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People v. Fitzpatrick: The Path to Amending the Illinois Constitution to Protect Child Witnesses in Criminal Sexual Abuse Cases

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Note

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Then call them to our presence.
Face to face,
And frowning brow to brow, ourselves will hear
The accuser and the accused freely speak.¹

I. INTRODUCTION

Reports of child abuse and neglect are rising at an alarming rate.² In 1992 alone, 2,855,691 children were reportedly abused or neglected nationwide.³ Nationally, 129,982 of these children were reported to have been victims of sexual abuse.⁴ With 12,019 reported cases of sexual abuse,⁵ Illinois accounted for almost ten percent of all reported cases of child sexual abuse in the country. The sheer volume of reported cases in Illinois depicts the magnitude of this state’s child abuse problem.⁶ Moreover, the actual number of incidents of sexual abuse, including those cases never reported, is likely much higher.⁷

⁴. Id.
⁵. I992 ABUSE & NEGLECT STATISTICS, supra note 2, at 19. Of the total number of reported sexual abuse cases, Illinois Department of Children and Family Services ("DCFS") investigators found credible evidence to conclude that 5346 of those cases occurred. Id. Of the 5346 indicated cases, 1709 took place in the Chicago region. Id. at 21. More than half of the alleged perpetrators in criminal sexual abuse cases were parents, step-parents, parental substitutes, or blood relations. Id. at 24. The children involved in these incidents varied in age, but 50.4% of the children were under the age of nine, and 23.9% of the children were under the age of five. Id.
⁶. Id.
⁷. A DCFS report acknowledges this fact noting that:

The actual number of sexually abused children in Illinois (and in the United States) is unknown. A child victim may not disclose a sexual assault for fear of rejection, blame, or punishment. Parents themselves may not report the sexual abuse of their children fearing that an investigation of the incident would be more damaging than any physical or emotional harm the child might
In response to the increasing number of reported child abuse cases, many states have adopted laws designed to facilitate the prosecution of child abuse offenders and to protect children in the courtroom. The statutes utilize procedures such as videotaped testimony, screening devices to prevent the defendant from seeing a child witness, and one-way closed-circuit television systems.

Illinois, like most other states, adopted many programs and procedures to protect child-victims of abuse, and also enacted legislation to protect children while testifying in the courtroom. In 1991, the Illinois General Assembly passed the Child Victims of Sexual Abuse Act (the "Child Shield Act"), to facilitate the prosecution of child sexual abuse cases and to protect child-victim witnesses. This Act permits sexually abused children to testify by means of closed-circuit television outside the presence of their alleged attackers, while still allowing the defendant's attorney to cross-examine the children.

On February 17, 1994, the Illinois Supreme Court struck down the Child Shield Act as unconstitutional in the case of People v. ABUSE & NEGLECT STATISTICS, supra note 2, at 16.

8. See U.S. Dep't of Commerce, Statistical Abstract of the United States 214 (1994). For example, from 1991 to 1992, the number of reported child abuse and neglect cases in the United States increased from 2,689,193 to 2,855,691. Id.


10. Testimony of Child Victims, supra note 9, at 813-23; see also Bastien, 541 N.E.2d at 672-73 (explaining the various devices, known as child shield laws, that the states use to prevent child witnesses from seeing the defendant).

11. See infra note 109.

12. Illinois first attempted to protect child-victim witnesses in 1987. See infra part II.D.


14. See infra part II.D.

15. For purposes of this Note, the term "sexual abuse" refers to certain statutory sex crimes. See infra note 115 (specifying the applicable crimes and statutory references).


In a five-to-two decision, the court held in Fitzpatrick that the confrontation clause of the Illinois Constitution guarantees an accused the absolute right to confront a testifying witness. In reaching this conclusion, the Illinois Supreme Court determined that the United States Supreme Court’s decision in Maryland v. Craig, which reached the opposite conclusion, was inapplicable. The Fitzpatrick court distinguished the language of the Illinois and the United States Constitutions, holding that the face-to-face language in the Illinois Constitution requires child-victims in criminal sexual abuse proceedings to meet their accuser face-to-face, regardless of the harm that the confrontation may cause the child.

In order to obviate the effects of Fitzpatrick, the Illinois General Assembly quickly passed a bill amending the Illinois Constitution. The bill amended the Illinois Constitution’s Confrontation Clause by deleting the “face to face” language and replacing it with language giving the accused the “right to be confronted with the witnesses against him or her.” On November 8, 1994, Illinois voters approved the constitutional amendment and completed the process of nullifying the Fitzpatrick decision. As a result, Illinois courts may once again employ the use of closed-circuit television to protect child sexual abuse victims.

19. Article I, section 8 of the Illinois Constitution of 1970 provides in pertinent part: “In criminal prosecutions, the accused shall have the right to appear and defend in person and by counsel; to demand the nature and cause of the accusation and have a copy thereof; to meet the witnesses face to face...” ILL. CONST. of 1970, art. I, § 8 (amended 1994) (emphasis added).
24. The United States Constitution provides in pertinent part: “In all criminal prosecutions, the accused shall enjoy the right... to be confronted with the witnesses against him...” U.S. CONST. amend. VI (emphasis added).
25. Fitzpatrick, 633 N.E.2d at 688-89.
26. See infra part III.B.
27. GEORGE H. RYAN, SECRETARY OF STATE, STATE OF ILLINOIS, PROPOSED AMENDMENTS TO THE CONSTITUTION OF ILLINOIS (1994) [hereinafter PROPOSED AMENDMENTS].
This Note first traces the history and meaning of the Confrontation Clauses of the United States and the Illinois Constitutions. It then briefly traces Illinois' passage of the current Child Shield Act. Next, this Note discusses the facts and opinions of the Illinois Supreme Court's decision in Fitzpatrick, and then discusses the constitutional amendment resulting from that decision. This Note then analyzes the Fitzpatrick decision and the resulting constitutional amendment. Next, it explores the impact that the Fitzpatrick decision will likely have on future constitutional interpretation by the Illinois Supreme Court, and the right to confrontation in Illinois in general. Finally, this Note concludes that the Fitzpatrick decision signals a change in the Illinois Supreme Court's constitutional analysis.

II. BACKGROUND

A. Historical Background and Judicial Interpretation of the Confrontation Clause of the United States Constitution

The right to confront an accuser face-to-face can be traced back to Roman law. Common law also recognized the right to confront an accuser, but did not require face-to-face confrontation. Instead, the primary purpose of the common-law right of confrontation was to enable cross-examination.

29. See infra parts II.A-B.
30. See infra part II.C.
31. See infra part II.D.
32. See infra part III.A.
33. See infra part III.B.
34. See infra part IV.A.
35. See infra part IV.B.
36. See infra part V.A.
37. See infra part V.B.
38. See infra part VI.
39. The majority opinion in Coy v. Iowa, 487 U.S. 1012 (1988), relied on a statement by the Roman Governor Fetus. Id. at 1015-16. In deciding whether to give up his prisoner, Fetus stated: "It is not the manner of the Romans to deliver any man up to die before the accused has met his accusers face to face, and has been given a chance to defend himself against the charges." Id. (quoting Acts 25:16 (Revised Standard Version)).
40. Id. at 1018 n.2 (citing 5 JOHN H. WIGMORE, EVIDENCE § 1397, at 158 (J. Chadbourn rev. 1974)). In referring to the right of confrontation at common law, the Court quoted Wigmore who wrote: "There was never at common law any recognized right to an indispensable thing called confrontation as distinguished from cross-examination. There was a right to cross-examination as indispensable, and that right was involved in and secured by confrontation . . . ." Id. (quoting WIGMORE, supra).
41. Id. Wigmore reasoned that "if the accused has had the benefit of cross-
The right to confront an accuser under the Sixth Amendment of the United States Constitution is firmly rooted in federal jurisprudence.42 The Supreme Court originally held that the Confrontation Clause grants an accused the right to cross-examine an opposing witness and to meet the witness face-to-face.43 The Court later refined its position on the right to face-to-face confrontation, stating that it was only a "preference."44 Thus, the Court concluded that the primary purpose of the Federal Confrontation Clause is to provide the opportunity for cross-examination, coupled with a preference for physical confrontation.45

The right of confrontation is deemed essential to the fact-finding process because most courts presume that witnesses are less likely to lie in the presence of the person that they are accusing.46 It is also
important to the function of the jury that the jurors have an opportunity to observe the witnesses, as they face the accused, to judge the veracity of the testimony in light of cross-examination. 47

The right to a face-to-face confrontation under the Sixth Amendment, however, is not absolute. 48 The Court has long recognized the validity of many hearsay exceptions. 49 In Ohio v. Roberts, 50 the Court thoroughly examined the Confrontation Clause in light of the Federal Rules of Evidence. 51 In deciding whether to admit an out-of-court statement made by a non-testifying declarant, the Court sought to balance the accused’s right to confront the out-of-court declarant with a State’s interest in effective law enforcement. 52 The Court emphasized

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stated:

It is always more difficult to tell a lie about a person “to his face” than “behind his back.” In the former context, even if the lie is told, it will often be told less convincingly. The Confrontation Clause does not, of course, compel the witness to fix his eyes upon the defendant; he may studiously look elsewhere, but the trier of fact will draw its own conclusions. Thus the right to face-to-face confrontation serves much the same purpose as a less explicit component of the Confrontation Clause that we have had more frequent occasion to discuss—the right to cross-examine the accuser . . . .

Coy, 487 U.S. at 1019-20.

47. Mattox, 156 U.S. at 242-43. The Court, in describing the function of the Confrontation Clause, noted:

[P]ersonal examination and cross-examination of the witness [provide] . . . the accused . . . an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.

Id. at 242-43 (emphasis added).

48. Dowdell, 221 U.S. at 330. The Court noted that the Confrontation Clause “intended to secure the right of the accused to meet the witnesses face to face, and to thus sift the testimony produced against him, has always had certain well recognized exceptions.” Id.

49. See, e.g., Mattox, 156 U.S. at 244-50 (recognizing the validity of the dying declaration hearsay exception); see also Fed. R. Evid. 803, 804 (listing numerous hearsay exceptions). For example, although in each instance the declarant will not testify in court and thus the defendant cannot literally confront the declarant, the court will admit an excited utterance, Fed. R. Evid. 803(2); an identification of a person after perceiving the person, Fed. R. Evid. 801(d)(1)(C); and testimony given at another hearing of the same or different proceeding if the defendant or a predecessor in interest with a similar motive had the opportunity to cross-examine the witness. Fed. R. Evid. 804(b)(1).

50. 448 U.S. 56 (1980).

51. Id. at 62-66.

52. Id. at 64. In Roberts, the defendant was charged with possession of stolen credit cards. Id. at 58. At a preliminary hearing, the defense unsuccessfully tried to cause the witness to admit that she gave the defendant the stolen credit cards, and that she gave him permission to use them. Id. At trial, the prosecution was unable to produce the
that if the Confrontation Clause were read literally, "the Clause would abrogate virtually every hearsay exception, a result long rejected as unintended and too extreme." Thus, the Court reaffirmed that the use of hearsay statements of an unavailable declarant does not violate the Confrontation Clause.

The Court has also adhered to this conclusion in criminal sexual abuse cases when applying hearsay exceptions such as the spontaneous declaration exception and the exception for statements made to medical personnel. For example, in White v. Illinois, the Court rejected the petitioner's argument for establishing a new rule excluding hearsay statements unless the court first finds the declarant unavailable. The Court reasoned that the declarant's availability is immaterial where there are other guarantees that the hearsay statements are reliable and therefore probative.

witness after attempting to serve five subpoenas. Id. at 59. The trial court admitted the prior testimony of the witness denying that she had given the stolen credit cards to the defendant and had given him permission to use them. Id. at 60. The defendant was convicted. Id.

The Court, in reviewing the hearsay exception, emphasized that the Confrontation Clause reflects a preference for face-to-face confrontation at trial, and that the primary purpose of the Confrontation Clause is to ensure the right of cross-examination. Id. at 63 (citing Douglas v. Alabama, 330 U.S. 415, 418 (1965)).

53. Id. at 63.

54. See supra note 48.

55. Roberts, 448 U.S. at 77.

56. FED. R. EVID. 803(2).

57. FED. R. EVID. 803(4).

58. 112 S. Ct. 736 (1992). In White, the defendant was convicted of sexual assault of a four-year-old based primarily on hearsay statements. Id. at 739. The Illinois Appellate Court held that the trial court properly admitted the hearsay statements and, further, that it was not necessary for the court to find that the child was unavailable before it admitted the child's statements. Id. at 740. The Illinois Supreme Court denied discretionary review, but the United States Supreme Court granted certiorari. Id.

59. Id. at 744. The Court reaffirmed and clarified its prior rulings in Roberts, 448 U.S. at 77, and United States v. Inadi, 475 U.S. 387, 400 (1986). White, 112 S. Ct. at 740-42. The White Court stated that "Roberts stands for the proposition that unavailability analysis is a necessary part of the Confrontation Clause inquiry only when the challenged out-of-court statements were made in the course of a prior judicial proceeding." Id. at 741. The Court then reviewed its decision in Inadi. Id. at 741-42. The issue in Inadi was whether the admission of a statement of a co-conspirator violates the Constitution. Inadi, 475 U.S. at 391. In rejecting the unavailability requirement, the Court noted that an unavailability requirement would "do little to improve the accuracy of factfinding, [and] it is likely to impose substantial additional burdens on the factfinding process" because the prosecution would continuously have to keep track of all such witnesses. White, 112 S. Ct. at 742.

60. White, 112 S. Ct. at 742-43. The Court further noted that "[t]o exclude such probative statements under the strictures of the Confrontation Clause would be the height of wrong-headedness, given that the Confrontation Clause has as a basic purpose
As such, the Court held that the prosecution may admit a child’s excited utterances made in response to sexual abuse, and statements made to medical personnel for the purposes of examination and treatment, without showing the unavailability of the declarant. Thus, the Court interpreted the Federal Confrontation Clause to allow certain witness statements without face-to-face confrontation or proof of unavailability.

B. The Supreme Court Evaluates Child Shield Laws under the Sixth Amendment: Coy v. Iowa and Maryland v. Craig

Until 1988, the Court’s decisions addressing exceptions to the defendant’s right to confrontation under the Sixth Amendment primarily concerned hearsay statements and restrictions on the scope of cross-examination. In 1988, in Coy v. Iowa, the Court examined an Iowa statute that allowed a child sexual abuse victim to testify with a screen placed between the defendant and the child-accuser or via closed-circuit television. Although the Court held that the statute violated the Confrontation Clause, it reiterated that the right to face-

the promotion of the ‘integrity of the factfinding process.’” Id. at 743 (quoting Coy v. Iowa, 487 U.S. 1012, 1020 (1988)).

61. Id. at 744.

62. Id. See generally Anthony C. Porcelli, Sixth Amendment—Right to Confront One’s Accuser when the Victim Does Not Testify: White v. Illinois, 112 S. Ct. 736 (1992), 83 J. CRIM. L. & CRIMINOLOGY 868, 879-84 (1993) (arguing that the decision in White is sufficiently limited by the Compulsory Process Clause to prevent the infringements of the rights of criminal defendants). But see Nancy H. Baughan, Recent Developments: White v. Illinois: The Confrontation Clause and the Supreme Court’s Preference for Out-of-Court Statements, 46 VAND. L. REV. 235, 253-56 (1993) (arguing that the decision in White further eroded Confrontation Clause protection for criminal defendants by restricting the necessity of finding a declarant unavailable pursuant to Coy and Craig, which could eventually permit the admission of hearsay that does not serve the goals of the Confrontation Clause).


65. Coy, 487 U.S. at 1016. The Court cited cases such as Ohio v. Roberts, 448 U.S. 56 (1980), and Dutton v. Evans, 400 U.S. 74 (1970), as cases which address out-of-court statements, and Delaware v. Van Arsdall, 475 U.S. 673 (1986), and Davis v. Alaska, 415 U.S. 308 (1974), as cases which address limitations on cross-examination. Id.

66. The statute analyzed in Coy provided in pertinent part: “The court may require a party be confined [sic] to an adjacent room or behind a screen or mirror that permits the party to see and hear the child during the child’s testimony, but does not allow the child to see or hear the party.” Coy, 487 U.S. at 1014 n.1 (alteration in original) (quoting IOWA CODE § 910A.14 (1987) (amended 1993)).

67. Id. at 1014.

68. Id. at 1022. The Court noted that “[i]t is difficult to imagine a more obvious or damaging violation of the defendant’s right to a face-to-face encounter.” Id. at 1020.
The Court indicated a willingness to revisit the issue, and articulated guidelines for states to follow in attempting to formulate legislation designed to shield child-victim witnesses. According to the Coy Court, state legislatures could create an exception to face-to-face confrontation to protect child-victims in abuse cases if: (1) the legislation required an individualized finding that the child would in fact be harmed if required to testify in the presence of the defendant; (2) the state advanced an important public policy; and (3) the right of the accused to cross-examine the child remained unfettered.

Subsequently, in Maryland v. Craig, the Court expressly created an exception to the preference for face-to-face encounters under the Confrontation Clause of the Sixth Amendment in the context of child abuse victims. The Maryland statute at issue permitted a child-

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69. Id. at 1020-21. The Court stated that "[i]t is true that we have in the past indicated that rights conferred by the Confrontation Clause are not absolute, and may give way to other important interests. . . . Whatever they may be, they would surely be allowed only when necessary to further an important public policy." Id.

70. Id. The Court stated: "We leave for another day, however, the question whether any exceptions exist." Id. at 1021. Justice O'Connor, in her concurring opinion, was more direct. She stressed: "I wish to make clear that nothing in today's decision necessarily dooms such efforts by state legislatures to protect child witnesses." Id. at 1023 (O'Connor, J., concurring).

71. Id. at 1021.

72. Id. At no point in the opinion was cross-examination explicitly an issue. Instead, most of the Confrontation Clause discussion focused on the Court's longstanding view that cross-examination was the primary purpose of the Confrontation Clause. Id. at 1020. Accordingly, the requirement of cross-examination can be assumed. See id.


74. Id. at 860 (holding that one-way closed-circuit television could be used for examining a child abuse victim if the court found such accommodation to be necessary).

75. MD. CODE ANN., CTS. & JUD. PROC. §§ 9-102(a)-(d) (1989) (amended 1992), stated in relevant part:

(a)(1) In a case of abuse of a child as defined in § 5-701 of the Family Law Article 27, § 35A of the Code, a court may order that the testimony of a child-victim be taken outside the courtroom and shown in the courtroom by means of a closed circuit television if:

(i) The testimony is taken during the proceeding; and

(ii) The judge determines that testimony by the child victim in the courtroom will result in the child suffering serious emotional distress such that the child cannot reasonably communicate.

(2) Only the prosecuting attorney, the attorney for the defendant, and the judge may question the child.

(3) The operators of the closed circuit television shall make every effort to be unobtrusive.

(b)(1) Only the following persons may be in the courtroom with the child when the child testifies by closed circuit television:
victim of criminal sexual abuse to testify by means of one-way closed-circuit television if the trial judge determined that the child-victim would suffer "serious emotional distress such that the child cannot reasonably communicate" if required to testify in the courtroom.  

The Craig Court determined that the Maryland statute comported with the central concern of the Confrontation Clause: "[T]o ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact." The Court explicitly defined the Sixth Amendment confrontation right as including the right to a face-to-face confrontation, the requirement that a witness be competent to testify under oath, the right to cross-examine the witness, and the right to have the trier-of-fact observe the witness. The Court concluded, however, that not all four aspects of confrontation must be present to comport with the Sixth Amendment, and created a specific exception for child sexual abuse victims.

Based on the Court's decision in Craig, therefore, states are free to enact legislation to protect child-victim witnesses provided that the

(i) The prosecuting attorney;
(ii) The attorney for the defendant;
(iii) The operators of the closed circuit television equipment; and
(iv) Unless the defendant objects, any person whose presence, in the opinion of the court, contributes to the well-being of the child, including a person who has dealt with the child in a therapeutic setting concerning the abuse.

(2) During the child's testimony by closed circuit television, the judge and the defendant shall be in the courtroom.
(3) The judge and the defendant shall be allowed to communicate with the persons in the room where the child is testifying by any appropriate electronic method.
(4) The provisions of this section do not apply if the defendant is an attorney pro se.
(5) This section may not be interpreted to preclude, for purposes of identification of a defendant, the presence of both the victim and the defendant in the courtroom at the same time.

Id. The Maryland legislature amended the statute in 1992 to require a judge to determine "that testimony by the child victim in the defendant's presence will result in the child suffering serious emotional distress such that the child cannot reasonably communicate." MD. CODE ANN., CTS. & JUD. PROC. § 9-102(a)(2) (1989) (amended 1992).

76. Id.
77. 497 U.S. at 845.
78. Id. at 846. The Court concluded that an exception to the right to a face-to-face encounter is similar to the hearsay exceptions that allow admission of statements against a defendant, "despite the defendant's inability to confront the declarant at trial." Id. at 847-48.
79. Id. at 857.
statute requires that the State show the following: (1) the use of one-way closed-circuit television is necessary to protect the welfare of the child witness; (2) the child witness would be traumatized by the presence of the defendant, and not just the courtroom generally; and (3) the State is furthering an important public policy.80

C. The Illinois Confrontation Clause Prior to People v. Fitzpatrick

Prior to the 1994 constitutional amendment,81 the Illinois Confrontation Clause guaranteed an accused the right “to meet the witness face to face . . . .”82 Because this language differs from the Confrontation Clause in the United States Constitution, it is necessary to review the legislative history and supreme court precedent interpreting the Illinois Confrontation Clause.

1. Legislative History of the Illinois Confrontation Clause

Prior to the constitutional amendment, the Bill of Rights section of the Illinois Constitution had contained face-to-face language since Illinois adopted its first Constitution in 1818.83 At the Constitutional Convention of 1870, delegates examined the clause and passed it without debate.84 At the Constitutional Convention of 1970,85

80. *Id.*


83. Article VIII, section 9 of the Illinois Constitution of 1818 reads:

That in all criminal prosecutions, the accused hath a right to be heard by himself and counsel; to demand the nature and cause of the accusation against him; to meet the witnesses *face to face*; to have compulsory process to compel the attendance of witnesses in his favor; and in prosecutions by indictment or information, a speedy public trial by an impartial jury of the vicinage, and that he shall not be compelled to give evidence against himself. *Ill. Const.* of 1818, art. VIII, § 9 (emphasis added), *reprinted in Annotated Statutes of the State of Illinois in Force May 1, 1896*, 55, 65 (Merritt Starr & Russell H. Curbs eds., 2d ed. 1896).

84. *2 Debates and Proceedings of the Constitutional Convention of the State of Illinois* 1573 (1870). When the Bill of Rights section of the Illinois Constitution was brought to the floor, the notes indicate only that section 10 of the Bill of Rights was agreed upon and passed without further debate. *Id.*

85. *Record of Proceedings of the Sixth Illinois Constitutional Convention* 1373-76 (1970) [hereinafter *Record*]. The forward to the Record of Proceedings also explains the drafters’ intent: “The intent of the delegates, as contained in these debates, . . . [is to] contribute to the understanding, implementation, and continued interpretation of the new Illinois Constitution.” *Id.* at III.
however, the delegates discussed in some detail the intent of the face-to-face language.\(^8\) During this discussion, one delegate expressed his belief that the Confrontation Clauses of the Illinois and Federal Constitutions were meant to protect the same interests.\(^8\) Thus, the Illinois General Assembly understood that the Illinois Confrontation Clause protected the same interests as the Sixth Amendment’s Confrontation Clause, despite the difference in language.\(^8\)

2. Decisions of the Illinois Supreme Court Concerning the Illinois Confrontation Clause

The Illinois Supreme Court generally has followed the “lockstep doctrine”\(^8\) of constitutional interpretation when confronted with hearsay exceptions and confrontation clause analysis.\(^9\) Under the lockstep doctrine, the Illinois Supreme Court follows the decisions of the United States Supreme Court when interpreting similar provisions of the Illinois and United States Constitutions.\(^9\)

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\(^8\) RECORD, supra note 85, at 1373; see supra note 19 for the text of the Confrontation Clause of the Illinois Constitution of 1970.

\(^8\) RECORD, supra note 85, at 1373. Mr. Pechous, a delegate on the Bill of Rights Committee, specifically emphasized that:

Talking about section 9 of the 1870 bill of rights, basically section 9 is reflected by—the same rights are reflected in the Sixth Amendment to the United States Constitution . . . [and] it reflects, completely, the same rights and the same guarantees as reflected in the Sixth Amendment of the United States Constitution.

Id. (emphasis added).

Mr. Pechous explained that the rights and guarantees included, among others, “the right to confrontation of opposing witnesses” as set forth in Pointer v. Texas, 380 U.S. 400 (1965). Id. In Pointer, the Court noted that “a major reason underlying the constitutional confrontation rule is to give a defendant charged with [a] crime an opportunity to cross-examine the witnesses against him.” 380 U.S. at 406-07.

\(^8\) According to the transcripts of the 1970 convention, one proposed amendment would have substituted the language of the Federal Confrontation Clause for that in the Illinois Constitution. RECORD, supra note 85, at 1373. Nevertheless, the Chairman indicated that the Bill of Rights Committee members simply “liked” the original language because it was “wholly adequate.” Id. Thus, the Committee voted to retain the language. Id.


\(^9\) People v. DiGuida, 604 N.E.2d 336, 342 (Ill. 1992); see Poland, supra note 89, at 538-58.

\(^9\) See, e.g., People v. Tisler, 469 N.E.2d 147, 156 (Ill. 1984) (holding that Illinois courts should follow Supreme Court decisions when interpreting similar provisions of the federal and state constitutions).
Applying this doctrine, Illinois courts have held that hearsay exceptions are constitutional under the Illinois Constitution, just as federal courts have held that hearsay exceptions are constitutional under the United States Constitution. Moreover, in the context of oral hearsay exceptions, the Illinois Supreme Court has generally construed the Confrontation Clause of the Illinois Constitution as protecting the same rights that exist under the United States Constitution. These rights include both the right of cross-examination and the right to meet an accuser face-to-face.

In *People v. Tennant*, the Illinois Supreme Court held that so long as the defendant had an adequate opportunity to cross-examine a witness, testimony given at a preliminary hearing could be admitted into evidence. Relying on both Dean Wigmore's treatise and prior

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Additionally, Illinois courts have long held that the admission of hearsay statements and documents is consistent with the Illinois Confrontation Clause. For example, the admissibility of testimony taken at a preliminary hearing of a declarant who died prior to trial was first considered in *Barnett v. People*, 54 Ill. 325 (1870). The court held that a witness who heard and remembered the testimony of the decedent could testify at a later trial as to the statements of the decedent. *Id.* at 330. The defendant argued that the admission of the testimony violated the Confrontation Clause of the Illinois Constitution. In response the court stated: "[T]he supposed constitutional objection [does not] arise to such evidence, as the witness was confronted with the accused, and he was afforded an opportunity of cross-examination in open court." *Id.*

93. See supra notes 48-62 and accompanying text.

94. See supra note 19.

95. See, e.g., *People v. Tennant*, 358 N.E.2d 1116, 1119 (Ill. 1976), cert. denied, 431 U.S. 918 (1977). In *Tennant*, the defendant challenged the use of testimony given at a preliminary hearing. *Id.* at 1117. The defendant had a chance to cross-examine the witness at the preliminary hearing. *Id.* At trial, the court admitted the prior testimony because the witness had died. *Id.* at 1121. The court reasoned that "[d]espite the language difference, the two clauses are meant to protect the same interest." *Id.* at 1119.

96. See, e.g., *Potts v. People*, 224 N.E.2d 281, 283 (Ill. 1967) (stating that the essential protection available at a criminal trial is the requirement under this clause that the accused shall have the right to appear, defend in person, and meet the witnesses face-to-face); *People v. Sorrells*, 127 N.E. 651, 653 (Ill. 1920) (stating that a defendant has the right to be confronted with those who testify against him); *Tucker v. People*, 13 N.E. 809, 811 (Ill. 1887) (holding that the Constitution guarantees a right to cross-examine and confront witnesses); *People v. McCambry*, 578 N.E.2d 1224, 1227 (Ill. App. Ct.) (stating that the Confrontation Clause was primarily designed to secure the defendant's right to cross-examine witnesses who appear against him), appeal denied, 584 N.E.2d 136 (Ill. 1991).


98. *Id.* at 1121.
United States Supreme Court interpretations of the Federal Confrontation Clause, the *Tennant* court stressed that the central function of the confrontation clause of the Illinois Constitution was to secure for the defendant the right to cross-examine a witness.\(^9\) Under the reasoning in *Tennant*, the mandates of the Illinois Confrontation Clause are met once a defendant has the opportunity to cross-examine a witness.\(^10\)

Illinois courts have also held that the admission of some hearsay statements does not violate a defendant’s confrontation rights under the Illinois Constitution.\(^11\) For example, Illinois courts have admitted statements made to medical personnel in child abuse cases.\(^12\) The Illinois Supreme Court has also allowed the spontaneous declaration hearsay exception in child abuse cases, regardless of the availability of the witness.\(^13\)

Moreover, in *People v. Wittenmyer*,\(^14\) the Illinois Supreme Court declined to adopt procedural safeguards for recording hearsay state-
ments in child sexual abuse cases.\textsuperscript{105} In refusing to adopt additional procedural safeguards, the supreme court relied on \textit{Idaho v. Wright},\textsuperscript{106} in which the United States Supreme Court rejected the same argument.\textsuperscript{107} Therefore, Illinois courts have made clear that the Illinois Confrontation Clause does not give a defendant the absolute right to confront a child witness face-to-face.\textsuperscript{108}

\textbf{D. The Illinois Child Shield Act}

Recognizing that instances of child abuse and neglect are increasing rampantly, the Illinois General Assembly has adopted many programs and procedures to protect these child-victims.\textsuperscript{109} In an attempt to protect child-victim witnesses, Illinois passed its first child shield law in 1987, allowing videotaped testimony to be admitted.\textsuperscript{110} Subsequently, in \textit{People v. Bastien},\textsuperscript{111} the Illinois Supreme Court struck down the law because the law failed to provide for contemporaneous cross-examination during the videotaping.\textsuperscript{112} In response to this

\begin{itemize}
\item \textsuperscript{105} Id. at 741. The defendant in \textit{Wittenmyer} argued that statements made to the police in child criminal abuse cases should be videotaped or tape recorded rather than handwritten to insure their reliability. \textit{Id.}
\item \textsuperscript{106} 497 U.S. 805 (1990).
\item \textsuperscript{107} Id. at 818 (''[W]e do not believe the Constitution imposes a fixed set of procedural prerequisites to the admission of such statements at trial.'').
\item \textsuperscript{109} See 1992 \textit{ABUSE \\& NEGLECT STATISTICS}, \textit{supra} note 2, at 28. In 1980, Illinois redesigned its state child protection system. \textit{Id.} The state's current programs include the Positive Youth Development Program, the Child Abuse Prevention Fund, Crises Nurseries, the Respite Care Projects, and the Cocaine Baby Helpline. \textit{Id.} In 1981, the Illinois Department of Children and Family services set up a child abuse hotline. \textit{Id.} at 6. Since its inception, the amount of incoming calls to the hotline has increased from 111,736 in 1982 to 322,748 in 1992. \textit{Id.} at 7. \textit{See also ILL. COMP. STAT. ANN. ch. 325, § 5/3 (West 1992 & Supp. 1994) (defining "abused child"); ILL. COMP. STAT. ANN. ch. 325, § 5/4 (West 1992) (imposing a duty on medical personnel to report cases of child abuse); ILL. COMP. STAT. ANN. ch. 325, § 5/5 (West 1992) (granting certain individuals the authority to take protective custody of children suspected of being abused); ILL. COMP. STAT. ANN. ch. 325, § 5/4.1 (West 1992) (defining the responsibility of the state to investigate the death of any child suspected of dying as the result of child abuse).
\item \textsuperscript{110} \textit{See ILL. COMP. STAT. ANN. ch. 725, §§ 106A-1 to -5 (1992), repealed by 1992 Ill. Laws 345. The former Child Shield Act allowed videotaped testimony to be taken outside the courtroom and used at trial. Id. The defendant and the defendant's attorney were allowed to be present during the taping. Id. Only the court and the prosecution, however, were allowed to question the child. Id.}
\item \textsuperscript{111} 541 N.E.2d 670 (Ill. 1989).
\item \textsuperscript{112} Id. at 671, 677. The \textit{Bastien} court explained that under the Illinois rules of evidence, no recognized exception existed that would allow the introduction of this type of hearsay. \textit{Id.} at 674. As such, the court held that prohibiting a defendant from cross-examining a witness at the time that the testimony was taken violated the truth-seeking
decision, the General Assembly passed the current Child Shield Act.\textsuperscript{113}

The current Child Shield Act\textsuperscript{114} allows a child-victim of sexual abuse\textsuperscript{115} to testify via one-way closed-circuit television, outside the function of the confrontation clause and, thus, the court found the statute unconstitutional. \textit{Id.} at 677.


\textsuperscript{114} 1994 Child Shield Act Amendment, \textit{supra} note 13, § 5/106B-5. Specifically, the amended Illinois Child Shield Act provides in pertinent part:

(a) In a proceeding in the prosecution of an offense of criminal sexual assault, aggravated criminal sexual assault, criminal sexual abuse, or aggravated criminal sexual abuse, a court may order that the testimony of a child victim under the age of 18 years be taken outside the courtroom and shown in the courtroom by means of a closed circuit television if:

(1) the testimony is taken during the proceeding; and

(2) the judge determines that testimony by the child victim in the courtroom will result in the child suffering serious emotional distress such that the child cannot reasonably communicate or that the child will suffer severe emotional distress that is likely to cause the child to suffer severe adverse effects.

(b) Only the prosecuting attorney, the attorney for the defendant, and the judge may question the child.

(c) The operators of the closed circuit television shall make every effort to be unobtrusive.

(d) Only the following persons may be in the room with the child when the child testifies by closed circuit television:

(1) the prosecuting attorney;

(2) the attorney for the defendant;

(3) the judge;

(4) the operators of the closed circuit television equipment; and

(5) any person or persons whose presence, in the opinion of the court, contributes to the well-being of the child, including a person who has dealt with the child in a therapeutic setting concerning the abuse, a parent or guardian of the child, and court security personnel.

(e) During the child's testimony by closed circuit television, the defendant shall be in the courtroom and shall not communicate with the jury if the cause is being heard before a jury.

(f) The defendant shall be allowed to communicate with the persons in the room where the child is testifying by any appropriate electronic method.

(g) The provisions of this Section do not apply if the defendant represents himself pro se.

(h) This section may not be interpreted to preclude, for purposes of identification of a defendant, the presence of both the victim and the defendant in the courtroom at the same time.

\textit{Id.}

\textsuperscript{115} The Illinois Child Shield Act protects child-victims of criminal sexual assault, aggravated criminal sexual assault, criminal sexual abuse, or aggravated criminal sexual abuse. 1994 Child Shield Act Amendment, \textit{supra} note 13, § 5-106B-5.

"Criminal sexual assault" of a child is defined as follows:

(a) The accused commits criminal sexual assault if he or she: \ldots
(3) commits an act of sexual penetration with a victim who was under 18
years of age when the act was committed and the accused was a family
member; or

(4) commits an act of sexual penetration with a victim who was at least 13
years of age but under 18 years of age when the act was committed and the
accused was 17 years of age or over and held a position of trust, authority or
supervision in relation to the victim.


"Aggravated criminal sexual assault" of a child is defined as follows:

(b) The accused commits aggravated criminal sexual assault if:

(1) the accused was 17 years of age or over and commits an act of sexual
penetration with a victim who was under 13 years of age when the act was
committed; or

(2) the accused was under 17 years of age and (i) commits an act of sexual
penetration with a victim who was under 9 years of age when the act was
committed; or (ii) commits an act of sexual penetration with a victim who
was at least 9 years of age but under 13 years of age when the act was
committed and the accused used force or threat of force to commit the act.

Id. § 5/12-14(b).

"Criminal sexual abuse" of a child is defined as follows:

(b) The accused commits criminal sexual abuse if the accused was under 17
years of age and commits an act of sexual penetration or sexual conduct with a
victim who was at least 9 years of age but under 17 years of age when the act
was committed.

(c) The accused commits criminal sexual abuse if he or she commits an act of
sexual penetration or sexual conduct with a victim who was at least 13 years of
age but under 17 years of age and the accused was less than 5 years older than
the victim.

Id. § 5/12-15(b), (c).

"Aggravated criminal sexual abuse" of a child is defined as follows:

(b) The accused commits aggravated criminal sexual abuse if he or she commits
an act of sexual conduct with a victim who was under 18 years of age when the
act was committed and the accused was a family member.

(c) The accused commits aggravated criminal sexual abuse if:

(1) the accused was 17 years of age or over and (i) commits an act of sexual
conduct with a victim who was under 13 years of age when the act was
committed; or (ii) commits an act of sexual conduct with a victim who was
at least 13 years of age but under 17 years of age when the act was committed
and the accused used force or threat of force to commit the act; or

(2) the accused was under 17 years of age and (i) commits an act of sexual
conduct with a victim who was under 9 years of age when the act was
committed; or (ii) commits an act of sexual conduct with a victim who was
at least 9 years of age but under 17 years of age when the act was committed
and the accused used force or threat of force to commit the act.

(d) The accused commits aggravated criminal sexual abuse if he or she commits
an act of sexual penetration or sexual conduct with a victim who was at least
13 years of age but under 17 years of age and the accused was at least 5 years
older than the victim.

. . . .

(f) The accused commits aggravated criminal sexual abuse if he or she commits
an act of sexual conduct with a victim who was at least 13 years of age but
under 18 years of age when the act was committed and the accused was 17 years
presence of the alleged attacker but still subject to cross-examination by the defendant's attorney. The current law is virtually identical to the statute upheld by the United States Supreme Court in *Maryland v. Craig.* Still, the Illinois Supreme Court found this law unconstitutional under the Illinois Constitution.

### III. DISCUSSION

In *People v. Fitzpatrick,* the Illinois Supreme Court held that the Child Shield Act violated the Confrontation Clause of the Illinois Constitution. In response to this decision, the Illinois General Assembly proposed, and the Illinois voters ratified, a constitutional amendment conforming the language of the Illinois Confrontation Clause to that of the United States Constitution's.

#### A. People v. Fitzpatrick: The Illinois Supreme Court's Invalidation of the Child Shield Act

1. The Facts and the Opinion Below

In *People v. Fitzpatrick,* George Fitzpatrick was charged with seven counts of aggravated criminal sexual assault against four of his minor grandchildren. At the time the incidents occurred, each of the grandchildren was under thirteen years of age. The State moved for an order allowing the children to testify by means of a closed-circuit

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116. 1994 Child Shield Act Amendment, supra note 13, § 5/106B-5. Essentially, the Child Shield Act attempts to balance the right of the accused to confront a witness with the right of a child-victim to escape any injury that might result from testifying in court. See Gail S. Goodman, *Understanding and Improving Children's Testimony in Child Abuse Cases,* 22 DEPARTMENT OF HEALTH & HUMAN SERVS., CHILDREN TODAY 13 (1993). In this report, the author found that children were negatively affected when required to testify in the presence of someone they feared. *Id.* at 16.


118. 633 N.E.2d 685 (Ill. 1994).

119. *Id.* at 688-89.

120. *See infra* part III.B.

121. *Fitzpatrick,* 633 N.E.2d at 686. Between June 1, 1989 and June 1, 1991, the defendant allegedly committed acts of sexual penetration against four of his grandchildren. *Id.*

122. *Id.*
television under the Illinois Child Shield Act. The State argued that the children "would suffer serious emotional or other severe adverse effects, or might be unable to reasonably communicate, absent an order allowing their testimony to be presented solely by closed-circuit television." The defendant argued that the Child Shield Act violated the Illinois Confrontation Clause because the Act would not permit him to meet the witnesses face-to-face as the text of the clause mandates. The trial court held that the Child Shield Act violated Article 1, section 8 of the Illinois Constitution by preventing the defendant from meeting the witnesses face-to-face. Thus, the trial court denied the motion to permit the children to testify by means of a closed-circuit television. The State appealed directly to the Illinois Supreme Court under Illinois Supreme Court Rule 603.

2. The Illinois Supreme Court Decision

The Illinois Supreme Court framed the central issue in Fitzpatrick as whether the Child Shield Act violated the confrontation clause of the Illinois Constitution. Answering in the affirmative, the court began its discussion by analyzing the principles of statutory construction applicable to constitutional provisions. First, the court reiterated its primary rule of statutory construction: "[T]o ascertain and give effect to legislative intent." The court then noted that statutory language best evidences legislative intent. The court reasoned that since the language in the Illinois Constitution was clear and unambiguous, the General Assembly’s intent was to grant an accused the absolute right to confront witnesses.

The court next evaluated the language of the Illinois Constitution in light of the United States Supreme Court’s decision in Maryland v.
Distinguishing *Craig*, the court explained that the face-to-face language in the Illinois Confrontation Clause renders *Craig* inapplicable because the United States Constitution has no express face-to-face language. The court further noted that it was not bound to follow the lockstep doctrine of constitutional interpretation, and thus could interpret the Illinois Confrontation Clause differently than the *Craig* Court.

In reaching this conclusion, the court relied on a Pennsylvania Supreme Court decision which held that face-to-face language in its constitution meant that a defendant had a right to a physical face-to-face confrontation, and therefore precluded a child from testifying via one-way television. The Pennsylvania Supreme Court reasoned that the language in its constitution clearly expressed the intent of the legislature and, therefore, refused to depart from the legislative intent embodied in the text of its constitution. Like the Pennsylvania Supreme Court, the *Fitzpatrick* court found the language in the Illinois Constitution to be clear and unambiguous, and thus applied a textual interpretation instead of the Supreme Court's decision in *Maryland v. Craig*. Accordingly, the court held that the Illinois Child Shield Act violates the confrontation clause of the Illinois Constitution.
3. The Dissenting Opinion

In his dissenting opinion, Justice Freeman criticized the majority for failing to demonstrate that the substance of the Illinois Confrontation Clause protects different interests than the Confrontation Clause in the United States Constitution. Justice Freeman emphasized that the court itself previously determined that the Federal and Illinois Confrontation Clauses are meant to protect the same interests. Thus, he reasoned that "the difference in phraseology can provide no basis for the distinction the majority seeks to make."

With this conclusion in mind, Justice Freeman next focused on the majority's dismissal of the Craig interpretation of the Confrontation Clause. While he agreed that the Illinois Supreme Court was not bound to follow United States Supreme Court decisions on similar state and federal constitutional provisions, Justice Freeman argued that the court needed a substantive basis to justify a departure from federal interpretations. He reasoned that a mere difference in language in a state constitutional provision was not a substantive reason to depart from Supreme Court interpretations of a similar federal constitutional provision. Instead, Justice Freeman explained that the court should

144. Justice Miller joined in Justice Freeman's dissenting opinion. Id. at 692 (Freeman, J., dissenting).

145. Id. at 689 (Freeman, J., dissenting).

146. Id. (Freeman, J., dissenting). Justice Freeman emphasized that the Illinois Supreme Court has previously stated that "[d]espite the language difference, the two clauses are meant to protect the same interest." Id. at 690 (Freeman, J., dissenting) (quoting People v. Tennant, 358 N.E.2d 1116, 1119 (Ill. 1976)).

147. Id. at 689 (Freeman, J., dissenting).

148. Id. at 690 (Freeman, J., dissenting).

149. Id. (Freeman, J., dissenting). Justice Freeman indicated that in many prior decisions, including People v. Levin, 623 N.E.2d 317 (Ill. 1993), cert. denied, 115 S. Ct. 94 (1994), the court focused on legislative intent rather than a strictly textual approach to interpreting a particular constitutional clause. Fitzpatrick, 633 N.E.2d at 690 (Freeman, J., dissenting). Justice Freeman stressed that "[u]ntil now, this court has consistently rejected the majority's approach to constitutional construction as inadequate." Id. (Freeman, J., dissenting).

150. Id. (Freeman, J., dissenting) (citing People v. Levin, 623 N.E.2d 317 (Ill. 1993), cert. denied, 115 S. Ct. 94 (1994)).

In Levin, the defendant argued that the difference in language between the Illinois Double Jeopardy Clause and the Federal Double Jeopardy Clause afforded more protection under the Illinois Constitution. Levin, 623 N.E.2d at 328. The Double Jeopardy Clause in the Fifth Amendment provides in pertinent part "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." U.S Const. amend. V. The Illinois Constitution provides in pertinent part that "no person shall be . . . twice put in jeopardy for the same offense." Ill. Const. art. I, § 10. The court rejected the defendant's argument, and suggested that the defendant needed to demonstrate a more substantive basis than the textual difference to prove that the Illinois Double Jeopardy Clause was intended to offer greater protection than its federal counterpart. Levin, 623
look to legislative intent in order to find a substantive basis to depart from federal interpretations of similar constitutional provisions. Justice Freeman questioned the majority's satisfaction with a "clear and unambiguous" approach especially since the "majority offer[ed] no reason why this approach is now sufficient." To rebut the majority's reliance on the Pennsylvania interpretation, he cited a Missouri case which followed the reasoning in Craig, and held that recorded testimony did not violate the state's constitution despite the face-to-face language in its confrontation clause.

 Justice Freeman reasoned that because the Illinois Supreme Court generally relies on the lockstep doctrine, as evidenced in Tennant, the court should have applied the Craig test. This is especially true, he explained, where precedent indicates that there is no substantive difference between the Illinois and Federal Confrontation Clauses. Justice Freeman concluded his dissent by criticizing the majority for an unsupported and flawed decision which "offers no valid basis for the invalidation of the Child Shield Act."

B. The Aftermath of Fitzpatrick: A Constitutional Amendment

Initially, the Fitzpatrick decision nullified the Illinois Child Shield Act. Within one month, however, the Illinois General Assembly drafted an amendment to the Illinois Constitution to reverse the

N.E.2d at 328.
151. Fitzpatrick, 633 N.E.2d at 690 (Freeman, J., dissenting).
152. Id. at 690 (Freeman, J., dissenting).
153. Id. at 691 (Freeman, J., dissenting).
154. Id. (Freeman, J., dissenting). Justice Freeman offered State v. Schall, 806 S.W.2d 659 (Mo. 1991), cert. denied, 112 S. Ct. 976 (1994), to counterbalance the majority's use of Commonwealth v. Ludwig, 594 A.2d 281 (Penn. 1991). Fitzpatrick, 633 N.E.2d at 691 (Freeman, J., dissenting). He argued that both Craig and Schall permit the deprivation of a face-to-face encounter where "legitimate policy considerations and adequate safeguards for the reliability of evidence are present." Id. (Freeman, J., dissenting).
155. See supra notes 97-100 and accompanying text for a discussion of Tennant.
156. Fitzpatrick, 633 N.E.2d at 691 (Freeman, J., dissenting).
157. Id. (Freeman, J., dissenting).
158. Id. (Freeman, J., dissenting). Arguing that a substantive basis is necessary to depart from federal interpretations, Justice Freeman emphasized that, "[b]ecause the language of our constitution cannot compel the result reached here, the majority leaves us with a result unsupported by law and flawed in its reasoning." Id. (Freeman, J., dissenting).
effects of *Fitzpatrick*. The General Assembly then passed a resolution which would replace the face-to-face language construed by the *Fitzpatrick* court as unconstitutional. This new language, giving an accused the right "to be confronted with the witnesses against him or her," is essentially the language contained in the United States Constitution. On November 8, 1994, voters of the State of Illinois approved the constitutional amendment, thereby changing the language of the Illinois Constitution, and rendering the *Fitzpatrick* decision a nullity.

IV. ANALYSIS

A. The Fitzpatrick Decision

Despite the constitutional amendment which nullifies the holding in *Fitzpatrick*, the court's reasoning is instructive because it foreshadows the current Illinois Supreme Court's view on constitutional, and perhaps statutory, interpretation. By strictly adhering to a textual approach in *Fitzpatrick*, the court seemingly ignored both the legislative history of the Illinois Confrontation Clause and the court's own precedent.

1. Applying Legislative Intent

The *Fitzpatrick* court correctly recognized that "the primary rule of statutory construction is to ascertain and give effect to legislative intent." The court nevertheless sidestepped an analysis of the legislative history of the Illinois Confrontation Clause by determining that the clear and unambiguous language of the clause negates the need

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160. See David Heckelman, *Senate Kills Proposal to Create Separate Criminal High Court*, CHI. DAILY L. BULL., Apr. 15, 1994, at 1 (explaining that the Senate passed a resolution 56-0 to change the constitution to reverse the effect of *Fitzpatrick*); see also David Heckelman, *Deadline Looms for Video Testimony Measure*, CHI. DAILY L. BULL., Apr. 28, 1994, at 1 (explaining that the house voted 117-0 in favor of the amendment).

161. *PROPOSED AMENDMENTS, supra* note 27.

162. See *supra* note 24 for the relevant text of the United States Constitution.

163. Illinois voters approved the amendment 62.73% in favor, and 37.27% against. *ILLINOIS STATE BOARD OF ELECTIONS, OFFICIAL VOTE CAST AT THE GENERAL ELECTION ON NOVEMBER 8, 1994* at vii (1994).


165. See *supra* part III.B.

166. See *supra* note 141-42 and accompanying text.

to resort to legislative history to determine intent.\textsuperscript{168}

The court's reluctance to examine legislative history to determine the meaning of the Illinois Constitution is flawed because legislative intent is the basis for statutory construction and is appropriately determined by a review of legislative history.\textsuperscript{169} Although the court relied on three prior Illinois Supreme Court cases\textsuperscript{170} to support its failure to review legislative history to determine legislative intent,\textsuperscript{171} these cases did not involve the interpretation of constitutional provisions, but merely involved the interpretation of statutory and administrative provisions.\textsuperscript{172}

While it may be appropriate to determine legislative intent from the face of statutes, it is far less appropriate to determine legislative intent from the face of a constitution.\textsuperscript{173} The court itself has recognized that the determination of the legislative intent behind a constitution is better evidenced by a review of the text and legislative history.\textsuperscript{174} In fact, the

\textsuperscript{168} Id.

\textsuperscript{169} The court itself has recognized that in departing from federal interpretations, a court should construe similar provisions in the state and federal constitutions differently when the language, debates, or committee reports construe similar provisions in a different way from the United States Supreme Court. People v. DiGuida, 604 N.E.2d 336, 342 (Ill. 1992). The debates and committee reports do not indicate that the Illinois Confrontation Clause is construed differently than the Federal Confrontation Clause. See supra notes 86-88 and accompanying text.


\textsuperscript{171} Fitzpatrick, 633 N.E.2d at 687-88.

\textsuperscript{172} People ex rel. Baker v. Cowlin, 607 N.E.2d 1251, 1252 (Ill. 1992) (interpreting sentencing guidelines); Business & Professional People for the Pub. Interest, 585 N.E.2d at 1037 (interpreting the Public Utilities Act); Boykin, 445 N.E.2d at 1175 (interpreting a statute relating to eligibility for supervision).

\textsuperscript{173} See Rock v. Thompson, 426 N.E.2d 891, 901 (Ill. 1981) (holding that "[i]n the construction of a constitution courts should not indulge in speculation apart from the spirit of the document, or apply so strict a construction as to exclude its real object and intent.") (emphasis added) (citation omitted).

\textsuperscript{174} People v. Tisler, 469 N.E.2d 147, 155-56 (Ill. 1984); see also People v. DiGuida, 604 N.E.2d 336, 342-43 (Ill. 1992) (explaining that the court might depart from federal interpretation of similar constitutional provisions if the language and legislative history show that the framers of the state constitution intended a different meaning); People ex rel. Daley v. Joyce, 533 N.E.2d 873, 875-76 (Ill. 1988) (examining legislative history in interpreting the right to a trial by jury).

The court's reasoning in Tisler is instructive:

After having accepted the pronouncements of the Supreme Court in deciding fourth amendment cases as the appropriate construction of the search and seizure provisions of the Illinois Constitution for so many years, we should not suddenly change course and go our separate way simply to accommodate the desire[s] of the defendant.

\textit{Tisler}, 469 N.E.2d at 157.
court has stated that: "Effective constitutional interpretation requires that, where possible, provisions be construed in a manner consistent with other provisions relevant to the same subject matter, and that we look to the whole enactment to determine its purpose." 175 Because the Fitzpatrick court refused to examine the "whole enactment," it failed to uncover the General Assembly's belief that the Illinois and United States Confrontation Clauses protect the same interest. 176 Because an examination of legislative history is far more likely to uncover the true intent of the framers, 177 the Fitzpatrick court set a dangerous precedent by ignoring legislative history and construing the constitution narrowly.

Accordingly, the Fitzpatrick court should have examined both the text of the Illinois Confrontation Clause and the legislative history surrounding its enactment to justify a diversion from federal interpretations of the Sixth Amendment. Such an examination, however, would have failed to justify striking down the Child Shield Act, because the two clauses are meant to protect the same interests. 178 The court, in effect, concluded that the General Assembly intended a defendant's right to confront a child sexual abuse victim to be absolute. Surely, the Framers of the Illinois Constitution did not envision the Fitzpatrick court's conclusion, especially in light of the legislative history. 179

2. Prior Precedent

As Justice Freeman emphasized in his dissent in Fitzpatrick, 180 the majority ignored precedent in interpreting the meaning of the Illinois Confrontation Clause. 181 First, the majority did not explain its departure from its previous explicit statement that "[d]espite the language difference, the . . . [Illinois and United States Confrontation

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176. See supra note 87 and accompanying text.


178. See supra notes 86-88 and accompanying text.

179. See supra notes 86-88 and accompanying text. The majority summarily concluded that a child who is examined out of the presence of the defendant does not provide the defendant with the face-to-face encounter envisioned by the drafters of the Illinois Constitution. Fitzpatrick, 633 N.E.2d at 687. The court, however, made no attempt to discern the scope of the drafters' intent. Id.

180. Fitzpatrick, 633 N.E.2d at 689 (Freeman, J., dissenting).

181. See supra notes 97-108 and accompanying text.
Clauses] are meant to protect the same interest." Since the Child Shield Act does not hinder an accused's right to cross-examine witnesses, the Fitzpatrick court could have relied on its prior decision in Tennant to find the Child Shield Act constitutional.

Second, the Fitzpatrick court ignored its established recognition that the right to face-to-face confrontation is not absolute. Even a cursory review of the court's prior decisions reveals that its interpretation of the Illinois Confrontation Clause is not static. The court has consistently upheld exceptions to the right to face-to-face confrontation under Illinois evidence rules. Thus, contrary to the Fitzpatrick court's reasoning that the "clear and unambiguous" language of the Illinois Confrontation Clause grants an accused an "express and unqualified right" to a physical confrontation, the Illinois Supreme Court has itself previously held that it does not.

182. People v. Tennant, 358 N.E.2d 1116, 1119 (Ill. 1976), cert. denied, 431 U.S. 918 (1977). The Tennant court followed the Supreme Court's analysis beginning with Mattox v. United States, 156 U.S. 237 (1895). In Mattox, the Court described the purpose of the Confrontation Clause as follows:

The primary object of the constitutional provision in question was to prevent depositions or ex parte affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.

Mattox, 156 U.S. at 242-43 (emphasis added). The Tennant court, in addition to Mattox, also cited 5 WIGMORE ON EVIDENCE, § 1395 (Chadbourn rev. ed., 1974).

Tennant, 358 N.E.2d at 1119.

183. See supra notes 97-100 and accompanying text.

184. See supra notes 97-108 and accompanying text.

185. The court has recognized for almost 100 years such hearsay exceptions as the testimony from a prior trial exception and the official documents exception. See, e.g., Gillespie v. People, 52 N.E. 250 (Ill. 1899) (allowing transcript from former trial to be read to jury without violating the right to confrontation); Tucker v. People, 13 N.E. 809 (Ill. 1887) (permitting the introduction of a marriage certificate to prove bigamy).

186. See supra notes 97-108 and accompanying text for a discussion of hearsay exceptions.


188. Id.

189. Justice Freeman suggested that the court's strict plain meaning interpretation of the confrontation clause could abrogate all hearsay exceptions. Id. at 690 (Freeman, J., dissenting). Such a result, however, is unlikely. Just two weeks prior to the decision in Fitzpatrick, the court in People v. West, 632 N.E.2d 1004 (Ill. 1994), faced the issue of whether the Illinois Constitution requires trial judges to give their rationale for determining whether the hearsay statements of child abuse victims bear sufficient indicia of reliability under ILL. REV. STAT. ch. 38, para. 115-10 (1989) (current version at ILL. COMP. STAT. ANN. ch. 725, § 5/115-10 (West 1992 & Supp. 1994)).
B. The Constitutional Amendment

The Illinois Supreme Court distinguished Craig based on the "face to face" language contained in the Illinois Constitution at the time of the Fitzpatrick decision. Since the constitutional amendment deleted the face-to-face language, and replaced it with language that mirrors the United States Confrontation Clause, the United States Supreme Court's reasoning in Craig becomes much more relevant to any subsequent challenge to the Illinois Child Shield Act. Indeed, if the new law is challenged, the Illinois Supreme Court will likely apply the Craig test.

Applying the Craig test, it becomes evident that the Illinois Child Shield Act comports with the Confrontation Clause of the United States Constitution. First, the Child Shield Act requires a case-specific finding that the child-victim will suffer serious emotional distress if required to testify in the courtroom. Next, the Child Shield Act requires the trial judge to find that the child will suffer more than de minimis harm if required to testify in court, satisfying the second prong of the Craig test.

Finally, although the Illinois Child Shield Act does not state that protecting children is an important public policy, the Craig Court did not require such a recitation to satisfy the final prong of the test. The Craig Court was satisfied that the protection of child-victims of criminal sexual abuse is an important public policy since so many

forth the child abuse hearsay exception. West, 632 N.E.2d at 1008. The Illinois Supreme Court held that the trial judge does not have to give the reasons, nor would it impose such a requirement, and allowed the hearsay statement into evidence. Id.


191. See supra note 24 for the text of the Federal Confrontation Clause.

192. See supra note 80 and accompanying text.

193. 1994 Child Shield Act Amendment, supra note 13, § 5/106B-5(a)(2). The Illinois Child Shield Act requires that the judge make a finding that the child would be traumatized by "testifying in the courtroom." Id. This language mirrors the language of the Maryland statute analyzed by the United States Supreme Court and found to be constitutional. See supra note 75.

In Craig, the Court held that the trial court must make a specific finding that the defendant would be the cause of the trauma. 497 U.S. at 860. Because the Illinois Child Shield Act does not set out a requirement that the child be traumatized by testifying in front of the defendant, the Illinois Supreme Court could again find the Child Shield Act unconstitutional. Nevertheless, because this result would clearly be contrary to the intent of both the Illinois General Assembly and Illinois voters, this result is not likely.


195. See Craig, 497 U.S. at 853.
states have enacted protective statutes. Moreover, the Court itself recognized that a state’s interest in “the protection of minor victims of sex crimes from further trauma and embarrassment” is a ‘compelling’ one.” Therefore, due to the protective nature of the Illinois Child Shield Act, the Act would most likely satisfy the final prong of the Craig test.

Based on this analysis, the Child Shield Act will likely withstand any future constitutional challenges. Although the Illinois Supreme Court is still not required to apply Craig, the clear message sent by the Illinois General Assembly and voters, coupled with the court’s prior decisions, leaves the court little room to once again sidestep the Craig analysis.

V. IMPACT

A. The Impact of Fitzpatrick on Constitutional Interpretation

While the constitutional amendment to the Illinois Confrontation Clause nullified the impact of Fitzpatrick on the Child Shield Act, the court’s decision set a dangerous precedent for constitutional interpretation. In the future, when the language of the Illinois Constitution differs from the United States Constitution, the court may apply a strict textual approach, and in the process ignore clearly defined legislative intent. This method of constitutional interpretation could lead to the invalidation of other laws which comport with legislative intent, but not the court’s interpretation of the language of the Illinois Constitution. As a result, Illinois voters may again be asked to change the constitution as a result of Illinois Supreme Court decisions.

B. The Impact of the Child Shield Law on the Right to Confrontation

Since the constitutional amendment reinstates the Child Shield Act, some have expressed concern that the new exception to face-to-face confrontation will undermine the true purpose of the confrontation clause. On the contrary, the Child Shield Act will further the

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196. Id.
197. Id. at 852 (quoting Globe Newspaper Co. v. Superior Ct. of Norfolk County, 457 U.S. 596, 607 (1982)).
198. See supra part III.B.
199. Application of this line of reasoning would follow from the court’s opinion in Fitzpatrick, 633 N.E.2d at 687.
200. See Michelle Stevens, Child Witness Law Imperils Rights, CHI. SUN TIMES, Nov. 14, 1994, at 31 (concluding that the law could limit the right to a fair trial and lead
primary purpose of the confrontation clause by mandating unfettered cross-examination of child abuse victims in an environment more conducive to obtaining the truth from children.\textsuperscript{201} Moreover, the United States Supreme Court has recognized that the use of closed-circuit television in child sexual abuses cases "may well aid a defendant in eliciting favorable testimony from the child witness."\textsuperscript{202} A child may actually be more willing to tell the truth out of court than if required to sit in front of a defendant in court.\textsuperscript{203} Additionally, studies have indicated that viewing a child’s testimony through a television will not diminish a jury’s ability to assess the credibility of the witness, allowing the primary check on false testimony to remain intact.\textsuperscript{204} Thus, the purpose of the confrontation clause—to reveal the truth—should be enhanced by the use of closed-circuit television.

Despite critics’ fear that the Child Shield Act will be expanded to apply to any witness who will suffer emotional trauma,\textsuperscript{205} neither the United States Supreme Court nor the Illinois General Assembly has created any such exception under their respective constitutions. In balancing the rights of the accused and the victim witness, the Craig...

\textsuperscript{201} Without the Child Shield Act, the alternative is to allow admission of the child’s hearsay statements without the child testifying at all. This is allowed under the Illinois evidentiary rules when the child is unavailable. \textit{See supra} notes 97-108 and accompanying text. Proof that the child would be so traumatized such that he or she could not speak can be a basis for proving the child is unavailable. \textit{People v. Rocha}, 547 N.E.2d 1335, 1340 (Ill. App. Ct. 1989).

\textsuperscript{202} \textit{Craig}, 497 U.S. at 851 (emphasis added).

\textsuperscript{203} \textit{See Gail S. Goodman, Understanding and Improving Children’s Testimony, 22 CHILDREN TODAY} 13 (1993). The author concluded that fear can affect a child’s willingness to offer information. \textit{Id.} at 15. Moreover, she also performed a study on the effect of testimony by closed-circuit television on jurors. \textit{Id.} She concluded that jurors found no significant difference in truthfulness by looking at the child on television than in court. \textit{Id.}

The medical profession also supports testifying outside the presence of an alleged attacker as a more productive method of seeking the truth in child sexual abuse cases. \textit{Stephen Ludwig & Allan E. Kornberg, CHILD ABUSE A MEDICAL REFERENCE} (2d ed. 1992). The authors, in examining the Confrontation Clause and its impact in the prosecution of sexual abusers of children concluded, "[t]o suppose that a frightened young child, threatened with physical harm or abandonment if molestation is disclosed, will testify more truthfully in the presence of an accused is dubious at best." \textit{Id.} at 438.

\textsuperscript{204} Goodman, \textit{supra} note 203, at 15. \textit{See also supra} note 47 and accompanying text.

\textsuperscript{205} \textit{PROPOSED AMENDMENTS, supra} note 27 (containing arguments against the proposed amendment, based on the fear that the Act will be expanded to include all those that may suffer from emotional trauma).
decision required a finding that the child shield law at issue furthers the important public policy of protecting child abuse victims. Therefore, it is unlikely that the Supreme Court or the Illinois General Assembly would create an exception to protect other witnesses from emotional trauma. Hence, while the opponents' concerns over the Child Shield Act pose legitimate questions, these concerns are not sufficient to overcome the constitutional analysis in Craig; or the benefit to victims of child sexual abuse.

VI. CONCLUSION

With the number of reported child abuse cases rising constantly, our society must take every appropriate measure to ensure that child-victims are protected in and out of the courtroom. The Illinois Child Shield Act accomplishes both ends by protecting child abuse victims from any further trauma which would result from testifying in court, while still allowing their testimony to be tested by the unfettered right of cross-examination.

In Fitzpatrick, the Illinois Supreme Court took a dangerous step when it departed from the lockstep doctrine to invalidate the Child Shield Act. In addition, the Fitzpatrick court seemingly ignored evidence that the drafters of the Illinois Confrontation Clause intended it to protect the same interests as the United States Constitution. Still, the court failed to follow the Supreme Court’s decision in Craig. Thus, the Illinois Supreme Court’s decision may signal a new direction for its constitutional interpretation—the authority to interpret the Illinois Constitution as the court wishes, even if its decision diverges from clearly defined legislative intent.

On the issue of child protection in the courtroom, however, the Illinois voters overruled the Illinois Supreme Court. The amendment to the Illinois Constitution reinstated the Child Shield Act, sending a message to the Illinois Supreme Court that the protection of child-victims in criminal sexual abuse cases is an important public policy.

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206. See supra note 80 and accompanying text.
207. See supra notes 2-8 and accompanying text.