

A Report on “On Evidence: Proving  
Frye as a Matter of Law, Science, and  
History” by Lepore (2015)

Reviewer 2

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I am wiser than this person; for it is likely that neither of us knows anything fine and good, but he thinks he knows something when he does not know it, whereas I, just as I do not know, do not think I know, either. I seem, then, to be wiser than him in this small way, at least: that what I do not know, I do not think I know, either.

Plato, *The Apology of Socrates*, 21d

To err is human. All human knowledge is fallible and therefore uncertain. It follows that we must distinguish sharply between truth and certainty. That to err is human means not only that we must constantly struggle against error, but also that, even when we have taken the greatest care, we cannot be completely certain that we have not made a mistake.

Karl Popper, 'Knowledge and the Shaping of Reality'

## Overview

**Citation:** Lepore, J. (2015). On Evidence: Proving Frye as a Matter of Law, Science, and History. *Yale Law Journal*. Vol. 124, No. 5, pp. 1092–1158.

**URL:** <https://www.yalelawjournal.org/essay/on-evidence-proving-frye-as-a-matter-of-law-science-and-history>

**Abstract Summary:** This essay uses the landmark ruling of *Frye v. United States* to illustrate how the law renders historical evidence invisible, arguing that the absence of facts about the expert witness, William Moulton Marston, is responsible for the case's broad misunderstanding.

**Key Methodology:** Extensive archival research and historical narrative/biography to reconstruct the facts of a legal case.

**Research Question:** How does the law render historical evidence invisible, and what facts were hidden in the record of *Frye v. United States* that led to its misunderstanding?

## Summary

### Is It Credible?

This essay by Lepore offers a historical reconstruction of *Frye v. United States*, the 1923 case that established the “general acceptance” standard for the admissibility of scientific evidence. The essay’s primary contribution is the resurrection of William Moulton Marston—the psychologist, lawyer, and creator of Wonder Woman—as the central figure behind the defense’s attempt to introduce a systolic blood pressure deception test. Lepore argues that Marston’s role has been systematically erased from the legal record, a phenomenon she attributes to the law’s tendency to prioritize resolution over the preservation of historical fact. The essay posits that the “cryptic” nature of the *Frye* opinion, which is a mere 669 words long and cites no precedent, is best explained by the fact that Marston was under federal indictment for fraud at the time the appellate court issued its ruling (p. 1145).

The historical excavation of Marston’s involvement is rigorously supported by archival research. Lepore convincingly demonstrates that the *Frye* trial was not merely a murder case but a “test case” and a “class project” orchestrated by Marston and his students to introduce his deception test into the legal system (p. 1122). The evidence regarding Marston’s fraud indictment and the timing of his arrest relative to the appeal is also well-documented; the essay notes that headlines such as “Marston, Lie Meter Inventor, Arrested” appeared in Washington newspapers while the case was pending. As a piece of biographical and historical recovery, the essay is highly credible, successfully filling a significant gap in the narrative of American evidence law.

However, the essay’s central causal claim—that the appellate judges wrote a brief, citation-free opinion *because* they were aware of Marston’s legal troubles—remains speculative. While the circumstantial evidence regarding the timing of the indict-

ment is strong, the essay provides no direct evidence, such as judicial memoranda or diaries, to prove that the judges were influenced by the scandal or that they were even aware of it. The assertion that this specific context is “responsible for the many ways in which *Frye* has been both narrowly and broadly misunderstood” relies on an inference rather than documented proof of judicial intent. It is possible that the court’s brevity reflected a view that the science was simply too nascent to warrant detailed rebuttal, regardless of the expert’s personal credibility.

Furthermore, the essay uses the *Frye* case to support a broader theoretical argument that the law “hides the knives” and renders historical evidence invisible. This generalization is provocative but potentially overextended. *Frye* was an extraordinary case involving a charismatic, erratic expert and a novel technology; it is an outlier. Using such an idiosyncratic example to characterize the entire “law of evidence” as a mechanism for concealing facts may oversimplify the complex relationship between legal procedure and truth-seeking. Additionally, by focusing so heavily on Marston, the essay risks marginalizing the defendant, James Frye, and the racial dynamics of 1920s Washington, D.C., which other scholars have suggested were central to the case’s outcome (p. 1141). While the essay acknowledges this context, its narrative commitment to Marston means that the racial dimensions of the case are treated as secondary to the story of the expert’s rise and fall.

## **The Bottom Line**

Lepore’s essay is a compelling piece of historical detective work that successfully restores William Moulton Marston to the center of the *Frye* narrative. However, the claim that Marston’s fraud indictment was the direct cause of the appellate court’s cryptic ruling is a speculative inference not fully supported by direct evidence of the judges’ reasoning. While the essay effectively critiques the legal system’s treatment of historical context, its broad conclusions about the nature of evidence law are

drawn from a highly anomalous case.

## Potential Issues

**Speculative causal claim regarding judicial motivation:** The essay's central and most novel claim—that the *Frye* opinion is brief and lacks precedent *because* the appellate judges were aware of the expert witness William Marston's indictment for fraud—is a significant inference based on circumstantial evidence. The author establishes the timing of Marston's indictment and the subsequent appellate ruling, and notes that his arrest was reported in Washington newspapers (p. 1142). However, the essay provides no direct evidence that the judges on the D.C. Circuit Court of Appeals were aware of the indictment or that it influenced their reasoning. The argument that this "fact" is "responsible for the many ways in which *Frye* has been both narrowly and broadly misunderstood" is a causal leap. The essay does not sufficiently weigh more parsimonious explanations for the opinion's style, such as the judges viewing the scientific claim as so premature that it did not warrant a detailed rebuttal, or that the opinion's brevity and lack of citation were not anomalous for the court at that time. The essay does not provide a comparative baseline of other D.C. Circuit opinions from the period to establish that *Frye's* style was indeed an outlier requiring a special explanation. Furthermore, the interpretation of the omission of Marston's name as an act to "have your name stripped from the record" may misread a standard convention of appellate opinion writing, which often omits the names of expert witnesses, as a deliberate act of concealment specific to this case (p. 1092). While the circumstantial evidence is suggestive, the claim about the judges' internal motivations remains speculative.

**Generalizing from an anomalous case:** The essay uses the single, highly idiosyncratic case of *Frye v. United States* to draw broad conclusions about the nature of "the law of evidence," "case law," and "the conventions of legal scholarship" as a whole (p. 1092). The overarching thesis that "the law...hides the knives" is derived from an outlier case. By the essay's own detailed account, the circumstances surrounding

*Frye* were extraordinary: they involved a novel and scientifically dubious technology, an expert witness who was a charismatic self-promoter under federal indictment, and a defense strategy orchestrated by the expert himself as a “test case” using his own inexperienced night-school students as counsel. It is debatable whether such a unique confluence of factors can serve as a representative example of how the legal system typically processes facts and evidence. The essay does not offer comparative analysis to demonstrate that the “hiding” it identifies in *Frye* is a systemic feature of the law rather than an anomaly produced by a bizarre set of particulars.

**Potentially oversimplified theoretical framework:** The essay’s argument is built on a stark, and arguably idealized, contrast between the epistemologies of law, history, and science. It posits that history and science are concerned with truth, while the law’s “concern lies not with truth but with resolution.” This framing presents a specific, legal-realist perspective on the law as a settled fact, which may oversimplify the complex relationship between truth-seeking and dispute resolution within the legal system. This is particularly evident in the characterization of the law’s exclusionary function as an act of “hiding facts” (p. 1092). While the essay correctly notes that evidence law is “fundamentally, exclusionary,” framing this function with a pejorative metaphor may obscure the legitimate jurisprudential purposes of exclusion, such as ensuring fairness, reliability, and relevance (p. 1108). The stark dichotomy, while a powerful rhetorical device, may not fully capture the nuances of how each discipline manages evidence and constructs knowledge.

**Scoping and the marginalization of race:** The essay centers its narrative almost exclusively on the white, Harvard-educated expert, William Moulton Marston, which has the effect of sidelining the crucial racial context of the case. The essay itself acknowledges prior scholarship by Seán Tath O’Donnell arguing that the case is best understood “in the context of race relations in Washington, D.C.” It mentions key facts, such as the victim being the “richest black man in Washington” and the defendant, James Frye, being a Black man who believed his conviction was due to “racial

prejudice.” However, these elements are not integrated into the essay’s central causal explanation, which rests entirely on Marston’s indictment. While this focus is a deliberate and valid authorial choice to explore the intersection of law, science, and history through the figure of the expert, it is a choice that necessarily decenters the racial dynamics that other scholars have argued are essential to understanding the case.

## Future Research

**Comparative analysis of appellate opinions:** Future work could assess the credibility of the claim that the *Frye* opinion was unusually “cryptic” by conducting a quantitative or qualitative comparison of other D.C. Circuit Court of Appeals opinions from the early 1920s. This would establish a baseline for opinion length and citation practices to determine if *Frye* was indeed a stylistic outlier requiring a specific external explanation like the Marston scandal.

**Investigation of judicial archives:** Researchers could examine the personal papers, correspondence, or biographies of the specific judges who sat on the *Frye* panel (Justices Van Orsdel, Smyth, and Martin) to search for direct evidence of their knowledge of Marston’s indictment. This would move the argument from circumstantial inference to documented historical fact regarding the court’s motivation.

**Integration of racial history:** Future scholarship could re-examine the *Frye* case by decentering Marston and focusing on the racial dynamics mentioned but not fully explored in this essay. By analyzing the treatment of Black defendants in D.C. courts during this period, researchers could test whether the rejection of the deception test was driven more by the identity of the defendant than the credibility of the expert.

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