The Intellectually Disabled Witness and the Requirement to Promise to Tell the Truth

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Mentally disabled victims of sexual crimes may be prevented from acting as witnesses in a criminal trial if their mental capacity is challenged. They face an important obstacle to access justice if the case against their alleged aggressor mostly relies on their testimony. In R. v. D.A.I., in 2012, the Supreme Court of Canada revisited the Canada Evidence Act’s requirement of promising to tell the truth and lowered the previously ambiguous threshold of cognitive capacities required to satisfy this requirement. The Evidence Act has been amended in 2015 to reflect the Court’s decision. While apparently facilitating people with mental disabilities’ (PMD) access to justice, I propose that the Court’s interpretation of the Evidence Act contains a problematic normalizing outlook on PMD qua legal subjects, leaves some problems untouched, and could potentially deflate the political urgency of addressing them.

Les personnes ayant une déficience intellectuelle qui sont victimes de crimes sexuels pourraient être empêchées de témoigner lors d’un procès si leur capacité mentale est mise en question. Elles pourraient faire face à un obstacle important pour avoir accès à la justice si la preuve contre leur agresseur présumé repose principalement sur leur témoignage. En 2012, dans R. c. D.A.I., la Cour suprême du Canada s’est penchée sur l’exigence, dans la Loi sur la preuve au Canada, de promettre de dire la vérité, et elle a abaissé le seuil auparavant ambigu des capacités cognitives requises pour satisfaire à cette exigence. La Loi sur la preuve a été modifiée en 2015 pour refléter l’arrêt de la Cour. L’auteur avance que même si, en apparence, l’interprétation qu’a donnée la Cour de la Loi sur la preuve facilite l’accès à la justice pour les personnes ayant une déficience intellectuelle, cette interprétation implique une perspective problématique de normalisation de ces personnes en tant que sujets de droit, sans s’attaquer à d’autres problèmes, et elle pourrait même masquer l’urgence de les régler.

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Introduction

“The law is finally fair,”¹ a columnist at the Toronto Star rejoiced when the Supreme Court of Canada declared in 2012 that the Canada Evidence Act should not require persons with mental disabilities (PMD) to understand what it means to “promise to tell the truth” before acting as witnesses.² Both disability advocates and women’s rights groups joined the media in welcoming this ruling.³ I wish, however, to problematize it. My claim is that the Court’s integrative strategy in R. v. D.A.I. “normalizes” the figure of the mentally disabled witness in a way that does not completely and successfully integrate PMD within the legal process and may even slow their effective inclusion.

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¹ Carol Goar, “Supreme Court Ruling Gives Canadians with Mental Disabilities Full Equality in Court,” The Toronto Star (14 February 2012), online: <http://www.thestar.com/>.


³ Canadian Association for Community Living, “Victory at the Supreme Court of Canada for People with Intellectual Disabilities” (13 February 2012), online: <http://www.cacl.ca/>, Women’s Legal Education and Action Fund, “The Voices of Women with Mental Disabilities Will Be Heard in Court” (10 February 2012), online: <http://www.leaf.ca/>.
The case *R. v. D.A.I.* arises from an accusation of repeated sexual assaults on a young woman, K.B., by her mother’s partner, D.A.I. K.B. was 19 at the time of the alleged events, but was said to have the mental age of a three- to six-year-old. K.B. made important statements relating to the assaults to her special education teacher and to the police, but these out-of-court statements were deemed to be inadmissible hearsay evidence by the trial judge. While it would also have been pertinent to question this finding of inadmissibility, the Supreme Court focused on the trial judge’s ruling that K.B. was not competent to testify, on the basis of section 16(3) of the *Canada Evidence Act*. More specifically, the Court focused on the judge’s interpretation of the requirement to “promise to tell the truth.”

In *D.A.I.*, the Supreme Court lowered the threshold of legal competence by interpreting the *Evidence Act* as requiring only an “ability to communicate the evidence” and an actual promise to tell the truth, regardless of whether the proposed witness understands the notion of “promise” or “truth.” While this revision of the competency threshold will allow more PMD to access the courtroom, it leaves a myriad of problems untouched. For instance, (1) some PMD will not meet this test and be excluded. (2) As to the “normalized” PMD, they may still suffer from prejudices on the part of various actors intervening at the earlier stages of the legal process (such as caretakers, witnesses, the police and legal representatives) and on the part of legal actors involved at the later stages of a trial (including judges and juries). (3) They may still encounter procedural obstacles to reporting their recollection of the truth. (4) PMD will suffer from this unresolved exclusion.

In this article, I scrutinize two aspects of the case. The first is how the minority judgement proposed depriving the PMD applicant of her standing as witness, and the second is how the majority judgement opted for assimilating her to the category of “normal witness.” My analysis aims at illuminating the problematic rationalizations judges often offer to define the status of PMD who do not share the capacities of the “normal” legal subject. Typically, these rationalizations only marginally expand the category of legal subject. Instead of reconceptualizing the category of legal subject to a more substantial extent, these rationalizations try to fit people with disabilities as well as they can within this marginally expanded category. This article illustrates how such processes unnoticeably occur within judicial discourses.

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I connect the limitations of these processes to an ableist ideology at work in our legal culture. The problematic symptom of this ableist ideology is the assumption that our traditional conception of the cognitively “normal” witness must remain intact. D.A.I. only marginally questions the conception of the “normal witness” and devotes much more of its energy to making PMD fit inside of it. Substantive integration would require challenging traditional legal structures and concepts to a greater degree than D.A.I. As I will argue, this normalizing strategy of integration still imposes significant integration costs on the “abnormal” legal subject by leaving traditional legal structures relatively intact.

I. On normalizing the witness

I assume for the purpose of this article that the state has an obligation to recognize the moral, political and legal dimensions of PMD’s personhood. I will not examine the theoretical foundations of this obligation, because it is not very controversial, all things considered. The normative robustness of this obligation is reflected, for instance, in the recent United Nations Convention on the Rights of Persons with Disabilities, to which Canada is a signatory. Article 12 of the Convention, concerning “Equal recognition before the law,” demands that states parties protect and support the legal capacity of persons with disabilities. Article 13 stipulates that states parties shall not only “ensure effective access to justice for persons with disabilities on an equal basis with others...including as witnesses,” but also “promote appropriate training for those working in the field of administration of justice, including police and prison staff.” The Convention therefore demands not only negative obligations not to discriminate against persons with disabilities within the legal process, but also positive obligations of support, training and institutional changes necessary to achieve a full integration. Rights to equal recognition of citizens before and under the law are protected under the Canadian Charter of Rights and Freedoms. What is more controversial, however, is how the state ought to properly recognize the legal capacities and entitlements of persons with disabilities. This is especially true of people with intellectual disabilities, since a

5. Ableism postulates the inferiority of people with disabilities, like racism and sexism postulate the inferiority of a certain group of people. Fiona K Campbell, for instance, defines it as “[a] network of beliefs, processes and practices that produces a particular kind of self and body (the corporeal standard) that is projected as the perfect, species-typical and therefore essential and fully human. Disability then is cast as a diminished state of being human.” Fiona Kumari Campbell, Contours of Ableism: The Production of Disability and Abledness (London, UK: Palgrave Macmillan, 2009) at 5.
variety of cognitive capacities that some human beings do not possess (or do not possess to the same extent as others) have traditionally been deemed to be necessary conditions of moral personhood and political and legal subjeckhood.

We have a social obligation to integrate PMD into the legal process, thereby recognizing their personhood and their role in the legal construction of reality through the administration of evidentiary rules, and extending them the protection of the law. Usually, our society tries to fulfill this obligation through assimilation. We may call this “normalization.” “Normalizing” leaves the benchmark of any “normal” social role intact, or minimally modified, while offering accommodations to the “abnormal” legal subject in order to enable her to perform the role of a “normal subject.” The normalizing framework does not hold the abnormality of a legal subject against her, but typically considers it as a misfortune to be attenuated as far as possible.

Normalization has had both detractors and proponents. Proponents since Wolf Wolfensberger have used the term to refer to a theory of inclusionary human services, enabling PMD to occupy valued social roles. Their theory surely goes a long way in debunking prejudiced beliefs toward, and securing the self-respect of, oppressed individuals otherwise barred from desirable social positions. The camp of scholars who have strong reservations about “normalizing” are generally worried that normalizing endeavours become synonymous with “assimilation” and the assumption that “normal” is good. I agree with the detractors’ important criticism, and I also think it would be a mistake to assume that “normal (-izing)” has only the beneficial meaning that it could have in the mind of role-valorization theorists. While not all “normalcy” is bad, it can be tyrannical.

A compelling hypothesis advanced by Anne Waldschmidt is that various social institutions have enough elasticity to accommodate the
“abnormal” subject. However, they are resistant to doing so if these accommodations require re-evaluating what is considered normal. Abnormality is accepted either because it unthreateningly acknowledges its status as “other,” and so reinforces, by being its contrary, the conception of “normal,” or because it is susceptible to being normalized. The result is familiar to disability scholars: accommodations and treatments which are seen as exceptional and costly are more easily placed in a low-priority normative category.

Integration by assimilation seems better than outright exclusion. However, no one would think that giving women and indigenous people the chance to behave like white men should be the endpoint of moral progress. In the same way, we should not want the endpoint of moral progress for PMD to just have the ability to participate in our system like “normal” people. One worries that normalizing measures (1) may slow a more confrontational challenge to the established paradigms of normality, and (2) maintain certain forms of social exclusions, disguised as biological inevitabilities beyond the reach of well-meaning efforts at integration.

I submit that the Supreme Court of Canada has recently contributed to such potential harms in its *D.A.I.* judgment. I assume no ill intentions on the Court’s part; on the contrary, it acted within the traditional boundaries of its judicial role and with benign—albeit normalizing—intentions when it enforced the conception of the normal witness that it assumed to be the proper benchmark. Even without intending such negative consequences, the Court nonetheless reinforced the normal-abnormal dichotomy I have mentioned. My goal is to reveal the ableist ideology that has subtly manifested itself through the normalizing assumptions that underlie the judicial analysis in *D.A.I.* This is to clear the way for future proposals of more effective integrative measures, which must not be discarded only because they do not reflect the figure of the “normal” legal subject.

To reiterate, the main approach to integration that I have presented and that I will be criticizing here can be called “normalization.” On this approach, “integrating” means “assimilating” or “making similar.” There is, however, another way of approaching integration, which is the one I want to push for throughout this paper. This other approach is to accept the challenge to the parameters of our political and legal theories and


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institutions when the figure of the “abnormal subject” does not fit them. This approach pushes us to open ourselves up to more radical rethinking and reconceptualizing of what our normal social roles should be, to more adequately and successfully integrate PMD into society. While it is sometimes appropriate to integrate PMD within predefined roles and requirements, meaningful accommodation may also require substantive reconceptualizations of those roles.

II. The requirement of promising to tell the truth (RPTT)

1. What does it mean to expect people with mental disabilities (PMD) to “Promise to tell the truth”?

What does it mean to “promise to tell the truth”? This apparently simple question is in fact a complex one. It invites us to ask what a “promise” is, especially in the context of evidence law. Is a promise some kind of declaratory performance, or is it an event that requires the promisor to endorse certain dispositions or mental states? This theoretical question has concrete implications: D.A.I. essentially showcases a disagreement on this fundamental issue.

On the face of it, the following two assumptions about making promises seem compelling:

(1) A promise is, first and foremost, a special kind of declaration.
(2) Promises necessarily imply a guarantee or assurance of a future event.

Legal actors naturally and commonly draw on these two assumptions in deliberations about promises. However, in some instances, these assumptions become problematic. For instance, the performance of a promise may not be connected to what seems to be at the heart of a promise, that is, the act of binding or committing oneself to carry out the object of our promise or, in other words, the acceptance of a constraint upon our freedom for the sake of abiding by our word.14

The first assumption naturally leads us to focus on performances of promise-making to detect whether a promise has been made. For instance, it will generally be enough to establish that the party made an explicit written or verbal commitment to do something to establish that the party made a promise. However, this should not make us conclude that “promising” is primarily a kind of visible performance (e.g., a verbal action or a written statement), but only that we primarily use such visible performances to

14. This definition only covers promises concerning our own actions, which is the case we will be concerned with (as PMD who act as witnesses must promise to tell the truth if they are unable to take an oath).
hold people accountable for their promises. It is unsurprising that people interested in regulating the accountability of promisors (like jurists) would focus on modalities of promise-communicating. One may also be inclined to grant a central importance to declaratory rituals to ensure that promisemakers are fully aware of the sort of commitment they are making, and of the potentially significant impact their promise may have on their freedom or welfare.

My main point is that when we focus our attention on the performance of promise-making, we are no longer focusing on whether or not the promise has been made, but on the visible rituals and actions which we generally take as indicative of a promise being made. One can see already how this subtle point might affect PMD. For example, a person with a mental disability might go through the established ritual of promising to tell the truth, but he or she may not understand what it means to promise to tell the truth. If we take the ritual as the primary constituent of the promise, then we have just understood the person as promising when they may not have been able to do so.  

This is just one instance where it is important to keep in mind what is really central to promising, instead of going by our ordinary ways of determining whether someone has promised. If committing oneself to carry out the object of our promise is more important to promising than special kinds of declarations, then we should expect that the ways we try to detect genuine promises would change depending on the actual capabilities of the people performing the action. In the case of PMD, we should expect these ways to change even more. It therefore becomes important to examine the ways in which PMD can promise and the ways in which these promises can be detected, independently of our existing rituals and other forms of visible performances which we consider to be reliable indicators of promise-making.

However, this article will not examine the status of PMD as promisors generally, but only insofar as it enables them to act as witnesses: that is, it will examine what it means to test their capacity to promise to tell the truth. More specifically, we will examine disagreements about how the legal requirement to promise to tell the truth should be interpreted and what capacities PMD should possess to meet this requirement. While the concepts of “promise” and “truth” could be analyzed independently, courts

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15. This was the concern expressed, for instance, by Binnie J in Dal. Far from leading us to exclude PMD from the role of witness, this concern should prompt us to carry out empirical studies to verify if and when it is well-founded. If it happens to be sometimes justified, our social duty to integrate people with disabilities implies that we ought to revisit currently available testimonial settings.
have been dealing with the composite concept of “promising to tell the truth.” This multi-component concept will be the object of our analysis.16

On the face of it, the Canada Evidence Act’s RPTT seems like a sensible criterion for allowing witnesses to take the stand. Yet, the case of mentally disabled witnesses requires us to revisit the two aforementioned common assumptions in this context. The distinction between promises-as-declarations and promises-as-assurances and the relationship between the two notions has posed a difficult challenge to our Supreme Court. This is because the verbal performance of a promise is a task that people with minimal linguistic capacities can achieve, whereas the underlying mental states that any declaratory requirements are assumed to correlate with is, as indicated above, quite another story. One of the main questions we will examine, from a conceptual point of view, is: what are the capacities actually required by the testimonial institution of promise-making? Incidentally, we will ask whether the legislative and judicial discussions that took place around the issue should even have concentrated on “promise-making,” since it is only a means, and perhaps not a necessary one, of achieving the truth-finding function of a trial.

2. The interpretative question put to the court
Section 16 of the Canada Evidence Act deals with the case of a witness whose capacity to testify has come into question. The relevant paragraphs read as follows:

16. (1) If a proposed witness is a person of fourteen years of age or older whose mental capacity is challenged, the court shall, before permitting the person to give evidence, conduct an inquiry to determine
(a) whether the person understands the nature of an oath or a solemn affirmation; and
(b) whether the person is able to communicate the evidence.

[...]

(3) A person referred to in subsection (1) who does not understand the nature of an oath or a solemn affirmation but is able to communicate the evidence may, notwithstanding any provision of any Act requiring an oath or a solemn affirmation, testify on promising to tell the truth.17

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16. I have focused on the notion of “promise” in this section because two of its competing interpretations (as a verbal action or as a psychological state of affairs) map onto the formalist–conceptualist dichotomy which is at the heart of judicial interpretations of the RPTT.

17. RSC 1985, c C-5, s 16. The act was amended in 2015 to reflect the Supreme Court’s decision (2015, c 13, s 53). Like the majority of the Court required in DAI, the act now provides at s 16 (3.1) that no questions shall be asked regarding the proposed witness’s understanding of the nature of the promise to tell the truth for the purpose of determining whether their evidence shall be received by the court.
It is the third paragraph that was at issue. It stipulated that if the mental capacity of a proposed witness is challenged and if this person does not understand the nature of an oath or a solemn affirmation, she can still testify on two conditions. First, she must have the ability to communicate the evidence. Second, she must promise to tell the truth. This requirement of promising to tell the truth (RPTT) is at the heart of D.A.I.

I suggest that the RPTT can be understood in the five ways presented in the next section. Distinguishing among these five interpretations will enable us to target rationales and assumptions behind the RPTT that need to be scrutinized and perhaps abandoned. These conceptual distinctions dispel the confusion currently unaddressed in legal discourses concerning the RPTT, and highlight certain unjustified normalizing assumptions that may keep PMD from being truly integrated. This distinction can also guide potential legal reforms by focusing proposals and empirical research on the questions that theorists and policymakers should ask. Finally, the analysis of the Court’s opinions in light of this distinction is a contribution to critical disability theory, as it constitutes a close analysis of how legal discourses insidiously bolster, rather than destabilize, the traditional conception of the cognitively “normal” legal subject. Indeed, the following conceptual framework suggests that the majority of the Court in D.A.I. endorsed a “formalist” view of the RPTT and the minority endorsed a “conceptualist” one. However, both pointed to a “functionalist” interpretation which might have solved the tensions within and between their decisions, and this interpretation may also provide better foundations for future innovative measures integrating PMD within legal procedures.

3. Five understandings of the RPTT

a. Formalist (thin and thick versions)
The formalist (or “verbal,” or “physical”) interpretation of the RPTT could be taken to require no more than the verbal ability to mouth the words, “I promise to tell the truth,” from the witness, or to say “yes” or “I promise” when asked whether she promises to tell the truth. It could, in theory, not be accompanied by any of the psychological capacities required to actually be able to promise anything. The minority in D.A.I. criticizes this requirement as not stringent enough, and as being an “empty gesture” or an “empty formality.” The minority accuses the majority judgment of holding such a view, which I call “thin” formalism.

No one, however, really endorses this formalist interpretation of s.16(3), as requiring only a strictly verbal capacity, and accompanied by no more than the most minimal psychological capacities necessary to say the words “I promise to tell the truth” at the right moment.
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Judges, including the majority in *D.A.I.*, who endorse a formalist view at least assume that if someone who is able to communicate the evidence says, “I promise to tell the truth,” in the context of a trial, this individual shall, by implication, have a capacity to actually be motivated to tell the truth, if not a disposition to do so. This interpretation of the formalist requirement to promise to tell the truth is *psychologically thicker* than the previous one and since it is different than a purely verbal requirement accompanied by thinner psychological capacities, we should distinguish between a *thin* formal ability to promise to tell the truth and a *thick* formal ability to do so.

b. **Conceptualist (thin and thick versions)**

If the thin formalist interpretation of section 16(3) merely requires a formal “empty gesture,” a meaningless, physical, mouthing of the words “I promise to tell the truth,” the conceptual interpretation of section 16(3) lies at the other extreme. It interprets section 16(3)’s RPTT as implying the ability to have a conceptual understanding of the signification of promising to tell the truth.

Such a requirement is ambiguous. It is unclear how sophisticated the conceptual understanding needs to be. It is also unclear what needs to be understood. Is the witness required to understand the significance of promising to tell the truth in factual, prudential or moral terms (or all of these)? A judicial inquiry into the witness’s conceptual understanding could also be compartmentalized in different questions: does the witness understand the notions of truth, of promising, of the duty to speak the truth, separately from one another? This compartmentalization may be problematic because understanding different parts of a complex notion does not necessarily amount to understanding that notion. Investigation into a witness’s capacity for conceptual understanding may also lead to a needlessly broad assessment of her capacity for conceptual understanding in the abstract, that is, a general evaluation of her intelligence or her capacity for abstract thinking. Similarly, it may lead to an assessment of the witness’s capacity for moral or prudential judgement, since the particular object of the conceptual understanding at stake is a duty to speak the truth, sometimes equated (by judges assessing a witness’s testimonial capacities) to a *moral* duty.

All of these capacities are *connected* to the goal of testing whether cognitively impaired witnesses can give reliable evidence to the court, but how necessary it is to prove each one of these capacities to establish this reliability is far from obvious. The diversity of the ways in which a conceptual understanding of a duty to speak the truth can be tested gives
judges considerable evaluative leeway. Holding PMD’s legal competency (not to mention their right to benefit from the protection afforded by criminal law) hostage to such unpredictability should give us pause.

Let me illustrate the array of cognitive capacities that can be encompassed within a conceptualist interpretation of a requirement to promise to tell the truth in judicial decisions.

Justice Robins’s description of the requirement of the duty to speak the truth in *R. v. Khan* at the Court of Appeal was on the thicker end of the conceptualist interpretation:

To satisfy the less stringent standards applicable to unsworn evidence, the child need only understand the duty to speak the truth in terms of ordinary everyday social conduct. This can be demonstrated through a simple line of questioning directed to whether the child understands the difference between the truth and a lie, knows that it is wrong to lie, understands the necessity to tell the truth, and promises to do so.18

In *R. v. McGovern*, Twaddle J.A. wrote: “It is...clear, in my view, that, in permitting a witness to give evidence ‘on promising to tell the truth,’ the statute implicitly requires an understanding on the witness’s part of what a promise is and the importance of keeping it. Otherwise, the promise would be an empty gesture.”19

In *R. v. Farley*, Doherty J.A.’s interpretation seems less stringent and closer to the functionalist approach that I will present below because he requires only an “appreciation by the witness that he or she must answer all questions in accordance with the witness’s recollection of what actually happened.”20 (Although he does not use the term “appreciation” in a cognitively demanding way, it could still be taken as implying some relatively cognitively sophisticated capacities.) Doherty J.A. also sees the requirement to “understand the duty of speaking the truth” as “[t]he moral component of the testimonial competence standard.”21 The minority of the Supreme Court in *D.A.I.* also held that s. 16 required an “inquiry into whether the potential witness has ‘any conception of any moral obligation to say what is “right.”’”22

It should be mentioned that Robins J.A. was interpreting a previous version of section 16 which (1) only considered the special case of proposed *child* witnesses and (2) stipulated a requirement of “understanding the

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18. (1988), 27 OAC 142, 42 CCC (3d) 197 at para 18 [Khan].
duty of speaking the truth.” By contrast, the later versions of section 16, which McGovern, Farley and D.A.I. are interpreting, (1) concern both persons “under fourteen years of age” and persons “whose mental capacity is challenged,” and (2) only mandate a requirement of “promising to tell the truth.” Another significant change is that the version that Robins J.A. was considering required (3) that witnesses who were unable to understand the nature of an oath be at least “possessed of sufficient intelligence to justify the reception of the [unsworn] evidence” whereas all later versions only require that such a witness be “able to communicate the evidence.” However, Robins J.A. held that his interpretation should apply to the new iteration of s.16 as well:

In the final analysis, it seems to me that the standards applicable to the admission of a child’s unsworn testimony under [the former] s.16(1) are in reality no different than those now set by the new provision dealing with unsworn evidence (s.16(3)) which came into effect on 1st January 1988. The new provision uses plainer language to permit a child who does not understand the nature of an oath ‘but is able to communicate the evidence’ to ‘testify on promising to tell the truth.’

Justice Robins, like Justice Twaddle and others after them, assumes that despite the use of less demanding language, the legislator still substantially refers to the same cluster of requirements. Indeed, the conceptualist interpretation of the apparently factual second requirement (the “promise”) will read certain prerequisite cognitive capacities into it, including an understanding of the duty to speak the truth. For instance, the trial judge in D.A.I. questioned the witness “on her understanding of the meaning of truth, religious concepts, and the consequences of lying.” The judge asked the witness if she went to church and about her relationship with God, about the reasons why it is important to tell the truth, and the consequences of not doing so (prudential or moral—including the possibility of going to jail), as well as about the nature of an oath, and of a promise.

23. This previous section read as follows: “16. (1) In any legal proceeding where a child of tender years is offered as a witness, and such child does not, in the opinion of the judge, justice or other presiding officer, understand the nature of an oath, the evidence of such child may be received, though not given upon oath, if, in the opinion of the judge, justice or other presiding officer, as the case may be, the child is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth.” (supra note 14) [emphasis added]. Robins JA’s interpretation of the RPTT is based on this previous version of s 16, which was repealed and re-enacted between the date of the trial and the date when he delivered his judgment (Khan, supra note 18 at para 12). See also An Act to Amend the Criminal Code and the Canada Evidence Act, SC 1987, c 24, s 18.

24. Khan, supra note 18 at para 20.

25. DAI, supra note 2 at para 84.
Conceptualists will also, like Doherty J.A. in *Farley*, see an understanding of the duty to tell the truth as a “precondition to giving unsworn or unaffirmed evidence.”

In *D.A.I.*, the Supreme Court held that it was a fatal error of law to interpret section 16(3) in this way. While it is obviously an error of law from the majority’s (thick formalist) standpoint, it is not obviously so from a conceptualist one. On the contrary, conceptualists hold that there is little need to ask any other question about the witness’s capacities (notably, to communicate the evidence) if the witness is unable to promise to tell the truth. The witness’s capacities to communicate facts are irrelevant to them if the witness is not able to conceptualize promise-making and is therefore not reliable.

Under a conceptualist understanding of the RPTT, mentally disabled witnesses face a formidable challenge before their voices are considered witness-worthy. Conceptually, they must understand the notions of promise, truth and lie. They must understand the difference between the truth and a lie. Normatively, morally or prudentially, they must know that it is wrong to lie and understand the need to tell the truth and the importance of keeping a promise. Otherwise, their promises would be “empty gestures.”

The requirement for a “conceptual understanding” of a promise to tell the truth is scalar: it can be basic or sophisticated. Justice Robins’s influential holding that the duty to speak the truth can be understood “in terms of ordinary everyday social conduct” and that this thin conceptual understanding “can be demonstrated through a simple line of questioning” is the only plausible conceptualist stand.

This thin conceptual approach could be distinguished from a thicker conceptualist approach requiring the witness to understand the concepts of promise and truth in the abstract. On the one hand, to be fair to the thick conceptualists, as Binnie J. points out in *D.A.I.*, they have long accepted that the “simple line of questioning is to be factual, not metaphysical.” On the other hand, it remains that, in practice, given unclear guidelines, judges may slip into quite sophisticated conceptual territories in spite of Binnie J.’s statement, as the trial judge’s interrogation in *D.A.I.* illustrates. However, these more sophisticated conceptual territories seem to become more and more problematic, the thicker one makes one’s conceptualist requirement. If we push the thick requirement to make it as thick as it

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could get, so as to require a complete understanding of what it means to promise to tell the truth, then one might think that this requirement is not just implausible for PMD, but probably also for most, if not all, of the human population. After all, professional philosophers have long struggled with the notions of promise, lie, and truth, and still debate their definitions. The thick conceptualist requirement just seems to be too demanding as a threshold for knowledge of what it means to make a promise to tell the truth. Given our obligation to include PMD in the legal process, only a thin version of the conceptualist interpretation would be acceptable (assuming that a conceptualist interpretation is indeed the correct interpretation to endorse, a conclusion that the Supreme Court did not endorse and that I would not defend myself).

The notions of knowledge (as in knowing that it is wrong to lie) and of understanding (as in understanding the duty to tell the truth or understanding what a promise is) have not received enough attention in the legal context and this is one of the reasons why judges, scholars and policymakers have talked at cross purposes. When can we say that a mentally disabled person knows or understands something, such as a “promise to tell the truth”? It seems obvious, contra the thin formalist view, that a witness needs to have some grasp of the signification and implication of the words “I promise” when she speaks them, if they are to have any binding effect at all. However, it is better (though perhaps still not the best solution) to treat the relevant understanding of promise-making as an understanding which is functional rather than conceptual. This is because the usefulness of a proper conceptual understanding of the RPTT entirely derives from the proposed witness’s actual capacity to respect the RPTT, which it is assumed to indicate. Since what really matters is the capacity to actually promise to tell the truth (rather than the capacity to understand what this means), it is hard to justify maintaining a requirement to understand the RPTT if alternative means of proving that a PMD can actually make such a promise are available. Put simply, one can competently engage in promise-making just as one can competently engage in swimming even if one is not able to conceptualize what swimming is about. This is the distinction between a conceptual and a functional understanding of the requirement to promise to tell the truth, to which I now turn.

c. Functionalist understanding

A functionalist reading of section 16(3) will require more from the witness than merely mouthing the words, “I promise to tell the truth.” The witness needs to “understand” what the truth is, but only functionally so. This means that the witness must be functionally able to promise to tell the
truth. Being able to utter the words, “I promise to tell the truth,” shows a verbal ability, but not necessarily the ability for promise-making and truth-telling. Similarly, the capacity to conceptualize (either in abstract, theoretical terms or in concrete, everyday terms) the notions and importance of truth and promise may very well imply the capacity to actually promise to tell the truth; crucially, however, this latter capacity may exist even if sophisticated conceptualizing capacities are absent. All the functionalist is interested in is whether the potential witness is in fact able to be bound or committed to telling the truth.

If demonstrating verbal abilities is insufficient and demonstrating conceptual ones is unnecessary, how should the functionalist judge proceed to determine whether potential witnesses have a functional understanding of a promise to tell the truth? They may engage with mentally disabled witnesses to have them exercise truth-saying and promise-making capacities, or have them relate such a performance, either from their past or as a hypothetical performance.

If we want to determine if a person with a mental disability functionally has an understanding of promise-making, the ascendancy of a traditional model of trial and of testing a potential witness’s reliability poses two problems. First, it is not evident whether the traditional structure of judicial questioning could be sufficiently adapted to successfully integrate PMD as witnesses. It may be necessary to transform this structure altogether, or make use of complementary ones rather than hope for spontaneous non-traditionalism on the part of judicial actors. Second, testing the capacity of a mentally disabled witness to be committed to telling the truth at a particular moment in time requires some relevant psychological expertise. If judges were to rely on experts, it is worth noting a residual concern with the judicial aptitude to properly weigh the expert evidence put to them and exercise the proper degree of deference or scepticism toward these experts.

A thorough treatment of these important issues falls beyond the scope of this essay. For our purposes, I wish rather to explore a slightly more radical functionalist approach to section 16(3) that may put less emphasis

30. For instance, Parry and Drogin report that: “[R]ecent empirical evidence suggests that judges ‘lack the scientific literacy to be sophisticated consumers of science’ and it is ‘their socio-political attitudes that influenced their judgments about the relevance of scientific evidence.’ In fact, one study showed that ‘judges’ decisions about whether to admit a psychological study into evidence was unaffected by the validity of the study.’” (John Parry & Eric Y Drogin, Mental Disability Law, Evidence, and Testimony: A Comprehensive Reference Manual for Lawyers, Judges, and Mental Disability Professionals (Washington, DC: American Bar Association, 2007) at 23, citing Demosthenes Lorandos & Terence W Campbell, Benchbook in the Behavioral Sciences (Durham, NC: Carolina Academic Press, 2005) at 14-15).
on the capacity to make a promise altogether. I suggest that if what matters in the legal system is truth rather than promising, the RPTT might helpfully be replaced by another requirement that would do away with the notion of promising altogether.\textsuperscript{31} I should make clear before going further, however, that my intent is not to operationalize a functionalist interpretation or design more significant institutional changes; this would be a different project calling for psychological expertise, which I admittedly do not have. My purpose is to destabilize the assumption that the Supreme Court’s normalizing view—as reflected in the \textit{Evidence Act’s} amendment—is the only way to remedy exclusion.

Although I find that a functionalist interpretation would have been better than a conceptualist or a formalist one, I ultimately think that even asking “how can PMD be accommodated so as to be able to achieve what normal witnesses can achieve?” is not the best, or at least not the only, question that lawmakers should contemplate. There may be better integrative strategies that require modifying more radically the “normal” parameters of the role of a witness rather than enabling “abnormal” people to be witnesses within such parameters.

The key trait that witnesses need to demonstrate according to a functionalist is not an ability to promise to tell the truth \textit{per se}, but an ability to be bound or committed to telling the truth. \textit{That} ability is the cardinal requirement upon which basic reliability hinges, and it is such a commitment that the formal process of oath-taking in ordinary trials involving “normal” witnesses is attempting to secure. The visible oath or promise itself should not be fetishized: it is a means to this end. The formalist pays too much respect to the ritual of promising, while the conceptualist is too dearly attached to the requirement that witnesses be able to conceptualize the “moral obligation to say what is ‘right.’”\textsuperscript{32} A defender of the conceptualist position may postulate that understanding conceptually that telling the truth is a good thing is an essential motivating factor in getting the witness to be truthful. The claim is that if a witness understands that telling the truth is a good thing, she will be committed to doing so, and we will most likely receive more truthful information. Putting aside the question of whether or not this controversial postulate could be empirically proven to be more often right than wrong, it would,

\textsuperscript{31} This would require a legislative reform, rather than a judicial interpretation of the RPTT. Yet, this reading is coherent with the legislator’s intention of securing the truth of testimonial evidence, may it be through an oath, a solemn affirmation, or a promise. I find it to be a virtue of the functionalist interpretation of the RPTT to bring to our attention that all such formalities are fundamentally trying to secure that witnesses are committed to telling the truth at a particular moment in time.

\textsuperscript{32} \textit{DAI}, supra note 2 at para 93.
in any case, make use of a moral commitment as a strategy for attaining the ultimate goal of discovering the truth. However, there seems to be nothing particularly better about that particular means of getting to the truth, compared to alternative methods that still commit PMD to telling the truth. Standards for committing people to telling the truth can and should be adapted to the methods that work best. It is plausible that getting certain PMD to understand that telling the truth is a good thing may be too difficult, and that it may not be as successful as other methods when it comes to getting them to actually tell the truth.

Before continuing further, I note that while the line between a thin conceptual understanding and a functional understanding may seem narrow, these two approaches remain distinct. Conceptualists ask whether a witness understands the notions of a promise, of truth, and the *signification* of "promising to tell the truth." Functionalists ask whether a witness is actually able to promise to tell the truth. Thin conceptualists will allow the witness to demonstrate her conceptual understanding in everyday terms, with concrete examples, but no matter how basic and simply expressed this understanding may be, it remains conceptual. It is focused on concepts like *differences* between truth and lie, the *necessity* or *importance* of telling the truth, the *wrongness* of lying, and so on. The simpler and more concrete this conceptualization is allowed to be, and the more a judge implies a conceptual understanding from the witness’s concrete answers about her everyday life, the more the conceptualist approach merges with a functionalist one. Functionalists, however, will not need to infer from the witness’s answers that she possesses capacities to conceptualize the truth. They are only interested in the witness’s capacity to commit to speaking it at trial (or, ultimately, under circumstances that would make the collection and assessment of the testimony fair to the accused). Similarly, the witness need not understand the notion of a promise. She only needs to be able to actually make one. Does that imply that she “understands” what a promise is? In a functional sense of “understanding,” yes. This is the distinction between functional and conceptual understanding.

4. *Conclusion on the interpretations of the RPTT*

Why is it important to distinguish between formalist (thin and thick), conceptualist (thin and thick) and functional understandings of the RPTT? First, it helps us to target what really matters (and why) about the RPTT and how we can test it. It may guide potential legal reforms by focusing

33. Of course, the “performance” of such a commitment (e.g., via an oath, or via assertions to a judge probing a PMD witness’s capacities for understanding moral concepts, including their normative weight) is no guarantee of an actual commitment.
initiatives, proposals and empirical research on the right questions. This is particularly relevant to theorists, researchers and policymakers who wish to better integrate PMD into the legal process. It also allows us to clear up the conceptual confusion currently prevailing in legal discourses concerning the RPTT, and to reveal certain unjustified normalizing assumptions that may keep PMD from being truly integrated.

Let me illustrate how the interpretations of RPTT I have delineated may work as a tool for analyzing shortcomings in judicial interpretation. For instance, the distinction between a thin conceptual understanding and a functional understanding of RPTT allows us to see, in D.A.I., why Binnie J.’s reference to the legislative record does not help him to support a thin conceptualist view like he thinks it does. Parliamentarians agree that “if the child understands the difference between telling the truth and lying, that would seem…to be all you would really need to find out.” Justice Binnie takes that to be “as clear a demonstration as one could ask for from the Parliamentary record that it was intended under s. 16(3) that the trial judge be satisfied that the witness ‘understands the difference between telling the truth and lying.’”

Justice Binnie underlined the word “understands.” However, we have examined how ambiguous this word is (and hopefully partly dissipated this ambiguity). The trial judge in D.A.I. meant a conceptual understanding. It is more likely than not, by contrast, that the Parliamentarians to whom Binnie J. refers meant a functional one. That is indeed all that is strictly necessary to secure actual truth-telling or, in the Parliamentarians’ words, “all you would really need to find out.” Thus, because of the ambiguity of

34. DAI, supra note 2 at para 120 citing (the) House of Commons, Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-15, 33rd Parl, 2nd Sess, No 2 (4 December 1986) at 1725 (Hon Mary Collins). I put aside for the time being the problem that both the majority and the minority are treating too lightly the fact that these debates concern children rather than persons with mental disabilities.

35. Ibid at para 121 [emphasis in original, quotations omitted].
the word “understands,” Binne J. overlooks that another—and much more plausible—option exists: the functionalist view.\footnote{36}

This is not to suggest that the functionalist view should be the one which is ultimately adopted. Such a proposal would face two objections. First, the point is currently moot: the Supreme Court’s recent decision and federal amendment to the Canada Evidence Act have opted for a formalist interpretation. (A proposed witness now must only promise to tell the truth.) A functionalist interpretation may also be perceived as regressive and dismissed out of hand, as it could be perceived as reinstating an obstacle for PMD to access the witness stand: it is easier to say “I promise” than to show that one can functionally promise to tell the truth. I agree with the first, pragmatic, observation. I take issue with the second one. The fact that the functionalist view would be seen as regressive and dismissed out of hand is indicative of an ableist normalizing attitude. As I said, it might well be that the functionalist view is itself normalizing, insofar as it would lead us to enquire whether PMD can function as “normal” witnesses. It may also not be readily implementable without formal legal reforms and uniform guidelines for judges to apply it. A functionalist approach nonetheless invites judges and lawmakers to ask a question (“can this particular PMD promise to tell the truth?” or even “can this particular PMD reliably testify?”) that has greater potential to destabilize the “normal” parameters of the role of witness. The fact that the Supreme Court failed to even consider it as an option (and that Parliament endorsed the Court’s view) is therefore problematic. A functionalist view seemed at

\footnote{36. For the same reason, Binnie J may not be able to draw so much from the fact that McLachlin CJC held in a previous case involving a child witness that the requirement to promise to tell the truth “incorporated the understanding in practical terms of a moral obligation to say what is ‘right.’” (DAI, supra note 2 at paras 92 and 108, citing Rockey, supra note 22) Rockey was decided after Parliament had eliminated the words “duty of speaking the truth” but, as Binnie J reminds us, McLachlin CJC nonetheless held that: “while Ryan [the potential witness] understood the difference between what is “so” and “not so,” he had no conception of any moral obligation to say what is “right” or “so” in giving evidence or otherwise. In these circumstances, no judge could reasonably have concluded that Ryan was able to promise to tell the truth.” (Rockey at para 27). This implies a requirement of “understanding] the concepts of truth and lying” in a more than functional way, as McLachlin CJC notes that the witness cannot “articulate” (by contrast to functionally put in practice) what a promise is, but could only say “A promise is a promise is a promise.” (Rockey at para 27) McLachlin CJC also includes a moral element to this conceptual understanding, the absence of which the minority in DAI would lament. (DAI, supra note 2 at para 93) This seems to be in stark contrast to McLachlin CJC’s opinion in DAI, but it may not indicate as brusque a departure from previous case law as Binnie J suggests. Indeed, in Rockey, the witness could meet \textit{neither} the functional requirement, nor the conceptual one. In such a case, it is easier to conflate the two, and one can rather safely wager that McLachlin CJC would not have held that the witness was unable to tell the truth had he been functionally able to do so. Had that been the case, his conceptual abilities would have looked less pertinent (because they were less necessary to the dual goal of securing a fair trial and ascertaining the truth).}
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least superior to its conceptualist and formalist alternatives, but it was either discarded (by the Court) or not developed (by the government) because it invited a reconfiguration of the role of witness. Artificially lowering the threshold of testimonial capacities to let more PMD access the witness stand is a less threatening, and therefore more attractive, quick fix. I do not mean to disparage its positive integrative effect; I only highlight how it falls short of a truly integrative outlook.

III. Critical review of the majority and minority opinions in R. v. D.A.I.

In D.A.I., the Court was divided between a majority of six judges against a minority of three. The minority’s dissenting opinion, written by Binnie J., wanted to maintain the thin conceptualist reading of the RPTT. Justice Binnie interpreted the legislative requirement to promise to tell the truth as incorporating Robins J.A.’s oft-cited test. I quoted it in section 11(3)(b), but for ease of reference, I reproduce it here:

To satisfy the less stringent standards applicable to unsworn evidence, the child need only understand the duty to speak the truth in terms of ordinary everyday social conduct. This can be demonstrated through a simple line of questioning directed to whether the child understands the difference between the truth and a lie, knows that it is wrong to lie, understands the necessity to tell the truth, and promises to do so.

Justice McLachlin, writing for the majority, rightly suggested that this test can easily get out of hand. While it could be taken to require a functionalist test, it could also be used to justify a (thin or thick) conceptualist evaluation as well. The first sentence suggests a fairly low threshold in terms of cognitive capacities. The judge could simply test if the child has a grasp of what it means to be bound or committed to telling the truth. However, the second sentence suggests ways of investigating the witness’s capacities that delve into the moral and conceptual aspects of promise-making. The resulting ambiguity leads to a serious problem, already mentioned earlier in this paper: judges have too much investigative leeway, or not enough direction, to apply the RPTT uniformly and can potentially interpret it in a conceptualist, a functionalist, or a formalist sense. This problem has been noted by experts in the field, such as Isabel Grant and Janine Benedet, as

37. DAI, supra note 2 at para 107.
38. Khan, supra note 18 at 206, quoted and endorsed by the Supreme Court of Canada in R v Khan, [1990] 2 SCR 531 [Khan SCC] at paras 13, 15 and quoted by both the majority (at para 55) and the minority (at para 107) in DAI, supra note 2.
39. DAI, supra note 2 at para 56.
40. Benedet & Grant, “More than an Empty Gesture,” infra note 69.
well as by Nicholas Bala (although the latter was discussing the case of child witnesses).

The ambiguity in the RPTT is such that it explains why the minority and the majority of the Supreme Court spoke more or less at cross purposes on the issue, each addressing a caricature of the other’s position. McLachlin C.J.C. took the minority to be “requiring an abstract inquiry into an understanding of the obligation to tell the truth” (i.e., a thick conceptualist position), while Justice Binnie found the majority to be requiring no more than an “empty gesture,” namely the “mere physical ability of a potential witness to say the words[; “I promise,”]” (i.e. a thin formalist position).

These mutual characterizations are at once accurate and inaccurate. They are inaccurate because, on the whole, their respective positions are subtler than what their disagreeing colleagues make it out to be. Justice McLachlin defends herself against the charge of requiring only an empty gesture, and Binnie J. responds that no one ever intended to undertake a very abstract, theoretical or philosophical kind of conceptual investigation. They are accurate, however, because, ultimately, the legal implications of their decisions (which is all that matters since they are writing an enforceable judgement rather than an academic essay or a proposal for legislative reform) is to require a formal gesture (the majority) or a potentially conceptually complex, abstract and theoretical line of investigation (the minority).

Neither the majority nor the minority refines their test by specifying the components that are rationally necessary to the purpose of testing the reliability of PMD to tell the truth, no more, no less.

The minority leaves the Khan test untouched, leaving the door open for an unnecessarily demanding interpretation of the RPTT. The majority reduces the test to a mere formal requirement, which (1) is already an improvement in terms of integrating disabled people to the justice system, but (2) potentially clashes with the truth-securing function of trials, and (3) poses some problems to the effective integration of PMD. We will turn to these problems in the final part of this article.

In the rest of this sub-section, I will look more closely at the judgment in order to substantiate my criticism since I can imagine that some, including the authors of this Supreme Court decision, would resist it. In

41. Infranote 60.
42. DAI, supra note 2 at para 63.
43. Ibid at para 108.
the following sub-section, I will offer a different interpretation of section 16.

The majority explicitly adopts a formalist interpretation of section 16:

I conclude that s. 16(3) of the Canada Evidence Act, properly interpreted, establishes two requirements for an adult with mental disabilities to take the stand: the ability to communicate the evidence and a promise to tell the truth. A further requirement that the witness demonstrate that she understands the nature of the obligation to tell the truth should not be read into the provision.44

This holding constitutes a clear rejection of the conceptualist interpretation of the RPTT, even the thin one. The majority rejects the “requirement to demonstrate understanding of the nature of the obligation to tell the truth” imposed by the previous jurisprudence, notably Khan.45 Khan was decided under a different version of section 16. Before 1987, this section explicitly required an understanding of the nature of the duty of speaking the truth. “In 1987,” McLachlin C.J.C. writes, “Parliament deleted the requirement of understanding the nature of the duty to tell the truth. Judges should not bring it back in.”46 McLachlin C.J.C. thus disagrees with Robins J.A.’s obiter remark in Khan that his test should be applied to the post-1987 version of section 16, “on the grounds that without the requirement that the witness understand what a promise is and the importance of keeping it, the promise would be an ‘empty gesture.’”47

By contrast, the minority’s conceptualist stance is that Parliament never intended to completely delete any kind of inquiry into the witness’s capacity to understand the notions of promise and truth. In terms of textual

44. Ibid at para 53.
45. Ibid at para 59, citing Khan SCC, supra note 38.
46. DAI, supra note 2 at para 59.
47. Ibid at para 56. McLachlin CJC distinguishes between thin and thick conceptual understandings. She opts for the former, as children and mentally disabled people may be able to explain in concrete terms taken from their “everyday social conduct,” but not to abstract from them (at paras 60-62). However, Binnie J counters by insisting that neither he nor the trial judge believes that “metaphysical” inquiries in abstract terms are appropriate (at para 108). Any sensible conceptualist would, like Binnie J at para 30, heed the warning of Dickson J (writing, as then he was, as an ad hoc judge on the Manitoba Court of Appeal) in the case R v Bannerman (1966), 48 CR 110 (aff’d 50 CR 76) to the effect that child witnesses should not be examined “on their religious beliefs and the philosophical meaning of truth.” However, McLachlin CJC makes a compelling point since even though conceptualists may claim to be thin conceptualists, they often end up asking questions that require the witness to think in conceptual abstract terms (rather than in concrete or practical terms reporting on one’s everyday experiences), as the trial judge did in DAI. That said, this portion of McLachlin CJC’s judgment may seem puzzling, as she defends a thin conceptualist position over a sophisticated, thicker, conceptualist one, only to reject all conceptualist positions. She would otherwise be in agreement with Binnie J. However, this portion of her judgement makes sense if it is read as supporting the view that a thin conceptualist test could be applied to meet the first requirement of 16(3), namely the ability to communicate the evidence. Her discussion at para 82 supports this reading.
interpretation, the majority focuses on the change to the text of section 16 that I have mentioned, whereas the minority insists on the fact that the legislator made specific adjustments for the particular case of child witnesses in the new section 16.1. This was explicitly directed at preventing questions regarding a proposed child witness’s understanding of the nature of the promise to tell the truth (s. 16.1(7)), but the legislator made no such changes with regard to the case of mentally disabled witnesses.

By rejecting the requirement for any kind of understanding of the duty to speak the truth, the majority also rejects the requirement for a functionalist understanding of the duty to speak the truth. This is where a clearer distinction between a functional and a conceptual understanding of the truth might have helped the Court to choose a middle ground (a functionalist interpretation) rather than to be divided into two more radical interpretations of the RPTT (formalist and conceptuallist).

McLachlin C.J.C. comes closest to adopting a functionalist interpretation in the following passage:

I have concluded that s. 16(3) imposes two requirements for the testimonial competence of an adult with mental disabilities: (1) the ability to communicate the evidence; and (2) a promise to tell the truth. It is unnecessary and indeed undesirable to conduct an abstract inquiry into whether the witness generally understands the difference between truth and falsity and the obligation to give true evidence in court. Mentally limited people may well understand the difference between the truth and a lie and know they should tell the truth, without being able to articulate in general terms the nature of truth or why and how it fastens on the conscience in a court of law.48

This exemplifies well how both the minority and the majority set themselves up against straw man arguments. The majority criticizes the obvious excesses of “an abstract inquiry,” while the minority criticizes the obvious oddity of requiring only an empty physical gesture. Neither explains why it would be as obvious to reject a requirement limited to a functional understanding—because it is not obvious at all.

In the passage quoted above, McLachlin C.J.C. should have taken a firm position against a functionalist understanding if she was indeed rejecting it. However, after having said that section 16 requires only a formal verbal promise, she went on to reject only the requirement for an “abstract inquiry,” that is, the kind of conceptual inquiry that the minority explicitly denies advocating (though we will see that this denial has no

48. DAI, supra note 2 at para 64.
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legal effect on the ultimately conceptualist conclusion of the minority). Not only does McLachlin C.J.C. not reject the functionalist interpretation in the passage quoted above, but she approves it in the last sentence. The “understanding” and “knowledge” she is referring to are not of a conceptually sophisticated kind. Her sentence makes it clear she is referring to functional kinds of understanding and knowledge. She thus seems to recognize the importance of establishing that the proposed witness has the capacity to understand the difference between a truth and a lie in a functional way as well as the capacity to be bound to tell the truth, or to functionally “know” what it means to be obliged to tell the truth. However, she did not read such a functionalist requirement in section 16(3)’s requirement to promise to tell the truth.

Could she have read it into the other requirement of section 16(3), that is, the requirement to have the capacity to “communicate the evidence”? The focus of D.A.I. is not on that portion of 16(3), so McLachlin C.J.C. said little on this. She wrote that this requirement refers to an “ab[ility] to relate the events,” and that

the...inquiry into the witness’s ability to communicate the evidence requires the trial judge to explore in a general way whether she can relate concrete events by understanding and responding to questions. It may be useful to ask if she can differentiate between true and false everyday factual statements.

However, previous jurisprudence indicates that the capacity to “communicate the evidence” is not only a verbal capacity in the less demanding (thin formalist) sense of “communicating.” The notion of “communicating the evidence” implies (1) perceptual, (2) recollection/memory and (3) recounting/communicative skills. The notion of “evidence” also implies that what is being perceived, recalled and communicated is factual, because evidence should of course not be fiction. The notion of “evidence” further implies that we are dealing with facts being communicated to a court. As McLachlin J. notes for the majority in R. v. Marquard, “[t]he reference to “the evidence” indicates the ability to testify about the matters before the court.” Therefore, the three requirements mentioned above each include the sub-requirement that what is being perceived, remembered and communicated are facts, which means that the

49. Ibid, e.g., at paras 108 and 114.
50. Ibid at para 64 [emphasis added].
51. Ibid at para 36.
52. Ibid at para 82.
witness has the capacity to “distinguish between fact and fiction” or to “distinguish between that which is actually perceived and that which the person may have imagined, been told by others, or otherwise have come to believe.” The third requirement (communicative/recounting skills) also includes the sub-requirement of having the ability to communicate within the physical structure and institutional setting of a court, though adjustments and accommodations can be made to this setting.

This approach seems to adopt a functionalist reading of section 16(3)’s first requirement of an ability to communicate the evidence. For instance, McLachlin C.J.C. suggests that a way for the judge to inquire “into the witness’s ability to communicate the evidence” may be “to ask if she can differentiate between true and false everyday factual statements.” However, the judge would not yet be testing the witness’s capacity to promise to tell the truth (or to be bound through some form of verbal commitment to do so) in the same functionalist way. These are two distinct capacities: the capacity to accurately report facts and the capacity to give some kind of reliable security or indication (namely, an oath or a promise) that one is actually willing to report, and is reporting, facts accurately in a particular instance (namely, during a trial). After D.A.I., the former capacity is to be tested functionally, and the latter, formally (verbally).

What are we to make, then, of McLachlin C.J.C.’s passing acknowledgement of what seems like a functionalist understanding of the RPTT? Why even mention the capacities of “mentally limited people” to functionally understand the meaning of a lie and to functionally know what promise-making entails if they will not be tested and are irrelevant to the purpose of section 16? Perhaps McLachlin C.J.C. is telling us that section 16 only requires a strictly verbal ability to promise to tell the truth but that there is no reason to worry, because PMD do have a functional understanding of promise-making anyway. However, that would not be accurate. Not all PMD understand, even functionally, what promising to tell the truth entails. She may be highlighting that a significant or underestimated portion of those who do not have a conceptual understanding of “promising to tell the truth” will nonetheless have a good enough functional understanding of it. This would be an important suggestion to make, but implementing

54. R v Caron (1994), 94 CCC (3d) 466 at 471, 19 OR (3d) 323 (Ont CA).
55. Farley, supra note 20.
56. The task of establishing how far these adjustments can (and should) go for PMD would benefit from further comparative and empirical work, and belongs to a different project. Benedet & Grant, “Taking the Stand,” and “More than an Empty Gesture,” infra note 69, explore some such adjustments.
57. DAI, supra note 2 at para 82.
58. Ibid at para 64.
it would require that we administer a functional test of understanding, as well as institutionally accommodate the proposed witnesses so that they stand a fair chance to pass the test. McLachlin C.J.C. does not explore these options. This makes me conclude that, while she seems to recognize the importance of a functional understanding of “promising to tell the truth,” this importance is not reflected in her ratio decidendi, that is, in her legally binding conclusions. It is not even an obiter dictum, that is, another incidental consideration that does not go to the heart of her conclusions and her justifications for them. Instead, McLachlin C.J.C. holds what I have called a thick formalist position. This is implicit in the passage we have been analyzing above, and it is explicit in the following quote:

Promising is an act aimed at bringing home to the witness the seriousness of the situation and the importance of being careful and correct. The promise thus serves a practical, prophylactic purpose. A witness who is able to communicate the evidence, as required by s. 16(3), is necessarily able to relate events. This in turn implies an understanding of what really happened—i.e. the truth—as opposed to fantasy. When such a witness promises to tell the truth, this reinforces the seriousness of the occasion and the need to do so. In dealing with the evidence of children in s. 16.1, Parliament held that a promise to tell the truth was all that is required of a child capable of responding to questions. Parliament did not think a child’s promise, without more, is an empty gesture. Why should it be otherwise for an adult with the mental ability of a child? 99

Justice McLachlin holds that when a certain class of PMD makes a promise to tell the truth, this verbal, formal, statement is automatically accompanied by a mental disposition to be bound to tell the truth. Let us call this the “verbal commitment assumption.” This empirical assumption would apply to the class of PMD who have passed the first requirement of section 16(3) and have the capacity to relate truthful events.

This assumption at first sight seems empirically plausible. Being explicitly prompted to speak the truth on a particular occasion, or verbally committing to it ourselves, is generally correlated with a greater likelihood of accuracy and truthfulnes in our statements. In the case of a trial with non-disabled witnesses, this empirical assumption has in fact played a key role in securing their reliability, as we will see. It is easy to see how as formal a statement such as “I swear to tell the truth, the whole truth, and nothing but the truth” in as intimidating a setting as a court can indeed correspond to a greater truthfulness. This correlation is likely to exist even when less solemn words are used, and even when they are used in

99. Ibid at para 36 [emphasis added].
an atmosphere made less threatening or awe-inspiring. For instance, the requirement applicable to the case of children to merely say “I promise” with a familiar, supportive, person allowed to stand by their side, has been shown to correlate with a higher degree of truthfulness on the part of the child. McLachlin C.J.C. is referring to the Parliament’s decision to require nothing but the formal promise to tell the truth from a child witness (section 16.1 (6)-(8)) and to the findings of the Child Witness Project at Queen’s University. This project, led by Nicholas Bala, found that (1) “[t]here is no relationship between children’s ability to answer questions about such abstract concepts as “truth” and “lie,” and whether they will actually tell the truth or lie” and (2) that “if a child promises to tell the truth, the child is more likely to tell the truth, even if the child cannot give a definition of the meaning of a ‘promise.’”

The thick formalist conception of the RPTT is therefore empirically warranted in the case of children. However, McLachlin C.J.C. is not presenting or relying on any such empirical evidence concerning people with mental disabilities. This is not a judicial failure, but a social failure. McLachlin C.J.C. was presented with no equivalent evidence for PMD. Of course, it is likely that McLachlin C.J.C.’s conclusion will hold true in many cases, but the group of PMD is vastly heterogenous in terms of capacities, unlike that of children, and she cannot transpose empirical findings from one group to the other and support this transposition with the rhetorical question, “Why should it be otherwise for an adult with the mental ability of a child?”

Mentally disabled adults cannot systematically be compared to children. While these comparisons may sometimes work to some extent in respect of certain aspects of a mentally disabled adult’s life, they are not necessarily accurate or reliable. The “verbal commitment assumption,” the assumption that for PMD, like children, when they perform acts which are seen as promising, they are more likely to tell the truth, is an empirical assumption that McLachlin C.J.C. was not entitled to make as a matter of judicial notice. Justice Binnie, writing for the minority, did not fail to criticize her on that point:

61. DAI, supra note 2 at para 36. Later in her judgement (at para 52), she also asks: “When it comes to testimonial competence, precisely what, one may ask, is the difference between an adult with the mental capacity of a six-year-old, and a six-year old with the mental capacity of a six-year old?”
The rhetorical question posed by the Chief Justice seeks to reverse the onus of proof. It *presumes* without proof the fact of equivalence and demands a rebuttal, but it was for the government to persuade Parliament, if it could, that there is no relevant difference between an adult with a severe mental disability and a child with no mental disability. It made no effort to do so because there was no evidence on which such an argument *could* have been made.

No evidence was led in these proceedings to suggest equivalence and we cannot take judicial notice of alleged “facts” that are neither notorious nor easily verifiable from undisputed sources.\(^{62}\)

This suggests that the minority’s opinion would have lost much or all of its plausibility had empirical evidence been brought forward to the court by the parties, or had private or public research groups persuaded Parliament that the findings of Bala applied to the case of PMD. Both strategies lie outside the reach of a Supreme Court judge. In the case of particular evidence submitted at trial, it would be the role of the lower court to appreciate the evidence. In the case of empirical findings that could be generalized into a norm which applies systematically to a category of people, it would be Parliament’s role to proceed with legislative reform. A judicial intervention at the appellate level can, however, interpret the existing legal norms and develop tests to guide trial judges through them, while respecting Parliamentary intentions. Justice McLachlin opted for a thin formalist test and it was not unreasonable to do so on the basis of a textualist reading of the section. Parliament is, after all, explicitly asking for a “promise to tell the truth,” no more no less.

She also gestured at a thick formalist position, in order to defend her position against the charge that a purely formalist or verbal interpretation requires no more than an “empty gesture.” While the “verbal commitment assumption” may well be empirically right in the particular case of K.B., and while it may well be empirically right more generally with regard to PMD (or certain categories thereof), McLachlin C.J.C. could have simply refused to discuss the “verbal commitment assumption.” It does not matter whether this assumption is correct or not, or whether the promise is an empty gesture or not: it is what the law explicitly requires and anyone who is unhappy with it should consult with Parliament, not with the Supreme Court.

It is understandable, however, that she wanted to answer the “empty gesture” charge, but I believe that the only legitimate way in which she could have done so would have been by adopting a functionalist

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\(^{62}\) *Ibid* at paras 129-130 [emphasis in original].
position, and insisting on the fact that (1) Parliament requires a functional understanding of “promising to tell the truth,” no more, no less (so that the promise would not be an empty gesture) and (2) that the trial judge tested more than a functional understanding and therefore made a mistake of law.

By contrast, the thick formalist position required her to assert that the “verbal commitment assumption” was accurate in the case of all PMD able to “communicate the evidence.” It seems highly likely that someone with the sophisticated perceptual, mnemonic and communicating skills required to “communicate the evidence” would also have the capacities to meaningfully commit to speaking the truth by a formal promise. It remains, however, an assumption that required expert evidence to be established in a court of law.

I take McLachlin C.J.C.’s “verbal commitment assumption” to be obiter dictum. Therefore Binnie J., by opposing it, would not be undermining her ratio decidendi. McLachlin C.J.C. was simply addressing a potential weakness of her position.

The minority was no less guilty than the majority of recognizing the pertinence of the functionalist position, but falling short of endorsing it. Binnie J. explicitly disavowed the thick conceptualist approach:

I have no disagreement with the Chief Justice insofar as she affirms the existing law that the judge’s inquiry should not ask the potential witness to “articulate abstract concepts” or tell what “the truth means in abstract terms” or venture into “abstract, philosophical realms” or conduct “an abstract inquiry into the nature of the obligation to tell the truth.”

Justice Binnie stated that section 16 only requires that the proposed witness “demonstrate…an understanding of a promise to tell the truth in terms of ordinary, everyday social conduct.” He therefore adopted a thin conceptualist approach.

As I have previously explained, there are good reasons to think that any conceptualist (basic or sophisticated) approach is wrongheaded. The reasons for this are a priori, rather than empirical. The fact that someone conceptually understands notions that relate to a practice (here, truth-telling) is no guarantee that she is able to put them into practice. Someone can understand what driving is about, conceptually speaking, and still not

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63. Ibid at para 114 [citations omitted].
64. Ibid at para 113.
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know how to drive.\textsuperscript{65} A the same time, the fact that someone functionally understands notions that relate to such practices is, \textit{ex hypothesi}, a guarantee that she is able to put them in practice. (Remember that we are not yet asking if the proposed witness is disposed or motivated to tell the truth. The admissibility test requires her to have the ability to promise to do so.) A conceptualist test proves that the witness can talk about this ability. A functionalist test proves that she has this ability.

Be that as it may, a thin conceptualist approach is already less unfair to people with cognitive limitations than a more demanding conceptualist approach. However, just as McLachlin C.J.C. approvingly nods at the functionalist approach, endorses a \textit{thick formalist} one as an \textit{obiter dictum}, and ultimately adopts a \textit{thin formalist} one, Binnie J. approves of the \textit{thin conceptualist} approach, formulates it in a way that makes it look quite like a \textit{functionalist} approach, but ultimately preserves a test which potentially allows a trial judge to carry out a \textit{thicker conceptualist} line of questioning.

Indeed, Binnie J. holds that “even this [thin conceptualist] approach could not be satisfied by K.B. according to the trial judge who was uniquely placed to observe her demeanour.”\textsuperscript{66} However, the trial judge did not reject K.B.’s testimony only on the basis of her failure to understand the notion of a promise to tell the truth “in terms of ordinary, everyday social conduct.” As the \textit{voir dire} record indicates, the Crown questioned K.B. about her age, and about whether she was still going to school, which were concrete facts that K.B. was able to remember and recount. K.B. was also able to identify a concrete statement as a “lie” and another as “true.” She functionally knew that it was “true” for the Crown counsel to say that he was wearing a gown that was black. She was not able to say why that was the truth. Such an explanation would have involved a conceptual definition of truth, such as: “because a statement is true when it accurately reflects a state of affairs.” But, functionally speaking, she knew what truth was, what lying meant, and she even expressed the moral opinion that lying was a bad thing and that telling the truth was a good thing.

The Court, however, went on to ask K.B. for abstract definitions of promise, oath, and of telling the truth. Certainly, this line of questioning was no longer functionalist. The questions became conceptual, and it is debatable whether they would fall within a thin conceptualist approach.

\textsuperscript{65} It could be said that a \textit{good conceptual understanding} of a practice necessarily includes a functional understanding of this practice. This may be true in some situations, depending on one’s view on what counts as a good understanding. Here, however, we are concerned with the particular setting of a court. In such a setting, the threshold to be found to be sufficiently “conceptually competent” to be a witness is very low—low enough not to necessarily include a functional understanding.

\textsuperscript{66} \textit{DAI}, supra note 2 at para 113.
or within a more conceptually sophisticated one. While some questions were anchored in the everyday life of K.B. (e.g. “Have you ever heard that expression ‘I promise to be good, mommy’?”), others were detached from anything concrete (“Tell me what you think about the truth,”; “Tell me what a promise is,”; “Do you know what an oath is?”). The judge also inquired into the moral and prudential dimensions of truth- and lie-telling and about the consequences of lying. Whether or not the ability to appreciate the moral dimensions of promising and truth-telling is required by s.16 (Binnie J. believes it is\(^{67}\)), moral knowledge can also be tested functionally and conceptually (and in a conceptually simplified and concrete way or in a conceptually abstract and complex one). The trial judge’s questions were too abstract to count as the kind of thin conceptalist line of questioning that Binnie J. considered adequate.

By deferring to the trial judge’s decision, and upholding Khan’s (Robins J.A.’s) conceptalist test, Binnie J. was effectively not only endorsing a thin conceptalist line of questioning, but also condoning a much more demanding conceptalist kind of questioning. He wrote that an everyday, simple, concrete line of questioning is all that s.16 should require, but upheld a test that has given enough leeway for judges to discard the testimony of a proposed witness because she cannot answer conceptually sophisticated questions.\(^{68}\)

Justice Binnie and McLachlin C.J.C. are therefore both acknowledging in obiter dicta that the capacity to promise to tell the truth can and should be tested in everyday, concrete terms. Justice Binnie did so by approving a thin conceptalist approach, and McLachlin C.J.C. did so by gesturing at a functionalist approach and by endorsing the “verbal commitment assumption,” that is, by endorsing a thick formalist approach. Yet, they both ultimately chose a legal interpretation of section 16 that contradicted these obiter dicta. The majority’s ratio decidendi favours a thin formalist reading of section 16, and the minority condones a (potentially complex rather than merely thin) conceptalist one.

We end up in a strange position where both the majority and the minority have issued very appealing obiter dicta that more or less contradict their much less appealing rationes decidendi. They both detect this flaw in each other’s judgment and mutually accuse themselves of holding too extreme a position (the “empty gesture” position and the “metaphysical” one, to

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67. Ibid at para 93.
use their terms). Perhaps their *obiter* are answers to these criticisms, but since they are legally ineffective, they are not good answers. The majority can still fairly be criticized for adopting an “empty gesture” view (which corresponds to my thin formalist category) and the minority can still fairly be criticized for condoning a “metaphysical” one (which corresponds to my thick conceptualist category). Distinguishing a functionalist interpretation of the RPTT from conceptualist and formalist kinds of interpretations would have enabled them to endorse only the elements of the RPTT which are necessary to achieve the functions of a trial.

IV. *Under a normalizing spell*

Is it possible that the majority and the minority failed to hone in on a promising common ground because they failed to clearly see the functionalist approach as a viable option, distinct from both a thick formalist and a thin conceptualist one? It is possible, but it would be odd considering that they both gestured at it in *obiter*.

I suspect that what kept the Court from fully endorsing a functionalist approach is that this approach has the subversive potential to upset the legal conception of a “normal witness.” One way in which the functionalist approach may disturb the normal conception of a witness is that functionalist tests may be different in form from the types of tests we would normally ask proposed witnesses to meet. For instance, a judge may ask a person with a mental impairment about her routine activities, or ask her if her clothes are red when they are in fact blue. Janine Benedet and Isabel Grant have suggested some helpful questions of that kind. They explain how complex questions may confuse the witness, not because she cannot tell the truth or answer them (were they asked differently), but rather because they use linguistically sophisticated turns, such as counterfactuals, double negatives, juxtaposition of ideas or questions that the witness has to separate herself, and so on. They also note other problems typical of witnesses with mental disability that need to be institutionally accommodated, such a higher suggestibility to leading questions, a desire to please the questioner by agreeing, or a muteness occasioned by contextual anxiety.69

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69. Janine Benedet & Isabel Grant, “More Than an Empty Gesture: Enabling Women with Mental Disabilities to Testify on a Promise to Tell the Truth” (2013) 25:1 CJWL 31 [Benedet & Grant, “More than an Empty Gesture”] at 47-48 (*mutatis mutandis*, as the line of questioning they propose would apply to the first requirement of 16(3), that of being able to communicate the evidence rather than that of promising to tell the truth). See also Janine Benedet & Isabel Grant, “Taking the Stand: Access to Justice for Witnesses with Mental Disabilities in Sexual Assault Cases” (2012) 50:1 Osgoode Hall LJ 1 [Benedet & Grant, “Taking the Stand”].
Of course, the guidance that Supreme Court judges can give to trial courts is limited. On the one hand, designing innovative ways of testing the testimonial capacities of PMD may require a psychological expertise that they do not have. On the other, prescribing such innovative tests moves onto the legislative terrain of making substantive decisions about the content of evidence law (rather than about its interpretation), which lies outside of their jurisdiction. Moreover, the Evidence Act was not challenged on the grounds that it violated the constitutionally protected rights of PMD. It can be said that the Supreme Court simply steered its efforts to integrate PMD within its jurisdiction and its expertise. Indeed, the majority of the Supreme Court may have contemplated the option of requiring judges to test mental capacities functionally but simply have doubted that trial judges could systematically be trusted with some versions of a functionalist test that could easily be bent out of shape and become a variant of a more demanding kind of conceptualist test.\(^7\)

Another way in which a functionalist approach may undermine the legal concept of a “normal witness” is by not requiring of PMD verbal promises to tell the truth. On the face of it, however, if the proposed witness is not able to verbally bind herself to make a promise, to presume that she can bind herself to tell the truth seems to be an illegitimate fiction, all things being equal. In ideal circumstances it would be unjustified to reject any evidence showing that a witness is incompetent to make promises to tell the truth. But we must also remember that given the historical exclusion from which this category of witnesses has suffered, existing prejudices toward their reliability, ill-accommodating institutional settings for interrogating them, and the motivation to be expected of the accused’s counsel to discredit them, we may be justified in rejecting evidence purporting to show that a witness is not competent to bind themselves to make a promise. This is because PMD are subjected, due to these problems, to such an unfair degree of scrutiny compared to normally abled witnesses. Of course, if the omission of this evidence were ever to be truly justified, this policy-based choice would be made at the expense of the accused, though the witness’s inability to make a meaningful promise may undermine the weight of her contribution in a later assessment of her credibility. Consider the recommendation of the American Bar Association’s National Legal

\(^7\) Had the case been about the Canada Evidence Act’s compliance with the Charter, the point about the discretion left to trial judges under the Act to decide whether a PMD proposed witness is able to promise to tell the truth might have been considered more critically, as an issue worth sending back to the legislative drawing board. Consider, mutatis mutandis, the disagreement between Iacobucci J (for the minority) and Binnie J (for the majority) in Little Sisters Book and Art Emporium v Canada (Minister of Justice), [2000] 2 SCR 1120.
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Resource Center for Child Advocacy and Protection that “alleged victims of sexual abuse should be considered competent witnesses, without the use of a competency assessment.”

In sum, the ideal solution may be to consider whether there are other legitimate ways of obtaining true renditions of past events from PMD. However, since this ideal solution may require empirical research and legal experimentation, why not rely on a quicker assimilationist fix, by artificially lowering the threshold of mental competencies required to testify?

While this may be the fairest achievable outcome under non-ideal circumstances, it is still worth considering whether we are not giving up too quickly on the ideal, whether because we have hastily assumed that it cannot be achieved, because of a normalizing impetus, or both. Parliament itself has simply endorsed the Supreme Court’s solution, instead of experimenting with modalities of communication that may better fit PMD. If the goal is to give a PMD’s testimony its due probative weight, the means of lowering admissibility thresholds may displace the problem rather than solve it. For instance, any automatic irrebuttable presumption of competency is likely to carry the risk that the ensuing testimony’s credibility may be more systematically questioned, as I will explain in the concluding section. It would seem more helpful to revise the way in which we obtain and assess this testimony. Not enough effort has been invested in countering the social and institutional circumstances that would make it unfair for PMD to be submitted to functional tests with regard to their capacities. In the absence of proper guidelines and settings to carry out these tests, policy-makers or judges have to resort to pragmatic second-bests, as the majority and the minority of the Supreme Court of Canada did in D.A.I. By contrast, improving ill-accommodating institutional settings for, and methods of, interrogation, as well as providing training, frameworks and other institutional measures that would correct or compensate for the aforementioned prejudices would obviously be fairer both to mentally disabled victims and to accused parties, even though it would be a more daunting task than to reinforce established normalized procedures.

A more radical change than a functionalist test of promise-making capacities would be to challenge the very necessity of promise-making. If what matters is that the witness bind herself to tell the truth, why would a promise be the only acceptable form of commitment? Why prohibit other

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equally reliable forms? PMD may sometimes require forms of support or alternative modalities of communication to express themselves. One can find empirical support in foreign legal frameworks that have experimented with such alternatives and conceptual support in philosophical literature examining how people with mental disabilities can benefit from “prostheses” like people with physical disabilities do. These arguments would pave the way for a further argument based on considerations of justice that would require going beyond limited normalizing strategies.

My aim for the time being is to problematize the Supreme Court’s default reaction to a request to access justice, which was either to exclude the “abnormal” witness (the minority) or to marginally tinker with a legal category so as to allow “marginally abnormal” potential witnesses to fit in. The Court did not explore more radically innovative modes of communication for people whose competency simply cannot be assessed by traditional means. Again, courts did not have the competency to do so, but the government did have this authority and chose to endorse the judicial formalist interpretation. It is not unreasonable to suspect an ableist normalizing tendency to be at work behind the majority and the minority’s choice not to significantly challenge the currently existing framework. The majority essentially assumed that PMD able to verbally promise to tell the truth could be assimilated to non-disabled witnesses. The minority disagreed. Both took the “non-disabled witness” as a benchmark, and so did the legislator when it endorsed the Court’s decision through its 2015 amendments. Ableism assumes that to normalize PMD is good, because it assumes that people without disabilities are superior or that their lives are more worth living, their voices more worth hearing. From an ableist point of view, integrating PMD into social and legal categories by assimilating them to non-disabled people is seen as a “step up,” whereas adjusting legal frameworks to acknowledge and better respond to disability would be conceived a step down, or somewhat of a failure.

V. Toward greater access to justice for persons with mental disabilities

This article has provided a particular illustration of a general problem: laws and policies sometimes deal with the “abnormality” presented

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by disabilities either by exclusion or by normalization, rather than by integration. More specifically, I have scrutinized the strengths and weaknesses of the interpretative possibilities open to the Supreme Court in D.A.I., in order to suggest that the Court’s choices, rhetoric and arguments are symptomatic of an ableist tendency to look for ways of normalizing the cognitively differently abled witness instead of problematizing “normal” testimonial structures. The forward-looking proposal that derives from this examination is to caution judges and policymakers against the unreflective tendency to integrate marginalized individuals by normalizing them into traditional legal categories or structures instead of more substantially challenging these categories and structures.

To reiterate, too quick an assimilatist fix displaces the problem instead of solving it. For instance, in the case of witnesses with mental disabilities, judges may have their arms twisted into accepting that a witness is competent enough to testify and should benefit from special testimonial measures, only to express their distrust or reservations towards these accommodation measures at the stage of evaluating credibility rather than competency. Judges may formally allow a witness to express her voice but still entertain the belief that, short of jumping through the intimidating hoops of traditional interrogation, testifying unaided and being cross-examined, this voice falls short of being incriminating. Judges’ prejudices or a lack of proper testimonial settings or guidelines may then favour those accused of abusing people with mental disabilities. The accused would then de facto benefit from a heightened criminal evidentiary standard, and would need to be guilty “beyond a prejudiced doubt.” To treat PMD as though they were “normal” witnesses and ignore their particular characteristics, capacities and needs leads to institutional settings that are not necessarily conducive to truth-finding, and can potentially be unfair to both the victim and the accused. Understanding in greater depth (1) what PMD are entitled to as a matter of justice and (2) PMD’s actual testimonial capacities and (3) the best ways to enable these capacities will be fairer to both PMD and the accused parties.

75. In support of this hypothesis, see: Benedet & Grant, “Taking the Stand,” supra note 69; DC Valentin-Hein & LD Schwarz, “Witness Competency in People with Mental Retardation: Implications for Prosecution of Sexual Abuse” (1993) 11:4 Sexuality and Disability 287 at 292; Dick Selbey & Tannis Doe, “Patterns of sexual abuse and assault” (1991) 9:3 Sexuality and Disability 243 at 249.

76. Unjustified or unreasonable assessments can go both ways. While PMD’s valuable testimonies can be unfairly rejected because they require an untraditional vehicle, an accused could be unfairly judged by serving as a scapegoat if the available evidence is presumed to be more reliable than it actually is.
This is why one ought not to rejoice too quickly at the Supreme Court’s decision in *D.A.I.* and the new section 16(3.1). One cannot be against the removal of a conceptualist test that can exclude PMD from accessing justice, but such a removal is not entirely successful if it only displaces exclusion to other stages. From a practical point of view, the challenge ahead is to determine how people with various mental disabilities can best act as witnesses and corroborate or disprove events, and to proceed with institutional experimentation aimed at achieving the best settings to meet this challenge. From a theoretical point of view, we must understand the nature of the harm and of the injustice to mentally disabled people when the state fails to take proper inclusive measures. This understanding is needed to justify and orient institutional reforms.

Since normalizing is often carried out within a liberal agenda with the laudable intention of promoting equality, its critics have the awkward task of saying that the step forward is not quite right—that inviting women to be men and disabled people to be “normal” is not quite equality. This leads me to send an interdisciplinary invitation to disability theorists to participate in the endeavours of jurists and political theorists by detecting and explaining the kind of normalization at work within legal structures and legal discourses (including case law such as *D.A.I.*). Normalization is the process through which “abnormal” subjects are either ostracized, isolated or otherwise segregated or brought in line with the “normal” ones. There are, it should be noted, stricter and softer normalizing norms, but even “flexible” forms of normalization that attempt to stretch the “normal” criterion to fit and normalize “abnormal” persons are limited: they will typically not question the core assumptions of what is a normal legal subject, a normal victim, and a normal witness.77 Legal discourses tend to stretch the criteria of legal subjecthood in order to protect these norms from breaking or being challenged on the ground of being unacceptably exclusivist. The legal discourse taking place among conceptualists, formalists and functionalists can be seen as a productive locus of negotiation between competing strategies of normalization, some more flexible than others, but normalizing nonetheless. The critical insights of disability theorists regarding processes of normalization may in turn incite political theorists and jurists to rethink their assumptions about the way in which the legal system collects evidence, reconstructs reality, and attributes criminal blame in ways that go beyond marginally tinkering with the RPTT.

77. This corresponds to Waldschmidt’s notion of “flexible normalism,” *supra* note 12 at 195-196.
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“Integration by decree” is preferable to unmitigated exclusion, but it does not address the various obstacles that PMD face to access justice when normalization fails. And it may even hinder the process of overcoming the deeper obstacles by creating an illusion that the problem has been solved. Other aspects of structural exclusion remain to be criticized and more innovative accommodations to give a voice to mentally disabled witnesses remain to be designed and tested. Procedural tradition should not stand in the way of social integration. In addition to conceptual analysis revealing the limits of current approaches, we need empirical research to improve PMD’s access to justice. This requires (1) interdisciplinary collaboration between legal experts and psychologists specialized in communicating with people with various types of cognitive impairments and (2) considering the strengths and weaknesses of institutional innovations practiced in other jurisdictions. Consider, for instance, the role of “registered intermediaries” in the United Kingdom to facilitate communications between vulnerable witnesses and different actors within the legal process.78

This article applies the critical outlook of disability theory on normalcy to a particular legal case.79 This is neither an essay on the concept of normalcy itself, however, nor is it a black-letter survey of legal alternatives that need exploring. Instead, it critically looks back at legal discourses about disability interpreted as liberal successes. The work of second-wave disability theorists (illustrated in this article) is not to use traditional tools set up by equality rights strategists and first-wave disability theorists. It may therefore sound abstract to human rights practitioners whose bread and butter is the use of such tools. My goal is nonetheless a worthy one: to expose the pre-reflective assumption that we should either assimilate or exclude PMD. It is no more than an intermediary step consisting of removing the laurels on which ideology rests, and asking policy-makers and scholars to take a second look at alternative solutions. Articulating

78. Brendan O’Mahony, “The emerging role of the Registered Intermediary with the vulnerable witness and offender: facilitating communication with the police and members of the judiciary” (2010) 38:3 British Journal of Learning Disabilities 232.
79. This literature belongs to the field of cultural critique and makes the case that normalization is, amongst other things, real and, like most damaging ideologies of its kind, generally concealed. The role of cultural critique is to reveal subtle forms of normalization. Due to space limitation, I have mostly referred to Waldschmidt’s notion of “flexible normalism,” but other normative accounts of normalcy have been made under the labels of “compulsory bodied-ability,” in Robert McRuer, Crip Theory: Cultural Signs of Queerness and Disability (New York: New York University Press, 2006); enforceable normalcy, in Lennard J Davis, Enforcing Normalcy: Disability, Deafness, and the Body (London, UK: Verso, 1995) and Lennard J Davis, The End of Normal: Identity in a Biocultural Era (Ann Arbor, MI: University of Michigan Press, 2014); or the “normate,” in Rosemarie Garland Thomson, Extraordinary Bodies: Figuring Physical Disability in American Culture and Literature (New York: Columbia University Press, 1997).
how nine judges sitting on the Supreme Court of Canada talked at cross purposes and took part in a legal discourse enforcing normalcy upon PMD provides us with valid reasons for moving forward.