Who will be heard? Using Minow's approaches to legal analysis to understand court decisions about facilitated communication

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Abstract

In this paper I look at two court cases that considered the admissibility of out of court statements or direct testimony made by people using facilitated communication. *Matter of M.Z. et al* (1992) dealt explicitly with the admissibility of testimony made by a ten-year old girl using facilitated communication, in which she alleged sexual abuse by a family member. *Hahn v. Linn County* (2002) was about the refusal of a county to pay an agency for provision of facilitated communication. Minow's (1990) three approaches to legal analysis (*abnormal-persons; rights-analysis;* and *social-relations approaches*) provided a useful framework for interrogating the two decisions. While using Minow's framework to examine the two decisions, I consider the possible implications of discourses of disability and disability research for participation in the legal setting. Which regimes of truth are established and re-established in this setting? Lastly, I make some suggestions about how the courts might embrace Minow's social relations approach in more obvious ways.

1. Introduction

In this paper I look at two court cases that considered the admissibility of out of court statements or direct testimony made by people using facilitated communication (part of a larger examination of six cases; Morton, 2006a, 2006b). Both cases reported in this study were, directly or indirectly, resulting from reports of allegations of abuse. *Matter of M.Z. et al* dealt explicitly with the admissibility of testimony made by a ten-year old girl using facilitated communication, in which she alleged sexual abuse by a family member. *Hahn v. Linn County* was about the refusal of a county to pay an agency for provision of facilitated communication. One of the reasons presented for not paying for, or providing, facilitated communication was fear of false allegations of abuse. The county had previous experience of a former local police chief accused of abusing his son, and this case had been dismissed.

At first glance, the cases appear quite unalike. *Matter of M.Z.* was a 1992 preliminary hearing in a family court case. The defense attorney had requested a *Frye* hearing, arguing that the technique of facilitated communication was a *novel scientific technique.* The issue was not about whether the particular child, *M.Z.* could communicate. The issue was whether or not anybody could reliably communicate using facilitated communication. *Hahn v. Linn County* was a disability discrimination case heard in a U.S. District Court in 2002. The judge in decided that the pivotal issue was whether or not the plaintiff, Mr Douglas Hahn, could communicate using facilitated communication.

Legal decisions convey much more than the narrow application of precedent. Minow (1990) and Austin (1994) both suggest that decisions and analyses can be read for their expression of the worldviews that shape those analyses. Minow (1990) and Denno (1997) both present detailed analyses of cases, drawing out the worldviews expressed in those cases. Minow (1990) ultimately argues for a *social-relations* approach to legal analysis. Denno (1997) similarly makes the case for a more contextualized approach to considerations of competence.

In the rest of this paper I describe Minow's framework for approaches to legal analysis. I then present the arguments and decisions in the two cases. The next part applies Minow's framework to the decisions, and also identifies ways of thinking about science and about disability that make these analyses possible (i.e. the larger worldviews that underpin the attorneys' arguments and the judges' decisions). I suggest that Minow's social relations approach to legal analysis offers a way to counter the dominant empiricist discourses of disability research in the legal setting. I conclude the paper with some suggestions about how the courts might embrace Minow's social relations approach in more obvious ways.

2. The framework for analysis

A product of legal analysis, according to Minow (1990) and to King and Piper (1995), is the reduction of complex issues to fit into simplified, pre-existing categories for analysis and comparison. On one level, law can present itself as a neutral process, the simple application of precedent. Yet, Minow (1990) argues,

the choice of appropriate pre-existing categories, precedent, is always contestable.

> In the United States, litigation is based on the adversary system. This system is founded on the belief that the most effective way to arrive at just results in litigation is for each side of a controversy to present the evidence that is most favorable to its position and to let a neutral judge or jury sift through the conflicting evidence and decide where the truth lies. In other words, the truth emerges from a clash of legal adversaries in the controlled environment of a courtroom. (Myers, 1992, p. 2, my emphases)

The attorneys have the task of selecting the relevant traits or aspects of a case, in order to identify the relevant case law or precedent that will allow evidence "that is most favorable" to their client's position. They must successfully and aggressively make the argument that the precedent they have distinguished best fits the issues at hand. With Minow (1990), Stubbs (1993) argues that judges have and exercise choice in their application of precedent, "delimiting the scope of statues and distinguishing and rejecting authorities" (Stubbs, 1993, p. 464). As Minow puts it, "The judge then selects the winning side" (1990, p. 2). Once the relevant precedent is chosen, the outcomes are often reasonably predictable: the judge chooses the winning argument, "accepting the consequences assigned to particular legal categories" (Minow, 1990, p. 1).

Minow's (1990) description of three approaches to legal analysis provides a useful framework for interrogating the two decisions. The abnormal-persons approach "treats classifications on the basis of mental incompetence as natural

and immutable" (p. 105). Of particular interest is the person's competence. This idea is important to this study because one of the attorneys' strategies is to present their witnesses as competent, and to undermine the competence of the witnesses from the other side. Defense attorneys sought to present potential disabled witnesses as inherently incompetent. This strategy can be seen as located within a wider understanding of autism or of Down syndrome as invariably incompetent. According to Minow (1990), the act of denoting difference is a key component of the abnormal-persons approach to legal analysis.

> Naming another seems natural and obvious when other professionals, social practices, and communal attitudes reinforce that view – and yet these sources of confirmation may merely show how widespread and deep are the prejudice and mistaken views about the "different" person. (Minow, 1990, p. 111)

The rights-analysis approach "addresses errors in classification and invokes the rights of individuals to be free from such errors by governmental officials" (p. 105). At first glance, the rights-analysis approach represents an advance on the abnormal-persons approach, mainly because it challenges the traditional attributions of difference, as those attributions have 'mistakenly' denied access to rights on the basis of, for example, race, gender, sexuality or religion. Within a rights-analysis there are however still some attributions of differences that 'correctly' deem some individuals to be incompetent. This approach relies on an understanding of progress in disability and special education research

being a matter of better diagnosis, intervention and rehabilitation. Minow argues that the perception of an advance is illusory.

> Indeed, an examination of contemporary legal theory shows that both the traditional theories justifying rights and the major contending theories replicate the distinction between normal and abnormal persons, thus perpetuating the assumptions that trap us in the difference dilemma. (pp. 144-145)

For Minow, the dilemma of difference is an issue that the courts have yet to address:

> [W]hen does treating people differently emphasize their differences and stigmatize and hinder them on that basis? And when does treating people the same become insensitive to their difference and likely to stigmatize or hinder them on that basis? (p. 20)

According to Minow, we would expect that the rights-analysis approach would ultimately individualize the approach to be taken, and that it would ultimately replicate (reinvoke) the discourses of difference. For example, rather than revise fundamental assumptions that it is possible to tell a lot about a person's cognitive abilities by their group membership (race, gender, and so on) we just learn to revise our assessments of particular groups of people.

The social-relations approach is an emerging view that "focuses on how classifications reveal relationships of power between those who label and those who are labeled" (Minow, 1990, p. 105). Minow suggests that this approach is

starting to be adopted because of more recent awareness that mistakes have been made in how people have assigned these categories of difference, and the implications of those differences. The social-relations approach adopts a critical stance towards the assumptions that problems of difference lie within the individual, rather than in the relationships between individuals and society. This is familiar ground to social constructionists. Finally, the social-relations approach calls into question both the hidden nature of the power of the labelers, and the institutional arrangements that preserve that power.

Minow (1990) described an important set of strategies that could contribute to legal treatment of people with disabilities:

> For legal analysis, relational approaches may best be articulated as imperatives to engage an observer – a judge, a legislator, or a citizen – in the problems of difference: *Notice* the mutual dependence of people. *Investigate* the constructions of difference in the light of the norms and patterns of interpretation and institutional relationships, which make some traits matter. *Question* the relationship between the observer and the observed in order to situate judgments in the perspective of the actual judge. *Seek out* and *consider* competing perspectives, especially those of people defined as the problem. *Locate* theory within context; *criticize* practice in the light of theoretical commitments; and *challenge* abstract theories in light of their practical affects. *Connect* the parts and the whole of a situation; *see* how the frame of analysis influences what is <u>assumed</u> to be given (p.213).

3. The decisions

The descriptions of the two court cases that follow draw on material that is already in the public domain, maintaining the level of confidentiality that is present in the published legal decisions or media reports of the cases. Each description will begin with a brief background of the circumstances leading to the hearing. I then outline the decision, setting out how the judges communicate their accounts of what was relevant. I describe the judges' presentations of, and responses to, the arguments made by the attorneys.

Matter of M.Z. et al. (September 16, 1992)

This decision by Judge Minna Buck concerns a preliminary hearing on the admissibility of facilitated communication. Prior to this hearing, Micah was ten and went to a special school. She was in a class with five other children who were also ten years old with disabilities. Her teacher was using facilitated communication with Micah, who could speak, albeit with some difficulty. The teacher was also using facilitated communication with two other students in the class. On returning to school in the spring semester, Micah's school reported to the CPS. Hotline that Micah had made an allegation of sexual abuse against her father. While CPS was investigating the allegation, there was a family court order made restricting contact. Micah and her younger brother were removed from the family home and placed in foster care pending the outcome of the hearing.

This preliminary hearing, a *Frye* hearing, was held at the request of the defense attorney. The case of *Frye v. U.S.* was decided in 1923. The Supreme Court was asked to decide whether or not evidence obtained by polygraph (lie

detector) should be admissible. The Supreme Court ruled that such evidence was not admissible. The standard that was applied concerns the general acceptance of a scientific technique or theory within the relevant field or scientific community. Since the 1923 decision, *Frye* hearings have been held on the admissibility of expert scientific testimony as related to DNA testing, hypnosis as an aid to recall for victims or witnesses, and the use of validation interviews to determine the presence or absence of child sexual abuse syndrome or rape trauma syndrome as corroborating evidence. Etlinger (1995, p. 1268) notes that the *Frye* standard of general acceptance requires more than demonstrating that the "underlying theory and research technique are scientifically valid." According to Etlinger, a dilemma that courts face when using the *Frye* standard is that "the basis for acceptance in the relevant scientific community is, ironically, not necessarily measured by scientific reliability or validity. Consensus in the scientific community does not necessarily represent empirical verification" (p. 1269).

In a section titled "The nature of the evidence" Judge Buck begins her decision with a brief synopsis of facilitated communication. Judge Buck's description is prefaced with "as described to the court" and "according to its practitioners" (p. 565). This background section concludes with a description of Micah: "the individual whose 'facilitated communication' is at issue in this hearing is one of the subject children, a 10-year-old partially verbal child afflicted with Down's syndrome" (p. 565).

Considering the arguments

Her first decision was that the *Frye* standard was applicable. This section of the decision covers the scope of the *Frye* hearing. Judge Buck sets out four issues. First, she considers the applicability of the *Frye* test. Judge Buck determined that *Frye* was appropriate, even in considering "soft sciences" but "with an emphasis on the reliability of the evidence" (p. 566). She then poses and answers four "threshold questions": "What must be accepted, who must accept it, how extensive must such acceptance be, and what evidence is acceptable to reflect the extent of acceptance?" (p. 566).

In answering her first question, Judge Buck places facilitated communication in the category of a new forensic technique:

> New "forensic technique ... may involve either the new application of a well-established theory or the application of a new theory. In the latter case, the theory can be validated only empirically or inferentially, not deductively ... In terms of the *Frye* test, if the technique is generally accepted, then the theory must be valid although not fully understood or explainable." (Giannelli, 1980, p. 1212, as cited in *Matter of M.Z.*, p. 566)

In other words, the underlying theory of the technique must be accepted as valid.

Judge Buck then asks, "Who are the experts whose opinion on facilitated communication must be considered?" (p. 567). She noted that who is considered an expert depended on which theory of etiology was adopted, acknowledging that there was more than one theory. The third finding of the court was that

> under any theory, the experts whose opinion on facilitated communication would be relevant would include psychologists, psychiatrists, speech and language pathologists, special education practitioners, and neuro-scientists (i.e., neurologists, researchers and clinicians in this field). Also included would be other clinicians or educators with experience and training in evaluating data for purposes of diagnosis, treatment or research (e.g., physicians who have diagnosed or treated patients with the aid of facilitated communication). (p. 567)

Judge Buck then went on to explicitly exclude from the list of experts parents who have used, or observed the use of, facilitated communication with their children.

Turning to the issue of how much acceptance was required, Judge Buck found that this was a matter of discretion for the court. She noted that "*expert testimony, scientific literature and court precedents*" (p. 567, emphasis added) were useful for establishing the degree of acceptance. Scientific literature was admissible if it "appeared in a peer-review journal in a relevant field and/or were published by acknowledged experts in the field" (p. 567).

The prosecutor argued that rule 402 of the *Federal Rules of Evidence* should apply, rather than *Frye.* Rule 402 states, "All relevant evidence is admissible, except as otherwise provided [by rule or statute]" (as cited in *Re M.Z.* p. 571). Judge Buck rejected this argument on the grounds that *Frye* was still the prevailing rule in New York at the time of the hearing. The remainder of the decision then addresses the expert testimony, the scientific literature, and court precedents.

Only the prosecutor called expert witnesses. The summary of the testimony quotes the opinion of a psychiatrist, Dr K., about the possible underlying theory for facilitated communication.

> [F]acilitated communication is a means to overcome speech impairments in the case of individuals suffering from autism, by allowing them to bypass impaired limbic function of the brain; in the case of other disabilities, it overcomes “dispraxia” (sic) – a condition described as an inability to make the appropriate physical or neurological response to a verbal command even though the latter is understood. Dr. K. acknowledged, however, that she was not aware of any studies as to either of these theories as they related to facilitated communication, and that they involved premises about the nature of both autism and Down’s syndrome which differed from the current prevailing view as to the etiology of those conditions. (p. 573)

Judge Buck made six points in her summations of the expert witness testimony:

1. Each of these experts testified, in effect, that there was no prescribed method of training facilitators. (p. 574)
2. Nor are there any requirements imposed by law or practice to certify the skill level of facilitators. (p. 574)
3. Each of the experts acknowledged concern about the possibility of manipulation by the facilitator. (p. 575)

4. None of these experts were able to refer to any empirical studies concerning the validity of the communications or the degree to which they were subject to suggestion or interpretation. (p. 575)
5. There was no research design they were aware of which might produce any empirical data. (p. 575)
6. Each of these witnesses did acknowledge their awareness of others, particularly those considered expert in the fields of autism, who either disagreed with the assumptions on which facilitated communication is based and/or called for more research to test the reliability of the technique. (p. 575)

The expert testimony put forward by the prosecutor is characterized as insufficient to make the argument.

Near the end of her decision, Judge Buck commented

> It should be pointed out that these findings do not constitute any judgment on the utility or reliability of facilitated communication … Nor do they imply any criticism or demeaning of the motives and conduct of those who have been studying and promoting facilitated communication. (p. 579)

However she is very critical, and dismissive of, the published research. Having noted earlier that scientific literature is permitted as evidence if published by an acknowledged expert and/or appearing in a peer reviewed journal, she decided that the article by Biklen (1990) in the *Harvard Educational Review* would not be allowed as evidence:

> The petitioners here also offered the article by Dr. Biklen referred to above. That article, identified on this record as having appeared in the *Harvard Education* (sic) *Review* of August 1990, had been discussed on direct and cross-examination of each of the expert witnesses in the instant case. It apparently contained a summary of Dr. Biklen's work to date regarding facilitated communication, as well as discussion of his experience with facilitated communication or something similar in another program in Australia, and a discussion of some of the issues raised by his findings. (p. 577-578)

She added, as an apparent aside "(It should be noted that Dr. K. had previously testified that the *Harvard Education* (sic) *Review* was not a peer-review journal)" (p. 578, parentheses in original). There is however, no description or explanation of the process of peer review for any journals, so it is not clear how the *HER* process of peer review is less rigorous than any other process. Finally she summarized her comments about the published research by stating "Petitioner has presented no scholarly literature about facilitated communication" (p. 578). Because Dr Biklen had not appeared as an expert witness, Judge Buck ruled "he was not called to establish a foundation for the purpose of receiving the article into evidence and, over respondents' hearsay objection, the court declined to receive the article in evidence" (p. 578).

The prosecution put forward the results of two earlier hearings. The first was a due process hearing from a Tennessee Administrative Law Judge (*Matter of L. v. Public Schools*, Dept. of Educ. 90-47, June 27, 1991). The summary of

this case includes a description of the research reported in the *Harvard Educational Review.* The judge ruled that L. be placed in a school in Missouri that would look at using facilitated communication

> at the School District's expense in order to "evaluate more fully L's communication abilities, identify the best teaching modalities ... and to provide a highly controlled environment in order to obtain an accurate assessment of L's potential." The order was to remain in effect for six months, with the implication that it would thereafter be reviewed. No information was provided in the instant proceeding about further proceedings or findings in the Tennessee case. (p. 577)

The decision makes no further reference to *Matter of L. v. Public Schools* and it appears that Judge Buck considers it to have no bearing on the *Matter of M.Z.*

The second case the prosecutor put forth was one that Judge Buck had herself previously considered:

> Petitioner here also requested the court to take notice of its own rulings (N-72/3-90 and N-37/8-91, June 20, 1991) in *Matter of Barbara M. and Kenneth M.*, an unrelated article 10 proceeding in which a witness was allowed to testify as to statements made by a child outside the courtroom using facilitated communication. (p. 577)

The judge distinguished *Matter of Barbara M. and Kenneth M* from the present case on the grounds that the prior case was dispositional only and was

concerned only with the credibility of another witness (i.e. did not involve fact-finding regarding the truth of the communication).

Judge Buck decided that the petitioners had not presented sufficient evidence to meet the *Frye* standard. She concluded

> The foregoing findings are limited to a determination that, in the case of the use of facilitated communication as described here, there has not been sufficient proof of its general acceptance or reliability to permit its use in a fact-finding proceeding under article 10 of the Family Court Act. (p. 579)

This decision ignored the published research about facilitated communication (e.g. the *IDRP* Report, 1989; Biklen, 1990; Biklen, Morton, Saha, Duncan et al., 1991). The *Matter of M.Z.* does not consider how the court might have used its discretion to find means of determining how someone might be able to use facilitated communication. The *Matter of M.Z.* similarly precludes Micah, the individual child, from demonstrating whether or not *she* could use facilitated communication without undue influence.

Hahn v. Linn County (February 2, 2001 and March 11, 2002)

Douglas Hahn, through and with his two sisters and co-guardians Barbara Axline and Judith Barta, claimed that Discovery Living and Linn County were denying him access to services. *Hahn v. Linn County* (2001) was a motion by the defendants, Linn County and Discovery Living, for summary judgment in a disability discrimination case in which the [d]efendants raise the following novel

question: Whether the defendants' refusal to provide facilitated communication, an alternative form of communication, to an autistic individual violates both federal and state disability discrimination laws (p. 1040)? The motion for summary judgment was dismissed, and the substantive issue taken up in the 2002 case. Chief Judge Mark Bennett, writing for the U.S. District Court for the Northern District of Iowa, described *Hahn v. Linn County* (2002) as a "disability discrimination case of first impression" (p. 1052).

Doug Hahn had lived away from home since he was 12, when he moved to Woodward Hospital State Hospital-School in Iowa. He lived there for 30 years. In 1987 he moved into a group home run by Discovery Living, a non-profit organization contracted by Linn County. There is always at least one Discovery Living staff member to supervise Doug and his two housemates. Five days a week, from 9:00 to 2:30, Doug goes to Options, which is a sheltered workshop, which also contracts with Linn County. At Options he assembles boxes and latches.

The use of facilitated communication in Linn County funded programs was short lived. In August 1993, staff at Options and at Discovery Living began using facilitated communication with people at the workshop and at his home. Karen Kray, a program manager at Options, learned how to facilitate from a speech-language therapist at a nearby high school. Karen Kray introduced facilitated communication to staff and a number of clients, including Doug Hahn. By October of that year, Linn County had stopped funding the use of facilitated

communication in any of the services it contracted, including both Options and Discovery Living.

Linn County cited two reasons for ceasing funding facilitated communication. First, the County said there was a lack of research to validate facilitated communication. Second, the County was concerned about "surfacing concerns over allegations of sexual abuse by means of facilitated communication" (*Hahn v. Linn,* 2002, p. 1057). While not mentioned in the court decision, the local media was also reporting the story of a 1993 allegation of sexual abuse made using facilitated communication. In 1993, in an unrelated case, a former local Cedar Rapids police commander was accused by his disabled son of sexual abuse. The son, who was living in Colorado at the time, had used facilitated communication to make the allegation (Kutter, 1999, 2001).

Linn County spent about a year trying to develop and implement a policy that would allow it to continue to use facilitated communication with clients. It required that Doug Hahn undertake a literacy test. The County also tried to develop a research protocol. In the end, it never resumed funding the use of facilitated communication in its services. Doug Hahn's sister Judith Barta continued to use facilitated communication with him, both when he visited them at their homes, and when they visited him at his home. The decision notes,

> … neither Linn County nor Discovery Living has banned the use of FC in their facilities; the defendants merely refuse to fund FC. Thus, Ms. Barta is free to facilitate with Mr. Hahn at both Discovery Living and Options, but neither defendant will fund facilitation with the use of its staff. (p. 1058)

It was this refusal by Linn County to fund facilitated communication in its services that was at the core of the complaint by Doug Hahn and his sisters.

The plaintiffs, Doug Hahn, Barbara Axline and Judith Barta, thus argued that the defendants, Linn County and Discovery Living, were discriminating against Doug Hahn. Specifically, by refusing to fund and provide facilitated communication, the defendants were "in violation of Section 504 of the *Rehabilitation Act*, the Titles II and III of the *Americans with Disabilities Act* of 1990 (ADA), and the *Iowa Civil Rights Act* (ICRA)" (p. 1051).

Considering the arguments

Judge Bennett's first ruling was that "… the court must first determine whether Mr. Hahn communicates through facilitated communication because any failure on the part of the plaintiffs to carry their burden of proof on this point renders unnecessary reaching the other issues" (p. 1058). Unlike the *Matter of M.Z.,* proponents in *Hahn v. Linn County* argued that the *ADA* provided guidance to the court. A further similarity is that both courts found that it was necessary to first make a determination about facilitated communication. Where the *Matter of M.Z.* used the *Frye* standard to consider the general acceptance of facilitated communication, *Hahn v. Linn County* considered the specific reliability of Doug Hahn's use of facilitated communication.

Both parties called expert witnesses to testify about the reliability and general acceptance of facilitated communication. Judge Bennett described this issue as "moot" because the "pivotal issue" was Doug Hahn's communication (p. 1060). The plaintiffs also wanted their expert witnesses, Dr Biklen and Dr

Kleiwer, to testify about the effectiveness of facilitated communication for Doug Hahn in particular, and the defense objected to this testimony, citing *Daubert* (1993).

> The guidelines provided by *Daubert* are that the
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> district court must 'ensure that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand.' … That is so because, absent some indicia of reliability and relevance to the case before the trier of fact, the testimony cannot 'assist' the factfinder, as required by Rule 702. (p. 1060)

In their turn, *Federal Rules of Evidence Rule 702* stipulate that

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case. (p1060)

Ultimately, the court decided that it did not need to decide the applicability of either *Daubert* or *Federal Rules of Evidence 702*, because the court found "that Mr. Hahn's facilitators, and not Mr. Hahn, author the facilitated communications" (p. 1064).

Judge Bennett invited Judith Barta to demonstrate facilitated communication to the court, either with Doug Hahn or anyone else. All parties agreed, and Doug Hahn and Judith Barta met with the judge in his chambers. The decision documents the judge's interpretation of what he saw:

> During this in-court demonstration, Mr. Hahn did not look at the keyboard despite Ms. Barta's prompts. Yet, his responses to Ms. Barta's typed questions were glaringly absent of the kind of typos one would expect when typing without looking at the keyboard and without a "home row" of keys. The plaintiffs' experts agree that an individual must look at the keyboard before there can be any question that the output is authentic. During the demonstration, Mr. Hahn never looked at the keyboard, while Ms. Barta's eyes never strayed from the keyboard. In addition, from the demonstration, it was clear that Ms. Barta was guiding Mr. Hahn's finger and not merely providing resistance. Her hand was directly under Mr. Hahn's hand and essentially placed Mr. Hahn's finger on the key to be typed. In combination, Mr. Hahn's failure to look at the keyboard and Ms. Barta's direction of Mr. Hahn's finger, compel this court to conclude that the output generated by Mr. Hahn was not genuine, *i.e.*, was not Mr. Hahn's. (p. 1062)

Judge Bennett noted that his decision was limited to the issue of whether Doug Hahn could communicate using facilitation. Given that this was not proven in court, he ruled that Discovery Living and Linn County were not required to "fund an ineffective means of communication" (p. 1064). The decision also

clearly stated that this finding was limited *only* to Doug Hahn, as "another Options or Discovery Living consumer might be one of the few individuals who is able to communicate his or her own thoughts through facilitated communication" (p. 1064). Nevertheless, because the court determined that facilitated communication was not effective for Doug Hahn, the defendants were not in violation of the Rehabilitation Act, ADA or the Iowa Civil Rights Act.

4. Discussion and conclusion

An important debate in these cases was what would count as research into facilitated communication, and who would be considered to have the necessary expertise to be able to comment on facilitated communication in particular, and disability in general. This debate emerged from the strategic manoeuvrings of the attorneys to frame the issues in particular ways. In framing the debates, the attorneys were able to invoke discourses of disability and of research that were easily recognized by their audiences of judges and other attorneys, who were also writers of legal analyses. The written decisions then place "on the record" the arguments and the outcomes of these debates. The published decisions add to the canon of 'what is known' about facilitated communication, about disability and how it should be studied.

The predominant approach has been the abnormal-persons approach to legal analysis. This approach both depends upon and supports an expert or medical discourse of disability. When a rights-analysis approach was used, the rights of the 'abnormal' purported victims were pitted against are the 'normal' accused, which invariably led to a collapse to the abnormal-persons approach to

analysis. The social-relations approach to legal analysis seems to offer the most cogent challenge to the normal science approach that both underpins and is supported by the abnormal-persons approach to legal analysis.

In the cases described in this paper, the judges (and attorneys) writing about the applicability of *Frye* or *Daubert* were not explicit that they were also writing about themselves (and juries) and their ability to "tell" if someone was communicating, their ability to understand and apply disability research to the person before them. They were not yet self-consciously writing about their relationships with the people who were used as experts to support the work of the courts, and their relationships with those they did not recognize as experts. They were not yet deliberately writing about their relationships with those they presumed to be like them, and about those they presumed to be different from themselves.

While it is beyond the scope of this paper to dictate the proper form of legal analysis, I want to suggest some questions that judges might consider as they determine the procedures that will be followed in *their* courts, the precedents that *they* will apply, *their* frameworks and perspectives that will shape *their* analyses and decisions. Judges would need to answer these questions for themselves, for the other participants in a specific case, and for the wider audiences who read the decisions and use these decisions to then guide their practices.

- What do I think we can achieve by setting up the interactions in this setting in this way?

- Whose voice is heard, whose argument is privileged by setting up the interactions in this way? What are the costs, and to whom?
- When a particular line of argument, or a particular piece of evidence, is compelling, why is it compelling? What are (my) assumptions, experiences and/or beliefs that make this compelling?
- What is it about a particular witness that makes her or him more or less convincing? What are (my) assumptions, experiences and/or beliefs that make this person more or less convincing? What are the shared experiences, values and understandings that I might assume we have? What are our differences that I might be assuming? What significance do I give to these assumed similarities and differences?

I do not mean to suggest that there will not be tensions as these questions are addressed. For example, people who are accused will want to feel that their perspective and their situation is well represented, that due process is followed. There will be a need to establish the competence and credibility of all witnesses, including ensuring that an individual using facilitated communication is in fact able to do so in the court setting. The challenge for judges will be to ensure those they have seen as most different to themselves are not required to reach different, and more restrictive, standards than those who already enjoy privileged positions in the legal setting. The challenge for judges will be to ensure that those who they have seen as least like themselves are no longer the people most likely to be silenced.

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