The Admissibility of Novel Scientific Evidence: The Current State of the Frye Test in Wisconsin

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THE ADMISSIBILITY OF NOVEL SCIENTIFIC EVIDENCE: THE CURRENT STATE OF THE FRYE TEST IN WISCONSIN*

I. INTRODUCTION

Recently our courts have been inundated with a deluge of novel scientific theories and techniques.1 Much literature by commentators has emerged relative to the standards to apply when considering the admissibility of these theories and techniques.2 Two approaches are frequently suggested: (1) the

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1. See Lacey, Scientific Evidence, 24 JURIMETRICS J. 254 (1984). Lacey describes the magnitude of scientific evidence presently before the courts:
   [T]he admissibility at trial of scientific evidence lately has been much in the news. Evidence of fiber analysis in the Wayne Williams/Atlanta case, the fiber, hair and “bite mark” evidence in the Florida trial of Theodore Bundy, the psychiatric testimony in the Utah trial of Francis Schreuder who claimed that his intense love for his mother stifled his free will and prevented him from disobeying her order to kill his grandfather, and the recent Hinckley trial have heightened public awareness of scientific evidence . . . .

   In short, the scientific and technological subjects that now enter our courts project us into the disciplines of Engineering, Medicine, Chemistry, Physics, Toxicology, Anthropology and Biology, and, as well, the social sciences: Sociology, Economics, Psychology and Linguistics, Statistics and Accounting.

   The reach of scientific evidence is dramatically illustrated by a recent survey which indicated that 44 percent of the judges and attorneys questioned encountered scientific evidence in approximately one-third of their cases.

Id. at 254-55 (footnotes omitted).

Frye\textsuperscript{3} test, and (2) the relevancy or "balancing approach" as suggested by the Federal Rules of Evidence.\textsuperscript{4} This comment will trace the origin of the Frye test,\textsuperscript{5} and examine the current state of the Frye standard,\textsuperscript{6} its proponents,\textsuperscript{7} adversaries,\textsuperscript{8} and application to newfangled scientific theories and techniques.\textsuperscript{9} Additionally, the article will examine Wisconsin's approach to the admissibility of scientific evidence under Frye,\textsuperscript{10} trace the confusion created by the court's selective employment of the "general acceptance"\textsuperscript{11} test, and conclude by urging a recommitment to Frye.\textsuperscript{12}

\section{The Frye Opinion}

Despite having encompassed a scant two pages in the Federal Reporter, Frye v. United States\textsuperscript{13} continues to be the most frequently cited authority respecting the admissibility of scientific evidence.\textsuperscript{14} Associate Justice Van Orsdel wrote the opinion for the court which, in a case of first impression, examined the admissibility of an ultramodern scientific instrument — the "systolic blood pressure deception test." This device was the forerunner of our modern day polygraph test.

James Alphonzo Frye was convicted of the second degree murder of a wealthy physician found shot to death in his office.\textsuperscript{15} The only issue on appeal was the admission of testi-

\begin{thebibliography}{99}
\bibitem{Frye} See infra notes 13-30 and accompanying text. In this comment the words Frye and general acceptance will be used interchangeably.
\bibitem{Balancing} See infra notes 45-62 and accompanying text. This article will deal primarily with the Frye "general acceptance" test and hence will mention the relevancy or "balancing approach" in only a summary fashion.
\bibitem{AA} See infra notes 13-20 and accompanying text.
\bibitem{BalancingAA} See infra notes 24-30 and accompanying text.
\bibitem{AA} See infra notes 31-42 and accompanying text.
\bibitem{BalancingAA} See infra notes 21-22 and accompanying text.
\bibitem{AA} See infra notes 63-119 and accompanying text.
\bibitem{AA} See infra notes 120-42 and accompanying text.
\bibitem{BalancingAA} See infra notes 153-57 and accompanying text.
\bibitem{Frye} 293 F. 1013 (D.C. Cir. 1923).
\bibitem{Shepard} According to a recent Shepard's Supplement, Frye has been explicitly mentioned 518 times in case law. Also, Frye has been the subject of praise and scorn by the commentators. See supra note 2.
\end{thebibliography}
mony of the expert who administered a deception test to the defendant. The court related the scientific theory underlying the deception test:

It is asserted that blood pressure is influenced by change in the emotions of the witness, and that systolic blood pressure rises are brought about by nervous impulses sent to the sympathetic branch of the autonomic nervous system. Scientific experiments, it is claimed, have demonstrated that fear, rage, and pain always produce a rise of systolic blood pressure, and that conscious deception or falsehood, concealment of facts, or guilt of crime, accompanied by fear of detection when the person is under examination, raises the systolic blood pressure in a curve, which corresponds exactly to the struggle going on in the subject's mind, between fear and attempted control of that fear, as the examination touches the vital points in respect which he is attempting to deceive the examiner.16

Frye underwent the deception test and defense counsel, in an attempt to diminish his client's guilt, sought to introduce the results of the examination. Justice Van Orsdel then wrote what remains the rule in a majority of jurisdictions17 concerning the admissibility of novel scientific evidence:

Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while the courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.18

The Frye court went on to conclude "the systolic blood pressure deception test has not yet gained such standing and scientific recognition among physiological and psychological authorities as would justify the courts in admitting expert testimony deduced from the discovery, development, and experiments thus far made."19 Hence, the "general acceptance" test was established. However, since the Frye opinion failed to in-

17. See Moenssens, supra note 2, at 546.
18. Frye, 293 F. at 1014 (emphasis added).
19. Id.
clude any authority for the "general acceptance" language, and likewise any definition of its terms, the test has often been the source of heated debate among commentators although it remains the majority rule.\(^{20}\)

### III. The Current State of the FRYE Test

Since its adoption in 1923, the FRYE test, which requires "general acceptance" within the scientific community, has been determined to be the applicable standard in federal district and state courts in a myriad of situations involving admissibility of scientific techniques.\(^{21}\) In fact, one commentator has stated "[s]ince the late 1960's, courts have cited FRYE in virtually every criminal prosecution dealing with a novel form of expert evidence."\(^{22}\)

Today, although the FRYE test represents the majority rule, there seems to be a growing minority of state supreme and federal district courts which have rejected the "general acceptance" test espoused in the FRYE decision.\(^{23}\)

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20. See infra notes 31-55 and accompanying text. However, even those critical of FRYE have had great difficulty defining with specificity an approach preferable to the "general acceptance" test. See Symposium Report, supra note 2, at 229-33.


22. See Moenssens, supra note 2, at 546.

A. Proponents

One advocate of the Frye "general acceptance" test has praised the standard claiming:

[t]he Frye standard serves two distinct but related values: (1) general scientific acceptance provides a meaningful indication of reliability; and (2) it provides a judicially manageable standard by which to avoid collateral issues during trial. While the Frye standard requires the exclusion of some relevant evidence, it saves time — not arbitrarily or unjustly, but in a manner largely consonant with the principle that only reliable evidence should be admitted.24

Another legal scholar who favors Frye opined that the "general acceptance" test acts to shield the awe-struck jury from the nimbus which frequently surrounds novel scientific techniques.25 Another argument frequently raised in favor of the Frye test relates to the need for uniformity of judgment and precedent, stemming from appellate court decisions, for resolution of future disputes.26

An additional concern often raised by those who look with favor upon the Frye standard is based on the practical need of litigants in the adversary system that, "a minimal reserve of experts exists who can critically examine the validity of a scientific determination . . . ."27 The underlying premise is that a scientific technique could be so new and unique so as to make the opponent unable to counteract this testimony with his own expert witness. In such a situation, the needs of the adversary system would not be met. Professor Giannelli has reasoned "[t]he principle justification for the Frye test . . . is that it establishes a method for ensuring the reliability of scientific evidence."28 The Supreme Court of Maryland reiterated the same point: "[w]ithout the Frye test or something similar, the reliability of an experimental scientific technique is likely to become a central issue in each trial in which it is

24. See Matthias, supra note 2, at 541.
25. See M. McCormick, supra note 2, at 883.
28. See Giannelli, supra note 2, at 1207 (emphasis in original).
introduced, so long as there remains serious disagreement in the scientific community over its reliability.″

Finally, while critics of Frye censure the essentially conservative nature of the test, proponents argue this is an advantage, not a drawback, in that it acts to insure against the admission of unreliable evidence."

B. Opponents

Antagonists of the Frye "general acceptance" test often focus their criticism on the conservative nature of the test. As Professor Giannelli has observed, "the heavy burden demanded by the Frye test deprives courts of relevant evidence." One court has gone as far as to claim that Frye thrusts "an unjustifiable obstacle" to the admission of scientific evidence. Constitutional theorists argue that to place such an "obstacle" before the admission of scientific evidence may interfere with a defendant's constitutional right to present a defense. Frye disputants sense that the "general acceptance" test acts to exclude otherwise valuable and sound scientific evidence simply because the evidence is too new or unique to have had the time or opportunity to meet the "general acceptance" standard. Some courts question whether one person's viewpoint could ever be sufficient to attest to the views of an entire scientific community regarding the reliabil-

30. See Moenssens, supra note 2, at 546.
[M]any courts favor a conservative approach because juries may be overly impressed by experts with seemingly impressive credentials. Additionally, juries may give greater weight to expert opinions than the opinions deserve on the basis of scientific validity . . . .

A conservative test — one that will not permit the prosecution or the defense to use evidence based on tests of unproven reliability — is especially commendable in criminal cases, in which the technical inquiry is directed toward resolving the ultimate issue of guilt.

Id. (footnote omitted).
31. See Symposium Report, supra note 2, at 192.
32. State v. Cantanese, 368 So. 2d 975, 980 (La. 1979).
34. See generally Boyce, Judicial Recognition of Scientific Evidence in Criminal Cases, 8 UTAH L. REV. 313 (1964).
ity of a new technique. These courts require that a minimum of two experts testify to corroborate their views because of the possibility of witness bias. In effect, Frye requires the passing of a "cultural lag" before the scientific evidence meets the "general acceptance" standard.

One further criticism of the conservative nature of the Frye test is that it seems to be inconsistent with modern laws of evidence which allow for the liberal admissibility of opinion evidence.

Further debate has focused on the vagueness of the "general acceptance" language. The Frye standard has been criticized as at best "nebulous." Professor Giannelli spoke of the problems inherent in a vague test:

Courts applying the general acceptance test have discovered the need to define the parameters of the test more closely than the D.C. Circuit did in Frye. In particular, courts must decide who must find the procedure acceptable, they must define exactly what must be accepted, and they must determine what methods will be used to establish general acceptance.

In conclusion, one critic has observed what has occurred in practice when courts have sought to minimize or eliminate the Frye standard:

38. Proponents of Frye would argue that requiring a novel scientific technique to pass a "cultural lag" is sound thinking because this will afford the device sufficient time to be tested and proven effective.
39. See Moenssens, supra note 2, at 560-61. Moenssens points out the inefficiencies inherent in scientific testing:

[T]he expansion of techniques and the growth in the number of laboratories have caused considerable problems. Many laboratories experience difficulty in finding staff to perform the new functions. Laboratories often hire people who are not fully qualified or appropriately trained in forensic methodologies. Increasingly, experts reach erroneous conclusions and make misidentifications even in disciplines as old and widespread as fingerprint identification.

Id. (footnote omitted).
Considering the problems inherent in laboratory testing, the logic of retaining a conservative test should become more obvious.
41. See Giannelli, supra note 2, at 1208 (emphasis in original).
As applied, distinguished, or ignored in [these] federal and state cases, the Frye standard has undergone substantial implicit modification. This process has occurred largely in situations in which a rigid or literal application of the test would require reversal of trial court rulings admitting scientific evidence. In these situations the records were obviously sufficient to persuade appellate courts of the accuracy and reliability of the principles and techniques involved, despite absence of total compliance with the Frye standard.

C. McCormick's Criticism

Perhaps the most frequently cited critic of the Frye "general acceptance" test is Professor McCormick in the second edition of his Handbook of the Law of Evidence:

"General scientific acceptance" is a proper condition for taking judicial notice of scientific facts, but not a criterion for the admissibility of scientific evidence. Any relevant conclusions which are supported by a qualified expert witness should be received unless there are other reasons for exclusion. Particularly, probative value may be overborne by the familiar dangers of prejudicing or misleading the jury, and undue consumption of time. If the courts used this approach, instead of repeating a supposed requirement of "general acceptance" not elsewhere imposed, they would arrive at a practical way of utilizing the results of scientific advances.

Professor McCormick cited Coppolino v. State as a case critical of Frye and supportive of his "relevancy" approach. In Coppolino, the jury found the defendant, Dr. Carl Coppolino, guilty of second degree murder. The defendant, represented by attorney F. Lee Bailey, appealed. In Coppolino, the state postulated that the victim, Mrs. Coppolino, had died as a result of an injection of succinylcholine chloride and

42. See M. McCormick, supra note 2, at 894-95.
44. Id. (footnotes omitted).
46. See id. at 69.
47. Id.
sought to introduce at trial evidence of a test performed by Dr. Umberger, a toxicologist, to show the presence of this chemical in the body tissue. The defense presented their own expert who disagreed as to the validity and accuracy of the test. The issue on appeal was whether the trial court should have admitted evidence of the test.

On appeal the court made reference to Frye but held “it is incumbent for the defendant to show that the trial judge abused his discretion. This the defendant has failed to do.”

Despite McCormick’s having cited this case as supportive of his view, commentators have objected to referring to Coppolino as repudiating Frye. Professor Gianelli remarked, “Coppolino thus ignores rather than rejects Frye. More importantly, it neither endorses the McCormick approach nor offers any alternative standard: it merely recognizes trial judge discretion.”

Another analyst, Mark McCormick, places criticism of the Frye test by the Coppolino court in perspective:

Because the court did not expressly modify or repudiate Frye, the decision safely can be read merely as using the range of trial court discretion as a basis for deferring to the trial court’s application of the general acceptance standard. The record contained no evidence of general acceptance of the new test. Instead, it showed only that it was accepted by scientists who testified for the state in the case, and it was not accepted by the scientists who testified for the defense. On one level of analysis, therefore, the case might be interpreted merely as upholding a trial court exercise of discretion without a legal basis for doing so. The decision, after all, was made by an intermediate appellate court that acknowledged it was bound by the Florida Supreme Court’s adoption of the Frye standard. Consequently, the case became persuasive authority for modifying or abrogating the very standard that the Coppolino court purported to apply.

Hence, McCormick’s reliance on the Coppolino decision as persuasive authority for overturning Frye seems ill-founded.

48. The test which the State introduced to show the presence of succinylcholine chloride in the tissue of the victim’s body was unique and developed specifically for the Coppolino case. Id. at 75 (Mann, J., concurring specially).
49. Id. at 71.
50. See Giannelli, supra note 2, at 1235 (emphasis added).
51. See M. McCormick supra note 2, at 889-90.
52. See Giannelli, supra note 2, at 1232-34, where Professor Giannelli points out:
Accordingly, it is curious to note that, following criticism by commentators of the oft-cited language at page 491 of McCormick's second edition, this language does not appear anywhere in McCormick's 1984 third edition. Therefore, one might justly conclude that Professor McCormick is retreating from the harsh treatment he afforded the *Frye* rule in his 1954 text.

**IV. THE FEDERAL RULES OF EVIDENCE**

In 1975, Congress adopted the Federal Rules of Evidence for use in federal district courts. The *Frye* test of "general

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[T]his formulation (citing Professor McCormick's oft quoted 1954 text) has generated some confusion. Several courts have concluded that under the McCormick view, lack of general acceptance plays no part in the trial judge's determination of admissibility... An even more puzzling statement appears in a later section of McCormick's chapter on scientific evidence. In discussing the polygraph, McCormick refers to his original comments on the general acceptance test and then observes: "If we thus deflate the requirement [of general acceptance] to the normal standard which simply demands that the theory or device be accepted by a substantial body of scientific opinion, there can be little doubt that the lie-detector meets this requirement." This passage seems to propose a "substantial acceptance" standard, an approach markedly different from the relevancy analysis. Indeed, a substantial acceptance standard would seem to come close to the *Frye* general acceptance standard, requiring the court to identify the field or profession in which the technique belongs and then to determine whether substantial acceptance has been achieved in that field.

*Id.* (emphasis added) (footnotes omitted).

53. See *supra* notes 50-51 and accompanying text.

54. See *supra* note 44 and accompanying text.


Fed. R. Evid. 401 provides: "Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

Fed. R. Evid. 402 provides: "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible."

Fed. R. Evid. 403 provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

Fed. R. Evid. 702 provides: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine
acceptance" does not appear anywhere in the Congressional Committee Reports, the Advisory Committee's Notes, or the hearings themselves. Since the time of their adoption, and as various states have enacted their version of the rules, courts and commentators have debated the status of the Frye test under the Federal Rules of Evidence. Professor Giannelli summarized the arguments from both perspectives pertaining to whether the federal rules superseded Frye:

[T]hose who argue that the Frye test survived the enactment of the Federal Rules have some support in the legislative history. Because the Federal Rules were not intended to be a comprehensive codification of the rules of evidence, a number of evidentiary rules are not covered, and many others, though mentioned, are treated only in a general fashion. Therefore, it can be argued that because Frye was the established rule and no statement repudiating Frye appears in the legislative history, the general acceptance standard remains intact.

Those who argue that the Federal Rules repeal the Frye standard focus on the language of the Rules. Rule 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 402 mandates that "[a]ll relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority." Because scientific evidence could be shown to be reliable and thus relevant under Rule 401 without regard to its general acceptance in the scientific community, and because none of

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57. See M. McCormick, supra note 2, at 886-87. "[T]wenty-two states and Puerto Rico now have rules similar to the Federal Rules." (footnote omitted). Additional states are considering adopting the Federal Rules of Evidence. Id. at 887, n.51.

58. See supra note 2.
the exclusions enumerated in Rule 402 is applicable, the Federal Rules have provided a standard of admissibility inconsistent with Frye. Although this argument has considerable merit, jurisdictions adopting the Uniform Rules of Evidence (1953), which contain a similar relevancy provision, have not accepted the argument.\textsuperscript{59}

The Federal Rules of Evidence have been construed as being substantially more liberal in application than the Frye rule. The reason for this conclusion is that under the federal rules there is no need to show "general acceptance" within the scientific community. The proponent need only show that the evidence is relevant under Rule 401,\textsuperscript{60} and successfully defend any possible challenges\textsuperscript{61} made to the admissibility of the evidence by the opponent.

However, in the interests of justice one must still guard against the admission of unreliable novel scientific evidence. Therefore, those who favor the "relevancy approach" point to the role the adversary plays in his or her cross-examination as a guard against unreliable scientific evidence. The theory is that the proponent of unreliable expert evidence will be less believable in the eyes of the jurors, and the opponent will prevail. But, legal scholars have seriously questioned the logic in that premise.\textsuperscript{62}

\textsuperscript{59} See Giannelli, supra note 2, at 1229-30.
\textsuperscript{60} See supra note 56.
\textsuperscript{61} Id.
\textsuperscript{62} See Symposium Report, supra note 2, at 213:

[W]hen an expert testifies, cross-examination may not be quite as useful in highlighting problems with his testimony. An expert, such as the one called in Frye, may not be relying very much on memory. Rarely will the expert be a witness to the underlying events that gave rise to litigation . . . .

If the expert had been permitted to testify, his testimony might have influenced the jury. If the machine was proven unreliable, then the jury's verdict may well have rested on unreliable — i.e., incorrect evidence. In Frye, a guilty defendant might have gone free. In another case, where the government offered the evidence, a defendant might have been erroneously convicted. It is one thing to accept the risk of human error by jurors when the errors are essentially unavoidable and probably not discernable. It is another to permit a "scientific claim" when that claim might later be shown to be wrong. Frye sought to minimize reliance on scientific claims that had not yet been sufficiently validated for courts to feel comfortable in relying on them to render a final judgment. \textit{Id}. (emphasis in original).

\textit{But see} Cullin v. State, 565 P.2d 445, 458 (1977): "[t]he device of cross-examination soon smothes out the inept, the unlearned, the inadequate self-styled expert." \textit{Id}. 

Despite the "relevancy approach" taken by some following the enactment of the Federal Rules of Evidence, debate is likely to continue concerning the vitality of Frye under the rules until state supreme and federal district courts provide further guidance.

V. THE WISCONSIN APPROACH

Wisconsin's approach to determining the admissibility of scientific evidence has been uncertain. The Supreme Court of Wisconsin in State v. Walstad\(^6^3\) admitted to this confusion: "this court's treatment of Frye [has] not been marked by certainty or consistency."\(^6^4\) The resulting haze has left practitioners with the unenviable task of discerning whether to apply the Frye "general acceptance" standard, or the "relevancy" or "balancing approach."

A. Cases Citing Frye

The first Wisconsin case to make reference to Frye was State v. Bohner.\(^6^5\) In Bohner, the defendant was charged and found guilty of bank robbery.\(^6^6\) On appeal Bohner asserted that "the court erred in refusing to permit the test of a lie detector to be presented to the jury."\(^6^7\) The defense sought to introduce the testimony of Professor Keeler, of Northwestern University Crime Detection Laboratory, to prove that Bohner could not have been in the city where the robbery took place on the day in question.

The defense tendered an offer of proof, "that this 'lie detector' has been used in over 10,000 cases and that seventy-five percent of those upon whom the 'lie detector' has been used have confessed their guilt upon completion of a second test with the said 'lie detector'."\(^6^8\)

The court cited and applied the Frye "general acceptance" test to conclude "[w]e are not satisfied that this instrument, during the ten years that have elapsed since the decision in the

\(^{63}\) 119 Wis. 2d 483, 351 N.W.2d 469 (1984).
\(^{64}\) Id. at 515, 351 N.W.2d at 485.
\(^{65}\) 210 Wis. 651, 246 N.W. 314 (1933).
\(^{66}\) Id. at 652, 246 N.W. at 315.
\(^{67}\) Id. at 657, 246 N.W. at 317.
\(^{68}\) Id.
Frye case, has progressed from the experimental to the demonstrable state.\textsuperscript{69}

The Bohner court examined the history of the "lie detector" test and found that the evidence failed to meet the "general acceptance" standard and hence excluded the evidence under Frye.\textsuperscript{70}

The next decision to explicitly\textsuperscript{71} mention Frye was State v. Stanislawski.\textsuperscript{72} Stanislawski had been charged and found guilty of forcible rape.\textsuperscript{73} The record from the trial court contained circumstantial evidence which would tend to support a finding that Stanislawski was innocent.\textsuperscript{74} In light of this evidence, defense counsel attempted to introduce mitigating evidence obtained through two polygraph examinations which were administered to the defendant, and the complaining witness. The offer of proof contained statements which demonstrated that the tests were conducted by two police officers who had 34 years of combined experience conducting nearly 2,000 polygraph examinations.\textsuperscript{75}

The results obtained by the examiners indicated that Stanislawski was telling the truth when he denied having sexual relations with the complaining witness on the date of the

\textsuperscript{69} Id. at 658, 246 N.W. at 317.

\textsuperscript{70} The Bohner court after citing and applying the Frye test stated its rationale for excluding evidence of the polygraph:

[w]hile it may have some utility at present and may ultimately be of great value in the administration of justice, it must not be overlooked that a too hasty acceptance of it during this stage of its development may bring complications and abuses that will over-balance whatever utility it may be assumed to have.

Id. (emphasis added)

\textsuperscript{71} The author contends that the reason there has been confusion in Wisconsin as to whether practitioners should apply the Frye test or a relevancy approach has been the selective application of the "general acceptance" language. The Frye test has been used in Wisconsin without proper citation. See infra notes 125-40 and accompanying text.

\textsuperscript{72} 62 Wis. 2d 730, 216 N.W.2d 8 (1974).

\textsuperscript{73} Id. at 732, 216 N.W.2d at 9.

\textsuperscript{74} For instance, pubic hairs were found on a pair of white mittens worn by the complaining witness, which did not belong to her, her boyfriend, or the defendant. Pubic hairs were also found in the vaginal area of the alleged victim. These pubic hairs also did not belong to the victim, her boyfriend, or the defendant. Finally, the defendant testified that he was already home and in bed when the alleged incident took place and his testimony was corroborated by his sister. Id. at 733-34, 216 N.W. 2d at 10.

\textsuperscript{75} Id. at 734, 216 N.W.2d at 10.
alleged incident.\textsuperscript{76} When the complaining witness was tested, the outcome led the examiner to conclude that she was not telling the truth in stating that she had sexual relations with the defendant and in response to questions as to whether she was trying to protect someone else in the case and whether she had intercourse with someone other than the defendant in the late night or early morning hours of April 25 or 26, 1972.\textsuperscript{77}

The trial court excluded the testimony as to the polygraph tests and the examiner's conclusions.

The supreme court cited \textit{Bohner}, and although the court made reference to McCormick's opposition to the \textit{Frye} standard, the court noted that \textit{Frye} remains "often cited and followed."\textsuperscript{78} The \textit{Stanislawski} court then stated that: "[w]e need not reject the \textit{Frye} test to inquire, forty-plus years later, whether the lack of general acceptance then found to exist, still persists."\textsuperscript{79} The supreme court went on to admit the evidence obtained via the polygraph test provided certain conditions\textsuperscript{80} were met. In referring to the reliability of the polygraph, the court noted the "increased use and acceptance [of the polygraph] reflects the establishing of polygraph tests, conducted by a competent examiner, as having gained 'standing and scientific recognition among physiological and psychological authorities' in their particular field."\textsuperscript{81} \textit{Stanislawski}, therefore, arguably applied \textit{Frye} to conclude that polygraphs are now "generally accepted" within the community of physiological and psychological experts, and that the case should not be viewed as a repudiation of \textit{Frye}.\textsuperscript{82}

\textsuperscript{76.} \textit{Id.}
\textsuperscript{77.} \textit{Id} at 735, 216 N.W.2d at 10.
\textsuperscript{78.} \textit{Id.} at 737, 216 N.W.2d at 10.
\textsuperscript{79.} \textit{Id.}
\textsuperscript{80.} \textit{Stanislawski}, now overruled, required that before polygraph evidence would be admitted the parties involved would have to enter a stipulation agreement. \textit{See} State v. Dean, 103 Wis. 2d 228, 307 N.W.2d 628 (1981).
\textsuperscript{81.} \textit{Stanislawski}, 62 Wis. 2d at 738, 216 N.W.2d at 642, \textit{quoting from}, State v. Bohner, 210 Wis. 651, 657, 246 N.W. 314, 317 (1933).
\textsuperscript{82.} \textit{But see} State v. Dean, 103 Wis. 2d at 242, 307 N.W.2d at 635. The \textit{Dean} court takes the position that \textit{Stanislawski} did not apply the \textit{Frye} test to determine admissibility. Rather, the \textit{Dean} court argues that by entering the \textit{Stanislawski} stipulation the parties were estopped from questioning the admissibility of the polygraph results. \textit{Id.} at 257-58, 307 N.W.2d at 642.
In 1974, the supreme court was once again faced with a question involving the admissibility of a novel scientific technique — hair identification. *Watson v. State*,\(^83\) erroneously referred to as the first case to reject *Frye*,\(^84\) concerned the admissibility of hair identification analysis which led to a jury verdict that John Joseph Watson was guilty of burglary. On appeal, the defendant asserted a number of errors, one being that the testimony of June Browne, hair identification witness for the State, should have been excluded "because the present state of the science of identification does not accept the proposition that hair samples can be determined to have come from a particular individual,"\(^85\) ergo *Frye*. The *Watson* court referred to *State v. Hunt*,\(^86\) in which the same witness testified that cat hairs found on the defendant's jacket came from an animal owned by the victim.\(^87\) Consequently, such evidence was then used to implicate the defendant.\(^88\)

The *Watson* court reasoned: "[i]n the instant case, as in *Hunt*, the defendant had the opportunity to present other evidence that June Browne was out of step with recognized authorities in the art of scientific identification."\(^89\) Accordingly, although the court cited criticism of the *Frye* test, it can be inferred from the above language that an argument based on the "general acceptance" standard would have been permissible. The defense having failed to so argue, however, effectively waived the objection.

Seven years passed before the *Frye* test was once again mentioned in Wisconsin case law. The defendant in *State v.*

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83. 64 Wis. 2d 264, 219 N.W.2d 398 (1974).
84. See M. McCormick, supra note 2, at 897. The author states "[t]he earliest rejection of the *Frye* standard occurred in *Watson v. State*, in which the Wisconsin Supreme Court upheld the admissibility of hair identification testimony." *Id.* (footnote omitted). *Watson* should not be viewed as rejecting *Frye* because in *Watson* the defendant could have presented evidence to "show that June Browne was out of step with recognized authorities in the art of scientific identification." See *Watson*, 64 Wis. 2d at 273, 219 N.W.2d at 403 (emphasis added). Therefore, the defendant could have presented evidence that the expert failed to meet the "general acceptance" test, but declined to do so. Consequently, the *Frye* test was not an issue properly before the court on appeal and any criticism by the court of *Frye* should be treated as merely dicta.
85. *Watson*, 64 Wis. 2d at 272, 219 N.W.2d at 402.
86. 53 Wis. 2d 734, 193 N.W.2d 858 (1972).
87. *Watson*, 64 Wis. 2d at 272, 219 N.W.2d at 402.
88. *Id.* at 272-73, 219 N.W.2d at 403.
89. *Id.* at 273, 219 N.W.2d at 403 (emphasis added).
Dean\(^{90}\) was charged with, and subsequently found guilty, of failure to remain at the scene of an accident resulting in injury.\(^{91}\) Dean entered a Stanislawski stipulation\(^{92}\) and underwent a polygraph examination which indicated truth deception in the control questions.\(^{93}\)

The appellate court reversed concluding that the polygraph tests should not have been admitted. A hearing had not been held to determine whether Dean's waiver of his right to counsel before the stipulation was entered was done "knowingly and voluntarily."\(^{94}\)

The supreme court took the opportunity to examine the wisdom of the Stanislawski stipulation, and although it was presented with an opportunity to clarify its position regarding the Frye test, it declined to do so.\(^{95}\)

The Dean court proceeded to trace the history of the polygraph under Frye and concluded that "the Stanislawski conditions are not operating satisfactorily to enhance the reliability of the polygraph evidence and to protect the integrity of the trial process as they were intended to do."\(^{96}\) The court did not consider polygraph evidence a question of admissibility under Frye; rather, the court addressed the issue in terms of admission by stipulation where the parties have waived their rights and are estopped from asserting that the polygraph is unreliable.\(^{97}\) The rationale is that a stipulation does not enhance the reliability of the polygraph. With the stipulation removed, the court neglected to address the issue of reliability of scientific evidence under the Frye "general acceptance" test.\(^{98}\)

90. See 103 Wis. 2d 228, 307 N.W.2d 628 (1981).
91. Id. at 229-30, 307 N.W.2d at 629-30.
92. Id. at 229-30, 307 N.W.2d at 629.
93. Id. at 230, 307 N.W.2d at 629.
94. Id. at 231, 307 N.W.2d at 630.
95. Id. at 233, 307 N.W.2d at 631. "We do not however treat this case as the occasion to examine the Frye . . . standard for admissibility of scientific evidence or the question of the scientific reliability or acceptability of the theory of the polygraph." Id.
96. Id. at 279, 307 N.W.2d at 653.
97. Id. at 242, 307 N.W.2d at 635.
98. Id. at 251 n.10, 307 N.W.2d at 640 n.10, "[t]here does not seem to be general acceptance that a pre-test stipulation enhances the reliability of the test." (citation omitted) (emphasis added). This seems to indicate that Frye is alive and well in Wisconsin. The Dean court merely held that the Stanislawski stipulation was operating ineffectively, not that Frye is inapplicable to scientific evidence. See also infra notes 125-57 and accompanying text.
Two years following *Dean*, the supreme court in *State v. Armstrong* was confronted with the admissibility of "hypnotically affected testimony." Armstrong had been found guilty of first degree murder and first degree sexual assault. The key issue was whether the State's use of hypnosis to refresh the recollection of a witness subsequently rendered her identification of Armstrong in a line-up and in-court testimony inadmissible.

When defense counsel criticized the procedure used during the hypnotic session, the State countered by arguing that the test administrator "concluded to a reasonable degree of scientific certainty, there was nothing in the hypnotic session that would have caused Orebia (the State's witness) to identify the defendant rather than any other person in the line-up." The court then made inquiry into the scientific validity of "hypnotically affected testimony," and the effect it could have on memory. The *Armstrong* court cited *Frye*, indicating that the "general acceptance" test was the appropriate standard for determining the validity of expert testimony; however, the court further stated that expert testimony was not at issue in the case at bar. Therefore, the court determined that *Frye* is not applicable to "hypnotically affected testimony," and it

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100. *See id.* at 559, 329 N.W.2d at 389.
101. *Id.* at 559, 329 N.W.2d at 389-90.
102. *Id.* at 563, 329 N.W.2d at 390-91.

In an effort to refresh Ms. Orebia's recollection of the events she had witnessed on the morning of June 24, 1980, the police asked her to submit to hypnosis. The hypnosis session was conducted by Doctor Roger A. McKinley five days after the murder. Prior to being hypnotized, Orebia described the person she saw as being "pretty well-built", with big arms and a flat stomach, and having long dark hair. She also was very positive in stating she would be able to identify the man if she saw him again. She described the car she had seen as white with a black top and "pretty old."

Under hypnosis, Orebia's description remained substantially the same. She described the man as having dark, wavy hair covering the back of his neck, and as being of medium height with big arms, small stomach, fat nose and bushy, dark eyebrows.

*Id.*

103. *Id.* at 559, 329 N.W.2d at 389.
104. *Id.* at 565, 329 N.W.2d at 391 (emphasis added).
105. *Id.* at 568, 329 N.W.2d at 393.

[In the case of expert testimony deduced from a scientific technique, under *Frye*, as an initial matter, it is the technique which is in effect on trial before the court. However, the trial judge is not required to do an independent examination as to]
was then not reversible error for the trial court to admit this testimony.

However, although the court determined Frye was inapplicable to this type of evidence, the Armstrong court admitted that Frye is the “most frequently employed rationale” used to ban this type of testimony. Also, the court pointed out in a footnote that “[i]f Frye could be viewed as applicable to this case, there is a strong argument that the test would be met. The phenomenon of hypnosis has been accepted by the appropriate scientific discipline.” The Armstrong case, therefore, should not be viewed as tacit approval of the “general acceptance” test but as a limitation on its range of application.

B. The Walstad Opinion

The most recent Wisconsin case to discuss the Frye test was State v. Walstad. Walstad was arrested and charged with operating a motor vehicle while under the influence of an intoxicant. Since the defendant had been previously convicted of the same offense within the past five years, he became subject upon this conviction to criminal penalties. When Walstad was arrested he submitted to a breathalyzer test, the admissibility of which became the basis for the dispute.

The defense moved to have the breathalyzer ampoule produced in court. The motion was denied, however, because the test operator, following standard operating procedure, had destroyed the ampoule. The defense then moved to suppress the test results, and the circuit judge denied the motion.

the scientific principles which underlie the technique. He does not have to have experiments conducted in court to verify the reliability of the technique. Instead, he evaluates the opinions of people who have spent sufficient time in the study of the field to qualify as an “expert.” If there is a sufficient number of “experts” who accept the validity of the technique, the judge will allow an expert to testify regarding deductions he has made from that technique.

Id.

106. Id. at 567, 329 N.W.2d at 392.
107. Id. at 567 n.14, 329 N.W.2d at 393 n.14 (emphasis added). See also id. at 565, 329 N.W.2d at 391, where the court states “[t]he phenomenon of hypnosis is generally accepted by psychologists.” (footnote omitted) (emphasis added). Id.
108. 119 Wis. 2d 483, 351 N.W.2d 469 (1984).
109. See id. at 486, 351 N.W.2d at 471.
110. See id. at 487, 351 N.W.2d at 471-72.
111. Id. at 487, 351 N.W.2d at 472. This motion was made 43 days after the test ampoule was taken.
Thereafter, Walstad pleaded no contest and brought an appeal.\textsuperscript{112}

The supreme court upheld the trial court's finding of fact that "a used ampoule — even had it been produced — could not have supplied evidence material to the guilt or innocence of the accused. Accordingly, the trial court, on the basis of the facts, correctly denied the defendant's motion to suppress."\textsuperscript{113} Justice Heffernan, writing for the majority, could have ended his inquiry at this point. He went on, however, to reprend the trial court's use of \textit{Frye}:

\begin{quote}
[T]his case has never been explicitly accepted in Wisconsin and, in fact, has been \textit{explicitly rejected}. The trial judge erred when he stated that he was "constrained by the principles elucidated in \textit{Frye} . . ." and he was incorrect when he stated the \textit{Frye} test was the accepted standard for the admissibility of scientific testimony. We hasten to add, however, that this court's treatment of \textit{Frye} has not been marked by certainty or consistency.\textsuperscript{114}
\end{quote}

The supreme court then undertook a historical survey of those Wisconsin cases which addressed the \textit{Frye} standard. Beginning with the \textit{Bohner} decision, the \textit{Walstad} court concluded that \textit{Bohner} cited \textit{Frye} because it was the only polygraph case then in existence "and [it] was not cited to import a new test of admissibility into Wisconsin law."\textsuperscript{115}

Turning to the \textit{Stanislawski} decision, after having addressed the conditional admissibility of polygraph examinations subject to the stipulations cited by the \textit{Stanislawski} court, Justice Heffernan wrote:

\begin{quote}
[T]hus, while this court in \textit{Stanislawski} thought it necessary to dispel the phantom holding of the \textit{Frye} dicta in \textit{Bohner}, it neither expressly ratified nor expressly rejected \textit{Frye}. It conditionally accepted polygraph testimony on newly articulated public policy grounds, \textit{i.e.}, that the polygraph evidence was used as a lie detecting device in various human pursuits and testimony derived from polygraph tests appeared to compare favorably with other types of expert testimony.
\end{quote}

\begin{itemize}
\item[112.] \textit{Id}.
\item[113.] \textit{Id.} at 514, 351 N.W.2d at 485.
\item[114.] \textit{Id.} at 515, 351 N.W.2d at 485 (emphasis added).
\item[115.] \textit{Id.} at 516-17, 351 N.W.2d at 486.
\end{itemize}
Stanislawski, however, did not accept nor reject Frye. That determination was unnecessary to the decision.\footnote{Id. at 517-18, 351 N.W.2d at 486.}

Finally, the Walstad court examined Watson. Although hair identification of this kind was not shown to be "generally accepted" within any particular scientific community, the Watson court had admitted the evidence and relied on cross-examination and impeachment to show whether the evidence was reliable. Credibility thus becomes a question for the factfinder, and if the testimony is relevant it is admissible.\footnote{Id. at 519, 351 N.W.2d at 487.} The Walstad court concluded by stating, "Frye was clearly and unequivocally repudiated in Watson,"\footnote{Id. (emphasis added).} and "if it is clear therefore, that the trial judge's reliance upon Frye does not find support in the law of evidence of Wisconsin."\footnote{Id. (footnote omitted) (emphasis added).}

VI. CRITIQUE

Contrary to the opinion expressed by Justice Heffernan in Walstad concerning Frye,\footnote{Id. at 516, 351 N.W.2d at 86. ("The Frye concept is alien to the Wisconsin law of evidence.")} the "general acceptance" test is not unfamiliar to the Wisconsin law of evidence.\footnote{See infra notes 126-37 and accompanying text.} The final section of this article will demonstrate that Wisconsin has relied on the Frye "general acceptance" test in the past,\footnote{See id.} and that the Frye standard has been adopted by the Seventh Circuit.\footnote{See infra notes 143-52 and accompanying text.} Additionally, Frye is currently the best available guarantee against the admission of unreliable, unproven, novel scientific techniques.\footnote{See infra notes 153-57 and accompanying text.}

A. The Frye Concept is Not Foreign to Wisconsin Case Law

An earlier section of this article dealt with cases which have explicitly cited Frye.\footnote{See supra notes 65-119 and accompanying text.} However, there are a number of other Wisconsin cases which have applied the Frye "general acceptance" language without citing to the case. These cases
provide further evidence that the "general acceptance" test is not foreign to Wisconsin case law.

In 1959, *Puhl v. Milwaukee Automobile Insurance Co.* \(^{126}\) came before the Supreme Court of Wisconsin. This case involved an automobile accident in which Theresa Puhl, three months pregnant, was injured. \(^{127}\) Theresa later gave birth to Mary Ann, the plaintiff, who was born with Down’s Syndrome. \(^{128}\) One of the evidentiary issues involved the admissibility of the testimony of Dr. Schuenzel that "mongolism could be caused by a lack of oxygen to the fetus about the thirteenth week of pregnancy." \(^{129}\) Dr. Schuenzel testified that he did not qualify as an expert or specialist in the causes of mongolism, \(^{130}\) but "it was his opinion to a reasonable medical certainty that the accident caused Mary Ann to be born a mongoloid." \(^{131}\) The medical theory was that the car accident "loosened" \(^{132}\) the mother’s placenta thereby decreasing the amount of oxygen available to the fetus, which, when combined with the "emotional upset," \(^{133}\) caused a secretion of hormones inhibiting the child’s development. \(^{134}\)

The opposing expert also admitted that he lacked expertise in the area of Down’s Syndrome but felt that the mother’s age was a significant contributing factor to the child’s condition. He also added that there was no known specific cause of Down’s Syndrome although many theories attempted to explain the cause. \(^{135}\)

The *Puhl* court, when faced with the dilemma of whether or not to admit the medical testimony as to causation, found guidance in *Frye*:

> The opinion of Dr. Schuenzel as to the cause of Mary Ann’s Mongolism was not based on clear and convincing evidence that such cause of Mongolism was the consensus of medical and scientific opinion...  

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126. 8 Wis. 2d 343, 99 N.W.2d 163 (1959).
127. *Id.* at 345, 99 N.W.2d at 165.
128. *Id.*
129. *Id.* at 351, 99 N.W.2d at 168.
130. *Id.*
131. *Id.*
132. *Id.* at 352, 99 N.W.2d at 168.
133. *Id.*
134. *Id.*
135. *Id.* at 352-53, 99 N.W.2d at 168.
When scientific or medical theories or explanations have not crossed the line and become an accepted medical fact, opinions based thereon are no stronger or convincing than the theories. While this court has gone a long way in admitting expert testimony deduced from well-recognized scientific and medical principles or discoveries, nevertheless, the facts from which the opinion is made must be sufficiently established to have gained general acceptance in the particular medical field in which they belong. Otherwise, the opinion is based not on facts but conjecture.\footnote{Id. at 353-54, 99 N.W.2d at 169.}

A comparison of the above language with an analogous excerpt from \textit{Frye} reveals the court's adoption of the \textit{Frye} standard:

\begin{quote}
[J]ust when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.\footnote{Frye, 293 F. 1013, 1014 (D.C. Cir. 1923).}
\end{quote}

There should be no doubt from a comparison of the language used by the courts in these two cases that \textit{Puhl} applied the \textit{Frye} "general acceptance" test to determine that the theory advanced by Dr. Schuenzel failed to demonstrate sufficient "general acceptance" to support a damage award to Mary Ann.\footnote{Puhl, 8 Wis. 2d 343, 354, 99 N.W.2d 163, 169.}

This case manifests the significance of \textit{Frye}'s ability to exclude unreliable scientific testimony. The trial court had accepted the testimony of Dr. Schuenzel, and the factfinder, according great weight to the expert testimony, awarded Mary Ann $50,000 for loss of her physical and mental faculties.\footnote{Id. at 345, 99 N.W.2d at 165.} However, the supreme court applied the \textit{Frye} test to deny recovery.\footnote{Id. at 354, 99 N.W.2d at 169.} In 1959, the same year \textit{Puhl} was decided, a medical report was released which stated that the cause of

\begin{footnotes}
136. \textit{Id.} at 353-54, 99 N.W.2d at 169.
137. \textit{Frye}, 293 F. 1013, 1014 (D.C. Cir. 1923).
139. \textit{Id.} at 345, 99 N.W.2d at 165.
140. \textit{Id.} at 354, 99 N.W.2d at 169.
\end{footnotes}
Down's Syndrome is the presence of an abnormal amount of chromosomes, not events which occur after conception.141

Because Dr. Schuenzel's testimony failed to gain "general acceptance" within the appropriate medical community, his testimony was rejected by the court. Without the substantial protection afforded by the Frye rule, unreliable medical and scientific testimony — such as was advanced by Dr. Schuenzel in Puhl, are likely to be accepted by a court. Such evidence could have a prejudicial effect on the jury. It is also noteworthy that although Puhl is the seminal case for having referred to the Frye language without proper citation, other Wisconsin cases have followed a similar approach.142

141. The long list of these possible causes shows that no specific maternal anomaly could be held responsible. Advanced maternal age remains an etiologic factor but it acts in a more subtle way than anticipated by early investigators. Many of these explanations were misleading because they blamed adverse events during pregnancy for the disorder. They promised that good care afforded the mother during pregnancy could eradicate the disease, a belief that led to many disappointments. There were legal implications, too, when accidents during the sixth or seventh week of pregnancy were adjudged to be the cause of the anomaly and awards were paid as compensation for injuries which had nothing to do with the child's Down's Syndrome.

This was the confusing status in 1958 when we prepared the conference on the etiology of Down's Syndrome in Cincinnati, but the situation was changed by the time we actually met in 1959. By then it had been announced by Lejeune and co-workers that in nine mongoloid children cells from tissue cultures showed 47 chromosomes instead of the normal 46. And it was shown that in most cases of Down's Syndrome trisomy 21 could be demonstrated. This discovery was a decisive step forward. Many of the old theories could be discarded, particularly those that explained the disorder on the basis of events weeks after conception. Other theories which had been vague and too general before were now confirmed in a more specific way. The presence of extra chromosomal material in every cell of the patient with Down's Syndrome appeared to be the solution of the entire problem.


142. See In re Adoption of R.P.R., 95 Wis. 2d 573, 590, 291 N.W.2d 591, 600 (Ct. App. 1980) (court cites Puhl language), rev'd on other grounds, In re Adoption of R.P.R., 98 Wis. 2d 613, 297 N.W.2d 883 (1980); Schulz v. St. Mary's Hospital, 81 Wis. 2d 638, 651 n.9, 260 N.W.2d 783, 787, n.9 (1978) (court cites Puhl language); City of Seymour v. Industrial Comm., 25 Wis. 2d 482, 487, 131 N.W.2d 323, 325 (1964) (court cites Puhl language). See also State v. Trailer Serv. Inc., 61 Wis. 2d 400, 408, 212 N.W.2d 683, 688 (1973). "A scientific or medical method not recognized as acceptable in the scientific or medical discipline as accurate does not enjoy the presumption of accuracy." (citations omitted). Id.
B. The Seventh Circuit has Explicitly Accepted Frye in the Tranowski Opinion

In United States v. Tranowski, the defendant Walter Tranowski was convicted of perjury. The perjury conviction stemmed from an earlier trial in which Walter’s brother, Stanley, had been accused of tendering a counterfeit five dollar bill. Stanley’s defense focused on Walter’s testimony that during the alleged counterfeit exchange, Walter had taken a photograph of his brother, and remained with him until 7:25 p.m. that evening. If Walter’s statement was accepted as true, it would effectively establish an alibi for Stanley.

The case concerned the admissibility of a novel scientific technique. The government sought to discredit Walter’s testimony by offering their key witness, astronomer Larry Ciupik, to prove that the picture taken by Walter could not have been taken on the day the alleged counterfeit exchange took place. Ciupik testified as to his theory that if one knew the compass orientation of an object in a photograph, it would be possible to date that photograph by: 
1) measuring the directional angle of the shadow cast by that object to determine the azimuth of the sun; and 2) measuring the angle of elevation of a complete shadow cast by another object in the photograph to determine the altitude of the sun.

The method employed by Ciupik was novel because to the best of his knowledge no one had ever used the technique prior to trial for the purpose of dating a photograph.

The Tranowski court made reference to Federal Rules of Evidence 702 and 703, and the ordinarily wide discretion given the trial judge to admit or deny the assistance of expert testimony. The court reasoned, “we believe that the technology Ciupik relied on was not ‘sufficiently established to have gained general acceptance in the particular field to which it

143. 659 F.2d 750 (7th Cir. 1981).
144. Id. at 751.
145. Id. at 752.
146. Id.
147. Id. at 753 (footnotes omitted).
148. Id. at 754.
149. See supra note 56 and accompanying text.
belongs'.” The court made it clear that it was not rejecting this testimony merely because it was a case of first impression: “[o]ur rejection is addressed to Ciupik’s application of that theory to the photograph in question. This should not be surprising since neither Ciupik nor anyone else to his knowledge had ever attempted this procedure before.”

The Tranowski court realized that Frye did not require the trial court to become a “scientific laboratory.” However, it also recognized that the defendant must not be deprived of his liberty and be subjected to the stigma of a criminal conviction on the basis of an untried test which had failed to gain a level of “general acceptance.”

The Tranowski case is significant for two reasons. First, the court clearly applied the Frye “general acceptance” test to exclude Ciupik’s testimony, thereby binding the Seventh Circuit to Frye. Second, the opinion discusses Frye in conjunction with the Federal Rules of Evidence, which indicate that Frye is in effect in this circuit as well.

VII. CONCLUSION

The Frye “general acceptance” test remains, at present, the best guarantee against the admission of unreliable, novel scientific techniques. The test erects a substantial barrier to the admission of unproven techniques with dubious reliability. While this test will sometimes act to prevent the admissibility of otherwise relevant evidence, the significance of admitting only reliable evidence should not be underestimated:

[tr]ials involve disputes, but they do more. They are symbols. Our system of litigation has endeavored to convince litigants and observers that it operates as fairly as human beings can to resolve disputes on the basis of reliable evidence carefully considered by the trier of fact, . . . . When the question is asked of an expert, “Do other scientists or experts support the claim you make?” and the answer is “no”, a court that permits a jury to accept and weigh that claim asks it to do what it is not equipped to do. And in the process it detracts from the image of a trial as a forum in

150. Tranowski, 659 F.2d at 756 (quoting Frye v. United States, 293 F.2d 1013, 1014 (D.C. Cir. 1923)).
151. Id.
152. Id. at 757.
which the jury and judge consider only evidence that reasonable people rely on and are capable of relying on . . . .

But courts do no disservice to the scientific community when they refuse to accept evidence based upon scientific theories and principles without even minimal scientific acceptance. Because courts are not free to change their minds down the road as to the results of a particular case, they need to know that a scientific principle is accepted and the extent to which it is accepted before they use it to resolve a dispute once and for all.153

Wisconsin has applied the Frye test in the past to issues involving the admission of novel scientific techniques. On occasion, Frye has been accompanied by proper citation,154 other times the court has merely borrowed the “general acceptance” language.155 Additionally, in Tranowski, the Seventh Circuit explicitly accepted Frye.156 Litigants need to have their disputes settled as fairly as possible. Attorneys and trial judges need to know that the evidence upon which the case is determined is the most reliable and trustworthy available. The image of the judicial system is enhanced when disputes are settled on the basis of dependable evidence. At the present time, the Frye test is the standard most capable of fulfilling these needs.157

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154. See supra notes 65-119 and accompanying text.
155. See supra notes 125-40 and accompanying text.
156. See supra notes 143-52 and accompanying text.
157. See Note, Expert Testimony, supra note 2, at 884-86. The “balancing test,” the alternative to Frye, is not a viable alternative to the “general acceptance” test. The former test fails to assure the opponent of the novel scientific technique that he will be able to find a rebuttal expert. Lack of an opposing expert will not render the evidence inadmissible under the “balancing approach.” Similarly, the “balancing test” unfairly shifts the burden of proof to the opponent of the novel technique to show the evidence would be of the type to confuse, mislead, or prejudice the jury.