Abandoning New York's "General Acceptance" Requirement: Redesigning Proposed Rule of Evidence 702(b) after Daubert v. Merrell Dow Pharmaceuticals, Inc.

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INTRODUCTION

We turn at times to physiology or embryology or chemistry or medicine—to a Jenner, or a Pasteur, or a Virchow, or a Lister, as freely or submissively as to a Blackstone or a Coke.

Benjamin N. Cardozo

On March 25, 1993, Assemblyman John C. Cochrane introduced a proposed code of evidence to the Committee on Codes of the New York State General Assembly. Included in the proposed code is Rule 702(b) entitled “Scientific Testimony.” Offered to govern the admissibility of expert opinion at trial, Rule 702(b) would write the oft-criticized “general acceptance” test into the consolidated laws. Although the drafters of the proposed rules intended to codify present state law, a careful examination of case law shows that the national trend away from “general acceptance” has begun in New York.

Reflecting the nation’s increasing discomfort with the “general acceptance” standard, the United States Supreme Court handed down its decision in Daubert v. Merrell Dow Pharmaceuticals, Inc. at the end of the 1992 term. In the opinion, the Court established a new test to be used in judging the admissibility of scientific expert testimony at federal trials. Daubert laid to rest a bat-
tle that had raged for decades concerning whether the Federal Rules of Evidence required courts to use the “general acceptance” standard to the exclusion of other methodologies. By rejecting the exclusive use of “general acceptance,” the Daubert Court heralded a transformation in the manner by which judges will determine the admissibility of scientific testimony.

Given this movement in expert testimony law, the legislature would be well advised to re-examine proposed Rule 702(b) as it is currently drafted. This Comment will demonstrate that New York State would be ill-served by writing “general acceptance” into the consolidated laws. Part I examines the “general acceptance” test and its manifestation in New York case law. In part II, the Comment surveys the current state codification effort and specifies the manner in which proposed New York Rule 702(b) embodies the “general acceptance” standard. Part III supports the contention that Rule 702(b) should be re-examined by discussing the scholarly criticisms of “general acceptance,” by analyzing the profound legal changes forecast by the Supreme Court in Daubert, by demonstrating that strands of New York’s case law are inconsistent with Rule 702(b), and by suggesting that the twin goals of uniformity and reform can be realized only through substantive changes in the proposed rule. In part IV, the Comment concludes by offering model legislation.


For a discussion of the logical underpinnings cited by both supporters and detractors of the Frye test, see infra part III.A.

10. Although only federal courts are bound by United States Supreme Court precedents, many states have codes modeled after the Federal Rules of Evidence and closely follow the Supreme Court’s interpretations of the language’s meaning. See Nelson v. State, 628 A.2d 69, 73-74 (Del. 1993) (following Daubert by rejecting Frye in favor of a “reliability” interpretation of the state evidence code); State v. Alberico, 861 P.2d 192, 202-03 (N.M. 1993) (same).
I. THE "GENERAL ACCEPTANCE" STANDARD

A. The Seminal Case: Frye v. United States

The most authoritative statement of the "general acceptance" standard was made in the 1923 case Frye v. United States. Faced with judging the evidentiary strength of a novel scientific technique, the trial court refused to admit expert testimony based on the test results of an early polygraph. The defense's polygraph evidence purported to show that the defendant had truthfully denied involvement in the murder for which he was charged. On review, the Court of Appeals affirmed the district judge's determination that the novel scientific evidence was inadmissible. The court's short and citation free opinion included language that constituted the Frye admissibility test:

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 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.

In essence, evidentiary reliability was conditioned upon the approval of scientists in the field.

Since the Frye decision, the "general acceptance" test has had


12. Frye, 293 F. at 1014.

13. Id. at 1014. There is reliable evidence that another person ultimately admitted to committing the murder for which James A. Frye was convicted. Wicker, supra note 11, at 715 (citing 14TH ANNUAL REPORT OF THE N.Y. JUDICIAL COUNCIL 265 (1948)). Others claim that this account is fanciful. Charles M. Sevilla, Polygraph 1984: Behind the Closed Door of Admissibility, 16 U. West. L.A. L. Rev. 5, 7 n.3 (1984).


15. Id. (emphasis added).
a significant impact upon the evidence law of the nation’s courts.\textsuperscript{16} During the last two decades, for example, nine United States Courts of Appeals have applied Frye’s methodology.\textsuperscript{17} Among state jurisdictions, at least thirty-three have mirrored these circuits and employed the test during the last twenty years.\textsuperscript{18} New York is in-

\textsuperscript{16} See 3 Jack B. Weinstein & Margaret A. Berger, Weinstein’s Evidence \textsuperscript{\textregistered} 1992, at 702-39 & n.12 (1991) (citing use of Frye by the Third, Sixth, Seventh, Eighth, Ninth, and District of Columbia Circuits); Symposium on Science and Rules of Evidence, 99 F.R.D. 188, 199-201 (1983) (cataloging the acceptance of Frye by numerous federal circuits and states); Giannelli, \textit{Novel Scientific Evidence}, supra note 9, at 1205 (stating that “the Frye test has dominated the admissibility of scientific evidence for more than half a century”).


cluded in those states that continue to apply “general acceptance.”

B. Frye's Standard in New York: People v. Wesley

New York courts have had a long and close relationship with the “general acceptance” test. The Frye case was first cited as support for an admissibility ruling by a state court in 1934. The Court of Appeals explicitly used Frye as support for an evidentiary ruling as early as 1938, referring to the test as one of “general scientific recognition.” Modern cases have continued to point to Frye as a reliable statement of New York evidence law.


21. People v. Forte, 18 N.E.2d 31, 32 (N.Y. 1938). The “general recognition” language was used earlier that year in the trial court decision in People v. Forte, 4 N.Y.S.2d 913, 916 (Cty. Ct. 1938). This “recognition” phraseology has continued to be utilized in such cases as People v. Williams, 159 N.E.2d 549, 555 (N.Y. 1959), People v. Leone, 255 N.E.2d 698, 699 (N.Y. 1969), and as recently as 1980 in People v. Vinson, 428 N.Y.S.2d 832, 834 (Sup. Ct. 1980). It appears that this specialized language for the “general acceptance” methodology has developed in New York and, consistent with the subject matter of each of the aforementioned cases, is used when a court is considering the admissibility of the polygraph. Nonetheless, it is clear that the “general recognition” and “general acceptance” tests are one and the same. See In re Jazmine M., 528 N.Y.S.2d 771, 772 (Fam. Ct. 1988).

In 1994, the Court of Appeals revisited its adherence to the "general acceptance" standard in *People v. Wesley*. Wesley presented an appeal from a criminal conviction based, at least in part, upon DNA-based evidence. Prior to trial, the lower court had held an *in limine* hearing to judge "DNA profiling" evidence, the admissibility of which was an issue of first impression in New York. Announcing that *Frye* remained New York's standard

N.E.2d 100, 103 (N.Y. 1981).

It is interesting to note, however, that the earliest citations to *Frye* in New York's case law were used to support a rule of law that is, at least facially, different from that found in the original D.C. Circuit opinion. While the *Frye* court had found that, to be admissible, a scientific technique "must be sufficiently established to have gained general acceptance in the particular field in which it belongs," *Frye*, 293 F. at 1014, the New York Court of Appeals has stated that "the test is . . . whether a particular procedure . . . is generally acceptable as reliable." *Middleton*, 429 N.E.2d at 103 (emphasis added). The words "as reliable," which are noticeably missing from the opinion of the *Frye* court, appear to come from earlier New York cases that conditioned admissibility upon "general reliability." E.g., *People v. Leone*, 255 N.E.2d 696, 700 (N.Y. 1969) (holding that "[the technique] has not as yet become sufficiently definite to be generally reliable so as to warrant judicial acceptance"); *People v. Magri*, 147 N.E.2d 728, 730 (N.Y. 1958) (stating that "time by watches and clocks, identity by fingerprinting, and ballistic evidence, among a variety of kindred scientific methods, are freely accepted in our courts for their general reliability").

The delineation of New York's standard by the *Middleton* court in 1981 has continued to be repeated by the Court of Appeals. See, e.g., *People v. Wesley*, 633 N.E.2d 451, 454 (N.Y. 1994) (holding that "the particular procedure . . . must be 'generally acceptable as reliable' "); *People v. Jeter*, 600 N.E.2d 214, 215 (N.Y. 1992) (stating that "New York has not yet held that spectrographic evidence has gained general acceptance in the scientific community as reliable"); *People v. Schreiner*, 573 N.E.2d 552, 555 (N.Y. 1991) (concluding that "hypnosis had not been generally accepted in the scientific community as reliable").

For a discussion of the courts' emphases on "reliability" and their impacts upon the propriety of enacting proposed Rule 702(b), see infra part III.D.


24. According to the majority, "[e]ven without the DNA profiling evidence, proof of defendant's guilt is compelling." *Id.* at 453. The majority noted associations between the defendant and the victim, bloodstain and fiber evidence from both the defendant's and victim's clothing, and statements made by the defendant during police interrogation as the additional "compelling" proof. *Id.*

25. *Id.* George Wesley was convicted at trial of murder, rape, attempted sodomy, and burglary. *Id.* The victim was found in her Albany apartment in 1987; DNA evidence purport to show that the genetic material drawn from bloodstains on the defendant's clothing matched that from decedent's hair follicles, but failed to match the defendant's own DNA. *Id.*

26. The "general acceptance" hearing has come to be known as a "*Frye* hearing," and was so-called by the trial judge in *Wesley*. *People v. Wesley*, 533 N.Y.S.2d 643, 644 (Sup. Ct. 1988). The *Frye* hearing was prompted by a prosecution motion seeking a court-ordered sample of the defendant's blood for DNA analysis. *Id.* at 643.

27. *Id.* at 644. Although the Court of Appeals referred to the process as "DNA profiling," *Wesley*, 633 N.E.2d at 457, the trial judge used the phrase "DNA fingerprinting," a term more commonly used. *Wesley*, 533 N.Y.S.2d at 645. In this case, the specific procedure involved RFLP analysis (Restriction Fragment Length Polymorphism). *Wesley*, 633 N.E.2d
by which scientific evidence must be judged,28 the trial court concluded that DNA-based tests had "gained general acceptance in the scientific community" and were, therefore, admissible.29

The Court of Appeals affirmed the trial court's decision, holding that "DNA profiling" technology had been "generally accepted as reliable by the relevant scientific community."30 By citing to Frye,31 as well as its New York progeny,32 the majority reaffirmed the long-held admissibility requirement. The court thus demonstrated its clear preference that New York evidence law should remain moored to the common law "general acceptance" standard.

II. NEW YORK'S EVIDENCE CODE AND PROPOSED RULE 702(b)

A. Efforts Toward Codification

The New York Court of Appeals' adherence to Frye's methodology is but one example of the common law underpinnings of the evidence law in the state. To the present, much of New York's evidence law has been dictated, not by a codified set of rules, but by common law notions.33 These judge-made bases for admitting expert opinion have been criticized for leading to contradictory re-
suits,\textsuperscript{34} being unnecessarily cumbersome,\textsuperscript{35} and making the law less accessible to the legal and lay communities.\textsuperscript{36} These undesirable aspects of the State's current legal regimen have prompted calls for a codified set of evidentiary standards.\textsuperscript{37}

The 1993 submission of the proposed code of evidence is the most recent manifestation of an attempt to "consolidate, simplify, and where appropriate, revise the laws governing the presentation of evidence" in New York State.\textsuperscript{38} Charged with these goals, the Law Revision Commission\textsuperscript{39} has worked for nearly two decades on an evidence code, the fulfillment of which has vexed the State for over one-hundred and forty years.\textsuperscript{40} Its current proposal is pending

\textsuperscript{34} For a discussion of one such contradictory result, see Faust Rossi, Expert Witnesses 14-15 (1991). Rossi compares two New York cases that address the admissibility of specialized testimony. In Kulak v. Nationwide Mut. Ins. Co., 351 N.E.2d 735 (N.Y. 1976), expert testimony was deemed inadmissible because the knowledge on which it was based was within the realm of experience of the average juror. Id. at 740. Conversely, the court in Selkowitz v. County of Nassau, 379 N.E.2d 1140 (N.Y. 1978), found that expert testimony, despite its basis on knowledge within the realm of the average juror, was admitted because it would prove helpful to the jury's decision-making. Id. at 1143-44.

\textsuperscript{35} Salken, supra note 33, at 668-72. Some commentators argue that the consolidation of evidentiary rules would be more efficient and would lead to better quality in lawyers' arguments and judicial decisions. Id. at 664 (citing Proposed Code of Evidence for the State of New York: Joint Public Hearing of the New York State Law Revision Commission, Senate Standing Committee on the Judiciary, Assembly Standing Committee on the Judiciary, Senate Standing Committee on Codes, and Assembly Standing Committee on Codes 460-61 (Nov. 19, 1980) (testimony of Richard Rifkin); Proposed Code of Evidence for the State of New York: Joint Public Hearing of the New York State Law Revision Commission, Senate Standing Committee on the Judiciary, Assembly Standing Committee on the Judiciary, Senate Standing Committee on Codes, and Assembly Standing Committee on Codes 227 (Feb. 25, 1983) (testimony of Robert Pitler); Proposed Code of Evidence for the State of New York: Joint Public Hearing of the New York State Law Revision Commission, Senate Standing Committee on the Judiciary, Assembly Standing Committee on the Judiciary, Senate Standing Committee on Codes, and Assembly Standing Committee on Codes 33 (July 25, 1990) (testimony of Judge William Donnino)).

\textsuperscript{36} Salken, supra note 33, at 664-68. A law of evidence that is anchored in the common law, scattered through disconnected cases and disjointed statutes, is difficult to find. Id. at 664. Salken notes that over nine thousand of New York's statutory provisions concern evidence. Id. (citing Eugene Canudo & Harold Corn, Proposal for Codification of the New York Law of Evidence, 1973 N.Y. St. B. J. 527, 528).

\textsuperscript{37} Salken, supra note 33, at 703-04.

\textsuperscript{38} Michael Martin, Proposed Code of Evidence (Part I), N.Y. L.J., Apr. 13, 1980, at 3 (quoting the original instructions given to the Law Revision Commission by the legislature when the code's preparation was commissioned in 1976).

\textsuperscript{39} The Commission was created by Chapter 597 of the Laws of 1934, Article 4-A of the Legislative Law. It consists of five members appointed by the Governor, and the chairmen of the Judiciary and Codes Committees of the Senate and Assembly as members ex officio. The New York State Law Revision Comm'n, A Code of Evidence for the State of New York at ii (1991).

\textsuperscript{40} The first attempt at codification was in 1849. See Salken, supra note 33, at 653. To date, there have been six attempts at codification. Id. at 653-59.
before the legislature in Albany.\textsuperscript{41}

B. \textit{Proposed Rule 702(b): "Scientific Testimony"}

Included in the proposed code of evidence is Rule 702(b) entitled "Scientific Testimony."\textsuperscript{42} This rule, offered to govern the admissibility of expert scientific testimony at trial, would write the "general acceptance" methodology into the consolidated laws.\textsuperscript{43} The proposed rule provides:

Testimony concerning scientific matters, or testimony concerning the result of a scientific procedure, test or experiment is admissible provided: (1) there is \textit{general acceptance} within the relevant scientific community of the validity of the theory or principle underlying the matter, procedure, test or experiment; (2) there is \textit{general acceptance} within the relevant scientific community that the procedure, test, or experiment is reliable and produces accurate results; and (3) the particular test, procedure or experiment was conducted in such a way as to yield an accurate result. Upon request of a party, a determination pursuant to this subdivision shall be made before the commencement of trial.\textsuperscript{44}

\textsuperscript{41} Id. at 659-62. Funded by the legislature in 1976, the Commission had prepared its first draft by 1979. \textit{Id.} at 660. The original draft was presented in 1980, revised, and re-submitted to the legislature in 1982. Martin, \textit{supra} note 38, at 3. After the proposal languished in Albany, the Governor restarted the process in 1988 and was presented with the most recent version in 1991. \textit{Id.} As of March, 1995, the proposal was pending in committee. \textit{See} legislative history of N.Y. A.B. 6335, 215th Gen. Ass'y (1993), \textit{available in Westlaw}, NY-Billtrak database.

\textsuperscript{42} \textbf{THE NEW YORK STATE LAW REVISION COMM'N, A CODE OF EVIDENCE FOR THE STATE OF NEW YORK} 162 (1991). Proposed Rule 702(b) is a subsection of a larger Rule 702 entitled "Testimony by experts, scientific theories, tests and experiments, and psychiatric testimony in certain criminal cases." \textit{Id.} at 161-65. Proposed Rule 702 contains three subsections: Subsection (a) entitled "Testimony by experts," subsection (b) entitled "Scientific testimony," and subsection (c) entitled "Psychiatric testimony in certain criminal cases." \textit{Id.}

The full text of proposed Rule 702(a) reads:

A witness qualified as an expert by knowledge, skill, experience, training, or otherwise may testify in the form of an opinion or otherwise concerning scientific, technical, or other specialized knowledge that is beyond the understanding or will dispel misconceptions of the typical trier of fact, thereby helping the trier of fact to understand the evidence or to determine a fact in issue.

\textit{Id.} at 161-62. The comments to Rule 702(a) indicate that this rule would control expert testimony of a non-scientific nature, such as property valuation, corporation management, and the meaning of slang words, such as those used by gamblers and drug traffickers. \textit{Id.} at 163.


\textsuperscript{43} The comments to Rule 702(b) indicate that this rule, unlike Rule 702(a), is intended to govern the "admissibility of scientific matters and theories or scientific procedures, tests or experiments and their results." \textbf{THE NEW YORK STATE LAW REVISION COMM'N, A CODE OF EVIDENCE FOR THE STATE OF NEW YORK} 164 (1991).

\textsuperscript{44} \textit{Id.} at 162 (emphasis added).
The language of subsections (1) and (2), as well as the comments accompanying the proposed rule, display a clear intention on the part of the drafters to make Frye the operative test for admitting scientific expert testimony in New York State.46

III. Not This 702(b), New York

Although codification could serve worthy ends, fixing the Frye methodology into New York’s Consolidated Laws is ill-advised. The legislature should seriously reconsider the language of the present draft because the Commission’s Rule 702(b) proposal (i) is based on a methodology that has been criticized effectively; (ii) is at odds with the current national legal trend as evidenced by the Daubert decision; (iii) does not reflect current trends in New York State evidence law; and (iv) ignores the important goal of substantive legal reform.

A. “General Acceptance:” Pro and Con

1. Support For the Frye Test. The Frye methodology gained support, at least in part, because of the policy justifications that have been raised in its favor. Some contend that “general acceptance” guarantees those most able to determine a process’ reliability, namely the scientists in the particular field, will have the “determinative voice.”46 Others argue that because the admissibility decisions of trial judges differ, the Frye test, by minimizing individual judges’ subjectivity, promotes consistency in the judicial process.47 Similarly, “general acceptance” is defended on the

45. Id. at 164. The comments of the drafters explicitly recognize Frye as the model for the rule. Id. “Subdivision (b) continues present law, based upon Frye v. United States, 293 F. 1013 (D.C. Cir. 1923), governing the admissibility of scientific matters and theories or scientific procedures, tests, or experiments and their results.” Id.

46. See Giannelli, Novel Scientific Evidence, supra note 9, at 1207 (quoting United States v. Addison, 498 F.2d 741, 743-44 (D.C. Cir. 1974)); McCormick, Scientific Evidence, supra note 9, at 884 (remarking that judges and juries do not have the technical capacity to assess the reliability of techniques when scientists disagree); John D. Borders, Jr., Fit to be Fryed: Frye v. United States and the Admissibility of Novel Scientific Evidence, 77 Ky. L.J. 849, 859 (1989).

In a related argument, supporters point to the test’s implicit requirement that a “field of experts” exists; they suggest that such a “field” ensures that a “minimal reserve” of knowledgeable critics will be available to examine the scientific processes. Giannelli, Novel Scientific Evidence, supra note 9, at 1207 (citing United States v. Addison, 498 F.2d 741, 744 (D.C. Cir. 1974)). See Green & Nesson, Problems, Cases, and Materials on Evidence 652 (1983).

47. MICHAEL M. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 703.2, at 647 (3d ed. 1991); McCormick on Evidence, supra note 9, at 362-63; Borders, supra note 46, at 859. See Giannelli, Novel Scientific Evidence, supra note 9, at 1207 (citing People v. Kelly, 549
ground that it promotes efficiency by eliminating wasted time at multiple "mini-trials" that would otherwise surround the admissibility of scientific opinion. Finally, some supporters maintain that Frye helps avoid the "mystic infallibility" that scientific evidence possesses in the eyes of many jurors simply because the testimony is given by experts.

P.2d 1240, 1244-45 (Cal. 1970)). The Kelly court announced that the "primary advantage . . . of the Frye test lies in its essentially conservative nature." 549 P.2d at 1245.


49. GREEN & NESSON, supra note 46, at 652; see also Borders, supra note 46, at 859; Giannelli, Novel Scientific Evidence, supra note 9, at 1237 (citing United States v. Addison, 498 F.2d 741, 744 (D.C. Cir. 1974)); Graham, supra note 47, at 632. See generally John E.B. Myers et al., Expert Testimony in Child Sexual Abuse Litigation, 68 NEB. L. REV. 1, 10 (1991); Lori L. Swafford, Comment, Admissibility of DNA Genetic Profiling Evidence in Criminal Proceedings: The Case for Caution, 18 PEPP. L. REV. 123, 131 (1990). Cf. McCormick, Scientific Evidence, supra note 9, at 884 (remarking that the reliability dispute over a scientific technique would likely lead the lay jury away from the merits of the case).

Contemporary political discourse has seen the rise of a related justification, adherents of which propose Frye as a solution to the problem of unsupported, unreliable scientific theories having a bearing upon judicial outcomes. PETER W. HUBER, GALILEO'S REVENGE: JUNK SCIENCE IN THE COURTROOM 199-204 (1991) [hereinafter HUBER, GALILEO'S REVENGE]. See Paul C. Giannelli, "Junk Science:" The Criminal Cases, 84 J. CRIM. L. & CRIMINOLOGY 105, 106 (1993). This position reached its zenith when, while serving as Vice President, Dan Quayle established the Civil Justice Reform Task Force that advocated a "general acceptance" amendment to Federal Rule of Evidence 702. CIVIL JUSTICE REFORM TASK FORCE, AGENDA FOR CIVIL JUSTICE REFORM IN AMERICA, reprinted in 60 CIN. L. REV. 979, 990 & 999 (1992). The proposed amendment was to include a requirement that opinion evidence be inadmissible unless "the proffered witness' testimony is based on a widely accepted explanatory theory." Id. at 1025, 1049 (1992). President George Bush subsequently implemented these changes by executive order, requiring that all government attorneys abide by Frye in civil actions in which the United States was a party. Exec. Order No. 12,778, 56 Fed. Reg. 55, 195 (1991).

The fear motivating opponents of this so-called "junk science" is that "charlatans" and "brash scientific iconoclast[s]" will dupe judges and juries, thus making for errant judicial results. HUBER, GALILEO'S REVENGE, supra, at 14. The main cause of these unwarranted "junk science" awards is greed, id. at 39-56, and results in great harm to the national economy in the aggregate. See PETER W. HUBER, LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES (1988). Huber argues: "The number of tort suits filed has increased steadily for over two decades . . . [as have awards,] the average size of [which have] grown more rapidly still. Multiplied together, these trends produce the universal tort tax so pervasive in our world today." Id. at 9. "Across the board," he concludes, "modern tort law weighs heavily on the spirit of innovation and enterprise." Id. at 14. These proponents of Frye contend that Federal Rule 702 is a "let-it-all-in" approach. HUBER, GALILEO'S REVENGE, supra, at 14-17. The opponents of "junk science" view "general acceptance" as an important tool, "stiffening the judge's spine and steeling his nerves" against unsupported opinion testimony. Id. at 14.

The Daubert decision and the logic underlying the law's movement away from Frye undermine these arguments. First, "general acceptance" is not a particularly efficient methodology given the difficulty judges have had in applying it. See infra part III.A.2. Second, as part III.E., infra, demonstrates, the lack of uniformity that will reign if states continue to
2. **Critical Analysis.** In spite of these justifications, the Frye rule has been effectively criticized by judges and scholars who raise serious questions about the test's efficacy. Foremost among its problems, the "general acceptance" methodology tends to deprive juries of relevant, reliable evidence. By introducing a conservative bias into the evidentiary process, the Frye test causes courts to risk errant judgments by favoring science that is old and possibly outmoded. These serious problems arise when effective, reliable science is precluded at trial simply because a "lag-time" exists between a showing of the procedure's scientific validity and its "general acceptance" in the field. Also problematic is the manner in which the test transfers the "legal" admissibility decision from the judge, with whom it properly belongs, to the lay scientific community. As one commentator observed, the Frye test does not ensure use the outdated Frye rule is inefficient and counter-productive. Third, the logic underlying Daubert is the proper response to fears of Mr. Huber's "bamboozlers" in the witness stand. It is more proper to expose quack science with a showing that the theory has no underlying scientific validity than to ask if some indeterminable number of scientists have heard of and accepted the theory as accurate. See infra part III.C.

50. One commentator has written that the "condemnations of Frye have been of the scattershot variety, hitting . . . everywhere, in a frenzied effort to cripple it." James E. Starrs, "A Still-Life Watercolor": Frye v. United States, 27 J. FORENSIC Sci. 684, 685 (1982).


52. Faigman, supra note 11, at 1816; Imwinkelried, supra note 51, at 265; Moenssens, supra note 9, at 548.

53. Hanson, supra note 11, at 367; Giannelli, Novel Scientific Evidence, supra note 9, at 1223; Imwinkelried, supra note 51, at 265; Michael J. Saks, Accuracy v. Advocacy: Expert Testimony Before the Bench, Tech. Rev., Aug.-Sept. 1987, at 46-7. One can imagine a new scientific method being precluded at trial because, although it is highly reliable, the method has not been in existence for a sufficiently long time to allow scientists in the field to accept it generally. See Hanson, supra note 11, at 367.

54. Jack B. Weinstein, Rule 702 of the Federal Rules of Evidence is Sound: It Should Not be Amended, 138 F.R.D. 631 (1991). But see Ortega v. State, 669 P.2d 935 (Wyo. 1983). In Ortega, the Wyoming Supreme Court misread science and thus misused a precedent set down in Schmerber v. California, 384 U.S. 757 (1966). In Schmerber, the Supreme Court had permitted the warrantless taking of a blood sample from a defendant arrested for driving while intoxicated after recognizing the tendency of the blood's alcohol content, and thus the proof of criminality, to dissipate quickly over time. Ortega, 669 P.2d at 942. The Ortega court used the Schmerber reasoning to uphold a warrantless police seizure of blood evidence at a crime scene although the blood's evidentiary value consisted only of blood typing, a characteristic which does not dissipate over time. Id. This fundamental difference was either
evidentiary reliability, but merely reflects the "scientific wisdom of the moment." 55

Aside from these problems, the procedural obstacles judges have encountered when applying "general acceptance" have invited other meaningful criticisms. 56 First, judges have had difficulty determining the percentage of agreement among experts that should constitute a "general" acceptance. 57 An associated problem is the subjectivity inherent in the decision a judge must make when defining the "field" from which acceptance will be sought. 58 Lastly, it is unclear whether Frye requires the judge to find "general acceptance" in the testimony's scientific basis or merely in the technique applying that basis. 59

Such criticisms cast doubt on the efficacy of the Commission's suggestion that Frye be written into the consolidated laws. The "general acceptance" language of proposed Rule 702(b) is particularly problematic because scholars have indicated that the accomplishments for which Frye is hailed could be realized with a less restrictive evidentiary standard. 60 Furthermore, fairness and rationality demand that evidentiary reliability, and not some "nose counting" scheme, 61 should be the touchstone of the admissibility decision.

missed or ignored by the court. But cf. Marconi Wireless Co. v. United States, 320 U.S. 1, 60 (1943) (Frankfurter, J., concurring in part and dissenting in part) (asserting that most judges lack sufficient scientific knowledge to determine complex patent issues).


56. Giannelli, Background Paper, supra note 51, at 192-93. The "general acceptance" test has been called "remarkably vague," Wright & Graham, supra note 11, at 87; "undefinable," Strong, supra note 9, at 14; and "not enlightening," McCormick on Evidence, supra note 9, at 490.

57. Green & Nesson, supra note 46, at 661; Faigman, supra note 11, at 1816; Giannelli, Novel Scientific Evidence, supra note 9, at 1210-11; Imwinkelried, supra note 51, at 265. New York courts have also wrestled with this dilemma. See, e.g., People v. Middleton, 429 N.E.2d 100, 103 (N.Y. 1981) (holding that "the test is not whether a particular procedure is unanimously endorsed by the scientific community, but whether it is generally acceptable as reliable").

58. Green & Nesson, supra note 46, at 661; Faigman, supra note 11, at 1816; Giannelli, Novel Scientific Evidence, supra note 9, at 1208-10; Moenssens, supra note 9, at 549; Saks, supra note 53, at 46. See also Imwinkelried, supra note 51, at 265.


60. McCormick on Evidence, supra note 9, at 873.

61. Referring to the Frye test as "nose counting" was popularized by the Second Circuit in United States v. Williams, 583 F.2d 1194, 1198 (2d Cir. 1978) ("A determination of reliability cannot rest solely on a process of 'counting (scientific) noses.' "). Another pejorative observation appears in Wright & Graham, supra note 11, at 87 (stating that "the Frye decision has all the earmarks of a 'sport'").
B. National Trend: The "Reliability" Approach

Faced with the necessity of proposing an alternative to the Frye methodology, many scholars suggested a turn toward a "reliability" approach. Courts and scholars began to maintain that evidentiary reliability, and not the austere Frye standard, had been the standard intended by the drafters of the Federal Rules of Evidence when Rule 702 was conceived. Like increasing numbers of...

62. Changes proposed by the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States were circulated for public comment on August 15, 1991 and would have required expert testimony to be "reasonably reliable" in order to be admissible at federal trials. COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE AND FEDERAL RULES OF EVIDENCE 83 (1991). See, e.g., Renee A. Forinash, Analyzing Scientific Evidence: From Validity to Reliability with a Two-Step Approach, 24 ST. MARY'S L.J. 223 (1992); Kenneth R. Kreiling, Scientific Evidence: Toward Providing the Lay Trier with the Comprehensible and Reliable Evidence Necessary to Meet the Goals of the Rules of Evidence, 32 ARIZ. L. REV. 915 (1990); Lederer, supra note 55, at 84; McCormick, Scientific Evidence, supra note 9, at 911-12; Moenssens, supra note 9, at 565.

In addition to the "reliability" approach, many scholars advocated adopting a "relevancy" approach in the place of the Frye test. See, e.g., Leo M. Romero, The Admissibility of Scientific Evidence under the New Mexico and Federal Rules of Evidence, 6 N.M. L. REV. 187, 198 (1978); Strong, supra note 9, at 14. The concept of relevancy was popularized in modern legal thought by Professor Charles McCormick. MCCORMICK ON EVIDENCE 491 (2d ed. 1972). It was Professor McCormick's opinion that "[a]ny relevant conclusions which are supported by a qualified expert witness should be received" in evidence. Id. Under this formulation, the cross-examination of experts in front of the trier of fact would ensure that "junk science" was exposed. See GREEN & NESSON, supra note 46, at 662 (pointing to an early case, United States v. Baller, 519 F.2d 463 (4th Cir. 1975), in which the court applied the McCormick relevancy logic. The Baller court admitted voice spectrography evidence, stating that "[u]nless an exaggerated popular opinion of the accuracy of a particular technique makes its use prejudicial or likely to mislead the jury, it is better to admit relevant scientific evidence in the same manner as other expert testimony and allow its weight to be attacked by cross-examination and refutation." 519 F.2d at 466). Under the relevancy approach, disagreements among experts concerning the "reliability" of the underlying basis would go to the weight, not to the admissibility, of the evidence. GREEN & NESSON, supra note 46, at 662.

The relevancy approach has been assailed on the grounds that it is a "let-it-all-in" approach that permits "junk science" to enter the decisionmaking process in the courtroom. Kenneth J. Chesebro, Galileo's Retort: Peter Huber's Junk Scholarship, 42 AM. U. L. REV. 1637, 1687 (1993). One commentator considered the reliability approach superior because "[c]onclusions that lack predictability or replicability do not aid in the proper determination of triable issues. The [admissibility test] should eliminate the possibility of a jury relying on the incorrect, but persuasive, opinions of an articulate expert witness." Moenssens, supra note 9, at 565. See also supra note 49.

63. United States v. Williams, 583 F.2d 1194 (2d Cir. 1978); United States v. Downing, 753 F.2d 1224 (3d Cir. 1985); 3 WEINSTEIN & BERGER, supra note 16, ¶ 702[03] at 702-44 (1988). See also Moenssens, supra note 9, at 565-67 (describing the advisability of moving to a reliability approach).
state courts, United States Courts of Appeals began to reject the Frye test in favor of the "reliability" approach thought to be demanded by the Federal Rules.

The seminal "reliability" decision among the Courts of Appeals came from the Third Circuit in United States v. Downing. Downing involved the appeal of a district court finding that certain psychological expert testimony was inadmissible. In vacating the district court finding, the appeals panel expressly rejected Frye and substituted a "reliability" approach.

The Downing court announced a process that trial judges would be expected to follow so as to avoid running afool of Federal Rule 702's "reliability" mandate. First, a threshold in limine hearing was required in which the judge was ordered to ensure that the proffered testimony was reliable. The court cited several factors that could be considered as indicia of a theory's "reliability," including specialized writing, potential rates of error, and even "general acceptance" within the field. None of these factors, in and of itself, however, was to be determinative of "reliability."

In addition to "reliability," the Court of Appeals required that the expert testimony be "sufficiently tied to the facts of the case [so] that it [would] aid the jury in resolving a factual dispute." To achieve this so-called "fit," the party advocating admission of


65. E.g., United States v. Williams, 583 F.2d 1194, 1198, 2000 n.11 (2d Cir. 1978) (rejecting Frye and pointing to the liberal thrust of Rule 702); United States v. Downing, 753 F.2d 1224, 1232 (3d Cir. 1985) (rejecting Frye as inconsistent with Rule 702); United States v. Bennett, 539 F.2d 45, 53 (10th Cir. 1976) (rejecting the Frye logic).

66. 753 F.2d 1224 (3d Cir. 1985).

67. Id. at 1226. The testimony sought to be admitted concerned the psychological factors that may make eyewitness identification unreliable. Id. For a full discussion of this growing field, see Wayne W. Westling, The Case for Expert Witness Assistance to the Jury in Eyewitness Identification Cases, 71 Or. L. Rev. 93 (1992).

68. 753 F.2d at 1226. In its test, the Downing court included not only reliability and fit, but also the need for the judge to assure that the evidence did not unduly confuse or prejudice the jury. Id. The court was cognizant of the possibility that a highly credentialed expert witness might overwhelm a lay jury. Id. at 1239-41.

69. For a discussion of Federal Rule of Evidence 702, see infra note 87.
70. 753 F.2d at 1241.
71. Id. at 1238-39.
72. Id. at 1238.
73. Id. at 1242.
74. Id.
the evidence was required to make a detailed on-the-record state-
moment explaining the specific ways in which the testi-
mony fit the facts sub judice.75

C. Daubert v. Merrell Dow Pharmaceuticals, Inc.

After Downing, the Third Circuit's view of Federal Rule 702 was at odds with other circuits that had remained moored to the "general acceptance" language of Frye.76 In response to this con-
flict,77 the Supreme Court granted certiorari in Daubert v. Merrell Dow Pharmaceuticals, Inc.78 and resolved the controversy in the 1992 term.

1. Daubert: Factual Background. On November 1, 1989, a United States District Court in Los Angeles granted summary judgment to the defendants in Daubert v. Merrell Dow Pharmaceuticals, Inc.79 The suit was based on birth defects alleged to have been caused by pre-natal ingestion of Bendectin, a drug produced by the defendants.80 The motion for summary judg-
ment articulated the defendants' contention that the essential element of causation was missing from plaintiffs' case because Bendectin had not been shown to cause birth defects in humans.81 As a consequence, both sides in the controversy introduced expert testimony on that narrow scientific question.82

Both the trial court and the Ninth Circuit Court of Appeals agreed that the plaintiffs' expert evidence failed to meet the re-
quirements of the Frye standard.83 The movants' experts claimed that no human statistical study had shown a causal link between

75. Id.
77. See Daubert v. Merrell Dow Pharmaceuticals, Inc., 113 S. Ct. 2786, 2792-93 (1993) (observing that "[a]lthough under increasing attack of late, the [Frye] rule continues to be followed by a majority of courts").
78. 113 S. Ct. 320 (1992).
81. 113 S. Ct. at 2791.
82. Id.
83. Id. at 2792. The Ninth Circuit Court of Appeals had accepted and applied the Frye methodology in the case of United States v. Kilgus, 571 F.2d 508, 510 (9th Cir. 1978).
Bendectin and birth defects. The plaintiffs responded with the testimonies of eight experts who, by relying on novel human, animal, and chemical studies, claimed to have found a positive link. Both courts found that the plaintiffs' novel data and analyses had failed to gain "general acceptance" within the medical field and were therefore inadmissible.

2. A New Admissibility Test: "Reliability" and "Fit." The Supreme Court's resolution of Daubert produced a finding that Federal Rule 702, and not Frye, articulated the proper standard for judging the admissibility of expert testimony in federal trials. A unanimous Court held that the "general acceptance" standard had not been codified by Congress in its 1975 enactment of the Federal Rules of Evidence. A majority of the Court interpreted Rule 702 to require that, as a threshold matter, trial judges must find, not "general acceptance," but instead "reliability" and a

84. 113 S. Ct. at 2791. Defendants' expert, Dr. Steven H. Lamm, claimed to have examined every study concerning Bendectin's teratogenicity (tendency to cause birth defects). Id. In over thirty studies examined, the expert could find no data showing a link between the drug and human defects. Id.

85. Id. at 2791-92. This evidence was particularly important to the plaintiffs' case given the history of Bendectin's treatment in federal courts. See generally In re Richardson-Merrell, Inc. "Bendectin" Products Liability Litigation, 624 F. Supp. 1212 (S.D. Ohio 1985), aff'd sub nom, 857 F.2d 290 (6th Cir. 1988) (finding no causation in a consolidated hearing covering over 1,100 cases of alleged birth defects). For a full discussion of the Bendectin litigation, see Michael C. McCarthy, "Helpful" or "Reasonably Reliable"? Analyzing the Expert Witness's Methodology Under Federal Rules of Evidence 702 And 703, 77 CORNELL L. Rev. 350, 366-81 (1992).

86. 113 S. Ct. at 2792.

87. Id. at 2793. Federal Rule 702, entitled "Testimony by Experts," requires that "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise." FED. R. EVID. 702. For a full discussion of the adoption of the Federal Rules of Evidence, see Glen Weissenberger, The Supreme Court and the Interpretation of the Federal Rules of Evidence, 53 OHIO ST. L.J. 1307 (1992).


88. 113 S. Ct. at 2794. The majority opinion, penned by Justice Blackmun, was joined by six justices. Id. at 2791. Justice Rehnquist, with whom Justice Stevens joined, concurred with the majority in their holding that the standard required by the Federal Rules was not a wholesale reflection of the Frye logic. Id. at 2799.

89. Id. at 2796. The Court required that a preliminary determination was necessary under Federal Rule 104(a). That rule requires that "[p]reliminary questions concerning . . . the admissibility of evidence shall be determined by the court." FED. R. EVID. 104(a). This requirement closely parallels the Downing court's mandated in limine hearing in which the trial judge was to engage in a threshold determination when deciding whether evidence is admissible. See supra note 70 and accompanying text.
proper "fit" before expert testimony may be admitted. For all intents and purposes, Frye was dead in federal courts.

The Court developed the first prong of the Daubert test, "reliability," through a plain meaning analysis of the Federal Rules. Federal Rule 702 mandates that expert testimony be based on "scientific . . . knowledge." The Court read the term "scientific" to require that reliable testimony must be grounded in the "methods and procedures of science." Reliable "knowledge" was conditioned on the showing that the expert's opinion was based on more than the expert's mere "subjective belief or unsupported speculation."

"Fit," the second prong of the Daubert test, was likewise the product of a plain meaning analysis of the Federal Rules. The majority found that in order to meet Rule 702's mandate that expert testimony "assist the trier of fact," the evidence must relate directly to an issue in the case. If the basis of an expert's testimony cannot be "properly . . . applied to the facts in issue," the evidence will be inadmissible. At bottom, "fit" is essentially a

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90. 113 S. Ct. at 2795-96. Justices Rehnquist and Stevens dissented from the majority's finding that "reliability" and "fit" are the touchstones of admissibility. Id. at 2799-800.

91. Id. at 2794 (stating that "the assertion that the Rules somehow assimilated Frye is unconvincing").


93. Fed. R. Evid. 702. The Court said that "in order to qualify as 'scientific knowledge,' an inference or assertion must be derived by the scientific method." 113 S. Ct. at 2795. The scientific method is "[a] research method characterized by the definition of a problem, the gathering of data, and the drafting and empirical testing of the hypothesis." The Living WEBSTER ENCYCLOPEDIC DICTIONARY OF THE ENGLISH LANGUAGE 859 (1st ed. 1971). For a full discussion of the use of the scientific method in legal contexts, see Bert Black, A Unified Theory of Scientific Evidence, 56 Fordham L. Rev. 595 (1988).

The Court stressed that Rule 702's definition of evidentiary reliability is closely akin to the concept of scientific validity. 113 S. Ct. at 2795 n.9. The Court noted that "scientists typically distinguish between 'validity' (does the principle support what it purports to show?) and 'reliability' (does application of the principle produce consistent results?)." Id. In this context, evidentiary reliability would not equate with scientific reliability. Id.

94. 113 S. Ct. at 2795.

95. Id.

96. Id. at 2795-96. This requirement is identical to the "fit" demanded by the Downing court. United States v. Downing, 753 F.2d 1224, 1242 (3d Cir. 1985).


98. 113 S. Ct. at 2796.

99. Id.
"relevancy" requirement.\textsuperscript{100}

In order to assist the lower courts in applying the admittedly flexible new test, the Court offered four factors judges might weigh in determining admissibility.\textsuperscript{101} First, the Court suggested that the results from testing will often be indicative of reliability.\textsuperscript{102} Second, in recognition of the value that peer review brings to scientific knowledge, the Court recommended that judges look to a theory's publication in scientific journals.\textsuperscript{103} Third, the Court noted that reliability can be signified by favorable rates of error and reputable standards of measurability underlying the expert's evidence.\textsuperscript{104} Fourth, the Court retained a place for "general acceptance" in the overall calculus, announcing that it too may be indicative of reliable testimony.\textsuperscript{105}

3. A Model for Applying the Daubert Methodology. Because some trial courts in New York State are using a Daubert-like admissibility standard,\textsuperscript{106} it is instructive for comparison purposes to examine the treatment Daubert has been given in lower federal courts. In Chikovsky v. Ortho Pharmaceutical Corp.,\textsuperscript{107} a mother and child sued the manufacturer of "Retin-A" acne cream in products tort, alleging that the mother's pre-natal use of the product had caused the infant birth defects.\textsuperscript{108} The defendant manufac-

\textsuperscript{100} FED. R. EVID. 402. For a thorough examination of the "fit" requirement, see Clifton T. Hutchinson & Danny S. Ashby, Daubert v. Merrell Dow Pharmaceuticals, Inc: Redefining the Bases for Admissibility of Expert Scientific Testimony, 15 CARDozo L. REV. 1875, 1912-17 (1994).

\textsuperscript{101} 113 S. Ct. at 2796. These "general observations" by the Court were not intended to be a checklist, nor were they intended to be exhaustive. \textit{Id}.


\textsuperscript{103} 113 S. Ct. at 2797. For an analysis of peer review, see Bernstein, \textit{supra} note 102, at 2150-53; Hutchinson & Ashby, \textit{supra} note 100, at 1900-05.

\textsuperscript{104} 113 S. Ct. at 2797. An analysis of the error standard can be found in Hutchinson & Ashby, \textit{supra} note 100, at 1895-900.

\textsuperscript{105} 113 S. Ct. at 2797. The Court rejected the exclusive use of the "general acceptance" test for determining whether scientific expert testimony would be admissible, stating that the Frye test, an "austere standard, absent from and incompatible with the Federal Rules of Evidence, should not be applied in federal trials." \textit{Id}. at 2794.

In addition to these four factors, the Court reiterated the "flexible" nature of the Rule 702 analysis and made passing reference to "different set[s] of factors." \textit{Id} at 2797 & n.12.

\textsuperscript{106} For a full treatment of these New York cases, see \textit{infra} part III.D.


\textsuperscript{108} 832 F. Supp. at 342. The birth defects consisted of an imperforate anus, bowl
turer moved for summary judgement, claiming that the plaintiffs had failed to show a causal link between Retin-A and the defects.\textsuperscript{109}

In granting the defendant’s motion, Judge Ryskamp found the testimony of the plaintiffs’ sole expert inadmissible.\textsuperscript{110} The expert, Dr. Bertman, M.D., was an obstetrician/gynecologist with no specialized training in teratology.\textsuperscript{111} Nonetheless, the doctor testified that Retin-A was a teratogen (i.e., that it causes birth defects).\textsuperscript{112}

The Chikovsky court relied on \textit{Daubert} to find that the doctor’s testimony was inadmissible because it lacked both “reliability” and “fit.”\textsuperscript{113} Looking to the four factors cited in \textit{Daubert}, Judge Ryskamp first determined that, because Dr. Bertman was unable to point to any publications showing a causal connection between Retin-A and birth defects, the reliability of the testimony was undermined by the lack of peer review.\textsuperscript{114} The expert’s failure to produce any causation data also led the court to determine that the testimony, unsupported by tests or rates of error, lacked the necessary indicia of reliability.\textsuperscript{115} Judge Ryskamp declined to examine the “general acceptance” factor cited by the \textit{Daubert} Court because no evidence of the theory’s acceptance in the relevant community had been presented.\textsuperscript{116} Insofar as “fit” was concerned, the court considered as determinative the lack of any showing that topically-applied Retin-A was absorbed at high levels through the skin of pregnant women.\textsuperscript{117} The plaintiff’s evidence was therefore insufficient to show that Dr. Bertman’s testimony was relevant to the facts in the \textit{Chikovsky} case.\textsuperscript{118}

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\textsuperscript{109} Id.
\textsuperscript{110} Id. at 346. In the face of plaintiff’s non-evidence, the defendant was entitled to summary judgement on the grounds that its admissible expert testimony was sufficient to show that there existed no genuine issue of material fact under Federal Rule of Civil Procedure 56. \textit{Id.} at 342-44.
\textsuperscript{111} Id. at 345. The court also noted that two of the original three experts employed by the plaintiff had been dismissed because the first, Dr. Benke, had testified that no causal connection existed while the testimony of the second, Dr. Mash, was considered by the plaintiff to be irrelevant. \textit{Id.} at 344.
\textsuperscript{112} Id. at 345. Dr. Bertman based the opinion on studies that had shown birth defects resulting from large doses of vitamin A (the active ingredient of Retin-A) and analogies to Accutane, another vitamin A-based acne medicine that had been tied to birth defects. \textit{Id.} at 345-46.
\textsuperscript{113} Id. at 344.
\textsuperscript{114} Id. at 345.
\textsuperscript{115} Id.
\textsuperscript{116} Id. at 345 n.6.
\textsuperscript{117} Id. at 345-46.
\textsuperscript{118} Because the \textit{Downing} test is closely akin to that in \textit{Daubert}, the treatment United States v. Downing was given on remand is also an enlightening illustration of \textit{Daubert}’s
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4. Daubert's Nationwide Impact. Cases like Chikovsky show that Daubert heralds a significant change in American evidence jurisprudence and is a methodology that will become increasingly popular, at least in part, because of its universal application in federal courts. The two-pronged Daubert analysis will be used by federal judges across the United States, including those in New York's Second Circuit, and will exert a strong influence on bench and bar nationwide. In addition, high courts in states across the country have begun to embrace Daubert as the operative admissibility test when faced with novel science. It seems misguided at

likely application. On remand, Judge Weiner, like Judge Ryskamp in Chikovsky, held an in limine hearing where documentary evidence, data, and verbal testimonies were presented. United States v. Downing, 609 F. Supp. 784, 785-89 (E.D. Pa. 1985). First, the judge found that the psychological evidence offered to refute the veracity of eyewitness identification lacked reliability. Id. at 790-91. Applying the Court of Appeals’ “reliability” factors, Judge Weiner found that the absence of methodology evidence, an inadequate amount of raw data, and several reports showing uncertainty and error were all indicative of the testimony's unreliable scientific basis. Id. Moreover, the judge found that the evidence failed to show the required “fit.” Id. at 792. The judge pointed to three major differences between the manner in which the subjects in the studies were tested and the situation faced by the eyewitnesses in this prosecution: while the subjects had been tested only for eleven month time spans, the actual span between the witnessed event and the eyewitness testimony in Downing was three years; while the studies had only tested subjects exposed to stimuli for one minute, the Downing eyewitnesses had seen the defendant for between five and forty-five minutes; and while the studies tested subjects exposed to violent, stressful crimes, the crime in this case was mail fraud and, as such, did not expose the eyewitnesses to the stress that might otherwise interfere with their perception. Id. Because the psychological studies did not fit the facts of the case, the judge found that testimony based on them would not be helpful to the trier of fact. Id.

119. See Rorie Sherman, 'Junk Science' Rule Used Broadly, Nat’l L. J., Oct. 4, 1993, at 3. The article chronicles the wide uses to which the Daubert methodology is being put, including judges stretching the test’s limits beyond scientific testimony to such non-scientific disciplines as accounting and economics. Id.

120. Some states have expressly adopted Daubert as the controlling definition of their federally-based state rules of evidence. Nelson v. State, 628 A.2d 69, 73-74 (Del. 1993) (following Daubert and rejecting Frye in favor of a “reliability” interpretation of the state evidence code); Hutchinson v. American Family Mut. Ins. Co., 514 N.W.2d 882, 885 (Iowa 1994) (accepting the Daubert decision as a re-affirmation of the state's rejection of Frye and long-standing interpretation of its evidence code); State v. Foret, 628 So. 2d 1116, 1123 (La. 1993) (accepting the Daubert logic and observations as definitive rulings on the meaning of the state evidence code); State v. Alberico, 861 P.2d 192, 202-03 (N.M. 1993) (following Daubert and rejecting Frye in favor of a “reliability” interpretation of the state evidence code); City of Fargo v. McLaughlin, 512 N.W.2d 700, 705 (N.D. 1994) (accepting the Daubert decision as an affirmation of the state’s rejection of Frye when interpreting its evidence code); State v. Hofer, 512 N.W.2d 482, 484 (S.D. 1994) (following Daubert in judging the admissibility of scientific testimony); Reese v. Stroh, 874 P.2d 200, 204 (Wash. Ct. App. 1994) (recognizing Daubert as the controlling definition of the state's evidence rules in civil trials). But cf. Flanagan v. State, 625 So. 2d 827, 829 n.2 (Fla. 1993) (voicing an intention to continue to apply the Frye methodology in the face of Daubert).

In other states, litigants have begun the process of change by arguing that their state's
best to propose that New York's Legislature should buck the trend away from "general acceptance" and enact proposed Rule 702(b).

D. State Trend: New York Moves Away From Frye

In addition to ignoring the national movement away from Frye, the drafters of proposed Rule 702(b) disregarded the trend away from "general acceptance" that has begun in New York courts. The goal of the rule's drafters is clear: to "codify[ ] existing New York law unless there is a consensus for change." Although "general acceptance" is the stated rule of the New York Court of Appeals, a careful study shows an "existing" motion away from Frye in both trial and appellate courts in the state. Recent case law demonstrates that some New York courts have been at odds with, and have even implicitly rejected, the exclusive use of "general acceptance." While it is true that a majority of New York jurisdictions continue to adhere and cite to Frye, other state courts have cast doubt on the test's long-term viability by declining to adopt the "general acceptance" logic. Two notable classes of cases in which Frye has been abandoned are those arising from a civil cause of action and those in which expert testimony is based on evidence codes demand a shift to a Daubert-based methodology. See, e.g., Jones v. State, 862 S.W.2d 242, 244 (Ark. 1993) (referring to defendant/appellant advocating the recognition of Daubert); People v. Webb, 862 P.2d 779, 798 n.22 (Cal. 1993) (referring to the California Attorney General's position that the state's "general acceptance" test should be reexamined in light of Daubert); State v. Klawitter, 518 N.W.2d 577, 585 n.3 (Minn. 1994) (noting the state's position that the Frye rule should be abandoned in favor of the Daubert criteria); Callahan v. Cardinal Glennon Hosp., 863 S.W.2d 852, 860 (Mo. 1993) (referring to both parties' arguments that the facts sub judice fit the Daubert criteria). At the writing of this Comment, California's Supreme Court is in the midst of deciding whether to abandon the Frye methodology in favor of the Daubert formulation. Richard Paddock, Court Hears Case Pivotal to DNA Tests, L. A. Times, August 31, 1994, at B1.

121. Michael Martin, supra note 38, at 71.

122. See supra part I.B. See, e.g., People v. Taylor, 552 N.E.2d 131, 134 (N.Y. 1990) (citing to Frye as controlling precedent when judging the admissibility of rape trauma syndrome).

123. For an enunciation of the discomfort some New York State jurists have with the "general acceptance" test, see People v. Mooney, 559 N.E.2d 1274, 1275 (N.Y. 1990) (Kaye, J., dissenting). But see People v. Wesley, 633 N.E.2d 451, 461 (N.Y. 1994) (Kaye, C.J., concurring) (agreeing with the majority that "where the scientific evidence sought to be presented is novel, the test is that articulated in Frye"). In the Court of Appeals Wesley opinion, discussed supra, at part I.B., the majority went beyond the classic "general acceptance" language of Frye: "It should be noted that . . . the modern trend in the law of evidence has been away from imposing a special test on scientific evidence and toward using the 'traditional standards of relevancy and the need for expertise.'" Wesley, 633 N.E.2d at 456 (citing 1 McCormick, Evidence § 203, at 873-74 (4th ed. 1992)).
1. The Civil Cause of Action. Some motion has been seen in New York courts toward rejecting the Frye methodology in favor of a reliability standard when the novel scientific evidence is presented in a civil proceeding. In support, judges have stressed the fact that a lower burden of persuasion is required in civil as compared to criminal actions. In criminal proceedings, the prejudice inherent in expert testimony is often sufficient to exclude the evidence from trial. Arguments underlying the civil-case distinction stress that prejudice is less likely to produce errant results in the civil setting than it is at criminal trial.

124. See infra parts III.D.1 & 2.

125. While criminal proceedings require persuasion beyond a reasonable doubt, civil proceedings require persuasion by a mere preponderance of the evidence. In re E.M., 520 N.Y.S.2d 327, 332 (Fam. Ct. 1987); Reese v. Stroh, 874 P.2d 200, 205 (Wash. Ct. App. 1994). In In re E.M., called "the leading case in [its] jurisdiction on the subject of appropriate methodology in child abuse validations," Eli v. Eli, 607 N.Y.S.2d 535 (Fam. Ct. 1993), Judge Jurow observed that "[r]egardless of the complexities concerning the admissibility of evidence derived from scientific testing, . . . whether under a Frye standard or otherwise, an overriding point to remember is that Family Court child protective proceedings are civil, rather than criminal, in nature and that it is therefore appropriate to err on the side of admissibility . . . when it comes to the introduction of evidence derived from new clinical testing techniques." 520 N.Y.S.2d at 332.

126. In re E.M., 520 N.Y.S.2d at 332; Reese, 874 P.2d at 204. Cf. People v. Collins, 438 P.2d 33, 41 (Cal. 1968) (explaining why a searching, critical examination of novel evidence is necessary at the criminal trial "in view of the substantial unfairness to a defendant which may result from ill conceived techniques with which the trier of fact is not technically equipped to cope"); People v. Law, 114 Cal. Rptr. 708, 712 (Cal. Ct. App. 1974) (same). While the lesser quantum of proof in the civil trial has been used to justify a relaxation of Frye's strict mandates, it does not appear that the reliability test espoused by the Daubert court would fail to meet the protections due criminal defendants.

127. In re E.M., 520 N.Y.S.2d at 332; In re Meyer, 504 N.Y.S.2d 358, 360 (Fam. Ct. 1986); Reese, 874 P.2d at 204. In Meyer, Judge Gallet observed that the reasons for excluding evidence under the Frye methodology are weaker in civil trials than they are in criminal proceedings. The judge believed a more liberal standard was appropriate in the civil context because of the lower burden of persuasion, the more relaxed rules of evidence, and the absence of a jury in certain civil trials as compared to their criminal counterpart. Meyer, 504 N.Y.S.2d at 360. In Reese, the court pointed to three policy reasons that counsel toward a rejection of Frye's use in civil cases. First, Frye was developed to deal with the uncertainty surrounding "black box" technologies, those which are mechanical and mysteriously produce answers without the jury knowing how or why. Reese, 874 P.2d at 205 (citing People v. Stoll, 783 P.2d 698 (Cal. 1989) and People v. McDonald, 690 P.2d 709 (Cal. 1984)). Second, there is a fear that novel scientific evidence may be given undue weight by a jury and thus lead, if unfounded, to an erroneous conviction. Id. at 205 (citing People v. Law, 114 Cal. Rptr. 708 (Cal. Ct. App. 1974)). Third, the defendant's constitutionally-mandated right to a fair criminal trial makes the efficacy of scientific evidence particularly important. Id. at 205 (citing Law, 114 Cal. Rptr. at 708). Again, however, it does not appear that the reliability test espoused by the Daubert Court would fail to meet the protections due criminal defendants.

the "soft sciences."
The admission of polygraph evidence in civil child protective proceedings presents one example of New York judicial decisions made outside the periphery of Frye. Historically, expert testimony based on the lie detector has been found to lack "general acceptance" in the scientific field by New York courts, thus rendering the technology inadmissible. Despite this fact, the court in *In re Meyer* admitted testimony based on the device. The opinion, which did not mention Frye or the "general acceptance" methodology, relied instead upon peer review, testing, and the technology's validity. As in Daubert, the Meyer court was concerned with the polygraph's reliability and the "fit" of the evidence.

2. "Soft" Science. Other New York courts have recognized that the Frye methodology may not be applicable when the expert testimony is based upon the "soft" sciences. "Soft" science is considered to be that body of knowledge that is based on the social sciences.

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Interestingly, a New York court also eschewed the Frye criteria and admitted polygraph evidence in a criminal trial. People v. Daniels, 422 N.Y.S.2d 832 (Sup. Ct. 1979). The court said that "[t]o require general acceptance would in essence mandate absolute infallibility. Instead, a court should weigh and consider the admissibility of polygraph results in the same manner it makes other decisions relating to admissibility of any evidence." Id. at 837. The court went on to consider the relevance and probative value of the evidence. Id. at 837-38.

132. *In re Meyer*, 504 N.Y.S.2d at 360 (citing factual material, a peer review article, and the affidavits of two polygraphers and a scholar as evidence in support of admissibility).

133. Id. at 360-61 (stating that "the polygraph evidence being offered appears no less reliable or helpful than the psychiatric and psychological 'validation' evidence which is finding wide acceptance in child protective proceedings... Along with the myriad of other 'soft evidence' admitted in child protective proceedings, the polygraph evidence may be assigned an appropriate weight under the circumstances") (emphasis added).

sciences, including psychology and the study of syndromes. Judges in New York have recognized that the Frye test was developed for the "hard" sciences and has only lately been applied to psychological and social science theories. According to one court, "[w]hether the Frye test should apply to 'soft' scientific evidence . . . is yet an open question."

In In re E.M., a court faced with "soft" scientific evidence applied an admissibility standard that is much more like the test used in Daubert than the classic "general acceptance" methodology. The case centered on whether psychological expert testimony could be admitted to validate the hearsay statements made by a child who claimed to have been abused. Faced with this evidence, the court outlined a three part "reliability" standard to determine the testimony's admissibility. Like the majority in Daubert, the In re E.M. court required both scientific "validity" and "fit" before it would admit testimony based on this "soft" science.

135. For a discussion of "soft" sciences, see McCord, supra note 9, at 29. The "hard" sciences are those that are characterized by devices or technology, such as the polygraph, DNA fingerprinting, or chemistry generally. Id. at 30. McCord refers to psychology as a "hybrid" of "soft" and "hard" disciplines: it is based upon medicine, an avowedly "hard" science, but also on the "soft" social sciences. Id. at 29-30.

Psychology has long been considered to be somewhat "less" of a science than other disciplines. See, e.g., William James, A Plea for Psychology as a Natural Science, in COLLECTED ESSAYS AND REVIEWS 316-17 (1920). James states, "I have never claimed . . . that psychology as it stands to-day is a natural science, or in an exact way a science at all . . . . I wished, by treating Psychology like a natural science, to help her to become one." Id.


137. Burton, 590 N.Y.S.2d at 976.


139. Id. at 330. The Family Court Act provides that "previous statements made by the child relating to any allegations of abuse or neglect shall be admissible in evidence, but if uncorroborated, such statements shall not be sufficient to make a fact-finding of abuse or neglect." N.Y. FAM. CT. ACT § 1046(a)(vi) (McKinney 1983 & Supp. 1994).

Psychological validation evidence includes the use of anatomically correct dolls or the interviewing of a child for signs such as unusual anger or a mature knowledge of sexual practices. In re E.M., 520 N.Y.S.2d at 332.

140. In re E.M., 520 N.Y.S.2d at 331. The court did suggest that the Frye standard remains operative in New York, but refers to the "general acceptance" formulation in People v. Hughes, 453 N.E.2d 484 (N.Y. 1983), that centered on evidentiary reliability. Id. For the balance of the E.M. decision, the court was concerned with the reliability and fit of the evidence, not on its general acceptance in the scientific community.

141. In re E.M., 520 N.Y.S.2d at 331-32. The court stated that "the reliability of evidence derived from a scientific principle depends upon three factors: (1) the validity of the underlying principle; (2) the validity of the technique applying that principle; and (3) the proper application of the technique on a particular occasion . . . ." Id. at 331. With respect to the "fit" criteria of prong (3), the court cautioned that the underlying basis for the evi-
E. Uniformity: An Advantage of Accepting Daubert

The General Assembly would be mistaken to implant Frye into the consolidated laws because, by ignoring national and state trends, it would eschew New York's opportunity to realize the advantages that uniformity would bring to the state's evidence law. Statutory uniformity can be divided into two conceptual categories: intrastate uniformity and interstate uniformity. Intrastate uniformity, aimed at achieving consistency among the various localities within a state, would be best accomplished by establishing one unified code of evidence to supplant the current hodgepodge of local rules used by different courts across New York State. Although the adoption of Rule 702(b) as currently proposed would satisfy this intrastate goal, interstate uniformity would go unfulfilled.

Interstate uniformity, aimed at harmonizing a state's law with the law prevailing in the nation, is a worthy goal that the New York legislature would be mistaken to ignore. By adopting the Daubert relevancy rule now embodied in the Federal Rules of Evidence, the legislature could harmonize New York's law with the federal code and, by extension, a substantial majority of state codes. Attaining interstate uniformity is particularly important given the purposes outlined by the Law Revision Commission in Rule 102: the drafters stated that the overall aim of New York's proposed code of evidence is to secure fairness, eliminate unjustifiable expense and delay, and promote progress. Because of the disparate treatment novel, valid science would receive in Second Circuit as compared to New York State courts, fairness would be ill-served by the non-uniform system that would result from the codification of proposed Rule 702(b).
The legislature's adoption of "general acceptance" would also thwart the efficiency and progress goals of Rule 102. A Frye-based test, being out of step with the national "reliability" trend, would eliminate the New York bar's ability to take advantage of jurisprudential economies of scale: attorneys and judges would be less able to learn from the opinions of courts in other jurisdictions when facing novel evidentiary questions. Moreover, Rule 102's plain language would be frustrated by enacting a Frye-based test that is anachronistic and clearly unprogressive.

In addition to the purposes set forth in Rule 102, interstate uniformity serves other worthwhile ends. First, uniform rules would be less complicated to teach in the "national law schools" that predominate in New York and across the United States. Uniformity would also heighten efficiency by allowing practitioners to more easily operate in both federal and state fora within New York. In an increasingly interdependent economy, uniformity also would reduce transaction costs to entities with national interests and those like insurance companies which have a need to predict litigation outcomes. Similarly, the costs of legal service would be reduced by a uniform system that erected fewer barriers to students and lawyers who wished to move across state lines. Finally, because states across the country have decided to join the trend toward uniformity, the legitimacy of New York law would be dampened by remaining moored to the anachronistic Frye rule.
F. Reforming the Substantive Law

In addition to reflecting actual legal trends, the codification effort has a greater goal: reforming the substantive law. Due to the common law character of New York’s evidence law, meaningful reform is often difficult. Not only are reform-minded judges limited by the piecemeal fashion in which controversies are presented for resolution, but courts will often refuse to act even when they realize that a rule is obsolete and indefensible.

The need for meaningful statutory reform was recognized by the Law Revision Commission when it outlined its proposed changes from New York’s common law evidence underpinnings. In the words of the Commission, the reforms it included in the proposal were designed to “modernize” the law, “assure reliability” in the law, and “gently push the law along its path.” The General Assembly would be well-advised to recognize that these three reform goals would be best served by abandoning the Frye standard in favor of a “reliability” approach.

A “reliability” approach would be a better means of “moderniz[ing]” and “assur[ing] reliability” in New York law than would a blanket codification of the “general acceptance” standard. An adoption of Frye, based on an old and outmoded methodology, would not only fail to update the state’s evidence law, it would actually turn the clock back on courts such as those in In re E.M and In re Meyer that have begun to modernize toward a Daubert-like approach. Codification of Rule 702(b) would also do little to assure reliability: there can be little doubt that the Daubert test, turning as it does upon peer review and testing of the bases of sci-
entific testimony, is a better indicator of a technique’s reliability than is Frye’s simplistic “nose counting” methodology.

One can also argue that the General Assembly’s affirmation of a “reliability” approach would give a mere “gentle push” to New York’s law along its present path. The cases In re E.M. and In re Meyer\textsuperscript{160} demonstrate that New York evidence law has begun to move away from the “general acceptance” methodology. Additionally, a “reliability” test is not inconsistent with the rationale the Court of Appeals regularly uses in deciding the admissibility of expert testimony. In \textit{People v. Leone},\textsuperscript{161} one of the seminal modern Court of Appeals cases on the subject, the court couched its admissibility determination in terms of “reliability” as much as it did in the language of “general acceptance.”\textsuperscript{162} \textit{Leone} is regularly cited as authority in Court of Appeals decisions that refer to the New York admissibility test as one requiring that the technique be “generally accepted as reliable.”\textsuperscript{163} One may rationally argue that the proper rule to be distilled from these cases teaches that “reliability” is the evidentiary goal, and that “general acceptance” is but a means to it. Because the Court of Appeals’ logic supports placing more credence in “reliability” than in \textit{Frye}, a move away from “general acceptance” would be neither a sudden nor a profound shift in New York’s evidence law.

IV. \textbf{WHAT THE RULE SHOULD LOOK LIKE: MODEL LEGISLATION}

In place of the current “general acceptance” language of proposed Rule 702(b), the New York General Assembly would be well-advised to consider a rule incorporating the “reliability” approach.

\textsuperscript{160} See infra part III.D.
\textsuperscript{161} 255 N.E.2d 696 (N.Y. 1969).
\textsuperscript{162} In finding that polygraph-based testimony was inadmissible, the Court of Appeals referred to the reliability of the technology. “For many years instruments to detect deception have been used in industry with increasing frequency, but we have held their reliability has not yet been sufficiently established to give them an evidentiary standing in the administration of the criminal law.” \textit{Id.} at 697. “It is claimed that in the hands of a qualified examiner the machine is extremely reliable.” \textit{Id.} at 698. “Applying [the general acceptance] standard, it is clear that the record before us does not adequately establish the reliability of the tests to be admissible in evidence.” \textit{Id.} at 700.

The current proposal for 702(b) reflects this fact. The Rule occasions admissibility upon a finding that “there is general acceptance within the relevant scientific community of the \textit{validity} of the theory . . . [and] there is general acceptance within the relevant scientific community that the procedure, test, or experiment is \textit{reliable.” The New York State Law Revision Comm’n, A Code of Evidence for the State of New York 162 (1991) (emphasis added).
The legislature is not, of course, bound by the language of the draft and can make significant changes to the substance of the proposal. To provide a “reliability” rule for expert scientific testimony in New York, the legislature should re-write the current draft rule to make “reliability” the operative standard.

A legislative re-draft of Rule 702(b) would be best accomplished within the form of the present proposal. The substance of the change would replace the “general acceptance” vocabulary in 702(b) with language that shows the General Assembly’s explicit intent to make “reliability” the operative test for admission of scientific testimony at New York trials. For instance, the modified Rule 702(b) could be titled “Reliable Scientific Testimony” and provide:

Testimony concerning scientific matters, or testimony concerning the result of a scientific procedure, test or experiment is admissible provided: (1) there is general acceptance within the relevant scientific community of the validity of the theory or principle underlying the matter, procedure, test or experiment is scientifically valid; (2) there is general acceptance within the relevant scientific community that the procedure, test, or experiment is reliable and produces accurate results; and (3) the particular test, procedure or experiment was conducted in such a way as to yield an accurate result.

These alterations in the form of proposed Rule 702(b) would be necessary to evince the clear intent to move the state’s evidence law toward a “reliability” approach.

Such a re-written scientific testimony rule would redound to the State’s advantage. First, the re-draft would eliminate the anachronistic and highly criticized Frye rule from New York’s evidence law. Second, the new proposal would firmly ensconce the “reliability” test in the consolidated laws, thus ensuring that valid-

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164. Legislatures have often made changes to evidence proposals before enacting them into law. E.g., Report of the House Committee on the Judiciary, Report On Federal Rule of Evidence 404(b) (“The second sentence of Rule 404(b) as submitted to Congress began with the words “This subdivision does not exclude the evidence when offered.” The committee amended this language to read ‘It may, however, be admissible.’”) reprinted in ERIC D. GREEN & CHARLES R. NESSON, FEDERAL RULES OF EVIDENCE WITH SELECTED LEGISLATIVE HISTORY AND NEW CASES AND PROBLEMS (1992); Report of the Senate Committee on the Judiciary, Federal Rule of Evidence 501 (“Clearly, the most far-reaching House change in the rules as promulgated, was the elimination of the Court’s proposed rules on privilege contained in Article V.”) reprinted in ERIC D. GREEN & CHARLES R. NESSON, FEDERAL RULES OF EVIDENCE WITH SELECTED LEGISLATIVE HISTORY AND NEW CASES AND PROBLEMS (1992).

165. See THE NEW YORK STATE LAW REVISION COMM’N, A CODE OF EVIDENCE FOR THE STATE OF NEW YORK 162 (1991) (language to be deleted has been lined-out; language to be added appears in italics).
ity, and not mere relevance,\textsuperscript{166} will be the operative admissibility standard. Finally, the updated rule would bring New York's scientific evidence standard into line, at least in result, with federal law and the growing trend of evidence law in the other states.

CONCLUSION

An important scientific technique rarely makes its way by gradually winning over and converting its opponents: it rarely happens that Saul becomes Paul. What does happen is that its opponents gradually die out and that the growing generation is familiarized with the idea from the beginning.\textsuperscript{167}

In 1936, Max Planck, famous for his developments in quantum theory, expounded upon a simple fact concerning the relationship between valid science and scientists, a fact that courts were unable to translate into law for six decades. The Supreme Court decided in 1994 that law should reflect reality. 

\textit{Daubert v. Merrell Dow Pharmaceuticals} has sounded the death knell for using \textit{Frye}'s anachronistic “general acceptance” test as the basis for determining the admissibility of novel scien-

\textsuperscript{166} Possibly because of the concern that the language of the Federal Rule of Evidence 702 embodies or could be construed to demand a mere “relevance” standard for novel scientific testimony, see \textit{supra} note 62, the drafters of New York's proposed code have turned away from adopting the text of the Federal Rule verbatim. For the textual language of Federal Rule 702, see \textit{supra} note 42. In both the 1980 and 1982 New York evidence code proposals, the Law Revision Commission had submitted a rule to govern the admissibility of expert testimony that mirrored the text of Federal Rule 702 verbatim. THE NEW YORK STATE LAW REVIEW COM'N, \textsc{A CODE OF EVIDENCE FOR THE STATE OF NEW YORK} 150-51 (1980); THE NEW YORK STATE LAW REVISION COM'N, \textsc{A CODE OF EVIDENCE FOR THE STATE OF NEW YORK} 163-65 (1982).

The current proposal embodied in New York Rule 702 diverges markedly from the Federal Rule. First, subsection 702(a) eschews the federal “helpfulness” approach and instead requires that, to be admissible, expert testimony must not merely help the jury but must be “beyond the understanding” or “dispel misconceptions of the typical trier of fact.” THE NEW YORK STATE LAW REVISION COM'N, \textsc{A CODE OF EVIDENCE FOR THE STATE OF NEW YORK} 161-62 (1991). Second, as discussed throughout this comment, subsection 702(b) proposes the enactment of the \textit{Frye} methodology.

Because of political necessities, the drafters have chosen to abandon their earlier drafts that were virtual mirror images of the Federal Rules in favor of the current proposal. Salken, \textit{supra} note 33, at 673. Codification of a mirror image of Federal Rule 702 would achieve the greatest level of uniformity between New York's law and the law of both federal and other states' courts. Despite this fact, New York's political realities and the structure of the current evidence-code proposal make adoption of a rule mirroring Federal Rule 702 unlikely at best.

\textsuperscript{167} MAX PLANCK, \textsc{The Philosophy of Physics} 90 (1936). The abstruse reference to Saul becoming Paul is apparently an allusion to the biblical story of Saul's revelation on the road to Damascus. Saul, a sinner, changed his evil ways after a visit from the Lord, and was shortly thereafter renamed Paul. \textit{Acts} 9:13.
tific testimony. *Frye*, long used by courts nationwide, has been effectively criticized by scholars and jurists alike. The *Daubert* Court, by determining that the Federal Rules demand a "reliability" standard, has ushered in a new era in expert testimony law.

New York would be mistaken to implant the *Frye* methodology into the consolidated laws by enacting the current draft of proposed Rule 702(b). Because Rule 702(b) embodies the "general acceptance" language, it is open to the same effective criticism that has critically wounded *Frye*. Furthermore, adopting proposed Rule 702(b) would fly in the face of reasoning used by the Supreme Court in the *Daubert* decision, a logic that has begun to become the common evidentiary tongue of the nation. Because enactment of draft Rule 702(b) would abandon New York's opportunity to garner the fruits of uniformity in and reform of its evidence law, it should be rejected. Simple logic demands that reliability, not "general acceptance," be the basis for admitting novel science in New York courts. The legislature should amend Rule 702(b) accordingly.