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Constitutional Law -The Confrontation Clause -The Emerging Trend of Literal Interpretation -Illinois v. Fitzpatrick, 633N.E. 2d 685 (Ill. 1994).

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NOTE

Constitutional Law - The Confrontation Clause - The Emerging Trend of Literal Interpretation - *Illinois v. Fitzpatrick*, 633 N.E. 2d 685 (Ill. 1994).

In *Illinois v. Fitzpatrick*,[1] the Supreme Court of Illinois held that a statute enabling sexually abused children to present testimony via closed circuit television[2] violated the provisions of the Illinois Constitution.[3] The decision confirms the right of an Illinois criminal defendant to personally confront a child witness who will present evidence against the alleged offender at trial.[4] While the decision to strike a witness protection statute in favor of direct confrontation is not unprecedented,[5] *Fitzpatrick's* rationale starkly contrasts with the analysis utilized for nearly a century in assessing the protections afforded by the confrontation clause.[6]

In its attempt to ensure the integrity of the criminal justice system, courts have traditionally assessed the scope of the confrontation clause

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1. 633 N.E.2d 685 (Ill. 1994).
2. *Ill. Ann. Stat.* ch. 38,para. 106B-1 (Smith-Hurd Supp. 1992).
3. *Ill. Const.* arts. I, § 8.
4. For an overview of child witness protection statues in Illinois, see Jan Crawford, *Young Accusers Must Face Defendants at Sex Trials,* Chi. Trib., Feb. 18, 1994, at 1.
5. States have been, and continue to be, divided on the question of whether the confrontation clause requires a face-to-face encounter. *Compare* Commonwealth v. Willis, 716 S.W.2d 224 (Ky. 1986) (holding that videotaped testimony of child abuse victim is an acceptable substitute to a face-to-face confrontation) *with* Commonwealth v. Louden, 638 A.2d 953 (Pa. 1994) (declaring a statute permitting videotaped testimony is repugnant to state constitution).
6. For a detailed background on the evolution of interpreting the Federal Confrontation Clause, *see* Maryland v. Craig, 497 U.S. 836 (1990).

through a balancing mechanism[7] and by considering the intentions of the framers.[8] *Fitzpatrick*, in contrast, typifies a recent upsurge in a literal approach to interpreting state confrontation clauses.[9] The court in *Fitzpatrick* failed to consider public policy or judicial necessity in its interpretation.[10] Instead, it opted to effectuate the literal meaning of the text in a mechanical fashion.[11] The shortcomings of interpreting the confrontation clause in a purely literal manner are apparent upon analysis of *Fitzpatrick*.[12] While the *Fitzpatrick* court vigorously safeguarded the text of the confrontation clause, the court's analysis, ironically, jeopardizes the very objectives of the clause.

In *Illinois v. Fitzpatrick*,[13] the defendant, George P. Fitzpatrick, was charged with seven counts of Aggravated Sexual Criminal Assault[14] for knowingly committing sexual penetration against four of his minor grandchildren.[15] The State, in a pre-trial motion, requested that the trial testimony of the children, ages three to eight, be presented outside the defendant's presence.[16] The motion alleged that if the children were unable to present their testimony through closed circuit television, the children would suffer serious emotional consequences or might be inarticulate witnesses at the trial.[17]

Thereafter, the Defendant moved to declare as unconstitutional the act authorizing the out-of-court testimony.[18] Citing the Illinois confrontation clause, the defense argued that the statute eliminates the face-to-face confrontation required by the state constitution.[19] The Circuit Court of Clinton County held that the Child Shield Act was unconstitutional,[20] and the State appealed to the Supreme Court of

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7. *Id.* at 844.

8. *See* Mattox v. United States, 156 U.S. 237 (1985) (discussing the original intentions of the framers).

9. *Accord Louden*, 638 A.2d at 953; Brady v. State, 575 N.E.2d 981 (Ind. 1991).

10. *Fitzpatrick*, 633 N.E.2d at 685.

11. *Id.*

12. *See infra* notes 44-47 and accompanying text for a discussion of the potential consequences of failing to consider human interests when interpreting the confrontation clause.

13. *Fitzpatrick*, 633 N.E.2d at 685.

14. 720 *ILCS* 5/12-14 (1994) (formerly cited at as *Ill. Rev. Stat.* ch 38, para. 12-14 (1989).

15. *Fitzpatrick*, 633 N.E.2d at 685.

16. *Id.* at 686.

17. *Id.*

18. *Id.*

19. *Ill. Const.* art. I, § 8 provides in part: "In all criminal prosecutions, the accused shall have the right . . . to meet the witnesses face to face . . . ".

20. *Fitzpatrick*, 633 N.E.2d at 688-89.

Illinois.[21] By a vote of 5-2, the supreme court affirmed the judgement of the circuit court.[22]

The court began its analysis by declaring that the principles of statutory construction are applicable to constitutional analysis.[23] In the court's view, the fundamental goal of statutory interpretation is to ascertain and effectuate the legislature's intent.[24] According to the court, these objectives are best evidenced by the actual language selected by the drafters.[25] "Clear and unambiguous" language, the court noted, is not subject to judicial interpretation.[26] After enunciating these guiding principles, the court opined that the Illinois confrontation clause is "clear and unambiguous."[27] The court was therefore bound to the literal meaning of the clause, which granted the accused the right to "meet the witness face to face."[28] Since the statute abrogated the right of a criminal defendant to personally confront a witness, the statute was struck down as unconstitutional.[29]

The court then examined the State's contention that a criminal defendant's right to confrontation is not abridged by the statute.[30] The State contended that the court should adopt the rationale of *Maryland v. Craig*.[31] Extending the same literal reasoning, the court differentiated *Fitzpatrick* from the conflicting United States Supreme Court decision.[32] The court compared the phraseology of the Federal Confrontation Clause[33] with its Illinois counterpart.[34] The language variation, the

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21. *Id.* at 686.

22. *Id.* at 689. The dissent disagreed with the majority's conclusion that the right to confrontation was absolute under the Illinois Constitution. *Id.* at 689-90.

23. *Id.* at 687.

24. *Id.* (citations omitted).

25. *Fitzpatrick*, 633 N.E.2d at 687. (citing Kraft, Inc. v. Edgar, 561 N.E.2d 656 (Ill. 1990) and explaining that legislative intent is best evidenced by the language chosen by the legislature).

26. *Fitzpatrick*, 633 N.E.2d at 687. (citing People *ex rel.* Baker v. Cowlin, 607 N.E.2d 1251 (Ill. 1992) (declaring clear statutory language is to be given intent without resort to other aids, such as legislative history)).

27. *Fitzpatrick*, 633 N.E.2d at 687.

28. *Id.*

29. *Id.* at 688.

30. *Id.* at 687-88.

31. 497 U.S. 836 (1990).

32. *Fitzpatrick*, 633 N.E.2d at 687-88. In *Craig*, the court upheld a child witness protection statute similar to the statute in *Fitzpatrick*. The Court opined that the Sixth Amendment does not guarantee a criminal defendant the absolute right to meet a witness face-to-face at trial. Rather, the central purpose of the Clause, ensuring the reliability of evidence, may be achieved through other means such as cross-examination and the observation of the witness' demeanor by the trier of fact. Maryland v. Craig, 497 U.S. 836, 844-860 (1990).

33. The Sixth Amendment of the United States Constitution states: "In all criminal prosecutions . . . the accused shall enjoy the right . . . to be *confronted* with the witnesses against them . . . ". *U.S. Const.* amend. VI. (emphasis added).

court postulated, distinguishes the two provisions.[35] The court acknowledged that the Federal Confrontation Clause reflects a preference for face-to-face confrontation, as opposed to a mandate.[36] According to the text of the Illinois confrontation clause, a personal encounter is necessary.[37] Therefore, the *Fitzpatrick* court dismissed *Craig* as distinguishable to the instant case.[38]

The strength of a constitution lies in its flexibility.[39] A constitution has the ability to grow and progress with a developing society. The Confrontation Clause was incorporated into the Federal Constitution in order to construct a "barrier" against trial abuses.[40] The Clause's central purpose was, and continues to be, ensuring fairness and integrity in criminal proceedings.[41] The primary mechanism in obtaining this goal has been through the cross-examination of witnesses.[42] Courts have interpreted the right to confrontation in a manner consonant with protecting the rights of the accused, as well as promoting the victim's welfare.[43] In some instances, public policy and case-specific circumstances outweigh the defendant's interest in a face-to-face confrontation with his or her accusers in court.[44] In recent years, the number of reported child abuse cases have increased disturbingly.[45] An

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34. The Illinois confrontation clause states: "In all criminal prosecutions, the accused shall have the right to . . . meet the witness *face to face* . . . . *Ill. Const.* art., I § 8. (emphasis added).

35. *Fitzpatrick*, 633 N.E.2d at 688.

36. *Id. See also* Mattox v. United States, 156 U.S. 237, 243-44 (1895) (admitting prior testimony and dying declarations where the declarant is deceased); *Craig*, 497 U.s. at 848 (citing Ohio v. Roberts, 448 U.S. 56, 63 (1980) (observing that literal reading of the Confrontation Clause would eliminate virtually every hearsay exception).

37. *Fitzpatrick*, 633 N.E.2d at 688.

38. *Id.*

39. *See* Commonwealth v. Willis, 716 S.W.2d 224, 231 (Ky. 1986).

40. *Craig*, 497 U.S. at 851 (quoting California v. Green, 399 U.S. 149, 179 (1990) Harlan, J., concurring)); *see also Mattox*, 156 U.S. at 242 (concluding that an object of the Confrontation Clause is to prevent trial abuses such as conviction by affidavit and absentee witnesses).

41. *See Craig*, 497 U.S. at 834; *see also* People v. Tennant, 358 N.E.2d 1116, 1119 (Ill. 1976) (concluding that, despite the difference in language, the Federal Confrontation Clause and its state counterpart are meant to project the same interests).

42. *See Tennant*, 358 N.E.2d at 1149. In *Tennant*, the Supreme Court of Illinois noted tha tcross-examination is the essential purpose of confrontation. According to the court, confronting the witness is an "accidental" result of confrontation. *Id. Cf.* Coy v. Iowa, 487 U.S. 1012, 1024 (1987) (quoting *Green*, 399 U.S. at 157 (recognizing that the literalright to confront forms "the core of values furthered by the Confrontation Clause")).

43. The United States Supreme Court described this balancing as follows: "[G]eneral rules of law . . . however beneficial in their operation and valuable to the accused, must occasionally give way to considerations of public policy and the necessities of the case." *Mattox*, 156 U.S. at 243.

44. *See, e.g., id.* at 242-43.

45. For an account of the child abuse crisis in the United States, *see* Gail S. Goodman, et al.,

awareness of the difficulty involved in detecting and prosecuting these crimes has also heightened.[46] Simultaneously, the criminal justice system has been criticized for its insensitive treatment of child witnesses.[47] In response, the majority of states have enacted legislation to accommodate child witnesses.[48] These statutes were promulgated to insure the reliability of a child's testimony and to protect juvenile victims from additional trauma and embarrassment.[49]

Sexually abused children are particularly vulnerable to the distresses of the legal system.[50] This anxiety is intensified when a child testifies face-to-face against his or her alleged abuser in a courtroom.[51] The uneasiness associated with this confrontation may have a negative impact on the child's ability to testify completely and accurately[52] and may also distort the jury's evaluation of the testimony's truthfulness.[53] Additionally, the physical and psychological well-being of child witnesses may be adversely impacted by facing an alleged abuser in open court.[54] As a result, a face-to-face confrontation is inconsistent with the state's interest in promoting both reliable testimony and child welfare.[55]

Some courts, in contrast, have been critical of the child witness protection statutes and have assessed their practical consequences differently.[56] These courts have noted that children are substantially more vulnerable to suggestions than adults and may not be able to differentiate truth from fantasy.[57] By requiring a personal confrontation, the youth may be deterred from telling falsehoods, or the child whose

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46. *Id.* at 24. The difficulty, in large part, can be attributed to the fact that the abuser is often a close friend or relative of the child, making it difficult for the victim to testify. In addition, often there are no other witnesses except the victim and, without his or her testimony, there is no case. *Id.*

47. For a discussion regarding the impact of the criminal justice system on children, *see* generally Goodman, *supra* note 45.

48. For an explanation of the particular ameliorative measures, as well as a state-by state statutory overview, *see* Robert H. King, Jr., *The Molested Child Witness and the Constitution: Should the Bill of Rights Be Transformed into the Bill of Preferences?* 53 OHIO ST. L.J. 49, 54-58 (1992).

49. *See, e.g.*, Commonwealth v. willis, 716 S.W.2d 224, 231 (Ky. 1986) (intimidating child witness as a factor in enacting statute).

50. *See* Goodman, *supra* note 45, at 13.

51. *Id.*

52. *Id.* at 26.

53. *Id.* at 29.

54. *Id.* at 21.

55. Several courts have reached this conclusion. *E.G.*, Maryland v. Craig, 497 U.S. 836, 857 (1990); Brady v. State, 575 N.E.2d 981, 991 (Ind. 1991).

56. *See, e.g., Craig*, 497 U.S. at 868 (Scalia, J., dissenting) (suggesting that the underlying motive of the statute is to assist prosecutors in getting more criminal convictions).

57. *Id. See also* King, *supra* note 48, at 90-93.

testimony is prompted by an adult may be detected.[58] The results of the court's balancing, however, are secondary to the actual balancing test itself.

In assessing the constitutionality of a statute, a court's analytical approach determines the threshold issue. The essential question in the traditional test is whether the statute preserves the fairness envisioned by the framers.[59] The particular provisions of the statute are integral in determining if the legislation meets constitutional muster.[60] While the right to confrontation is not disregarded, the rights of the public are not sacrificed in order to afford the accused with a nonessential benefit.[61]

The literal approach, exhibited in *Fitzpatrick*, considers only the text of the constitution and whether the statute prohibits a face-to-face confrontation.[62] This mechanical reasoning presupposes literary precision on the part of the framers.[63] Furthermore, this approach places more credence in the court's own interpretation, than in Illinois precedent that indicates the right of confrontation is not absolute.[64]

The most compelling criticism of the traditional approach is that the interpretation is purely judicial interest-balancing.[65] Courts utilizing literal analysis, however, often employ a similar balancing test because ascertaining whether the text is clear and unambiguous is necessarily judicial interest-balancing.[66] Regardless of their approach to interpreting the clause, courts aim to effectuate ordinary legal meaning.[67]

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58. *See* Pointer v. Texas, 380 U.S. 400 (1964) (intimating that is may be more difficult to tell a lie if directly confronted by the defendant).

59. People v. Tennant, 356 N.E.2d 1116, 1119 (Ill. 1976).

60. *Fitzpatrick*, 633 N.E.2d at 688. (Freeman, J., dissenting).

61. *See* Mattox v. United States, 156 U.S. 237, 243 (1895) (adhering to the technicalities of constitutional provisions may occasionally be carried farther than the safety of the public will warrant).

62. *See Fitzpatrick*, 633 N.E.2d at 687.

63. The *Fitzpatrick* court assumed that the framers of the Illinois Constitution intended to differentiate the state Confrontation clause from the federal Confrontation Clause solely because the state clause contains the phrase "face-to-face" instead of "confront." *See supra* notes 33 & 34 for the texts of both constitutional provisions.

64. *See, e.g.*, People v. Ferguson, 101 N.E.2d 522 (Ill. 1951) (holding that criminal defendant is not entitled as a matter of right to personally confront witness in proceedings to correct the record).

65. *See* Maryland v. Craig, 497 U.S. 836 870 (1990) (Scalia, J., dissenting) (conducting an interest-balancing analysis and then adjusting the meaning of confrontation to comport with finding is improper).

66. For example, the Supreme Court of Illinois opined in *Fitzpatrick* that the Confrontation Clause was unambiguous and required no further interpretation. *Fitzpatrick*, 633 N.E.2d at 687. The court opted, however, to employ a balancing test to interpret the state's double jeopardy clause which provides: "No person shall . . . twice be put in jeopardy for the same offense." *Ill. Const. Art.* I, § 10. The court considered the intent of the provision and read an exception into the seemingly unambiguous language of the clause. *See* People v. Levin, 623 N.E.2d 317 (Ill. 1993).

67. *See* Kraft, Inc. v. Edgar, 561 N.E.2d 656 (Ill. 1990) (discussing the goals of statutory

The confrontation clause and child witness protection statutes were both framed in response to humane concerns.[68] When a court balances the competing interests of the defendant and the victim, the considerations are unmistakably humane. In contrast, by interpreting the confrontation clause in a literal vacuum, the court in *Fitzpatrick* eliminates from the constitution and the statute, the pervasive element of humanity. Thus, the more enlightened and accurate approach to determining whether the clause is infringed is by focusing on the intentions conveyed by the framers, not on the literal language.

If the movement toward a purely mechanical interpretation continues, criminal defendants will embrace their state constitutions for protections that were not intended by the framers. Furthermore, the attempts of state legislatures to enact laws for the betterment of society will be hampered. As *Fitzpatrick* illustrates, the court has removed the humanity from the law; as a result, if the confrontation clause is interpreted literally, the goal of a fair trial for both the defendant and the victim may never be realized.

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interpretation).

68. *See supra* notes 6 & 45 and the accompanying text for a discussion regarding the humane considerations that promulgated the clause and the statute.