Facilitated Communication: Rejected in Science, Accepted in Court—A Case Study and Analysis of the Use of FC Evidence Under Frye and Daubert

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This article traces the phenomenon of facilitated communication (FC) from its introduction to the United States in 1990 to its use in recent court proceedings. FC is an alleged breakthrough technique that enables nonverbal individuals with developmental disabilities to communicate via a form of assisted typing. Widespread use of FC resulted in miraculous communications and surprising allegations of abuse. The growing importance and notoriety of FC attracted the interest of the scientific community which rejected the technique after numerous controlled studies were undertaken. Despite the rejection of FC by the scientific community, however, some courts have accepted this unproven technique by evading their state’s test of scientific admissibility. It is asserted that court decisions admitting FC evidence are pretextural, and it is argued that FC should not be admitted into court proceedings. In addition, this report analyzes the future of FC in those states that have adopted the newer Daubert standard for scientific evidence. Copyright © 1999 John Wiley & Sons, Ltd.

THE FC PHENOMENON

In August of 1990, Professor Douglas Biklen of Syracuse University introduced a revolutionary breakthrough in the United States that allegedly enabled 90 percent¹

¹ See Mary Makarushka, *The Words They Can’t Say*, N.Y. TIMES, Oct. 6, 1991, at 33. “Biklen says his experience at the school, and that of others, indicates that facilitation could be used successfully for more than 90 percent of the 350,000 autistic people in America.” Id.

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of nonverbal autistic individuals to communicate through assisted typing. The technique is known as facilitated communication (FC). This new revolutionary form of fostering communication with nonverbal individuals was well received and spread rapidly throughout the educational communities that served individuals with autism and other developmental disabilities. However, controversy soon followed after the phenomenon was rejected by the scientific community.

FC is criticized because it lacks empirical support, frequently results in accusations of abuse, and often raises false hope. Despite criticism, Biklen continues to promote FC, and many continue to practice the technique. Since alleged evidence of abuse was derived from communication via FC, courts eventually confronted the FC controversy. Some courts following the Frye standard for scientific evidence rejected FC-based evidence, while other courts have accepted FC evidence considering it akin to translation. The latest trend, however, reflects an acceptance of FC testimony in sex abuse cases despite the rejection of FC in the scientific

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3 See Karen Levine et al., *A Plea to Professionals to Consider the Risk–Benefit Ratio of Facilitated Communication*, 32 MENTAL RETARDATION 300 (1994). "Facilitated Communication (FC) is being promoted by speech pathologists, psychologists, school principals, teachers, and direct-care workers across the country." Id. at 300.
4 American Psychological Association Resolution, Washington, D.C., Aug. 1994. ("Facilitated communication is a controversial and unproved communicative procedure with no scientifically demonstrated support for its efficacy.") Position Statement on Facilitated Communication, American Speech–Language–Hearing Association, Rockville, Maryland (Nov. 1994) ("No conclusive evidence that facilitated messages can be readily attributed to people with disabilities .... It is the position of the American Speech–Language–Hearing Association (ASHA) that the scientific validity and reliability of Facilitated Communication have not been demonstrated to date.") Other resolutions against FC were published by The American Academy of Child and Adolescent Psychiatry, Washington, D.C. (Oct. 20, 1993) (endorsed by the American Academy of Pediatrics); American Association on Mental Retardation (June 4, 1994); The Association for Behavior Analysis (Apr. 26, 1995).
5 In a survey of studies on FC there were only 21 validations out of 210 subjects. In addition, the scientific validity of the 21 validations have been questioned. See Allen A. Schwartz et al., *Facilitated Communication: What You Don't Know Can Hurt You*, Address at The Continuing Education Program of the Interagency Council (Oct. 12, 1993) [hereinafter Facilitated Communication Address]." See, e.g. Callahan v. Lancaster-Lebanon Intermediate Unit 13, 880 F. Supp. 319 (E.D. Pa. 1994); State v. Warden, 891 P.2d 1074 (Kan. 1995); In re Luz, 590 N.Y.S.2d 541 (App. Div. 1993); In re M.Z., N.Y.S.2d 390 (Fam. Ct. 1992); Department of Social Services v. Mark & Laura S., 593 N.Y.S.2d 142 (Fam. Ct. 1992); People v Webb, 597 N.Y.S.2d 565 (Cty. Ct. 1993). "More than 50 allegations of sexual abuse have risen out of facilitated communication, and this flurry has prompted urgent questions about a method that just five years ago was widely greeted as a shining breakthrough." Joseph Berger, *Shattering the Silence of Autism: New Communication Method is Hailed as a Miracle and Derided as a Dangerous Sham*, N.Y. TIMES, Feb. 12, 1994, at 21.
6 See Brian P. Leung & Candace Clark, "I'm Terrified!": One Parent's Perspective on Facilitated Communication, 20 J. ASS'N FOR PERSONS WITH SEVERE HANDICAPS 163 (1995). "'Breakthrough' techniques, though enticing to try, carry at least two dangers for parents. There is the common danger of raising (false) hopes .... Raising the hope and expectations of parents, even with careful explanations of advantages and disadvantages, can have detrimental effects on parents' coping skills. And if a technique has potentially major impact on the child's functioning, this would require even more support and preparation of the parents." Id.
7 The standard for determining the admissibility of scientific evidence was established in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). *Frye* required that the scientific principle in question must have gained "general acceptance" in its field before it could be admitted into the court room. However, the Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals Inc.*, 113 S. Ct. 2786, 2799 (1993), held that the more liberal Federal Rules of Evidence should replace the "general acceptance" standard. Therefore, under *Daubert*, the judge as the "gatekeeper" has greater leeway in admitting controversial scientific evidence in federal courts and states that adopt the more liberal *Daubert* standard.
This paper examines the FC phenomenon in the scientific and legal communities and argues that FC should not be used in court proceedings.

The major flaw of FC is known as “facilitator leading.” Facilitator leading refers to the unconscious or deliberate manipulation of the child’s hand, which results in answers originating from the adult facilitator rather than from the child. The facilitator leading hypothesis is, in part, supported by the finding of surprisingly advanced literary skills attributed to retarded children which are produced through facilitation. Many FC writings seem to reflect a precocious and aggressive tone. For example, one of the alleged communications reported by Biklen included the following sentences: “I'M NOT RETARDED,” “MY MOTHER FEELS I'M STUPID BECAUSE I CAN'T USE MY VOICE PROPERLY.”

Another problem is that, even in the best of circumstances, gaps in facilitated responses are often remedied with letters that “fill-out” alleged thoughts. This practice of gap-filling fosters unintentional leading. Critics contend that facilitator leading is the result of subtle or unconscious cueing known as the “Clever Hans Effect.” The Clever Hans Effect refers to the phenomenon in the early 1900s whereby a horse was apparently able to communicate answers to math problems, read, spell, and identify musical tones by tapping out responses converted to numbers. Respected professionals of that time believed in Hans' ability until Oskar Pfungst applied a scientific method to uncover how unintentional cues were passed to Hans.

The widespread use of FC is due to the lack of standards and the ease with which anybody can learn the technique. The actual process of “facilitating” is easy to learn. It is nothing more than providing resistance to a hand as it points down at a letter board resembling the layout of a keyboard. Biklen even provided instructions in his 1990 article to those wishing to practice the technique:

2. [P]rovide physical supports under the forearm, under or above the wrist, or by helping a person to isolate the index finger to facilitate use of communication aid.

3. Pull back the hand or arm after each choice so that the person takes enough time to make a next selection and also to avoid repeating selections.

Unfortunately, the seeds of leading were planted in this seminal article. Surprisingly, little attention has been paid to Biklen's blatant instructions on

9 See discussion infra; State v. Warden, 891 P.2d at 1074; In re Luz, 595 N.Y.S.2d, at 541; Webb, 597 N.Y.S.2d at 565.

10 Biklen, supra note 2, at 296.

11 Robert A. Cummins & Margot P. Prior, Autism and Assisted Communication: A Response to Biklen, 62 HARV. EDUC. REV. 228 (1992). “[H]is mother remained unable to facilitate communication. One explanation of this phenomenon is that with some clients any form of physical contact, such as a hand on the shoulder, can be used, even unconsciously, to provide cues to correct responding; this is called a ‘Clever Hans Effect.’” Id. at 232.

12 ROBERT ROSENTHAL, CLEVER HANS: A CASE STUDY OF SCIENTIFIC METHOD xi (1965). “Hans was clever only when he had visual access to a source of the correct answer . . . . Hans' rate of tapping apparently depended on the angle of the questioner's forward inclination . . . . When Hans reached the correct number of taps, the questioner tended to straighten up—and that was the cue for Hans to stop . . . Pfungst still cued Hans unintentionally, though he was consciously trying to suppress sending visual messages.”

13 See Biklen, supra note 2.

14 Biklen, supra note 2, at 307 t.2.
leading. In addition to the basic instructions, Biklen tells the facilitator to correct the client as they are communicating by “preventing problems.”

**Being Positive**

4. “[P]ulling back and reminding the person of the question or request whenever an incorrect or nonsensical choice is about to be made. Use semantic common sense (e.g., *n* does not come after *w*). In other words, help the person avoid errors.

**Other Support**

7. Keep your eyes on both the person’s eyes and on the target (e.g., letter keys). This helps you identify and prevent errors caused by hand/eye coordination problems.

**Achieving Communication/Overcoming Problems**

10. If a person is not communicating, is producing nonsensical communication, or is producing questionable or wrong communication (e.g., when you doubt the communication and believe that it might be you, the facilitator, who is initiating the choices of letters and words), revert to set, structured curricula (e.g., fill in blanks, math drills).

Biklen fails to provide any guidance on how to control for leading; he only suggests practicing math drills if leading is suspected. He also fails to indicate the purpose or benefits associated with doing math drills when the facilitator suspects leading. It is probable that the aforementioned drills will actually train the facilitator to better mask their leading, making it less detectable when they resume “communicating” with the individual.

One of Biklen’s facilitated conversations is particularly suspect. In a remarkable conversation, several young adults, who presumably spent years in special schools for the mentally retarded, demonstrated linguistic skills that would most likely surpass their non-disabled peers. Likewise, proponents of FC have yet to account for the advanced literacy skills evidenced by scores of previously retarded individuals.

The formerly retarded young adults with which Biklen conversed allegedly produced conversation evincing higher-order abstract thinking, sophisticated vocabulary, and insight into political and economic affairs rarely expressed by teenagers of average intelligence. Coincidentally, such perspective, insight, and intelligence is arguably more consistent with the well meaning advocates who believe in FC and practical the technique. Excerpts from the conversation allegedly facilitated from these students include the following:

> Why are you here? . . . You put emphasis on integration, What really does integration have to offer to some terribly retarded people? . . . You must be so idealistic . . . Too mean to judge people by ability . . . Tell me how really retarded people get people to see them as ordinary human beings . . . That gives me the question back, not answer it . . . Most people need proof . . . How can the disabled meet such a gauntlet? . . . Do you really feel there’s a future for us out of institutions? . . . Unless people suborn their own wishes, it will fail . . . You are illogical because there is no profit in disability . . . Have you thought about people wanting to be in institutions? . . . Not important (to speak) if you have typing. Just tell yourself that daring to reach out is more important . . . I want to ask Doug if people like me will ever be normal . . . able to do more things that other people do? . . . I’ve tried for thirteen years to be normal and I’m still where I started.

Cummins and Prior argue that the aforementioned dialogue reflects facilitator leading. They base their conclusion on peculiar circumstances such as the use of

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15 *Id.*

the word “suborn.”17 While it is no surprise to find an arcane word such as “suborn” used improperly, the use of this word in this situation contributes to the doubts over student authorship. In the alternative, even if one were to assert that the child facilitated a sophisticated conversation on account of previously unknown savant skills, such savant literary skills represent a radical departure from previously documented cognitive, numerical, and mechanical savant skills.18 Biklen’s claim of a 90 percent literary skill incident rate through FC is also in stark contrast to the range of savant skill incident rates previously documented by researchers.19

**FC in the Scientific Community**

After FC’s initial acceptance in countless classrooms and households across the United States, scientists began to test the phenomenon under controlled conditions. Despite the occasional report of validation, most of the reports on FC failed to validate the procedure. As of October 1993, there were at least 21 studies on FC validation which cumulatively alleged 21 cases of FC validation out of 210 trials.20

Critics of FC do not view the finding of 21 validations as significant support for the phenomenon because it appears as if the validations were conducted without adequate controls.21 Furthermore, even neutral scientists can err when trying to replicate a new and exciting discovery. The aftermath of cold fusion22 provides insight into research on FC:

When numerous groups of researchers attempt to replicate an exciting new finding, even if that finding is artificial, some will “succeed” in the replication while some will correctly fail to replicate. The seeming successes may be due to errors of

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17 See Cummings & Prior, *supra* note 11, at 234. “The word ‘suborn’ is used incorrectly, and perhaps instructively, on two occasions. The word is defined as ‘to bribe or procure or commit perjury or other unlawful or wrongful act.’ In the following sentence, however, it seems to be used in the sense of subordination: ‘Being a dynamic support means being able to suborn your own ego . . . .’ This quotation is extracted from a list of ‘Attitudinal Dimensions of Facilitated Communication’ that Crossley provided to Biklen. It is interesting, therefore, to find an assisted communication at DEAL in which a client incorporated this unusual word into a similarly inappropriate context: ‘Responding to my question about concessions, Polly (a client) explained, “unless people suborn their own wishes, it will fail”’.” *Id.* (citations omitted).

18 Bernard Rimland & Deborah Fein, *Special Talents of Autistic Savants*, in THE EXCEPTIONAL BRAIN: NEUROPSYCHOLOGY OF TALENT AND SPECIAL ABILITIES 474 (Loraine K. Obler & Deborah Fein eds., 1988). “In his review of research on the idiot savant, employed the following definition: ‘A savant is a mentally retarded person demonstrating one or more skills above that expected of non-retarded individuals.’ For the most part, the special skills appear to fall within several areas: music, calendar calculating, mechanics, memory, sensory discrimination, and calculation.” *Id.* at 474 (citation omitted).

19 See *id.* at 478. “The approximately 10% incidence of savant skills in the autistic population may be compared with the value of 0.06% reported by Hill . . . in his survey of several hundred residential facilities for the retarded.” *Id.* (citing a study by Hill in 1974).

20 See Facilitated Communication Address, *supra* note 5.

21 Facilitated Communication Address, *supra* note 5.

22 William J. Broad, “Cold Fusion Still Escapes Usual Checks of Science,” N.Y. TIMES, Oct. 30, 1990, at C1. “It was in March 1989 that Dr. Pons and his British colleague, Dr. Martin Fleischmann, announced that they had created energy by fusing atoms at room temperature in a table-top experiment. Palladium rods in a jar of heavy water, they said, could produce great quantities of excess heat.” *Id.*
As time passed, it was established that the seemingly successful replications were due to various sources of errors, some quite subtle. When these were eliminated, no evidence [of the anticipated result] was obtained.23

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The few alleged validations were criticized by the authors of the Facilitated Communication Address. Calculator and Singer’s study is criticized for having poor experimental controls.24 Attwood and Remington-Gurney are criticized because they failed to use objective standards, and merely published their study in a book chapter which was not subject to the rigor of a peer review journal.25 The Vazquez study was seen as the strongest support in 1993.26 But, in 1994, Vazquez ultimately noted a recurring problem in her FC study: Apparently successful communications through FC tend to be limited to when the facilitator knows the answers to the subject’s questions.27

23 Facilitated Communication Address, supra note 5 (citing a study by Terence Henes published in *The Skeptical Inquirer*).
24 See id.
25 See id.
26 “The findings should be understood in the context of issues of inconsistent performance and what it means to perform a simple cognitive task under one condition but not another, and possible confounding factors [journal article under peer review]. [Vazquez] is currently the strongest available research evidence in support of benefit from FC.” *Id.*
27 See Carol A. Vazquez, *Brief Report: A Multitask Controlled Evaluation of Facilitated Communication*, 24 J. AUTISM & DEV. DISORDERS 371 (1994). “In general, correct answers were typed only when the facilitator knew the answer … Conspicuous among the wrong answers in most sessions were meaningful but irrelevant words … Perhaps subjects simply typed words they knew how to write. It is also possible that subjects randomly hit letters and that facilitator cuing resulted in meaningful continuations.”
Additional studies were published that reported both failures\textsuperscript{28} and alleged successes\textsuperscript{29} with FC validation. The more recent claims to validate FC are, however, not without criticism. Notable criticisms of the recent studies claiming FC validations focus upon questionable experimental controls and the lack of objective data on prior reading, spelling and communication skills of the disabled children in the studies.\textsuperscript{30} While proponents and critics may argue over the efficacy of the studies validating FC, there is little doubt that the weight of the scientific evidence fails to support FC.

Despite the overwhelming weight of scientific evidence against FC, some of its proponents question the methodology of studies that fail to validate the procedure, claiming that the tests are designed to produce failure.\textsuperscript{31} First, this view is surprising because there was little or no initial opposition to the FC movement, as evidenced by its rapid spread and wide acceptance. The wave of criticism of FC did not gain momentum until it was determined that validations were problematic.\textsuperscript{32} Second, this perspective may indicate a lack of understanding of basic scientific procedures. Jay Devore provides an apt analogy to illustrate hypothesis testing:

In any hypothesis testing problem, there are two contradictory hypotheses under consideration . . . There is a familiar analogy to this in a criminal trial. One claim is the assertion that the accused individual is innocent. In the American judicial system, this is the claim that is initially believed to be true. Only in the face of strong evidence to the contrary should the jury reject this claim in favor of the alternative assertion that

\textsuperscript{28} “The results of this study do not validate the use of FC with the PPVT-R as a method of appropriately assessing clients’ level of receptive vocabulary.” Ann R. Beck & Christine M. Pirovano, \textit{Facilitated Communicators’ Performance on a Task of Receptive Language}, 26 J. AUTISM & DEV. DISORDERS 510 (1996); “At the end of 10 weeks of instruction, no participants were able to produce functional, typed communication. Findings are consistent with other quantitative studies that find no support for the cause–effect relationship proposed by FC proponents.” Cheryl Bomba \textit{et al.}, \textit{Evaluating the Impact of Facilitated Communication on the Communicative Competence of Fourteen Students with Autism}, 26 J. AUTISM & DEV. DISORDERS 43 (1996).

\textsuperscript{29} “Results showed that (a) under controlled conditions, some facilitated communication users can pass accurate information.” Donald N. Cardinal \textit{et al.}, \textit{Investigation of Authorship in Facilitated Communication}, 34 MENTAL RETARDATION 231 (1996); “The child’s language with FC was significantly better than his oral language in length of utterances, novelty of utterances, and syntactic complexity . . . Evidence that he was authoring his own messages during his facilitated spelling was found in his idiosyncratic use of language and his ability to convey verifiable information that was unknown to the facilitator.” M. Lori Janzen-Wilde \textit{et al.}, \textit{Successful Use of Facilitated Communication With an Oral Child}, 38 J. SPEECH & HEARING RESEARCH 658 (1995), “The case study of a 13-year-old boy with autism, severe mental retardation, and a seizure disorder who was able to demonstrate valid facilitated communication was described. In three independent trials, short stories were presented to him, followed by validation test procedures with an uninformed facilitator providing physical support to the subject’s arm.” Michael J. Salomon Weiss \textit{et al.}, \textit{A Validated Case Study of Facilitated Communication}, 34 MENTAL RETARDATION 220 (1996).

\textsuperscript{30} Telephone interview with Dr. Gina Green, Director of Research, New England Center for Children (Aug. 6, 1997).

\textsuperscript{31} Charles A. Phipps & Mark L. Ells, \textit{Facilitated Communication: Novel Scientific Evidence or Novel Communication?}, 74 NEB. L. REV. 601 (1995). “Proponents take issue with the methodology used by certain facilitation opponents, suggesting that some research methods have been designed to produce failure.” Id. at 607–8.

\textsuperscript{32} A prominent critic of FC, Douglas Wheeler, believed in FC before testing it. Jamie Talan, \textit{An End to Silence? A Controversial, New Computer Technique Sweeps Through the Autistic Community, Offering the Hope of Communication}, NEWSDAY (Nassau County Edition), Jan. 12, 1993, at 51. “Psychologist Douglas Wheeler said they were excited that they were getting words and phrases from low-functioning autistics. They began to use it so widely that they decided to undergo a rigorous experiment to prove that their clients were really communicating. ‘We wanted to show the critics there was something here.’” Id.

the accused is guilty. In this sense, the claim of innocence is the favored or protected hypothesis, and the burden of proof is placed on those who believe in the alternative claim.33

Unfortunately, FC was not subject to traditional scientific scrutiny in the United States before it was introduced to the American public in 1990.34 The fact that professor Biklen apparently holds a perspective at variance with that held by researchers grounded in traditional quantitative and clinical scientific methods may help explain this critical issue.35 Therefore, the scientific community of autism researchers had to “catch up” with the FC phenomenon because the technique was widely disseminated and practiced in many settings before it was properly tested. As with any alleged scientific breakthrough, the scientific method should be applied before it is disseminated to the public. Devore provides an excellent synopsis of the scientific method:

Scientific research often involves trying to decide whether a current theory should be replaced by a more plausible and satisfactory explanation of the phenomenon under investigation. A conservative approach is to identify the current theory with $H_0$ and the researcher’s alternative explanation with $H_a$. Rejection of the current theory will then occur only when evidence is much more consistent with the new theory. In many situations $H_a$ is referred to as the ‘researcher’s hypothesis,’ since it is the claim that the researcher would like to validate. The word null means ‘of no value, effect, or consequence,’ which suggests that $H_0$ should be identified with the hypothesis of no change (from current opinion), no difference, no improvement, and so on.36

FC IN THE COURTS

Two lines of cases developed in response to the FC phenomenon. The “Frye-line” cases37 exclude FC evidence due to its rejection in the scientific community and its imprecise use in obtaining allegations of abuse. In contrast, the “translation-line” cases38 disregard FC’s failure in the scientific community and lack of underlying theory. The translation-line relies upon intuition and unscientific personal observations to conclude that FC is valid interpretation in order to admit allegations based on FC.

34 "Gina Green contends greater precautions should have been taken when F.C. first was introduced. ‘If this had been an experimental drug, a new medical procedure or many other kinds of intervention, or if it had been a new teaching intervention or behavioral intervention that was in the hands of scientists, then it would have been more than likely evaluated in very small-scale, well-controlled, well-monitored studies first. That’s the proper and prudent way to evaluate a novel therapy—particularly one for which somebody is making pretty extraordinary claims.’” Shawne K. Wickham, Autism Aid Under Fire: About the Show: Woman Weighs Suit Over False Abuse Allegations, UNION LEADER, Oct. 10, 1993, at A1.
36 DEVORE, supra note 33, at 284.
The Frye-Line Cases

The first case involving FC testimony, Department of Social Services v. Mark & Laura S., rejected allegations of abuse based upon FC. This action was brought because of the allegation of parental sexual abuse, which was alleged via FC by Jenny, a 16-year-old nonverbal autistic child. It appears as if the court took this matter very seriously by conducting a preliminary hearing on the admissibility of the alleged statement made through FC. The preliminary hearing consisted of seven days of testimony which reflects the diligence with which this case was conducted in the rural family court in Ulster County, New York. The court held that the Department of Social Services failed to present sufficient evidence of testing of FC in order to determine reliability and validity of FC under the Frye test, and the evidence was insufficient to "conclude that facilitated communication is simultaneous transmission from one common modality of English to another conducted by a qualified, reliable individual." The Frye test has governed the admission of scientific evidence in New York state courts for over 60 years. In Frye v. United States the court refused to admit the testimony of an expert witness in a criminal case regarding the validity of a polygraph test based upon systolic blood pressure because the technique was not generally accepted in the scientific community at that time. Frye held that "scientific evidence will only be admitted at trial if the procedure and results are generally accepted as reliable in the scientific community." Thus, to avoid failing the Frye test, the prosecution argued that FC was not a scientific method. An argument put forth by the prosecution’s expert witness contended that FC was not a translation, but merely a transmission of communication from one modality to another. This argument failed, however, because another witness admitted that, as a facilitator, she edited out typographical errors and imposed nouns or pronouns based upon content. The judge determined that Jenny’s facilitation was "assertively assisted." Therefore, the court needed to determine whether FC is generally accepted in the field as a valid method of communication. It is important to note that the facilitator leading referred to by this witness is prevalent among facilitators and even encouraged by Biklen.

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39 593 N.Y.S.2d at 142. "Research of counsel and the court indicates that this is a case of first impression, not just in New York but in these United States and, quite possibly the world." Id. at 143.
40 See id.
41 Id. at 151.
42 Beuschel v. Manowitz, 271 N.Y.S. 277 (Sup. Ct. 1934). "Naturally, the courts will not permit the application of scientific tests which have not attained definite and dependable results accepted generally by those qualified to judge. So we find a Federal court refusing to permit the use of the systolic blood-pressure deception test because it had not gained sufficient recognition." Id. at 280.
43 293 F. 1013 (D.C. Cir. 1923).
44 See id. at 1014.
45 Department of Social Services v. Mark & Laura S., 593 N.Y.S.2d at 146.
46 See id. at 145.
47 See id. at 150.
48 See id.
49 See id. at 146.
50 See Biklen, supra note 2, at 307.
The petitioners also contended that the Americans with Disabilities Act (ADA), via the Auxiliary Aides and Services section, placed an affirmative obligation on the court to hear Jenny. In response to the petitioner’s assertion, the court recognized that the ADA requires public entities, including the court, to make reasonable accommodations so as to eliminate discrimination due to disability. However, the judge disagreed that FC fell within the “Auxiliary Aides and Services” definition. The judge explained this conclusion when she said “clearly a communication technique . . . whose reliability and validity has been proven must be [made available], but [FC] does not fall within that category of technique . . . .” The use of a technique that does not pass the Frye test cannot be used to satisfy the ADA, yet in the process ignore the due process rights of the accused. Thus, the ADA argument creates a revolving door. For the ADA to apply, the aide must be reasonable. To be considered reasonable, it must pass the Frye test, and FC is not supported by enough certainty, is merely in the experimental stage, and lacks the scientific acceptance to survive Frye. The court concluded that proponents of FC failed to conduct the necessary studies to sufficiently ensure its reliability and validity to permit the court to accept Jenny’s alleged statement into evidence. In light of the Frye test, Judge Peters was compelled to reject the petitioner’s request to submit FC testimony. In its conclusion, the court implored those who are able, to conduct the necessary studies to determine the reliability and validity of this “most interesting technique.” This carefully considered opinion reflects the seriousness with which Judge Peters took this case of first impression.

The next two cases that addressed FC were Callahan v. Lancaster Lebanon Unit 13 and In re M.Z., both of which reflect a skepticism over the FC procedure along with a toleration for its early use at a time when it appeared to be a plausible technique. The tone in these cases reflects a hesitation to compound misfortunes already caused by FC.

Judge Buck apparently decided In re M.Z. without the benefit or influence of the Mark & Laura S. opinion, because the court was unaware of any other

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51 42 U.S.C. §12102-(3).
52 According to Section 3 of the act “Auxiliary Aides and Services” includes: “(A) qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments; (B) qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments; (C) acquisition or modification of equipment or devices; and (D) other similar services and actions.” 42 U.S.C. § 12102(1).
53 Department of Social Services v. Mark & Laura S., 593 N.Y.S.2d at 151. “[The ADA] extends so far that ‘if in this country there exists one qualified individual with a disability who can communicate in a language known only to that individual and one other individual, the court must allow that person in and hear what she has to say.’” (citation omitted).
54 The ADA requires “qualified interpreters or other effective methods.” 42 U.S.C. § 12102 (emphasis added). Thus, without such scientifically accepted qualified or effective aides, FC will not achieve the goal to “eliminate[e] discrimination against individuals with disabilities” and bring them into the social and economic mainstream. Id. § 12101(b)(1).
55 Department of Social Services v. Mark & Laura S. 593 N.Y.S.2d at 151.
56 See id. at 150.
57 See id. at 152.
58 See id.
59 See id.
62 Department of Social Services v. Mark & Laura S., 593 N.Y.S.2d 142.
It is interesting, however, to note that Judge Buck took a similar approach in *In re M.Z.* There, the court relied on the *Frye* test to determine that FC is inadmissible in a New York State “Article 10” Family Court hearing for removal of a child due to abuse or neglect, since the petitioner failed to establish that FC is generally accepted within the relevant scientific community for use with children with Down’s syndrome.

The court heard testimony from local professionals who endorsed the use of FC. However, the expert testimony in support of FC failed to convince the court that FC evidence should be admitted. The court noted the testimony of Dr. Chadwick, a speech pathologist associated with Syracuse University, as well as others who failed to offer a prescribed method for training facilitators. Chadwick testified that some individuals with no previous training were able to utilize FC after watching a mere one-hour videotaped presentation. Additional facts that militated against the admission of FC include the failure of experts to present a coherent theory for the underlying principle, that FC is subject to manipulation, results are inconsistent with different facilitators, the lack of established training procedures, the lack of procedures for monitoring or evaluating practitioners, the lack of empirical studies relating to technique or results, and the “glaring” absence of Dr. Biklen whose university is within the county of the court. Akin to the advice of Judge Peters in *Mark & Laura S.*, the judge concluded that more research should be conducted to obtain more definitive findings.

In *Callahan*, the United States District Court for the Eastern District of Pennsylvania granted a motion to dismiss in a case regarding alleged violations of federal civil rights statutes arising from the temporary loss of a couple’s child after unsubstantiated allegations of abuse were made against the father. The Callahan’s 16-year-old son Michael, had been diagnosed with severe autism and mental retardation. Michael’s Individual Educational Plan (“IEP”) provided for the use of FC at school where the allegation of abuse was made. After the allegation had been facilitated, Michael was taken into custody and given a medical examination that failed to support the allegations of abuse.

A hearing was conducted to determine the admissibility of FC. At the close of the hearing, all parties agreed that the petition for temporary custody should be withdrawn, and Michael was returned to his parents. The court held that at the time in question, it was reasonable for the school to rely on allegations of abuse

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64 N.Y. FAM. CT. ACT, Pt. 2 § 1028(b). “In determining whether the temporary removal of the child is necessary to avoid imminent risk to the child’s life or health, the court shall consider and determine in its order whether continuation in the child’s home would be contrary to the best interests of the child and where appropriate, whether reasonable efforts were made after removal of the child from the home and where appropriate, whether reasonable efforts were made after removal of the child to make it possible for the child to return home.” *Id.*
65 *In re M.Z.*, 590 N.Y.S.2d at 396.
66 See id. at 398. The published opinion does not, however, state that Dr. Biklen was subpoenaed for this trial nor does it appear that he was a party in this case. “Although Dr. Biklen resides in this community and was included on a list of potential witnesses by the petitioner, he was not called to establish a foundation for the purpose of receiving [his] article into evidence.” *Id.*
67 See id. at 399.
69 See id. at 329.
70 See id.
based on FC and thus recognized the existence of a qualified immunity.71 The
court noted that there was no case law at that time that indicated that it would be
unreasonable to rely on FC, that teachers are required to report suspicion of child
abuse,72 and that Michael’s parents gave permission to use FC in his Individual
Education Plan.73

Additional decisions in Colorado like-wise demonstrate the flaws of FC. In 1996,
the Colorado Court of Appeals affirmed a decision against the Delta County
Department of Social Services (DCDSS), in which attorney’s fees were awarded to
the parents of a non-verbal 41-year-old man with Down’s syndrome and severe
mental retardation.74 The Stepanek’s son, Bernie, had attended a training
workshop for the disabled, and workshop employees claimed that Bernie made
allegations of physical and sexual abuse against his parents by way of FC. Bernie
was removed from his parents’ home while the DCDSS investigated the validity of
the FC allegations over a three month period. Bernie was returned, however, after
the DCDSS concluded that Bernie’s alleged communications were unreliable. The
court upheld the partial award of attorney’s fees against the Delta County Attorney
because the delay in finding the facilitated communication unreliable was improper
and unnecessarily expanded the proceeding.75 However, the Supreme Court of
Colorado granted absolute immunity to the County Attorney and reversed the
award of attorney fees.76 The court identified the issue as, “whether a grant of
absolute immunity shields the County Attorney from sanctions that are designed to
curb attorney misconduct.”77

The court faced an apparent conflict of law. Allowing financial damages or
sanctions against government attorneys would appear to undermine the cloak of
protection afforded by absolute immunity and could ultimately have a chilling
effect on their ability to properly perform required duties in protecting at risk adults.78
However, the court recognized that “[a]bsolute immunity does not relieve
a county attorney from the rules governing the legal profession.”79 Since absolute
immunity was not intended to exempt attorneys from the standards of professional
conduct, the court remanded the case to consider violations of the Colorado rule of
procedure that sanctions attorney misconduct,80 so as to evaluate “whether the
attorney (1) read the pleading; (2) undertook a reasonable inquiry into the
pleading’s factual and legal assertions; and (3) possessed a proper purpose in filing
the pleading.”81

71 See id. at 341.
72 See id. at 338. “Under the law, teachers must report, and child service agencies must investigate, all
suspected allegations of child abuse. This reporting requirement is all the more compelling when the
children at issue suffer from some form of mental disability”. Id.
73 See id. at 335.
75 See id. at 6. The Court made an award of partial attorney fees after dissecting DCDSS’s actions into
three parts. The Court held that the initiation of the investigation and eventual return of Bernie was
proper. But the Court awarded partial fees based upon the excessively long three month investigation
which rose to the level of “improper conduct” which “unnecessarily expand[ed] the proceeding.”
76 In re Stepanek, 940 P.2d 364 (Col. 1997).
77 See id. at 369.
78 See id.
79 See id. at 370.
80 Due to the substantial similarity between that rule, and its “counterpart,” FED. R. CIV. P. 11, the
Supreme Court of Colorado looked to federal cases construing the federal rule for guidance.
Although the majority of the Appellate Court believed that reliance on the initial allegation was reasonable, Judge Ney argued, “a conclusion that the incapacitated person was the author of the messages transmitted through F/C is, at best, tenuous.”

Judge Ney believed that, “Rule 11 required the county attorney to make a reasonable inquiry to determine that the motion was well-grounded in fact.”

Both the Appellate Court and the Supreme Court of Colorado noted flaws with FC consistent with previous cases critical of the method. Judge Ney, however, also detailed many of the shortcomings of FC in his dissent. The factors cited include: lack of acceptance in the scientific community; no standardized training or instruction required for facilitators; severe retardation; lack of subject’s education and ability; no testing controls to support reliability of FC; variation in sentence structure and pronunciation depending upon the facilitator; and the incredible ability to spell correctly rather than phonetically.

Further, the Supreme Court of Colorado considered Bernie Stepanek’s poor vision in citing flaws with his facilitated allegations. The court noted that an ophthalmologist originally measured Bernie’s vision at “20/50” with facilitation, but when his facilitator’s vision was obstructed, it was doubted that Bernie even had the ability to see the letters on his letter board. Thus, the Stepanek case illustrates flaws in FC commonly found in other cases.

**The Translation-Line Cases**

After the rejection of FC in *Mark & Laura S., In re M.Z., Callahan, In re Stepanek*, and the trend in scientific research, it appeared as if FC would go down in history as another miracle cure that disappeared nearly as fast as it arrived. FC evidence, however, started to gain acceptance in certain criminal prosecutions. The first case in New York to pioneer a new approach toward FC evidence was *People v. Webb*.

The court in *Webb* held that the limited use of a facilitator in a Grand Jury proceeding was not in error when a particular control for FC was utilized in the proceeding. During the Grand Jury proceeding the facilitator listened to “white noise” through a headset so that the questions could not be overheard. The court additionally assumed that the mere ability to view the facilitating first hand would expose facilitator leading. The approach tolerated by the court, however, is flawed—there were no reported controls for visual stimuli, the facilitator’s familiarity with the proceeding, and the facilitator’s awareness of sensitive details of the case. Moreover, the opinion did not indicate whether the decibel level of the white noise was measured or whether it reached sufficient levels. Thus, given the...

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83 See id. at 9.
84 See id. at 7.
85 See id. at 8.
88 “White noise is referred to as “[a] random mixture of many frequencies, designed to mask the hearing of other material.” MARGARET W. MATLIN, HUMAN EXPERIMENTAL PSYCHOLOGY 242 (1979).
89 *Webb*, 597 N.Y.S.2d at 568.
facilitator’s base of knowledge, visual cues, and closed set of questions, it is fair to say that this was a seriously confounded validation.

This live use of FC led the court to distinguish Mark & Laura S. and In re M.Z., both of which did not allow the use of FC testimony. However, the court scheduled a hearing in limine for an inquiry into the process of FC. The court noted that if FC involved reliance upon scientific conclusion, then there may well be serious questions as to whether those procedures enjoy sufficient acceptance in the scientific community. Thus the defense was entitled to probe this question in greater detail.

Unfortunately, the results of the in limine hearing were not published. But, Webb is important because it was the first FC case to disregard a body of peer reviewed scientific research in favor of an ad hoc demonstration of the method conducted by lay people. Furthermore, the court gave weight to what it could see of the demonstration, unaware of, or disregarding, the fact that the controversy over FC concerns the aspects of it that cannot be seen by the naked eye, like most scientific endeavors. Thus, the court opened the door to subsequent evasions of the Frye test in states that adopt this standard.

The court clearly deferred to the Grand Jury’s reliance on the technique because it was demonstrated live, and then subsequently distinguished the aforementioned Family Court cases from New York. The court waffled over the FC issue because it had to reconcile the solid reasoning of previous New York State Family Court cases such as Mark & Laura S. and In re M.Z., with the vividness heuristic of a live demonstration. It appears that the court’s “Ordinary Common Sense,” derived from seeing it live, enabled it to by-pass case law such as Mark & Laura S. and In re M.Z., as well as New York’s Criminal Procedure Law.

Grand Jury proceedings are secret, but a limited number of essential individuals are allowed to attend certain segments, so long as the Grand Jury is not voting or deliberating. New York’s statute specifically allows the presence of the district attorney, a clerk, a stenographer, an interpreter, a guard, the witness’s attorney, a videotape operator, and a human service professional such as a social worker for emotional support. This list was expanded by case law to include mothers needed to provide moral support for their child-witness, so long as she did not influence her child’s testimony and prejudice the defendant. However, in People v. Cheeseman a portion of a Grand Jury proceeding was deemed “totally outside of

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90 Beck and Pirovano found “speech noise” through earphones at 80 dba sufficient to block a facilitator’s hearing. See Beck & Pirovano, supra note 27, at 497.
91 Webb, 597 N.Y.S.2d at 568. “Those cases are distinguishable chiefly because they did not involve the proposed live use of facilitated communication. Here the grand jurors actually saw the witness testify, saw the facilitator, saw the headphones, and saw and heard the machine produce sounds indicating responses to questions asked of the witness.” Id.
92 See id. at 569.
93 See generally MICHAEL PERLIN, THE JURISPRUDENCE OF THE INSANITY DEFENSE 269–75 (1994). Professor Perlin explains how the oversimplification of complex issues may result from the effect salient elements of a trial may have upon cognitive processes.
94 See generally id. at 287–329 (discussing Ordinary Common Sense as the unconsciousness of legal decision making and the frequent lack of awareness of underlying psychological issues).
95 “During the deliberations and voting of a grand jury, only the grand jurors may be present in the grand jury room.” N.Y. CRIM. PROC. § 190-25(3) (McKinney 1993).
96 See id.
97 See id. § 190.25(3) (a)–(h).
acceptable practice” when “the mandated oath was not given, the child’s mother participated in the proceeding, and she assisted [her son] in testifying.”

Webb is analogous to Cheeseman because, assuming arguendo that the facilitator likewise plays a special role, the facilitated testimony should not be acceptable because the facilitator “assists” the witness and runs the risk of unintentionally “participating” by unconsciously leading the witness.

In the light of the previous opinions, it is surprising that a court should fail to recognize the significant problems of facilitator leading that plagues the use of FC. Ironically, even a 50 year old warning about influencing witnesses in Grand Jury proceedings speaks to FC’s fatal and obvious flaw. The court in People v. Minet warned that, “[a] change in expression, a pressure on the hand or a warning glance would not be shown upon the minutes but might well influence, suppress or alter testimony to the prejudice of the defendant.” Thus, it could be argued that the illogical reasoning and meretricious scientific approach toward the validation of FC in Webb supports the contention that the reasoning behind the decision was pretextual.

Cases involving FC are especially prone to pretextual reasoning because these cases often involve allegations of sexual abuse against a disabled child. When it is alleged that a nonverbal disabled child can identify a perpetrator, a powerfully emotional situation is naturally heightened. Thus, inherent bias built into the situation distracts the fact finder from balanced and detached reasoning, and invites “a rush to judgment,” similar to that found in sanist behavior against the accused abuser.

In In re Luz an 11 year old child, Luz Prieto, who is nonverbal, autistic and mentally retarded allegedly made an accusation of sexual abuse against her parents, Augusto and Luz Prieto, via FC. Consistent with the FC phenomenon, teachers alleged that Luz, the mentally retarded child, was bilingual, could read, spell, and tell time when using FC. The local Department of Social Services along with the County Attorney initiated an Article 10 child protective hearing in Family Court based upon the facilitated allegations of abuse. The Family Court initially ordered a Frye hearing to establish the scientific reliability of FC. After the County Attorney requested the second adjournment in the case to call expert witnesses from out of town for the Frye hearing, the Family Court dismissed the Article 10 hearing sua sponte. The County Attorney, however, delayed the return

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100 See Cummings & Prior, supra note 11, at 232.
102 See id.
103 Michael Perlin, Morality and Pretextuality, Psychiatry and Law: of “Ordinary Common Sense,” Heuristic Reasoning, and Cognitive Dissonance, 19 BULL. AM. ACAD. PSYCHIATRY & L., 131 (1991). “I am suggesting … there is a dramatic tension between those areas in which courts accept (either implicitly or explicitly) dishonesty in certain subject-matter areas and those where they erect insurmountable barriers to guard against what they perceive as feigning, malingering, or other misuse of the legal system.” Id. at 133.
104 PERLIN, supra note 93, at 11. “[M]ental disability law decision making is inspired by (and reflects) the same kinds of irrational, unconscious, bias-driven stereotypes and prejudices that are exhibited in racist, sexist, homophobic, and religiously- and ethnically-bigoted decision making.” Id.
106 See id. at 542.
107 See id.
108 See id. at 543.
of Luz to her family by successfully appealing to the Appellate Division which stayed enforcement of the Family Court order, and then reversed and remanded for further proceedings.

The Appellate Division, however, radically departed from the reasoning offered in the Family Court cases and followed the poor reasoning in *Webb* when it held that the Family Court erred in ordering a *Frye* hearing. The court held that the test is whether the interpreter or facilitator can effectively communicate with the witness reliably, and reliably convey the witnesses’s answers to the court. Without significant justification, the court simply stated that “[s]ince the ability of an interpreter, translator, 'signer', or anyone else who transmits the testimony of a witness is not based on a scientific theory, any application of the *Frye* test is inapposite.” Furthermore, the court held that a test proposed by the County Attorney, whereby the court could question Luz outside the presence of the facilitator, should adequately establish whether FC is a reliable and accurate means of communication by Luz without the necessity of expert testimony. Consistent with other poorly conducted validation attempts, the court failed to control for the facilitator’s knowledge of the proceedings and the case.

The pseudo-scientific approach and pretextual reasoning in *Luz* far exceeded that in *Webb*. There were virtually no controls for facilitator leading, and quite clearly any facilitator used in the courtroom could have, consciously, or unconsciously, supplied the answers that would lead to a finding of parental sexual abuse. Thus, the court followed an *ad hoc* "scientific" approach proposed by an interested and unqualified party and failed to rely upon expert scientific testimony. This judicial reach appears unique given how unlikely such nonexpert validations would be tolerated in "hard science" actions such as medical malpractice.

The additional fact that Mr. and Mrs. Prieto were poor immigrants in need of court appointed interpreters and counsel may have influenced this arguably pretextual opinion. Perhaps the most damaging factor weighing against the parents was the fact that they did not seek the return of their daughter as allowed by the Family Court Act. Apparently, the Prietos failed to make a request to have Luz returned to their home between the time of her removal and the date of the Family Court fact finding hearing. Such failure apparently contributed to the Appellate Division’s reversal of the Family Court’s *sua sponte* dismissal of the petition for the child’s removal. This final fact which was not in issue in the matter at hand, yet mentioned by the court, may reflect circumstances to which the court may lack sensitivity. It is quite possible that the Prietos lacked full awareness of the tactical choices available in challenging the authorities over the removal of their daughter given their economic and linguistic limitations.

Additionally, the court appears to act as its own expert witness by claiming that the pioneering efforts of the teacher Ann Sullivan with Helen Keller were similar to FC in that both are trial and error and neither are supported by scientific
theory. The court, however, inappropriately compares FC with Helen Keller’s experience since Ann Sullivan’s work fell squarely within the bounds of traditional operant learning theory. Anne Sullivan helped Helen Keller make sense of the world she lived in by pairing sign language with that which it represented. Moreover, the fact that FC lacks a reasonable theory accounting for the phenomenon should militate against its acceptance, particularly since there is a lack of evidence supporting its effectiveness.

Under this court’s standards, the prosecution could just as easily have used telepathy since mere visual observation of the procedure and a sworn facilitator proved sufficient as opposed to a scientifically controlled procedure. In contrast, it is unlikely that the court would impose such a rule as an “I know it when I see it” standard when weighing “hard” DNA testimony.

The court’s view is clearly summarized in a citation to in re Marshall R., which involved interpretation for a deaf child:

The best interests of the child are far more important than some technical objection which, on this record, appears to have little substance. The testimony of the interpreter should have been admitted, and then it would become the duty of the court to weigh and evaluate such testimony in the light of the circumstances under which it was given.

Thus, the court likened all of the criticisms of FC to a “technical objection” which interferes with the prosecution of child abusers. In the court’s rush to a pretextual decision, it failed to consider how the true best interest of the child may lie in exposing a potentially false allegation of abuse.

Ultimately, however, the Prietos did prevail in the remanded Family Court hearing because FC failed Judge Slobod’s own test. Judge Slobod dismissed the case because she found that the facilitated answers were “complete gibberish.” After the remanded case was dismissed, the Prietos filed an amended complaint

116 See id. at 544.
117 See C.B. FERSTER & MARY CAROL PERROT, BEHAVIOR PRINCIPLES 1 (1968). “Reinforcement is the fundamental principle of operant behavior. It describes the procedure by which the frequency of an operant performance is increased and also concerns the conditioning of reflexes. Operant behavior . . . deals with the behavior of men and animals as they act on and interact with the environment.”
118 “Even on the first afternoon . . . she began to spell into Helen’s hand D-O-L-L; and later, when she sought to divert Helen from the doll, she spelled out C-A-K-E. Although Helen quickly imitated the hand signs, she made no connection between them and the objects they symbolized, and after an exhausting struggle Annie let her have both.” JOSEPH P. LASH, THE STORY OF HELEN KELLER AND ANNE SULLIVAN MACY 51 (1980).
120 Id.
121 See Michael L. Perlin, Psychodynamics and the Insanity Defense: “Ordinary Common Sense” and Heuristic Reasoning, 69 Neb L. Rev. 3 (1990). Professor Perlin discusses the psychodynamics of insanity defense jurisprudence and analogizes heuristics in mental disability cases to that found in the juvenile sexual assault case Coy v. Iowa, 108 S. Ct. 2798 (1988), where nontraditional legal precedents were relied upon. “In Coy, Justice Scalia first precedentially invoked the literary and cultural underpinnings of OCS by citing to the Bible and to Shakespeare, and then explained his use of references to and quotations from antiquity as part of his effort to convey ‘that there is something deep in human nature that regards face-to-face confrontation . . . as essential to a fair trial.’” Id. at 26.
122 Prieto v. County of Orange, WL 399662, at 3 (S.D.N.Y. 1997). “The case was remanded to Family Court, where a second trial commenced before the Honorable Elaine Slobod on July 8, 1993. After hearing the facilitated testimony, Judge Slobod sought to test the veracity of minor plaintiff’s facilitated answers by putting questions to minor plaintiff that only plaintiff, but not the facilitator could hear.” Id.
123 See id.
alleging a number of violations of their constitutional rights and related state law
claims. All of these causes of action were dismissed in District Court except for
one alleging “constitutionally deficient training in the use of FC by [Orange] County, [and its present and former Commissioners of the Social Services
Department] Bloomer, and Cook.” The court stated that in order to successfully
state a claim under § 1983, “such a failure to train must be the product of
deliberate indifference to constitutional rights, which in turn requires a showing
that: 1) the policymaker knew ‘to a moral certainty’ that employees would
commonly confront a given situation, 2) the situation is frequently mishandled or
confronts employees with a difficult choice of the sort that training or supervision
would make less difficult, and 3) the wrong choice by an employee will often result
in deprivation of a citizen’s constitutional rights.” The subsequent trial
evaluating the Prietos remaining claim thus far resulted in a significant judgment
in their favor.

The most controversial case having dealt with FC is State v. Warden. In this
case, the court held that the Frye test does not apply to FC testimony and upheld a
conviction for “indecent liberties” with a 12 year old profoundly retarded autistic
child, JK, at the Institute of Logopedics (IOL). Warden is a direct-care worker
who originally denied wrongdoing, subsequently confessed to a police detective
and co-worker of the accused “indecent liberties,” and then finally denied
wrongdoing again at trial. The opinion does not reflect that Warden was aware of
any coercion from his interrogators, but there is circumstantial evidence which
suggests that Warden may have been susceptible to coercion from authorities.
Warden also denied his confession claiming that he was under the influence of
alcohol when he gave the interview.

The state’s expert witnesses in this case were the same clinicians who work for
the facility where the alleged abuse occurred. The defense’s expert witnesses, Dr.
Jacobson and Dr. Schwartz, were psychologists from the New York State Office of
Mental Retardation and Developmental Disabilities. Dr. Schwarz testified that
JK was not validly communicating because he had good motor skills and did not
require the aid of a facilitator to point to a yes–no board. However, one of the
state’s witnesses, a speech pathologist named Terese Conrad, maintained that JK
was communicating through FC. In this connection, it is important to note that the

124 See id at 1.
125 See id. at 7.
127 Bill Alden, County Liable to parents for $750,000: Use of ‘Facilitated Speech for Disabled Child at
Issue, N.Y.L.J. Nov. 7, 1997, at 1. “A federal jury last Friday returned the verdict . . . voting 8–0 to find
the county liable under 42 USC § 1983 to Luz Prieto, now 16 years old, and her parents, Augusto and
Luz Prieto.” Id.
128 891 P.2d 1074 (Kan. 1995).
129 See Richard Ofshe, Coerced Confessions: The Logic of Seemingly Irrational Action, 6 CULTIC
STUD. J. 4 (1989). “Relatively standard interrogation tactics applied to individuals possessing little
self-confidence and particular sorts of vulnerabilities can produce the first signs of a thought reform
reaction (i.e., brainwashing) . . . . The influence tactics routinely used in interrogations are sufficiently
powerful to cause some innocent persons to at least temporarily come to believe that they have
committed a serious crime.” Id.
130 See Warden, 891 P.2d at 1083.
131 See Facilitated Communication Address, supra note 5.
132 See Warden, 891 P.2d at 1080.
state’s witness also happened to be the facilitator who originally elicited the alleged testimony from the alleged victim JK.133

While facilitating at trial, Conrad did not make any efforts to control for leading, she did not wear headphones nor did she take any other minimal precautions relied upon in other trials that considered FC evidence. Thus, Conrad merely repeated the same “uncontrolled” FC method that produced the original allegation of abuse. The court also interpreted the fact that JK conveyed facilitated allegations of abuse only to Conrad as an indication of its validity.134 The court failed to see how this same phenomenon could be a result of facilitator leading in a poorly controlled situation.

The Institute of Logopedics started using FC in February, 1992, undeterred by the growing questions regarding FC’s validity.135 The allegations against Warden were made in May of 1992 through a series of interviews over a number of days. The interviews with JK were precipitated by tantrums that JK exhibited when his case manager’s, not the defendant’s, pants were off.136 JK’s tantrums would continue until the case manager’s pants were put back on. In order to explore this issue further, the case manager elicited the assistance of Conrad who proceeded to interview JK with Dr. Marks.137 There was no mention in the opinion as to why the case manager takes off his pants in the presence of clients, nor was there mention of a functional analysis to hypothesize the cause of JK’s tantrums. Thus, the judgment of Conrad in adopting the use of FC at that point in time without adequate control for leading, the failure to analyze the cause of the tantrums, and the circumstances whereby it appears that employees routinely change their clothes in front of clients, raises issues over protocols at the Institute.

In the first interview conducted by Dr. Marks and Conrad, JK was asked if he liked various people with whom he lived and worked. JK responded yes to all except Warden when he typed, “NO NO NO.” Dr. Marks then asked JK what he disliked about Warden, to which he responded, “DON’TASK.” Several days later the questioning continued until explicit allegations of abuse were elicited.138

The court also relied on the pretextual statements and flawed logic of In re Luz, including the analogy that if a Spanish translator does not have to be subject to the Frye test then neither does a facilitator, and that expert testimony is not required because, “[t]o the contrary, the proffered facilitated communication lends itself to empirical rather than scientific proof.”139 The court blindly recognizes a cite to Luz and blithely accepts an arbitrary distinction between empiricism and science, which simply ignores the fact that empiricism is at the heart of scientific inquiry. The Kansas court ignored the reasoning of published Frye-line opinions and looked to the opinion in Luz which similarly employed pretextual reasoning regarding “undesirable” defendants. It is likely that the defendant Warden, a 29 year old suicidal, HIV-positive, low level employee failed to present well in the court room, much like the poor immigrant parents in in re Luz.

133 See id. at 1083.
134 See id. at 1082. “Conrad did ask JK if he would convey the information with a facilitator other than herself, and JK refused.” Id.
135 See id. at 1079.
136 See id. at 1081.
137 See id.
138 See id.
139 See id. at 1087 (citation omitted).
The court held that FC is a method of communication and requires no scientific testimony, thereby making the Frye test inapplicable. However, Warden’s attorney claimed that failure to implement a protocol to control for facilitator leading, such as diverting eyes or white noise, deprived him of a fair trial. The court justified the failure to use proper controls by noting that the jury was aware of the problems, such as Conrad’s failure to wear headphones and that she was the only facilitator who was told of the abuse. The court said that Conrad had no vested interest, did not know of the alleged abuse in advance, facilitated a retraction of an allegation of abuse against Warden with another child, and JK’s facilitated allegations were validated by Warden’s retracted statements.

The Supreme Court of Kansas noted that the trial court did not abuse its discretion and said that regardless of the recommended protocol for FC, “familiarity and predictability were essential if JK was to be able to communicate.” The problem with this finding is that it is actually based upon a mere unchallenged hypothesis. The opinion failed to address whether JK required the same type of “familiarity” to communicate in other instances. Typical of children with JK’s disabilities, he was able to sign “yes” or “no” responses and point to pictures in a communication book to express his immediate wants and needs. Thus, it is highly relevant to the court’s “familiar facilitator” hypothesis whether JK likewise refused to communicate via his signing and picture book pointing with anybody other than Conrad. The practice of exclusive communication through one party is atypical of other similarly situated children with JK’s basic communicative ability. Children such as JK typically use basic communication skills indiscriminately in order to satisfy immediate wants and needs. This is especially true of children like JK who live in residential treatment settings because he needs to communicate his wants and needs to a wide variety of staff members who serve him. The opinion did not state the unlikely proposition that JK exclusively communicated all of his basic wants and needs through Conrad.

In accepting the familiar facilitator hypothesis, the court fails to recognize that the inability to communicate is an extremely frustrating experience that is not given up easily once attained. Therefore, it is illogical to conclude that a person who is suddenly enabled to communicate so proficiently through FC would use the new ability so sparingly, and deviate from established patterns of communicating indiscriminately with those around him to achieve his wants and needs. Logic dictates that when a person, previously incapable of communicating, finds a new effective outlet, that outlet would most certainly be exercised extensively, not selectively.

Thus, after the court rejected the use of science, it ironically embraced an untested pseudo-scientific theory proffered by the state—that JK can only facilitate when in special familiar circumstances. The court stated that the failure to follow the recommended protocol goes to the weight of JK’s testimony, not to its admissibility. The lesson here is that even the Frye test is no obstacle to courts wishing to embrace the mystical powers of FC.

140 See Warden, 891 P.2d at 1088.
141 See id. at 1089.
142 See id.
143 See id. at 1090.
144 See id. at 1090.
145 See Warden, 891 P.2d at 1078–9.
The Critical Difference Between Translation and Facilitation

Despite the careless use of FC in translation-line cases, Phipps and Ells recommend that FC should be analyzed in court as translated testimony.146 There is, however, a critical flaw with the assumption that FC is a mere translation. The term translation usually refers to information that is received and reformulated to an equivalent meaning in another mode. The witness, in response to a question, typically provides a parol response (R1) which originates exclusively from the witness before being translated to the reformulated response (R2). In a translation, R1 represents 100% authorship from the witness. It is critical to note the independence of R1, since there is no question as to influence from the translator if the witness speaks or writes R1 on his own. It is well known, however, that R2 is susceptible to translator influence. But, the risk of minimal translator influence is tolerated in this instance because translation has existed for centuries, and R1 stands alone without translator influence. Also, R1 could be recorded for visual or aural comparison to R2, and the oath’s intended power and effect remains intact since the translator is conscious of the potential disparity between R1 and R2. Thus, the test for translation is whether the translator can stand between R1 and R2 with full awareness and control of his or her input.

In contrast, FC only provides one null response (R0) because it is impossible to determine the degree to which either the witness or the facilitator contributes to R0. When properly instituted, controls help eliminate misleading sources of authorship. Although FC and translation may appear similar upon first impression, careful analysis reveals that they are quite dissimilar and should not be confused. Thus, the analogy drawn between FC and translation is in error.

PRETEXTS AND FACILITATED COMMUNICATION UNDER DAUBERT

New York state did not adopt the new standard established by the United States Supreme Court in Daubert v. Merrell Dow Pharmaceuticals Inc.147 However, if New York had adopted the new Daubert standard, the result of the Frye-line cases could have been radically different if the judge personally believed that FC was credible regardless of its acceptance in the scientific community. Daubert expanded a judge’s discretion and liberalized the admission of novel scientific evidence.148 This expanded discretion on behalf of the trial judge caused Chief Justice

147 113 S. Ct. 2786 (1993). Since Daubert only concerned the interpretation of the Federal Rules of Evidence, states were not constitutionally compelled to adopt the new Supreme Court standard in resolving state evidentiary questions.
148 David Hominik, Expert Testimony: Daubert and the Changing Standard for the Admission of Psychiatric, Psychological and Other Evidence, 19 MENTAL & PHYSICAL DISABILITY L. REP., 393 (1995). “Post-Daubert judges have an expanded gatekeeper’s function, with increased latitude to admit or exclude evidence. The door is open. The degree individual judges will screen expert testimony offered by psychologists, psychiatrists, and other professionals remains to be determined in many jurisdictions.” Id. at 393.
Rehnquist to raise concern over its dangers.\textsuperscript{149} There is no predicting the outcome of FC cases under the \textit{Daubert} standard because the judge has such wide discretion. But, given the precedent set in \textit{Frye} test states, the flood gates in more liberal \textit{Daubert} states could run the risk of being opened especially wide.

In \textit{Daubert}, the Supreme Court ruled that in federal trials, the Federal Rules of Evidence, not \textit{Frye}, provide the standard for admitting expert scientific testimony in a federal trial.\textsuperscript{150} Thus, the “general acceptance” standard of the \textit{Frye} test is no longer a necessary pre-condition to the admissibility of scientific evidence in federal courts and states that adopt this standard. As of June 1995, 14 states could be characterized as \textit{Daubert} states due to individual state high court decisions.\textsuperscript{151}

\textit{Daubert} is intended to liberalize the admission of scientific evidence by giving the judge greater latitude than the more rigid \textit{Frye} test established in 1923.\textsuperscript{152} In \textit{Daubert}, the Court declined to create a bright-line test, but rather set out a five-step guideline for judges to follow in evaluating scientific testimony. First, the judge must determine whether the reasoning or methodology underlying the testimony is scientifically valid and can be properly applied to the facts at issue; second, whether the theory or technique can or has been tested; third, whether the theory or technique has been subjected to peer review; fourth, the rate of error of the technique; finally, the general acceptance of the technique could have a bearing on the inquiry.\textsuperscript{153}

The \textit{Daubert} standard is clearly beneficial for new theories and scientific techniques that are valid and would be generally accepted but for their lack of exposure. However, hotly contested scientific techniques are a different matter. But, it is conceivable that if a debate evenly splits comparably respected, empirically based, authorities within a scientific community, then a court could use the \textit{Daubert} guidelines to determine if application of the technique is reasonable under the circumstances.

Theoretically, the \textit{Daubert} standard should assist the fact finder in reaching a fair decision. The judges in \textit{Luz} and \textit{Warden} would have been hard pressed to reconcile FC’s performance record in testing, peer reviews, rate of error, and general acceptance in a judicial test. But, \textit{Daubert}’s preponderance of the evidence standard erodes easily because it merely sets liberal guidelines that are easy to get around as opposed to a bright-line test. The initial “gatekeeping” function of making a preliminary determination as to whether the reasoning or methodology underlying the testimony is scientifically valid and whether it can be properly applied to the issue provides an “easy out” for any court.\textsuperscript{154} The judge may be qualified to make a ruling on whether reasoning or methodology is scientifically valid based upon testimony and evidence. It is, however, ill advised for judges lacking expertise in science to make determinations based upon their own ken while precluding relevant testimony on the merits of the technique in question.

\begin{footnotes}
\footnote{\textit{Daubert}, 113 S. Ct. at 2799 (Rehnquist, C.J., concurring in part, dissenting in part). “Unusual subject matter should cause us to proceed with great caution in deciding more than we have to, because our reach can so easily exceed our grasp.” \textit{Id.}}
\footnote{\textit{Daubert}, 113 S.Ct. at 2786.}
\footnote{See Hominik, \textit{supra} note 148, at 394.}
\footnote{\textit{Daubert}, 113 S.Ct. at 2792–94.}
\footnote{See \textit{id.} at 2797.}
\footnote{See \textit{id.} at 2796.}
\end{footnotes}
The court in *Luz* made an apparently illogical statement in support of its view, "A determination of these questions does not require expert testimony. To the contrary, the proffered facilitated communication lends itself to empirical rather than scientific proof." The fact that this statement was made, compounded by the fact that this statement was cited in a subsequent case, militates against the fact finder's liberalized gatekeeping role under *Daubert*. Judges are experts in the law, not the branch of science that encompasses FC and other novel science. Thus, it appears that Rehnquist's admonition in *Daubert*, that judges will act as amateur scientists, is justified. Judicial treatment of FC makes a strong case against judges' switching robes for the expert's lab coat.

On one hand, the problem inherent in step one of the *Daubert* guidelines is an arguably unavoidable problem that was also faced with the *Frye* test. The courts in *Luz* and *Warden* simply side-stepped the scientific issue by claiming that science was not involved despite their own "scientific" approaches justifying the reliability of FC. On the other hand, the *Daubert* standard, when followed appropriately, should not open the floodgates to quackery or pseudo-science. On the contrary, the *Daubert* guidelines should guide the fact finder in probing further into scientific methodology and theory. The Supreme Court, however, left the gate to pretextual opinions open when it failed to make the more comprehensive *Daubert* guidelines a mandatory test.

As a result of *Daubert*, courts can unabashedly choose to circumvent a reasoned exploration into a scientific methodology in favor of rushing toward a pretextual decision. Ordinary jurors without scientific sophistication may rest their decisions upon pseudo-scientific theories or emotions in lieu of sound theories accepted by a qualified community of scientists. Thus, the court in *Daubert* advanced evidentiary analysis while compromising its application. The court's newly created position for the fact finder as scientist–gatekeeper is ironic because the blessing to ignore the "general acceptance" within a field standard causes the judge to enter that very field and make judgments that he or she may simply be unqualified to make without expert opinions.

The United States Supreme Court recently compounded the problems spawned by *Daubert* by holding in *General Electric v. Joiner* that the "abuse of discretion standard" is the proper standard of appellate review to either admit or exclude expert scientific evidence. *Joiner* is problematic because the resulting insulation

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156 *Daubert*, 113 S.Ct. at 2800. "I do not doubt that Rule 702 confides to the judge some gatekeeping responsibility in deciding questions of the admissibility of proffered testimony. But I do not think it imposes on them either the obligation or the authority to become amateur scientists in order to perform that role." *Id*.
157 Discomfort with the substitution of an expert's opinion with that of a judge was likewise evidenced in *Rennie v. Klein* 653 F.2d 836, 851 (3rd Cir. 1981). In *Rennie*, the court reversed a lower court's attempt to engraft its own procedures onto the requirements set out in an "Administrative Bulletin" which details the state's procedure through which decisions to administer drugs against a patient's will are made and reviewed. *Id*. "The participants in the procedure are mental health professionals, rather than judges who doffed their black robes and donned white coats." *Id*. at 851.
158 Jurors' comments in *State v. Warden*, made after the case, reflects how they glossed over the scientific complexities of the FC controversy. Matthew Schofield, *Autistic Child's Machine 'Talk' Wins Conviction*, KANSAS CITY STAR, Mar. 31, 1993, at A1. (A juror said "[i]t was obvious he was intelligent in his own way. We felt like his testimony was accurate enough. We didn't think he was guided into it, like they wanted us to believe.") *Id*.
159 118 S. Ct. 512 (1997).
of court decisions from appellate review increases the unpredictability of rulings on scientific evidence. Thus, under Daubert trial courts can admit scientific evidence falsified and rejected by the scientific community. Additionally, under Joiner, “good” theories of respected scientists can be excluded by the court’s own falsification\textsuperscript{161} despite the absence of theory falsification by peers in the scientific community. This recent development, however, should not be confused with a conservative step back toward the Frye standard. Rather, the modern “liberal thrust”\textsuperscript{162} of the Federal Rules of Evidence is manifest in the encouragement trial judges receive to determine the admission of scientific evidence based on their own expertise as opposed to that of the scientific community which determines the admissibility of novel scientific evidence under Frye. Some authorities welcome a new era where judges and lawyers will become more proficient in scientific methods\textsuperscript{163} and even encourage the imposition of a new duty upon judges to develop scientific literacy.\textsuperscript{164} Despite apparent advantages of increased scientific competencies among jurists, prudence and practicality dictates that the emphasis should be on improving judicial tests and analyses as opposed to increasing the specialized acumen of individual judges in any field from science to the arts, or literature.

Professor Jonakait posits that the Supreme Court’s conceptualization of scientific evidence as “unusual”\textsuperscript{165} may have rendered Daubert an \textit{ad hoc} decision.\textsuperscript{166} The same argument could likewise be applied to Joiner given the particular theory proffered and the potential economic implications of this toxic tort case.\textsuperscript{167} Therefore, the scientific method, which brings order and predictability to the sciences, paradoxically fails to bring similar predictability to rulings on scientific evidence because of \textit{ad hoc} determinations such as Daubert and Joiner. Thus, after Daubert and Joiner, judges are more able than ever to use pretextual and OCS rationalizations to open the gate to junk science or close it in the face of rational science.

\textsuperscript{160} See id. In Joiner, the United States Supreme Court cited the District Court’s falsification of the expert witnesses’ theory which linked exposure to PCPs with Joiner’s development of small cell lung cancer. The distinctions drawn between Mr. Joiner and the studies included the fact that the subjects of the studies were animals, had different levels of exposure, and developed different types of cancer. In addition, the court concluded that the epidemiological studies upon which Joiner’s experts relied were “insufficient basis” upon which to base testimony.

\textsuperscript{161} See id. at 518.

\textsuperscript{162} See Daubert, 113 S. Ct. at 2794.

\textsuperscript{163} David L. Faigman, David H. Kaye, Michael J. Saks & Joseph Sanders, MODERN SCIENTIFIC EVIDENCE: THE LAW AND SCIENCE OF SCIENCE AND EXPERT TESTIMONY, at VII (1997). “there are signs that a ‘third culture’ is emerging in the law. This third culture would be one that integrates a sophisticated understanding of science into legal decisionmaking.”

\textsuperscript{164} See id. at 21. “If Daubert is not to become a dead letter, judges must develop sufficient literacy to recognize research designed to truly test a hypothesis as compared to research designed merely to supply impressive looking graphs and imposing numbers to a researcher’s theory.” Id. (citation omitted).

\textsuperscript{165} See id. at 2799 (Rehnquist, C.J., concurring and dissenting in part).

\textsuperscript{166} Randolph N. Jonakait, Texts or Ad Hoc Determinations: Interpretations of the Federal Rules of Evidence, 71 IND L.J., 551, 559 (1996). “Daubert, however, may simply be an \textit{ad hoc} determination not based on any generalizable principles. The question of the admissibility of scientific opinions somehow seems different from other kinds of evidentiary decisions.” Id.

\textsuperscript{167} General Electric, 118 S. Ct. at 520. (J. Breyer concurring) “And it may, therefore, prove particularly important to see that judges fulfill their Daubert gatekeeping function, so that they help assure that the powerful engine of tort liability, which can generate strong financial incentives to reduce, or to eliminate, production, points towards the right substances and does not destroy the wrong ones.” Id.
CONCLUSION

Warden represents the unique combination of the interaction between bad science and bad law. It is clear that Warden sets a dangerous precedent by casting the anchor for a line of cases that may arise with a similar desire to convict utilizing spurious FC testimony. The future of such a line of reasoning is bright because cases based upon scientific fads, such as FC, have a safe harbor in federal courts and Daubert states where the prevailing rules of evidence accommodate poor reasoning on the part of the fact finder.

The characterization of FC in courts has been transformed from a tolerance of a novel untested methodology to the blatant acceptance of bad science. The ramifications of this development are far reaching because the proponents of scientific fads rely on cases like Warden to defy rejection of the scientific community and bolster bad science. Moreover, the endorsement of FC through Warden is problematic because it alters the natural course of passing fads in the scientific arena by undermining professionals in another discipline. FC’s rejection by the scientific community is nullified when courts admit FC evidence. This reliance on FC evidence is then subsequently used as a judicial endorsement which has great weight with the public and makes it harder to deter the promotion of FC by those advocates who benefit from its use.168

As a consequence of Warden, prosecutions relying on FC evidence will most likely enjoy success whenever courts are inclined to believe that the defendant “looks” guilty. Cases like Warden that disregard overwhelming evidence and logic reduce scientific and legal analysis to an absurdity. Unfortunately, the real issue raised by cases like Warden concern neither science nor law, but the ability of the weakest elements of the two to endure and complement one another.

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168 Schofield, supra note 158, at 1. A reporter quoted Biklen reacting to Warden, “‘this case is important,’ Biklen said. ‘It doesn’t settle the debate on facilitated communication. But it does suggest the debate is still open and that people who communicate this way will one day have their day in court.’” Id.