effective a step-father can I be? She deserves better. She has done nothing wrong. Similarly, in the past eight years—since our engagement on the eve of her jailing—I have been able to be together with Elizabeth for a total of only 18 months. How good a husband can any man be under such circumstances? She deserves better. She has done nothing more than what she believed necessary to protect her child. From a broader perspective, one may reasonably ask, I think: How does perpetuating this situation promote family values? How does maintaining the status quo of family separations serve the child's "best interests," in the words of the controlling standard in family law?

In addition to unending human suffering by my family, the years of separation have exacted a significant toll on individual careers and family finances. My wife has been unable to find permanent employment in New Zealand where she is not permitted to practice medicine or surgery. Her medical career has been destroyed, her savings expended. Between her being jailed and being restricted to New Zealand, Elizabeth's parallel career as author has also been impaired. My own work has been made more difficult. The entire Morgan family has endured and continues to shoulder extraordinary financial strain. Most important of all, Ellen's educational progress and career potential, in my view, are beginning to be compromised.

How ironic that Ellen's half-sister is allowed to live with her mother at their home in suburban Virginia fully protected by her family court judge, while Ellen, unprotected by her judge, must live in another country 12,000 miles from home! That the New Zealand judge fully protects Ellen here has had no effect on the court here. Because the District of Columbia court has not protected Ellen, she and her mother remain separated from their family and country. Two sisters, similar facts, but opposite results in America. How is this fair?

I acknowledge how unusual it is for the Congress to intervene in a family matter, but my family has little other recourse. Since 1987, the judge in the District of Columbia family court, despite requests, has declined to make further orders regarding Ellen, apparently because she is not here. Indeed, in its opinion in August 1988, the District of Columbia Court of Appeals expressly stated that no further orders need be made until after Ellen is back under the physical control of the family court. And the family court judge has declined to review the admissibility of evidence he initially excluded, including evidence about the suffering of Ellen's half-sister, even though in another suit a federal appeals court found that evidence relevant and admissible and the D.C. Court of Appeals indicated the trial judge might reconsider its admissibility. The fact of not changing the orders until after Ellen is back creates a catch-22 because Ellen feels, and her mother and I agree, she cannot safely return (absent legislation) until after new court orders protect her. As a result, the virtual exile of my family has no realistic resolution other than by legislation, at least not in this decade. It is true that after reaching the age of 18 in the year 2000, Ellen apparently could come home safely, and Elizabeth, too. That is because with Ellen no longer then a minor, the District of Columbia family court would lose jurisdiction over her as to custody, visitation and the like, according to what I have been told. Is it not cruel, however, after so many years in exile to make them wait another five years?

A humanitarian act, passage of this legislation would relieve my family from further suffering, suffering that they do not deserve, having already suffered so much for so long. As far as I can see, the bill would have little other effect.

During further consideration of this bill, the Subcommittee can, of course, count on full cooperation from me—within the limits of the Code of Judicial Conduct, which binds me as a federal judge and which, according to interpretations by some, may limit the scope of my public statements, even about my own family and even to the Congress.

PREPARED STATEMENT OF MARY L. FRONING, PSYCHOLOGIST

My name is Dr. Mary L. Froning. I am a psychologist in private practice licensed in Maryland and the District of Columbia. My background is in child and family psychology with a subspecialty in child sexual abuse. I have authored journal articles and book chapters on child abuse and have lectured nationally on the subject.

I feel I am in a unique position to comment on this bill because of my therapeutic work with Ellen Morgan (nee Hilary Foretich) when she was ages 3½ to 5 years (before she went into hiding). Since the time of the Morgans' discovery in New Zealand, I have maintained contact with the family to monitor Ellen's progress in healing. I am happy to report that she has made great strides in that regard. However, there are limitations on the therapy that can be conducted in New Zealand, because of the lack of expertise available there to deal with her condition. This belief was reinforced to me recently by an expert from the Pacific Rim familiar with the therapy community in New Zealand.

Further, one cannot complete the process of therapy unless one has one's family and home as a container providing the necessary safety to heal. A return to the United States would afford these conditions for Ellen. In addition, issues with regard to Ellen's older sister cannot be addressed unless they can be seen together.

For these psychological reasons, I support the effort to provide a legally safe return of Ellen Morgan to the United States. Most important to her safety is to continue to have her mother by her side and not to be forced to see her father. She has been clear since she was a small child what her wishes have been about paternal visitation. I will let her speak for herself in that regard, but want to underscore for the decision-makers that her wishes are her own and are not prompted by anyone else.

As a child psychologist, I might add that most 13-year olds are capable of understanding what is best for them with regard to custody and visitation. Children who say they have been abused, in particular, need the validation of being believed and supported with regard to those wishes. It is an important part of their healing.

It is my wish to complete with Ellen the work we started so many years ago. With a foundation of safety, I believe her prognosis is excellent. She deserves both safety and complete healing. H.R. 1855 can provide that opportunity. I urge its passage.

PREPARED STATEMENT OF MARILYN VAN DERBUR, MARILYN VAN DERBUR INSTITUTE, INC.

Congressman Davis and Honorable Members of the subcommittee: My name is Marilyn Van Derbur Adler, I am a former Miss America and an incest survivor.

I urge you to support H.R. 1855, a bill to amend title 11 of the District of Columbia Code that will allow Ellen Morgan to return to the United States from New Zealand. Ellen, formerly known as Hilary, has been a fugitive from her own country since she was 5 years old. She is now almost 13 and wants to come home.

The entire nation knows of the circumstances that caused her to be taken into hiding by her maternal grandparents and that forced her to become a virtual exile in New Zealand: Her mother, Dr. Elizabeth Morgan, sent her into hiding and went to jail rather than send her on unsupervised visits with the child's father ordered by Judge Herbert B. Dixon of the D.C. Superior Court. Dr. Morgan believing that she would remain in jail until her child was eighteen in order to protect her. An act of Congress freed Dr. Morgan in 1989 after two years and one month in the D.C. jail.

Since the ruling of the D.C. Court is still in effect, Ellen must remain under the protection of the New Zealand court until she is eighteen. This is cruel and unseemly punishment for a child who is ardently proud of her U.S. citizenship and wants to come home to her extended family. It is a crucial time in her young life when she will enter junior high and then high school, when she will begin to form long lasting friendships. The longer she remains out of the country the more of these precious years of being an American kid she will miss.

When a U.S. citizen is unjustly held in another country, such as the current imprisonment of Harry Wu in China, the full force of our government is brought to bear to rescue that citizen. Surely we can do as much for one of our children who, through circumstances over which she has absolutely no control, in being forced to live out her childhood away from her family and country.

Ellen Morgan has already endured more than any child should ever have to endure. It's time to bring her home. It's the right thing to do. I beseech you to speed this bill on its way to passage.

PREPARED STATEMENT OF KENNETH T. STRONGMAN, PROFESSOR OF PSYCHOLOGY

On this current brief visit to Washington, D.C., it has come to my attention that you are intending to introduce a new law to Congress, the result of which, if successful, would be to allow Elizabeth Morgan and her daughter Ellen to return to the U.S. I have also noticed newspaper reports occasioned by this news which are scurrilously incorrect about Elizabeth and Ellen. I write as a close friend of theirs and also as the supervisor of Elizabeth's Ph.D. thesis, which has recently been examined and received most favorably. I therefore know Elizabeth professionally as well as socially. She is a person of great integrity and reliability. She always does whatever she says she will do, carries the courage of her convictions and acts with extreme courtesy. I trust her without reservation.

To put it succinctly, Elizabeth Morgan is an exemplary professional woman and is a splendid and caring mother to Ellen. Mother and daughter have a warm, loving relationship and are very close. Elizabeth has achieved remarkable results in what can only be described as the rehabilitation of Ellen to a normal life after such a harrowing start. Equally, Ellen herself has made great strides towards maturity and has a word that can be relied upon.

I applaud what you are attempting to do and thought that this perspective from someone who knows Elizabeth and Ellen well in New Zealand might be of some help. If there is anything further you would like to know or any way in which I might be of assistance, please do not hesitate to get in touch. Our current travels now take us to Europe, but we will have returned to New Zealand by the end of June.

PREPARED STATEMENT OF THELMA STRONGMAN

I was much heartened to read in the Washington Post of your intention to introduce new law into Congress, which may ultimately affect my good friend Elizabeth

Morgan and her daughter Ellen, possibly allowing their return to their own country within the near future.

My husband and I have known both Elizabeth and Ellen for the past six years, while they have been living in New Zealand. During this time I have gradually come to know Elizabeth as a friend whose company I have enjoyed and whose kindness, sensitivity and good judgment I have come to respect. I have also watched Ellen develop from a shy, abrupt and somewhat inhibited child to a warm, enthusiastic and responsive young girl moving into adolescence.

Although I have to say that some credit is due to the open but secure atmosphere that New Zealand provides for its children, most of the credit is due to Elizabeth's hard work and devotion to provide a "normal" and stable life for Ellen.

The point of this communication is that I feel Ellen is at an important stage in her young life. She is almost ready to branch out socially and culturally into the community and is in danger of being deprived of her American birthright. By this I mean the adolescent process and experience which most young people go through—the high school, particular sports and various activities which form the American experience. If she remains in New Zealand, she will inevitably experience some cultural confusion. I believe she has already had enough to cope with without adding further burdens.

PREPARED STATEMENT OF PHYLLIS DAEN, CLINICAL PSYCHOLOGIST, VIRGINIA
PSYCHOLOGICAL INSTITUTE, FAIRFAX, VA

I am writing in support of the House of Representatives Bill 1855 to amend Title 11, District of Columbia Code, to restrict the authority of the Superior Court of the District of Columbia in certain pending cases involving child custody and visitation rights.

I am a licensed clinical psychologist working in the metropolitan Washington area and holding licenses to practice at an independent level in the District of Columbia and in the States of Virginia and Maryland. As part of my practice, I see many children and families who are involved in custody visitation disputes. I have both facilitated visitations when this seemed to be in the best interests of the child's development: and I have mediated family disputes when custody and visitation practices seemed to be creating undue stress for a child.

Such disputes are often intense and may ultimately need to be resolved in the court. It has been my experience that over time, most parents are able to focus on the well-being of their child and act in ways that foster their child's emotional health. Occasionally, however, there are parents who are more concerned about their own rights and needs, and lose sight of the effect on their child. In those cases, the judgement of what will be best for the child must be returned to the courts, with the courts, through investigation, determining how to best prevent emotional injury to the child.

While there are times when children's memories may be inaccurate. I believe that it is crucial that a child be respected and that he/she must be heard by the court. The repeated assertions of a child who describes abuse must not be derogated. When a child believes that even the court will not hear their anguish, the distrust of adults becomes more marked. In my experience, children are often willing to testify in court in their own behalf. But when the court attempts to coerce interpersonal relationships between a parent and child, without regard to the child's experiences, children feel very unprotected.

The proposed amendment relates to the needs of a child who asserts and believes that he/she has been sexually and/or emotionally abused by a parent. Since continued visitation arouses intense fear and anger, the child believes and responds as if it will continue to be harmful to him/her. As a therapist who believes that the State must choose the least detrimental alternative for safeguarding a child's growth and development, I believe it is important to fully investigate the reasons for and basis of a child's fears. However, the more important consideration must be how those fears are affecting a child. When there is sufficient evidence of the reality of the child's fears, the needs of the child should be considered before the rights of a parent.

The present bill speaks to the specific needs of a child who at the age of 13, out of fear of a parent requests emancipation from visitation without the approval of that parent. Were the principles underlying this bill generalized it would allow the courts to terminate parent-child relationships to avoid the violence, volatility, or destructive involvements of a parent who has aroused fear and hatred. Current research suggests that such experiences lead to wariness and apprehension that has long-term chronic emotional and psychological consequences. In reaching such a de-

termination to terminate, the consent of the child would be sought and valued by the court, and individual children would experience the courts as a more secure place of refuge and understanding.

PREPARED STATEMENT OF MARY ELLEN DURANT, CO-FOUNDER, PURPLE RIBBON PROJECT

I commend you on your plans to present H.R. 1855, the D.C. child custody case of Hillary "Ellen" Morgan which originated back in 1987. Your proposed bill to bring Ellen Morgan back to United States safely is above reproach. It is truly inspiring to see your commitment to helping this innocent child, one who has suffered a great injustice in being shut out of her own country by an inappropriate and antiquated court system which does not place child protection first.

The American Judicial System must begin the process of treating children involved in legal proceedings with respect. Children deserve protection from abuse and the right to live in a safe environment where they are treated as human beings, not property.

It is inhumane, and should be unlawful, for any judge to order any child to chose between visitations with their perpetrator and living in exile. No child should be forced under any circumstances to fall unto the custody of their abuser upon return from exile, should they return to the United States.

Freedom is the most valuable asset of every American citizen, including children. There is no sense in laws which revoke the freedom of children who have fallen prey to abusive adults. Abused children should not be doubly betrayed. It is their inborn right as equal citizens of the United States to live safely with the caregiver of their consent who will nurture them with respect and compassion.

The focus of child welfare legislation should never sacrifice the safety, health and happiness of the child in favor of protecting the adults involved in the abusive situation. The adults are secondary. The child's well being and need for proper care are always the priority.

Thank you for your clearly honorable and moral intentions in presenting H.R. 1855. As an adult survivor of seventeen years of childhood sexual abuse by multiple familial abusers, I have great concerns for the legal rights of child victims.

No child should be failed by our legal system. This country owes Ellen the remainder of her childhood.

Mr. DAVIS. The record will remain open upon order of the Chair for any additional comments or submissions any of you wish to make and by other groups. These proceedings will be closed and the meeting adjourned. Thank you.

[Whereupon, at 12:45 p.m., the hearing was adjourned.]

[Additional material submitted for the record follows:]

PREPARED STATEMENT OF RANDY BURTON, FOUNDER AND PRESIDENT, JUSTICE FOR CHILDREN

Congressman Major R. Owens at the opening of a field hearing on child sexual abuse in New York on April 20, 1992, stated "Ignoring or mistreating child sexual abuse is tantamount to allowing an untreated cancer to grow in our society."

At that hearing, experts and parents testified concerning the obstacles to addressing and remedying this problem. The Honorable David Paterson, a state senator from New York, testified that one of every three young girls and one of every five boys become the victims of child sexual abuse and that a high percentage of those most afflicted repeat the cycle.¹

This federal hearing was convened in response to a state-level investigation conducted by then-Assemblyman Jerrold Nadler (D-NY), who concluded that the system has failed miserably to protect sexually abused children.

Unfortunately, over 3 years have passed since the hearings, yet, reports of child abuse and neglect continue to rise. This increase is a direct and predictable consequence of the failure of our legal system to protect known victims of abuse. This crisis is even more critical as it affects children who are unable to fight for themselves.

¹Field Hearing on Child Abuse. 1992: Hearing before the Subcommittee on Select Education of the Committee on Education and Labor, House of Representatives, 102nd Cong., 2nd Sess. 6-7 (1992).

A major portion of our legal system's failure to protect abused children occurs in state family courts. Understandably, when the abuser is a parent of the child and the other parent is innocent of any complicity in the abuse, the "protective parent" often seeks to dissolve the marital relationship, or, if the abuse is discovered post-divorce, seeks to restrict or eliminate visitation privileges. Unfortunately, the judicial system from which the protective parent and child are seeking justice and protection is comprised of judges and court personnel who lack sufficient training in child abuse issue and are often indifferent to the child's allegations of abuse, particularly allegations of sexual abuse. This is so despite numerous national studies indicating that the number of false allegations of sexual abuse in custody cases is de minimis.² Mental health professionals and attorney ad litem are often appointed by judges in return for campaign favors and tend to be mere puppets of the court. Further, critical court decisions can be based more on personal relationships with lawyers than on sound legal principals. As a result, the protection of the child and any due process to which the child is entitled is given little or no consideration and the abuser is frequently given unrestricted visitation with the child, if not outright possession. Child abuse, whether sexual or physical, is only incidentally a custody question.

Traumatized originally by the perpetrator, the child is victimized again by the legal system designed to protect him/her. The purposes for which this system was created include 1) identifying children who have been abused or severely neglected by their parents or caretakers, 2) removing those children at risk of further abuse or neglect, 3) placing those children in protective custody or terminating parental rights and finding placements with adoptive parents, and 4) bringing perpetrators of child abuse and criminal neglect before the bar of justice. Unfortunately, however, since its creation, our legal system has evolved into one where incompetent, ineffective, overwhelmed, and sometimes corrupt government officials, who lack accountability for their actions, make decisions which result in abused and neglected children being left in dangerous homes at further risk of reabuse and death.

Although an alarming picture of the family courts' failure to protect abused or neglected children has already developed, the evidence in support of this, particularly in cases encountered by non-abusive parents attempting to protect their children, often involve court proceedings wherein the records have been sealed. Allegations of altered transcripts, altered or destroyed government documents, expert communications, and hearings held and orders issued without court reporters are not limited to the few highly publicized child abuse cases which make national news but are being heard throughout nation. Statistical data in support of this failure and its impact on our nation is overwhelming.

In 1993, an extensive investigation was conducted into Texas' family court system by the Texas Ethics Commission after numerous complaints. In its report, the Commission stated "we believe the testimony in Houston raised questions about the administration of justice in the Harris County Family Courts. We suggest that the State Commission on Judicial Conduct, the Legislature, or the Supreme Court should investigate the issues raised by those who testified to the commission in Houston and decide what action, if any, may be appropriate to address those concerns."

Furthermore, in March of that same year, the "Texas Supreme Court Task Force to Examine Appointments by the Judiciary" found that the current appointment system "impedes the court's ability to function efficiently and can result in injustice and undermine the public's confidence in the entire system." They also found "that in some areas of the state judges use appointment income as a reward or incentive to campaign supporters." The Task Force heard numerous cases in which the judicial appointee received substantial fees despite spending very little time on the case or performed poorly.

Of the 3 million child neglect and abuse cases reported in 1993, an estimated 1,299 children died from abuse or neglect. 90% of those children were age 5 or younger. 42% of the children who died had been previously reported as being in danger. 1993 records from Children's Protective Services ("CPS") show that almost half of all children who were identified as abused or neglected did not receive any follow-up assistance. Forward '93 reported that there are 60 million survivors of child sexual abuse in America today.

An urgent need exists for federal action to ensure that laws in our states pertaining to child abuse and neglect, whether physical or sexual, whether family member

² See R. Ducote and D. Harrison, "Studies of True and False Allegations: A Critical Review," in *Sexual Abuse Allegations in Custody and Visitation Cases*, (Nicholson, Bulkeley eds.); "Child Sexual Abuse and Custody Disputes", in *Journal of Interpersonal Violence*, Vol. 2 No. 1, March 1987, pages 91-105 David L. Corwin, et al. (see attached).

or stranger, be strengthened to protect children. By aggressively intervening on a timely basis on behalf of the child, and by ensuring that the legal rights of the child are observed in any subsequent judicial proceeding, our government can stop both the actual and systemic abuse of the child.

OFFICE OF THE CORPORATION COUNSEL,
Washington, DC, August 25, 1995.

Hon. THOMAS M. DAVIS,
Chairman,
Subcommittee on the District of Columbia,
Government Reform and Oversight Committee,
Room B-349A,
Rayburn House Office Building,
Washington, DC.

Re: H.R. 1855

DEAR CHAIRMAN DAVIS: I write to express to you and to the other members of the House Government Reform and Oversight Committee the views of the Executive Branch of the District of Columbia government on the enactment of H.R. 1855, "A Bill to amend title 11, District of Columbia Code, to restrict the authority of the Superior Court of the District of Columbia over certain pending cases involving child custody and visitation rights."

The purpose of H.R. 1855 is to permit Dr. Elizabeth Morgan, her daughter Hillary, and Dr. Morgan's parents to return to the District of Columbia from abroad and be immune from the current laws of the District of Columbia relating to child custody and visitation rights and to be immune from the power of the Superior Court to enforce its orders relating to those laws. For background regarding the dispute between Dr. Morgan and Hillary's father, Dr. Eric Foretich, regarding Dr. Foretich's visitation rights in regard to his daughter, see the following cases entitled *Morgan v. Foretich*: 521 A.2d 248 (D.C. 1987); 528 A.2d 425 (D.C. 1987); 546 A.2d 407 (D.C. 1988), cert. denied 488 U.S. 1007 (1989); and 564 A.2d 1 (D.C. 1989) (vacated by the D.C. Court of Appeals acting en banc).

In 1989, Congress enacted the District of Columbia Civil Contempt Imprisonment Limitation Act of 1989, approved September 23, 1989, Public Law 101-97, 103 Stat. 633. This law placed a 12-month limit on the amount of time a person may be imprisoned for civil contempt in a child custody case, but also provided that its provisions would not apply to anyone held in civil contempt in a child custody case after the expiration of the 18-month period beginning on the effective date of the law. This "sunset" provision meant that the 12-month prison limitation would not apply to anyone held in civil contempt in a child custody case after March 23, 1991.

The first purpose of Public Law 101-97 was to cause the release of Dr. Morgan from jail where she had been confined for more than two years for civil contempt for violation of orders of the Superior Court regarding the visitation rights of Dr. Foretich vis-a-vis his daughter Hillary.¹ The second purpose of Public Law 101-97 was to direct the undertaking of studies of the current law and procedures relating to civil contempt in the District of Columbia courts and in the Federal courts. The studies were to be completed pursuant to a timetable that would allow Congress an opportunity to consider: (1) whether to extend the life of Public Law 101-97 beyond its March 23, 1991 sunset date, and (2) whether to pass a similar law governing civil contempt in the Federal courts. In a letter dated March 6, 1991 (copy enclosed), to Senator Carl Levin, then Corporation Counsel John Payton expressed the District government's opposition (and the reasons therefor) to the enactment of S. 444, which proposed to extend indefinitely the civil contempt imprisonment limitation set forth in Public Law 101-97. Congress took no action to extend Public Law 101-97 beyond March 23, 1991. For the reasons stated in the aforementioned March 6, 1991

¹In August of 1989, a panel of the D.C. Court of Appeals ruled that Dr. Morgan should be released from jail because her 2-year imprisonment was no longer serving its purpose of coercing her to comply with the Superior Court's orders to produce the child and permit Dr. Foretich to exercise his visitation rights. However, the Court of Appeals, acting en banc and sue sponte, immediately vacated the panel's decision, and ordered the Clerk of the Court of Appeals to schedule the case for en banc argument. Before the en banc argument could take place, Public Law 101-97 was approved by the President. Acting pursuant to that law, the Court of Appeals remanded the case to the Superior Court "for entry of an order forthwith releasing Dr. Morgan from custody pursuant to" Public Law 101-97. See *Morgan v. Foretich*, supra, 564 A.2d at 20-21.

letter, it is District government's position that Congress acted wisely in not extending Public Law 101-97 beyond March 23, 1991.

The purpose of H.R. 1855 is to affect a single dispute and to substitute legislative judgment for what appropriately should be judicial judgment. If enacted, H.R. 1855 would violate the doctrine of separation of powers embodied in the Constitution of the United States.² As Senator Mitchell stated, in commenting on S. 1163, the bill that became Public Law 101-97: "[T]he bill interferes with a separate branch of government. . . ." 135 Cong. Rec. 19919 (September 7, 1989). In the case of H.R. 1855, the interference in the functioning of the judicial branch of the District of Columbia government would be even more egregious than the interference that resulted from the enactment of Public Law 101-97. Unlike Public Law 101-97, there is nothing in H.R. 1855 that indicates a Congressional intent to study the use of civil contempt power generally, or in relation to child custody cases, or to study the law as to visitation rights in such cases, with a view to possibly enacting general changes in the law. That such was a purpose of S. 1163 in 1989, was a significant factor in persuading some legislators to vote, albeit reluctantly, in favor of S. 1163. *See, e.g.*, remarks of Senators Levin and Rudman at 135 Cong. Rec. 19911 and 19917 (September 7, 1989). Thus, the objections voiced in the Senate to S. 1163 in September of 1989 apply with even greater force to H.R. 1855, devoid as it is of any general legislative purpose. In this regard, Senator Dole stated on September 7, 1989 (135 Cong. Rec. 19917):

. . . [Y]ou do not have to be a legal scholar to recognize that the court's use of the civil contempt power has failed in this case. Notwithstanding her continuing incarceration, Dr. Morgan has steadfastly refused to comply with the D.C. Superior Court's order. Coercion, in other words, simply has not done the trick here. And I believe that the time has come for Dr. Morgan's release from jail. More jail time will simply not result in a change of heart or a change of mind.

But what role should Congress play? Should Congress directly interfere in the Morgan case? In fact, should Congress amend the District of Columbia Code every time it believes that a single individual is entitled to relief from the sometimes tough requirements imposed by the laws of our Nation's Capital?

I think the answer to these questions is "no." And S. 1163, no matter how well intentioned, would set a bad precedent, a bad precedent for Congress' relationship with the District of Columbia and a bad precedent for the importance of obeying court orders generally.

The assumption underlying H.R. 1855 seems to be that if it is not passed, Hillary Foretich could not return to the United States without being forced to see her father. Such an assumption is mistaken. Under District of Columbia law, the controlling consideration is to whether a non-custodial parent should have visitation privileges vis-a-vis his or her child (and the circumstances of visitation privileges) is the best interest of the child. *See, e.g., Jackson v. Jackson*, 461 A.2d 459, 461 (D.C. 1983). Moreover, any decision regarding visitation privileges would be based on the court's determination on what is now in the best interest of the child, not what was in the child's best interest five years ago. Given the fact that Hillary is now almost 13 years old, the court would, of course, listen to and carefully consider Hillary's wishes in the matter. Thus, it is a mistake to believe that the only solution to this controversy is legislation by Congress.

In sum, there is no need for H.R. 1855. To what extent, if any, Dr. Foretich should have visitation privileges vis-a-vis his daughter Hillary is a controversy that should be decided by the courts of the District of Columbia if it is to be decided in the District of Columbia at all. It is not a controversy properly within Congress's power to decide by legislation.

For these reasons, the Executive Branch of the District of Columbia government opposes the enactment of H.R. 1855.

Sincerely,

GARLAND PINKSTON, JR.,
Principal Deputy Corporation Counsel.

²Article I, Section 9, Clause 3 of the Constitution provides that "No Bill of Attainder or ex post facto Law shall be passed." In his written statement submitted to the Subcommittee on August 4, 1995, Jonathan Turley, a professor of law at the George Washington University Law Center, persuasively argues that if H.R. 1855 were enacted it would constitute a bill of attainder because of the effect it would have on the legal rights of Dr. Foretich. For the relationship between the doctrine of separation of powers and the Constitution's prohibition of bills of attainder, see *United States v. Brown*, 381 U.S. 437, 441-446 (1965).

PREPARED STATEMENT OF ELAINE MORRISON FOSTER, PH.D.

The following statement is submitted in opposition to the passage of H.R. 1855, a bill which would amend title 11 of the D.C. Code to restrict of the authority of the Superior Court over "certain pending cases" (specific, that is, to the relief of all standing court orders against Elizabeth Morgan) involving child custody and visitation rights. Laws under our Constitution are enacted for the common good, not to enable one of the parties in one particular custody dispute to evade a judicially and constitutionally-weighted judgment against her.

The vitiation of our judicial processes would be only one of the undesirable consequences of such an amendment. In any other age, such a legislated override of justice would be overwhelmingly rejected. It is only in today's climate that uncorroborated accusations of child molestation translate into a defiance of judicial order "for the good of the child."

Today's climate is shaped by the myth of child abuse, the term "myth" being used in its extended sense as a controlling world view that shapes and explains personal and political decisionmaking—just as a myth of ethnic impurity shaped and explained the Holocaust. The mythmakers are those who use our innate abhorrence of child abuse as a banner under which to further their own agendas.

THE MYTH OF RAMPANT CHILD ABUSE

The legislative etiology of this myth appears to lie in the child abuse prevention and treatment legislation that was first enacted in 1974. At that time the mythmakers, through a well-orchestrated media campaign, convinced Congress that it could and should establish a "program for the prevention, identification, and treatment of child abuse and neglect." The inability of Congress to legislate child abuse out of existence had already become apparent when the legislation came up for reauthorization in 1977. Senator Donald W. Riegle, Jr opened the reauthorization hearing by noting that "Congress was never under the illusion when it established this modest program that it would result in the termination of child abuse and neglect. Rather, the intent in developing the legislation was to heighten awareness of the problem, to improve the focus of the fragmented resources of the Federal Government on the problem and to stimulate creative thinking and programs sponsored by private organizations, local, and State Governments and the media, as well as the Federal Government."¹

The Committee on that day articulated the same concerns that are being raised today: Should there be more emphasis on prevention of child abuse; is it possible to prevent child abuse and, if so, how? What role should States play in the program? What have we learned from supported research and how can this be reflected in programs and policies? Has the National Center for Child Abuse and Neglect ("NCCAN") carried out the intent of Congress? Should the program be extended as it is currently structured to provide more time to improve the coordination of children and family services or should substantial changes be enacted which would take several years to implement.²

One of the witnesses at this first reauthorization hearing was Dr. Edward Zigler, a research analyst from Yale University, former director of the Office of Child Development and Chief of the U.S. Children's Bureau. Although he approved the extension of CAPTA for the attention it gave to the problem, he was pessimistic over any impact it would have on curbing abuse. In his testimony, Dr. Zigler warned of two dangers, and the truth of his prophecies is borne out by testimony offered at the most recent reauthorization hearing an inquiry into "Child Protection: Balancing Diverging Interests," conducted by the Senate Subcommittee on Children and Families of the Committee on Labor and Human Resources on May 25, 1995. Dr Zigler foresaw, first of all, that even though we may know how to impact families and reduce child abuse, the money required to be effective is not available.³

But further, Dr. Zigler told the Committee that the bill's emphasis on reporting child abuse "may unleash a bureaucratic monster in which many innocent people will be placed on lists. There is indeed already a phenomenon in our Nation where

¹ *Extension of the Child Abuse Prevention and Treatment Act, 1977: Hearings Before the Subcomm. on Child and Human Development of the Comm. on Human Resources, 95th Cong., 1st Sess. 2 (April 6 and 7, 1977) (presiding pro tempore for Committee Chairman Senator Alan Cranston).*

² *Extension of the Child Abuse Prevention and Treatment Act: Hearings Before the Senate Subcomm. on Child and Human Development, 2-3 (1977).*

³ His pessimism was expressed in "Controlling Child Abuse in America; An Effort Doomed to Failure," as cited in *Extension of the Child Abuse Prevention and Treatment Act: Hearings Before the Senate Subcomm. on Child and Human Development, 39 (1977).*

people are going around taking names. My feeling is that these lists represent a threat to the civil rights of the citizens of this Nation. . . . I am very troubled by what I see. In fact, child abuse is the only instance I know of in which the individual is considered guilty until he is proven innocent."⁴

Dr. Zigler had just heard described a technique that had been developed to identify "at-risk" groups—a technique that involved a mental health professionals observation of the eye contact between a new parent and a child. "If we continue down this path" Zigler predicted, "I guarantee you that there is no end to it because it will turn out that we are all potential child abusers and deserve to be on that list."⁵

In response to Dr. Zigler's statement that periodic screening of all children for child abuse potential could raise a civil rights monster, Stephen W. Bricker, ACLU attorney from Richmond, Virginia, testified: "I think we have already got it in many ways." The Act, as administered by the Office of Child Development, he said, promotes coercive intervention systems. Mandatory reporting laws, requiring professionals, under penalty of criminal prosecution, to report to welfare authorities all suspected cases of abuse and neglect, create a system that functions without regard to the voluntary participation of either the child or the parent. It is a system that is concerned only with "what someone else thinks should be done."⁶

Under such a coercive intervention system, social workers who have been trained as family service providers now find themselves spending a proportionately greater amount of their time investigating accusations of abuse or neglect. Down in Richmond, Bricker told the Committee, a social worker's appearance on the doorstep with the announcement, "I'm from the Government and I'm here to help you," is viewed with the same skepticism that is accorded such a statement as "I put that check in the mail yesterday."

Dr. Eli H. Newberger, Professor of Pediatrics at Harvard Medical School, and Director of the Family Development Study at Children's Hospital in Boston, also spoke prophetically on that day. "States are compelled to expand the definition of child abuse to qualify for Federal moneys under this act, but not to demonstrate improved services. An enormous number of names are being swept into State registers and no services worthy of the name are being provided in several States, other than the fact that the names themselves are being collected and stored."⁷

Despite these dire warnings, the reauthorization of CAPTA as the Child Abuse Prevention and Treatment and Adoption Reform Act, 1978 ("CAPTARA") extended the original child abuse protections to other areas of reform.⁸ In addition to the adoption reforms reflected in its new title, CAPTARA established a small grant program to provide treatment for young victims of sexual abuse. This program, coauthored by Senators Cranston and Percy, was the first of its kind to focus Federal attention on services and treatment for young victims of sexual abuse. Kee McFarlane served as the first director of this young-victims-of-sexual-abuse project at NCCAN.⁹

Separate funding for the prevention of the sexual abuse of young victims was eliminated in a greatly stripped-down version of a Child Abuse Prevention and Treatment and Adoption Reform Act ("CAPTARA") which survived the first year of Reagan's budget cuts when then, as now, congressional conservatives questioned whether child abuse was not a problem best addressed at the state level.¹⁰ It was

⁴*Extension of the Child Abuse Prevention and Treatment Act: Hearing Before the Senate Subcomm. on Child and Human Development*, 39 (1977). For a formidable account of how reporting laws have turned the war against child abuse into an ugly war against children and their families, see Richard Wexler's *Wounded Innocents: The Real Victims of the War Against Child Abuse* (Buffalo, New York: Prometheus Books, 1990).

⁵We have continued down that path and Terry Claris, testifying before the House Subcomm. on Early Childhood, Youth and Families on January 31, 1995, identified "eye contact" as one of the techniques currently used by child protective service providers to identify potential child abusers.

⁶*Extension of Child Abuse Prevention and Treatment Act: Hearings Before the Senate Subcomm. on Child and Human Development*, 205-06 (1977).

⁷*Extension of the Child Abuse Prevention and Treatment Act*, 43 (1977).

⁸The Child Abuse Prevention and Treatment and Adoption Reform Act, 1978, approved as Pub. L. 95-266 on April 24, 1978, authorized funding of the Act through FY1981.

⁹See *Children's Justice Act: Hearings on S. 140 Before the Subcomm. on Children, Family, Drugs, and Alcoholism of the Senate Labor and Human Resources Comm.*, 99th Cong., 1st Sess. 4 (May 2, 1985).

¹⁰The Child Abuse Coalition, a new created lobby sponsored by the National Committee for Prevention of Child Abuse (represented at the January 31, 1995 hearing before the House Subcomm. on Early Childhood, Youth and Families by Anne Cohn-Donnelly), tried hard to enlist administration support for the reauthorization of CAPTARA. Anne Cohn (not yet Donnelly) accompanied Donna Stone, founder of the National Committee and daughter of Clement Stone (a large contributor to the Republican party), and Tom Birch of the Coalition, met personally with

only through last-minute Congressional horse trading that the legislation was included in the new budget reconciliation procedures that Reagan had initiated under the mandates of the Budget Reform Act.¹¹

Conservatives, by this time, had begun calling into question the proliferation of domestic abuse issues that were seeking inclusion under the aegis of child abuse prevention and treatment. The expanding definition of abuse itself came under fire. JoAnn Gaspar, Reagan's Deputy Assistant Secretary for Social Services Policy in HHS, wrote; "I know what yelling is—that is when I raise my voice. But what is 'excessive yelling'? Who determines 'excessive'? My son would probably say that if I yell at him once, that is excessive. So now, we understand domestic violence as any form of mistreatment and neglect as defined by government bureaucrats and professional 'family service' personnel."¹²

Barbara J. Nelson, analyzing child abuse as a political agenda-setting issue, saw that the legislation future in an era of social service cutbacks and research consolidation "seemed precarious at best."¹³ When the issue first gained national attention, she explained, the problem had been constructed as "parenting gone crazy," an awful violence that individual adults inflicted on individual children. This gave the issue a valence character that no one—"not even Nixon," said Mondale—could oppose. How did this "quintessential valence issue" become so controversial? Nelson finds the answer in the tensions inherent in incremental, single issue social reform. Governmental action was instigated against a small but severe problem—violent, deviant parenting.

But abuse and neglect do not come in discrete increments separable from family stress and social inequities like poverty, racism, and patriarchy. And once on the agenda, the content of child abuse policy began to reflect these connections. State legislatures, consciously or not, reinforced these essential connections by broadening the statutory definitions of abuse and neglect. When protective custody clauses were added, the reporting laws lost their public health character and clearly became child welfare statutes. At the national level, the research and services funded by the Child Abuse Prevention and Treatment Act explicitly sought comprehensive explanations and interbred service models, even though a narrow construction of abuse was consciously used to create the consensus responsible for passing the legislation.¹⁴

It is this failure to treat an act of abuse within the context of its social and economic antecedents that places child abuse programs in an unfavorable light. "Simultaneously, they appear to have exceeded the limited intent of the politicians who created them, while failing to redress the root causes of the problem."¹⁵

The correctness of Nelson's analysis is demonstrated by the strength and the speed with which child abuse legislation has recovered from its 1981 setback. The valence character (the political correctness) of the governmental response to child abuse has been used by agenda-setters to promote more governmental response to a number of domestic violence issues—rape, child pornography, spousal abuse and, above all, child sexual abuse.

After separate grant monies for the prevention of the sexual abuse of young children was eliminated in 1981, Kee MacFarlane, then recognized as a child sexual abuse expert, took a position at the Children's Institute International in Los Angeles, California. She subsequently initiated charges of sexual and satanic ritual abuse against the McMartin day care providers.¹⁶ Her influence on policy at the Federal level, however, continued unabated. The restoration of the sexual abuse grant funds in the Child Abuse Amendments of 1984 (enacted as Pub. L. 98-457 in October, 1984), was largely due to the efforts of Senators Paula Hawkins and Christopher Dodd whose sponsorship of a Children's Caucus conference, attended by Kee MacFarlane, kicked off nationwide concern about childhood sexual victimization. It

Richard Schweiker, Secretary of Health and Human Services. Schweiker stood firm on the administration's belief that child abuse was problem best addressed at the state level.

¹¹The Omnibus Budget Reconciliation Act of 1981, enacted as Pub. L. 97-35 on August 13, 1981, extended the child abuse prevention and treatment and the adoption opportunities programs through FY1983.

¹²"Beating Up on the Family," *Conservative Digest* (March 1980), 36.

¹³*Making an Issue of Child Abuse: Political Agenda Setting for Social Problems*, Chicago: University of Chicago Press, 1984), 93.

¹⁴Nelson, *Making an Issue of Child Abuse*, 136-37.

¹⁵Nelson, *Making an Issue of Child Abuse*, 137.

¹⁶A screen play documentary of the Mr. Martin day care prosecution, written by Academy Award winner Abby Mann and directed by Oliver Stone, is currently being offered for viewing on HBO.

was at this Conference in April of 1984 that Paula Hawkins revealed to the media that she had herself been sexually abused as a child.¹⁷

In an opening statement at a hearing on children's justice issues in May of 1985, Senator Dodd reported that most of his legislative efforts in the last session had been focused on "prevention and treatment programs designed specifically to break the tragic cycle of sexual and physical abuse in this country." By even the most conservative estimates, he said, "a child is sexually abused someplace in this country every two minutes." The legislation that he had introduced to help States set up special funds for community-based activities had been enacted into law as a direct result of the Senate Caucus hearing last April.¹⁸ "Kee McFarlane, who testified at the caucus hearing last April," Dodd explained "will be here testifying again here this morning. Her job as the national expert on child sexual abuse was eliminated when the funds were cut in 1981. As magnificent as the work she is doing now with sexually abused children in Los Angeles, I would like her to know that her old job with the Federal government will be available again soon. Many of us in the Senate would be delighted to have her take that job on again."¹⁹

The purpose of this hearings on the Children's Justice Act, Senator Cranston explained in his opening remarks, was to address "another very important element of the overall problem relating to sexual abuse cases the further victimization of the child victims through an abusive judicial process that fails to recognize the special nature of the crime involved and the additional trauma inflicted upon the children, who are often the principal sources of evidence in the judicial proceedings brought against the perpetrators of the sexual abuse."²⁰

A principal witness at this hearing was Andrea Landis from Miami, Florida, founder of *Parents of Country Walk* who testified that her daughter, along with 20 other children ranging from the age of 5 months to 7 years (her daughter at the time was 3), had been sexually and emotionally abused at the Country Walk, a babysitting service operated by Francisco Fuster Escalano and his wife Ilyana Fuster. The children, according to Ms. Landis' testimony, "were not only raped, not only emotionally abused, they were made to eat feces; they were urinated upon; they were defecated upon, and in order to keep their secret, the Fusters killed animals in front of the children and told them that if they told, this was what would happen to mommy and daddy."²¹

The daughter had given no indication of what was going on, Andrea assured Senator Nickles. There were nightmares, she said, "but I have a 4-year-old girl who is spoiled, and you always think—there was nothing to corroborate anything." It was not until she and her husband had taken their daughter to Joseph and Laurie Braga, nationally recognized child development specialists who had been working in the State attorney's office for free over the past eight months, that they learned what their daughter had been unable to tell them. The Bragas were interpreters rather than investigators—they interpreted meaning in the demeanors and behaviors of the children. "They have gotten statements from children who are 18 months old who are not lying; they are telling what happened."²²

Ms. Landis addressed the need for counseling programs for the families of victims. "[I]f our children are counseled, then by the time our case goes to court, they are going to say they were coached." That was the problem, she understands, in the

¹⁷ *Children's Justice Act: Hearings on S. 140 Before the Subcomm. on Children, Family, Drugs, and Alcoholism, Senate Labor and Human Resources Comm. 3-4* (May 2, 1985) (statement of Senator Alan Cranston).

¹⁸ Dodd was referring to the Child Abuse Prevention Federal Challenge Grants Act which had been enacted as Title IV of Pub. L. 98-473, Continuing Appropriations, 1985—Comprehensive Crime Control Act of 1984. Title VI established an Office of Justice Assistance within the Department of Justice to be made up of the Bureau of Justice Programs, the Bureau of Criminal Justice Facilities, the National Institute of Justice, and the Bureau of Justice Statistics, substantially the same provisions introduced by Senators Thurmond and Laxalt on March 16, 1983 as part of the Comprehensive Crime Control Act of 1983, title VIII of S. 829. 1984 U.S.C.C.A.N. 3456. The Challenge Grant program was enacted after Congress determined that States historically directed their limited resources toward treating the increasing numbers of children already abused, and had no monies left for child abuse prevention projects. Title IV provided matching funds to encourage States to establish and maintain prevention projects, including the specialized training of police officers, judges, prosecutors, child welfare workers, and others.

¹⁹ *Children's Justice Act: Hearing on S. 140 Before the Senate Subcomm. on Children, Family, Drugs, and Alcoholism*, 35-36 (1985).

²⁰ *Children's Justice Act: Hearings on S. 140 Before the Subcomm. on Children, Family, Drugs, and Alcoholism*, 4 (1985).

²¹ *Children's Justice Act: Hearings on S. 401*, 31-32 (May 2, 1985). The Country Walk affair was revealed on August 8, 1984 and was set for trial on July 15, 1985. It is the subject of a forthcoming book by investigative journalist Debbie Nathan.

²² *Children's Justice Act: Hearings on S. 401*, 31-32 (May 2, 1985).

MacMartin case. "The children went through therapy for a year prior to giving their statements." Senator Hawkins said, "That is true. I know several of the children."²³

Senator Dodd commended the parents of Country Walk for their courage in coming forth with their stories. He recalled the courage displayed by Senator Hawkins in coming forth at the Children Caucus hearing: "Senator Hawkins did very much what you have done here—what I thought was one of the more courageous acts I remember of Congress in some time. And I think that single act encouraged a lot of other people to come forward. . . . And we all know about the statistics on this particular issue. . . . I am anxious to see Kee MacFarlane. . . . who is tremendously effective. In fact, Kee is doing such a tremendous job in Los Angeles, but I wish she had a job back here in Washington. . . ."

In view of the current backlash against false allegations of abuse, Kee MacFarlane's testimony at this hearing is both revealing and prophetic. She began by noting the "tremendous upsurge of a backlash" that was even then building against the problem. To illustrate the entrenched resistance to her revelations of childhood sexual abuse, MacFarlane read at length from an article, titled "Hug-Hungry Grownups Stumble under Child Abuse Bandwagon," that had just appeared in the *Los Angeles Times*.

Despite heroic efforts by the media and social services agencies to prove otherwise, there is absolutely no evidence that child abuse and molestation are any worse a problem than they were a few years ago when everyone was worried about rape and drunk driving. There is precious little reason to hope that they will be any less of a problem when national attention has moved on again. . . .

The most shameless exploiters of children have been our nation's politicians. There is now a Children's Caucus in the Senate, established on the ludicrous premise that children's interests previously had been ignored. . . . For politicians and media, the citizenry issues like child abuse serve as a substitute for serious politics. It is a problem, sure, . . . but it is not a systemic problem like unemployment, public education, or defense. Carrying on about child abuse allows everyone to engage in a mock exercise of civic virtue without engaging in the really great questions of government.²⁴

With respect to therapy and counseling for sexually-abused children, she spoke of her efforts to prepare children to give testimony by doing "all kinds of mock courts sessions. That is all being called 'coaching' now; everyone is scared to let us near the children; they are cutting down on victim witness assistance programs that prepared children for court. . . ." But the Court is a toxic environment for children:

They just are not ever going to be good in this setting. They do not have the attention span, they do not have the verbal skills, they do not have the memory, they are easily intimidated, they have magical thinking, they get attached to abusers, they get easily confused. Some will be able to do it, but a lot of them will not—even with major reforms.

We can do a lot to minimize trauma, but we are never going to change the nature of kids. And for some of them, we can wait until they grow up a little older, perhaps, and try it, unless you live in California, when they grow out of the statute of limitations in 6 years.²⁵

With respect to therapy and treatment programs, MacFarlane thinks that "our goals are wrong. I do not think that our overall goal should be getting convictions in child sexual abuse cases through prosecution. . . . I think our goal should be getting guilty pleas in criminal court. How do you get guilty pleas? Not the way most places are doing it. You have to have . . . options to the consequences of the criminal justice system.

I have worked with lots and lots of perpetrators as well as kids, and I know people—I have seen them—they hate themselves, they are ready to crack, they do not know where to go. But if somebody is facing the loss of everything they have in the world—their family, their home, their kids, their job, and their freedom—with nothing in return except a long-term prison term, and all that loss and the only option they have to try not to lose everything is to ram some child through the criminal justice system, even if they care about that child, they are going to go for that option. And

²³ *Children's Justice Act: Hearings on S. 401*, 32 (May 2, 1985).

²⁴ *Children's Justice Act: Hearings on S. 401*, 116 (1985).

²⁵ *Children's Justice Act: Hearings on S. 401*, 119–20 (1985).

if the woman is forced to choose between doing that to a man, and putting a child through that, many times, she is going, to choose him. And we force our system, we force the parents in these situations to choose, and the children lose in those choices—as opposed to looking at a wide range of options which are being done in some places.”²⁶

In 1987, Senator Dodd, presided at yet another reauthorization hearing on child abuse legislation. Noting that “the surge in reports of child sexual abuse in recent years demonstrates greatly increased public awareness and concern,” he attributed it in no small part to Senator Paula Hawkins’ revelation, at the Children’s Caucus hearing over which he presided, that she herself had been abused.²⁷

Dr. J.M. Whitworth, Associate Professor of Pediatrics at the University of Florida, appearing on behalf of the American Academy of Pediatrics Task Force on Child Abuse and Neglect, acknowledged that sexual abuse had been “rediscovered,” as reflected by tremendous increases in the numbers of reports. “As reports have increased,” however, “so too have false allegations of abuse, especially in the area of sexual abuse, involving custody disputes. . . . It is, in fact, not true to say ‘children never lie’—they do, but more commonly they lie when they have been questioned and say they have not been sexually abused, but were (4 percent), than when they say they were sexually abused, and were not (1.5 percent). It is even more common for children never to reveal sexual abuse.”²⁸

The real problem, Dr. Whitworth pointed out, is that we still do not know the true incidence of child abuse and neglect in this country because no reliable study has yet been done. The first incidence study was poorly conceived, relying upon data voluntarily submitted by the States. “Trends cannot be adequately monitored, and an adequate analysis cannot be made if the database is not constant or if the database is not somehow controlled.”

Data collection under NCCAN, he said, has been characterized by a paucity of control studies. Focusing on the social aspects of abuse and neglect, it had ignored research in the pediatric, psychiatric, or epidemiological aspects of child abuse and neglect.

Senator Dodd questioned Dr. Jean Elder, Secretary-Designate, Human Development Services (“HDS”), with respect to the standardization of reporting procedures. “I think the major problem we have faced on this issue is that there has been a lot of hyperbole. We find out that in fact the issue does not get properly addressed because people exaggerate statistics and then they find out they are false. Then people begin to believe that really, this problem is not there, and you get into a mess.” Dodd noted that “it really does present tremendous problems when you cannot rely on statistics, and you get all sorts of numbers thrown at you. It really is very difficult to legislate on that basis.”²⁹ He was specifically concerned about the status of the Department’s ongoing funding (\$200,000 annually) of the American Humane Association’s data collection.

Dr. Elder explained that there were “a lot of problems with the data that are available to the American Humane Association which is voluntarily provided by States to them for analysis. As you know, there are problems due to the lack of common definitions, the data is reported differently. It simply does not serve us as well as we would like.”

In response to this criticism, the Child Abuse Prevention, Adoption, and Family Services Act of 1988 required NCCAN to establish a national data collection and analysis program which, among other things, shall include “standardized data on false, unfounded, or unsubstantiated reports.” In response to this mandate, NCCAN designed the National Child Abuse and Neglect Data System (NCANDS).³⁰ A further amendment in May 1992 required that NCCAN establish a program which, “to the extent practical, is universal and case specific, and integrated with other case-based foster care and adoption data collected by the Secretary.”³¹

²⁶ *Children’s Justice Act: Hearings on S. 401*, 120 (1985).

²⁷ *Reauthorization of the Child Abuse Prevention and Treatment Act of 1974: Hearing Before the Subcomm. on Children, Family, Drugs and Alcoholism of the Senate Committee on Labor and Human Resources*, 100th Cong, 1st Sess. 11 (April 1, 1987). Senators Thad Cochran and Strom Thurmand were also present.

²⁸ *Reauthorization of the Child Abuse Prevention and Treatment Act of 1974: Hearing Before the Subcomm. on Children, Family, Drugs and Alcoholism of the Senate Committee on Labor and Human Resources*, 100th Cong, 1st Sess., 82–97 (April 1, 1987).

²⁹ *Reauthorization of the Child Abuse Prevention and Treatment Act of 1974: Hearing Before the Subcomm. on Children, Family, Drugs and Alcoholism*, 138 (1987).

³⁰ Public Law 100–294 100th Cong., 2nd Sess (April 1988), 101.

³¹ Public Law 102–295, 102nd Cong., 2nd Sess. (May 1992), 112, amending section 105 of CAPTA.

The findings of a data collection carried out under the controls of the new NCANDS design were published in April 1994.³² An analysis of the national data in chapter II of this study shows that of the 1,595,701 reports of abuse that were investigated, 54% were "not substantiated." The report defines "unsubstantiated" to mean "that there is insufficient evidence on the basis of State law or policy to conclude or suspect that the child has been maltreated or is at risk of maltreatment." This means that 861,679 of the people who, were investigated in 1992 were likely to have been investigated without cause. With respect to the disposition of 2,115,901 reported cases of abuse, 58% were not substantiated. Does this not mean that 1,227,223 allegations of abuse were falsely reported in 1992?

NCANDS' analysis of types of maltreatment suffered finds sexual abuse (14%) trailing behind physical abuse (23%) and neglect (49%). Those who are interested in keeping sexual abuse alive and screaming cite this 14% figure in an attempt to mollify and impeach the angry backlash against false allegations of sexual abuse that is sweeping the nation today. The figure is derived, however, from a limited report of 918,263 victims of substantiated abuse from 49 states, and has no bearing on what percentage of those 1,227,223 false allegations of abuse were sexual in nature. The NCCANDS report makes no attempt to show, but the outraged November electorate can tell you, that most of the 1,227,223 people against whom false reports were lodged in 1992 were accused of horrendous sexual and ritualistic satanic crimes.

These uncorroborated accusations feed into and are fueled by a mass hysteria of child sexual abuse that, in terms of the number of lives destroyed, exceeds the Salem witch trials in 1692 and the McCarthy hearings in the 1950s.³³ The etiology of this hysteria lies in the flow of federal funds, under the CAPTA, as amended, to a network of child social service agencies in direct proportion to interagency referrals of suspected child abuse.³⁴

Taxpayer costs for dealing with this hysteria are enormous and constitute no small part of the voter anger that mandates change today. According to a report from the National Center for Youth Law ("NCYL") in San Francisco,³⁵ Congressional appropriations in fiscal year 1994, under the Children's Justice Act alone, amounted to \$3,128 billion for foster care, \$399 million for adoption assistance, and another \$292 million for child welfare services.

Despite the billions of federal dollars that are being expended to provide the services specified in the various pieces of child abuse legislation, federal mandates in many states are not being met. NCYL has assisted with numerous lawsuits that have been filed on behalf of the children who have suffered because states have not implemented the federal act.³⁶ From NCYL's point of view, and they are probably right, the preservation of federal child welfare mandates are absolutely necessary to the protection of vulnerable children. In the absence of federal mandates and their enforcement, the "official" state abuse of children will continue unchallenged.

NCYL agrees with those who contend that one of the obstacles in holding child protective service workers and agencies accountable is the federal grant of absolute immunity to those who report or act upon reports of abuse. The child protective services should be granted no more than the qualified immunity that is provided to other government employees who are charged with protecting the public safety, and immunity from prosecution only if they can show that their acts did not violate "clearly established" federal rights.

No small part of the billions of dollars that are being wasted by this child abuse establishment goes for the psychotherapy that is supposed to be required in order to come to terms with the trauma of sexual abuse. The Bragas who interpreted the demeanors of the Country Walk children are representative of a vast network of

³² U.S. Department of Health and Human Services, National Center on Child Abuse and Neglect. *Child Maltreatment 1992: Reports From the States to the National Center on Child Abuse and Neglect*, Washington, DC: U.S. Government printing Office, 1994.

³³ Richard A. Gardner, "Sexual Abuse Hysteria: Diagnosis, Etiology, Pathogenesis, and Treatment," *Academy Forum* (Fall, 1993), 2-5.

³⁴ Gardner identifies this network of child social service agencies as a "Child abuse establishment"—a network of social workers, psychiatrists, psychologists and law enforcement officials—that through its very existence frequently validates an individual's charges. In other words, this establishment, unintentionally or intentionally, encourages charges of child abuse whether they are reasonable or not. "Modern Witch Hunt—Child Abuse Charges," *The Wall Street Journal*, February 22, 1993.

³⁵ NCYL is a non-profit organization funded in part by the federal Legal Services Corporation as a part of the national system of legal services for the poor, particularly in areas of law affecting poor children and adolescents.

³⁶ See, e.g., Bill Grimm's "Triumph in Utah Child Welfare Litigation; Long Road Ahead in Implementing Reforms" in the September-October 1994 issue of *Youth Law News*, a publication of the National Center for Youth Law.

mental health providers that is required to deal with this debilitating trauma. The pathogenesis of the current hysteria is clearly related to the increased availability of public funds under the Social Security programs for treatment of emotional disorders. And much of the current voter anger is directed at mental health services providers who, in reckless disregard for the well-being of their client-patients and in pursuit of their own political, financial and quasi-religious goals, employ nonscientific-verified methods of psychotherapy to elicit false accusations of child abuse, sometimes decades-delayed.

In its recent mandated report to Congress, the Health Care Financing Administration ("HCFA") acknowledged that, at least with respect to drug abusers, too little is known of a large treatment network "consisting of psychologists, social workers, private physicians, the Alcoholics Anonymous and other self-help groups."³⁷ In 1982, with respect to facilities where treatment for alcoholism focused on peer counseling and self-help, the Agency stated its policy to be that "lay counseling (as the primary method of care) does not constitute 'medical or remedial treatment' required for Medicaid reimbursement," and Federal matching funds can not be claimed for care in any facility where "such treatment is the sole reason for the inpatient stay."³⁸

Today, however, this too-little-known treatment network provides the lion's share of Medicaid expenditures for mental health services: "The Federal share of even the lowest estimates exceeds that which was paid for ADM services under the Alcohol, Drug Abuse, and Mental Health Block Grant in 1990."³⁸ This policy change has been mandated, in part, by the reclassification of alcoholism and chemical dependency as mental disorders, and of depression as a psychiatric disease which has the potential of destroying every man, woman and child in our society.

Considering the high cost of these services, should the Department not consider launching an initiative to examine the effectiveness of current treatment modalities before public funds are so indiscriminately committed? We commend to your attention the recently-reported results of a study carried out by Dr. Gail A. Goodman under a grant from the National Center for Child Abuse and Neglect.³⁹

The study is of special significance to mental health professionals, says Dr. Goodman, because "many cases of alleged ritual abuse, and repressed memories of such abuse, emerge in the context of psychotherapy. This has led skeptical social scientists . . . to doubt the competence and wisdom of psychotherapists and the advisability of using certain therapeutic methods, such as hypnosis, and diagnostic categories such as multiple personality disorder (MPD) (p. 3)."

Of the five studies conducted, the third dealt with "allegations of ritual abuse in which memory of horrendous abuse was said to have been repressed for many years (p. 8)." Dr. Goodman found that "[r]eports of repressed memory of ritual abuse made by 'adult survivors' were found to be particularly extreme, especially when the adult survivor claimed to be both a victim and perpetrator of abuse (p 2)." But that is exactly why, despite the lack of any strong evidence of abuse, therapists "overwhelmingly tended to believe their clients' claims"—simply because the allegations contained so many "bizarre features (pp. 9-10)."

Fundamental to the proposed enactment of H.R. 1855 is the premise that child abuse and molestation behind closed doors is epidemic and out of control. Victims of this rampant abuse are further victimized by a judicial system that guarantees evidentiary and due process rights to the accused. What if this supposed epidemic of child abuse is a myth? What if the special interest groups who brought this "epidemic" to the attention of legislators in 1974 were using the strategy that was adopted by the fraudulent tailors who duped the Emperor and his subjects?

The Emperor's new clothes will be visible to those
Who are fit for their jobs, and clever;
But those who are stupid and dumb and unfit,
They won't see a thing! No, never!⁴⁵

Child abuse is universally abhorred and child abusers, even among convicted felons, are universally condemned to penal scourge and providential retribution. No issue can so readily be adopted as a politically correct proposition. What is now epi-

³⁷ Report to Congress on Medicaid and Institutions for Mental Diseases (December 1992), IV-6.

³⁸ Report to Congress, II-8, citing Section 4390 of its 1982 State Medicaid Manual.

³⁸ *Ibid.*, VI-8.

³⁹ The quoted passages herein are from the *Abstract and Executive Summary* of Dr. Gail A. Goodman's Final Report on the "Characteristics and Sources of Allegations of Ritualistic Child Abuse".

⁴⁵ Lyrics from the Broadway production of Larry Simeone's *The Emperor's New Clothes*.

demic and out of control is the child abuse industry that has arisen from this false premise.

CONCLUSION

Band-aid reforms to a child abuse industry that has been built upon a false premise will be of no avail. What is required is a reevaluation of the basic profuse and a realistic restructuring of the government's response to the problem of abuse where and to the extent that it does in fact exist. What is needed are Congressmen who will dare to declare that the Emperor is naked,—who will dare, at the risk of being branded as a reprehensible person who condones the sexual abuse of the children, to declare that child abusers are no more prevalent today than were Communists during the McCarthy era.

This Committee must not allow constitutionally-ordered judicial processes to be eroded by emotional fallout from uncorroborated allegations of child abuse. For the good of this child (Hilary) and all children, this Committee must "just say no" to the mythmakers.

