Volume 20
Number 3 *Spring 1986*

*pp.*619-651

Spring 1986

Excluding Hypnotically Induced Testimony on the "Hearsay Rationale"

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EXCLUDING HYPNOTICALLY INDUCED TESTIMONY ON THE "HEARSAY RATIONALE"

INTRODUCTION

During the 1970's, teams of specially trained police hypnotists formed across the country.[1] These teams, called Svengali Squads,[2] were designed to aid police investigations by employing hypnosis to restore a victim's memory[3] of a crime.[4] Such cases generally involve situations where the victim viewed the assailant, but because everything happened too quickly or was so traumatic, the victim is later unable to recall crucial facts surrounding the incident.[5] Hypnosis is used in an effort to restore these crucial facts to the victim's present memory. Success in refreshing the memory not only facilitates the investigation of the crime,[6] but enables the victim to later testify at trial. However, whether the previously hypnotized victim's testimony is from his factual memory of the event or from a memory unconsciously

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1. Serrill, *Breaking the Spell of Hypnosis*, TIME, Sept. 17, 1984, at 62. The Los Angeles police department was the first to employ the use of hypno-investigators. The use of hypno-investigators became so popular that even the Federal Bureau of Investigation instructed some of its agents in hypnosis. *Id.*

2. *Id.* The title of Svengali was adopted from the name of a character in the novel TRILBY. Svengali was a hypnotist who hypnotically overpowered a helpless female and inspired her to musical accomplishment. G. du MAURIER, TRILBY (1894).

3. This note does not differentiate between the victim and non-victim of crime who is hypnotized and subsequently testifies. In each instance the cases similarly analyze the admissibility question. *Compare*, People v. Smrekar, 68 Ill. App. 3d 379, 385 N.E.2d 848 (1979) (eyewitness) *with* Chapman v. State, 638 P.2d 1280 (Wyo. 1982) (victim/witness).

4. *See generally* Monrose, *Justice With Glazed Eyes: The Growing Use of Hypnotism in Law Enforcement*, JURIS DOCTOR, Oct.-Nov. 1978, at 54.

5. A witness who claims to have forgotten the facts surrounding a particular event is, in effect, claiming amnesia for that event. There are three types of amnesia important to this note: (1) *Congrade Amnesia*: a complete loss of recall of the event itself; (2) *Retrograde Amnesia*: a loss of recall of events preceding the incident; (3) *Anterograde Amnesia*: a loss of recall of events following the incident. Milos, *Hypnotic Exploration of Amnesia After Cerebral Injuries*, 23 INT'L. J. CLINICAL & EXPERIMENTAL HYPNOSIS 103 (1975).

6. For example, in July of 1975, Franklin Edward Ray, a bus driver, along with the twenty-six children in his bus, were kidnapped outside of Chowchilla, California. Ray was later hypnotized in an effort to recall details surrounding the event. While under hypnosis Ray recalled five of the six digits on the license plate of the kidnapper's van. This information proved to be a breakthrough in the investigation. Reported in State v. Beachum, 97 N.M. 682, 686, 643 P.2d 246, 250 (N.M. Ct. App. 1981). The use of hypno-investigators has reportedly led to hundreds of convictions. Serrill, *supra* note 1, at 62.

confabulated[7] while under hypnosis is not known.[8] Nevertheless, the frequency in employing hypnosis to restore a victim's memory of a crime has dramatically increased over the past two decades.[9] Consequently, litigation on the admissibility of hypnotically induced testimony has also increased.[10]

State courts have assumed three different positions concerning the admissibility of hypnotically induced testimony in a criminal trial. Some state courts admit such testimony, holding that hypnosis affects only the witness' credibility and not the testimony's admissibility.[11]

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7. Confabulation is the filling in of memory gaps with inaccurate or fictitious bits of information. Dilloff, *The Admissibility of Hypnotically Influenced Testimony*, 4 OHIO N.U.L. REV. 1, 4 n.13 (1977).

8. *See infra* note 122-24 and accompanying text.

9. Diamond, *Inherent Problems in the Use of Pretrial Hypnosis on a Prospective Witness*, 68 CALIF. L. REV. 313 n.3 (1980). Although specific reasons for the increased popularity for the use of hypnosis cannot be isolated, one commentator suggests it may be attributable in part to three books dealing with hypnosis and law enforcement: H. ARONS, HYPNOSIS IN CRIMINAL INVESTIGATION (1967); W. BYRAN, LEGAL ASPECTS OF HYPNOSIS (1962); and M. TEITELBAUM, HYPNOSIS INDUCTION TECHINQUES (1969). *Id.*

10. Through 1968 there were eight cases that decided the admissibility of hypnotically induced testimony. Note, *The Admissibility of Testimony Influenced by Hypnosis*, 67 VA. L. REV. 1203 n.4 (1981). From 1968 through 1974, nine such cases were decided, and from 1975 through September of 1980, twenty-two such cases were decided. *Id.*

11. State v. Contreras, 674 P.2d 792 (Alaska Ct. App. 1983) ("[W]e decline to adopt a *per se* rule rendering the complaining witnesses in these cases incompetent to testify at trial regarding the matters covered in their pretrial hypnotic sessions."); Creamer v. State, 232 Ga. 136, 205 S.E.2d 240 (1974) ("[W]e do not agree that the hypnotic sessions tainted the testimony and rendered it inadmissible."); People v. Smrekar, 68 Ill. App. 3d 379, 385 N.E.2d 848 (1979) (when a witness is capable of giving testimony having some probative value, witness is permitted to testify with evidence of impairment of ability of witness to accurately recall evidence, or that suggestive material has been used to refresh witness' recollection going only to weight to be given to testimony of witness); State v. Seager, 341 N.W.2d 420 (Iowa 1983) (the policy underlying the admissibility of hypnotically induced testimony must be judged in light of the totality of the truth-finding process); State v. Wren, 425 So. 2d 756 (La. 1983) (issue as to hypnosis went to question of proper weight to be accorded deputy's testimony, rather than to question of its admissibility); State v. Brown, 37 N.W.2d 138 (N.D. 1983) (witness whose memory has been previously enhanced by use of hypnosis is not rendered incompetent to testify, but rather, hypnosis affects credibility of testimony); State v. Jorgensen, 8 Or. App. 1, 492 P.2d 312 (1971) (since the witness, who underwent pretrial hypnosis testified in open court, was subject to rigorous cross-examination and the hypnotic procedure was fully exposed into evidence, there is no basis for disallowing her testimony); State v. Armstrong, 110 Wis. 2d 555, 329 N.W.2d 386 (1983) (the State's use of hypnosis in an effort to enhance the recollection of a witness did not render inadmissible a subsequent identification by such witness of defendant in a lineup or the subsequent in-court testimony of a witness regarding the events which were the subject of hypnosis); Chapman v. State, 638 P.2d 1280 (Wyo.

Federal courts generally adopt this approach.[12] Other state courts admit hypnotically induced testimony if the hypnotic session was conducted in compliance with specified procedural safeguards.[13] Still

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1982) (an attack on credibility is the proper means to determine the value of hypnotically induced testimony).

12. Clay v. Vose, 771 F.2d 1 (1st Cir. 1985) (the court admitted identification testimony from a previously hypnotized witness, who had given a prehypnosis identification to the police and was subject to in-court cross-examination before a carefully instructed jury who had heard testimony concerning the possible inaccuracies of hypnotically induced testimony); United States v. Valdez, 722 F.2d 1196 (5th Cir. 1984) (the court held that in a particular case the evidence favoring admissibility might make the probative value of the hypnotically induced testimony outweigh its prejudicial effect); United States v. Adams, 581 F.2d 193 (9th Cir. 1978) (the fact of hypnotically induced evidence affects only the credibility of the evidence, not its admissibility); United States v. Charles, 561 F. Supp. 694 (S.D. Tex. 1983) (the court held that hypnotically induced testimony was inadmissible where its probative value was outweighed by the danger of unfair prejudice in that the hypnotist was unavailable for examination at trial); United States v. Waksal, 539 F. Supp. 834 (S.D. Fla. 1982), *rev'd*, 709 F.2d 653 (11th Cir. 1983) (in dicta, unaffected by the reversal, the court found hypnosis to affect credibility but not admissibility); United States v. Narciso, 446 F. Supp. 252 (E.D. Mich. 1977) (the court held that the hypnotically induced testimony was not so implausible that it could not be true; therefore, it was up to the jury, aided by the advocacy of counsel, to determine the credibility of such testimony).

13. Brown v. State, 426 So. 2d 76 (Fla. Dist. Ct. App. 1983) (admissibility of hypnotically induced recall testimony hinges on a case-by-case examination of the techniques used to hypnotize the witness; the following safeguards are recommended to reduce potential prejudice from admission of hypnotically induced testimony: neutral hypnotist should be employed; session should be conducted at independent location; only hypnotist and witness should be present; subject should be examined by hypnotist to elicit every possible detail that witness recalls concerning the crime; witness should be examined by hypnotist to ascertain whether he suffers from mental or physical disorders that might affect results; some record of session should be preserved; hypnotist should avoid reassuring remarks that might stimulate confabulation; court should carefully consider whether there is independent evidence corroborative of or contradictory to statements made during the trance; and jury should receive instruction warning it of potential influence hypnosis may have on witness); State v. Iwakiri, 106 Idaho 618, 682 P.2d 571 (1984) (in cases where hypnosis has been employed, trial court should conduct pretrial hearing on procedures used during hypnotic session in question, then apply a "totality of the circumstances" test and make determination whether, in view of all the circumstances, proposed testimony is sufficiently reliable to merit admission; the following safeguards are to be examined in determining the competence of a witness who has undergone hypnosis: the hypnotic sessions should be conducted by a licensed psychiatrist or psychologist trained in use of hypnosis; person conducting session should be independent from either of the parties in case; information given to hypnotist concerning the case should be noted; before hypnosis, hypnotist should obtain detailed description of facts from subject; sessions should be recorded so permanent record is available; and preferably, only hypnotist and subject should be present, but other persons should be allowed to attend if their attendance can be shown to be essential and steps are taken to prevent their influencing results); House v. State, 445 So. 2d 815 (Miss. 1984) (because the hypnotically refreshed memory of the victim was susceptible of having been contaminated during the hypnotic session, her testimony

others find it *per se* inadmissible.[14] Courts adopting this strict exclusionary rule generally do so on the basis of the common law test of general scientific acceptance, otherwise known as the *Frye* test or

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was admissible only after procedural safeguards were first complied with); State v. Hurd, 86 N.J. 525, 432 A.2d 86 (1981) (requirements before party may introduce hypnotically refreshed testimony in a criminal trial are: psychiatrist or psychologist experienced in use of hypnosis must conduct session; professional conducting the session should be independent of and not regularly employed by prosecutor, investigator or defense; any information given to hypnotist by law enforcement personnel or defense prior to hypnotic session must be recorded, either in writing or another suitable form; before inducing hypnosis the hypnotist should obtain from subject a detailed description of facts as the subject remembers them; all contacts between hypnotist and subject must be recorded; and only hypnotist and subject should be present during any phase of the hypnotic session); State v. Beachum, 97 N.M. 682, 643 P.2d 246 (N.M. Ct. App. 1981) (the testimony of prehypnotic recollections is admissible in the sound discretion of the trial court, but posthypnotic recollections are admissible only if specified procedural safeguards are followed); State v. Weston, 16 Ohio App. 3d 279, 475 N.E.2d 805 (1984) (hypnotically refreshed testimony is admissible provided there is general compliance with certain safeguards which tend to assure that such testimony is as trustworthy as other eyewitness testimony).

14. Prewitt v. State, 460 So. 2d 296 (Ala. Crim. App. 1984) (the court upheld excluding a witness' hypnotically induced recollections on the basis of the *Frye* test); State v. Mena, 128 Ariz. 226, 624 P.2d 1274 (1981) (until hypnosis gains general acceptance in fields of medicine and psychiatry as a method by which memories are accurately improved without undue danger of distortion, delusion or fantasy, testimony of witnesses who have been questioned under hypnosis regarding subject of the offered testimony should be excluded in criminal cases from time of the hypnotic session forward); People v. Shirley, 31 Cal. 3d 18, 641 P.2d 775, 181 Cal. Rptr. 243 (1982), *cert. denied*, 459 U.S. 860 (1982) (a witness who undergoes hypnosis for the purpose of restoring his memory of an event is *per se* incompetent to testify at trial); People v. Quintanar, 659 P.2d 710 (Colo. Ct. App. 1982) (testimony of a witness who undergoes hypnosis is *per se* inadmissible as to recollections from time of hypnotic session forward; however, witness is not incompetent to testify to prehypnosis recollections that have previously been unequivocally disclosed and recorded by tape recording, videotape, or written statement); State v. Atwood, 39 Conn. Supp. 273, 479 A.2d 258 (1984) (testimony elicited by use of hypnotism is inadmissible, since such processes have not achieved general acceptance in the scientific community); State v. Davis, 490 A.2d 601 (Del. Super. Ct. 1985) (testimony of witness who underwent hypnosis to refresh her recollection was inadmissible in a criminal trial where witness had no recollection of events in question prior to hypnosis); State v. Moreno, ___ Hawaii ___, 709 P.2d 103 (1985) (witness who has been hypnotized may not testify as to matters or details not recollected prior to hypnosis and brought out by the hypnotherapy sessions); Peterson v. State, 448 N.E.2d 673 (Ind. 1983) (previously hypnotized witness should not be permitted to testify in criminal proceedings concerning subject matter adduced during pretrial hypnotic interview); State v. Haislip, 237 Kan. 461, 701 P.2d 909 (1985), *cert. denied*, ___ U.S. ___, 106 S.Ct. 575 (1985) (events first recalled by witness after or during subsequent hypnosis were inadmissible at trial due to problems of unreliability, including enhanced suggestibility); Collins v. State, 52 Md. App. 186, 447 A.2d 1272 (1982) (use of hypnosis to restore or refresh memory of witness was not shown to be accepted as reliable by relevant scientific community, and thus such testimony was

standard.[15] In short, there is little consensus among state courts regarding the treatment of hypnotically induced testimony.

The disparate case law treatment of hypnotically induced testimony should cease.[16] This note finds the *per se* exclusion of such testimony appropriate. Courts not adopting this position either find the *Frye* test inapplicable,[17] or hypnotically induced testimony

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inadmissible); Commonwealth v. Kater, 388 Mass. 519, 447 N.E.2d 1190 (1983) (hypnotized witness may testify based on what he knew before hypnosis, but the fact of hypnosis and its likely effect on a witness are proper matters for inquiry at trial and a careful record of witness' prehypnotic memory should be preserved); State v. Gonzales, 415 Mich. 615, 329 N.W.2d 743 (1982) (hypnosis as a technique to enhance memory recall has not received sufficient scientific recognition of reliability to allow posthypnotic recollection of witnesses to be introduced into evidence); State v. Mack, 292 N.W.2d 764 (Minn. 1980) (previously hypnotized witness could not testify in criminal proceeding concerning subject matter adduced at pretrial hypnotic interview); Alsbach v. Bader, 700 S.W.2d 823 (Mo. 1985) (posthypnotic testimony lacks scientific support for its reliability and thus should not be admitted); State v. Palmer, 210 Neb. 206, 313 N.W.2d 648 (1981) (until hypnosis gains acceptance to a point where experts in the field widely share view that memories are accuarately improved without undue danger of distortion, delusion or fantasy, a witness who has been previously questioned under hypnosis may not testify in criminal proceeding concerning subject matter adduced at the pretrial hypnotic interview); People v. Hughes, 59 N.Y.2d 523, 453 N.E.2d 484, 466 N.Y.S.2d 255 (1983) (a victim's posthypnotic recollections are inadmissible at trial); State v. Peoples, 311 N.C. 515, 319 S.E.2d 177 (1984) (witness' hypnotically refreshed testimony and videotape recording of the hypnotic session were inadmissible); Harmon v. State, 700 P.2d 212 (Okla. Crim. App. 1985) (although the hypnosis does not render a witness incompetent to testify, the witness' testimony is limited to those facts which can demonstrably be shown to have been recalled prior to hypnosis); Commonwealth v. Nazarovitch, 496 Pa. 97, 436 A.2d 170 (1981) (process of refreshing recollection by hypnosis has not yet gained sufficient acceptance in its field as a means of accurately restoring forgotten or repressed memory so as to permit introduction of hypnotically-refreshed testimony); State v. Martin, 101 Wash. 2d 713, 684 P.2d 651 (1984) (absent any general scientific acceptance of hypnosis as a reliable means of refreshing recollection, the dangerous possibility of prejudice should preclude the admission of hypnotically induced testimony).

15. The common law test of general scientific acceptance originated in Frye v. United States, 293 F. 1013 (D.C. Cir. 1923). This test is most commonly called the *Frye* test. For an explanation of what the *Frye* test is, see *infra* notes 126-33 and accompanying text. For an explanation of how the *Frye* test is used in determining the admissibility of hypnotically induced testimony, see *infra* notes 140-45 and accompanying text.

16. C. MCCORMICK, MCCORMICK ON EVIDENCE § 50 (3d ed. 1984) (the admissibility of hypnotically induced testimony should be accepted or rejected or conditioned by direct rule rather than by case law).

17. United States v. Valdez, 722 F.2d 1196, 1200-01 (5th Cir. 1984) (*Frye* test inapplicable in determining the admissibility of hypnotically induced testimony); People v. Gibson, 117 Ill. App. 3d 270, 452 N.E.2d 1368 (1983) (*Frye* standard is concerned with admission of expert opinion deduced from the results of a scientific technique and not the admissibility of eyewitness testimony).

reliable.[18] However, a question currently debated concerns whether or not the federal courts even have a *Frye* standard to apply, for it has been persuasively argued that the Federal Rules of Evidence silently abolished the *Frye* test.[19] Therefore, for the state courts which admit hypnotically induced testimony and for the federal courts which find the *Frye* test unavailable or inapplicable, an alternative rationale for the *per se* exclusion of hypnotically induced testimony is necessary.

An alternative rationale for the *per se* exclusion of hypnotically induced testimony is the rationale underlying the hearsay rule.[20] Hearsay is generally excluded at trial because the three ideal conditions for a witness to testify under are not satisfied.[21] Ideally, a person testifies under oath or affirmation, in the presence of the trier of fact, and is subject to contemporaneous cross-examination.[22] Although a witness testifying from a hypnotically induced memory may literally satisfy these testimonial requirements, the purpose underlying each requirement remains unsatisfied.[23] Therefore, testimony from a hypnotically induced memory should be excluded in the same manner as hearsay. This is not to say that hypnotically induced testimony should be excluded as hearsay, but that it should be excluded on the rationale which excludes hearsay testimony.

First, this note will examine the scientific phenomenon of hypnosis and its use as an investigative tool. Next, the three methods employed by state courts in determining the admissibility of hypnotically induced testimony will be explored. This note will then examine the position taken by the federal courts, the hearsay rule, and the purpose underlying each of the three requirements for testifying in a non-hearsay manner. The testimonial requirements of oath or affirmation, personal presence, and contemporaneous cross-examination will be discussed seriatim. After examining each requirement this note

18. State v. Hurd, 86 N.J. 525, 538, 432 A.2d 86, 92 (1981) (hypnotically induced testimony is admissible in those cases where it can be shown that the hypnotically induced memory is comparable in accuracy to normal recall).

19. S. SALTZBURG & R. REDDEN, FEDERAL RULES OF EVIDENCE MANUAL 452 (3d ed. 1982) ("If past cases are any guide, one can only guess that the decision on whether to apply the *Frye* standard will be made on a case-by-case basis, as each individual scientific problem is posed."). C. WRIGHT & K. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 5168 (1978) (test eliminated); Gianelli, *The Admissibility of Novel Scientific Evidence: Frye v. United States, a Half-Century Later*, 80 COLUM. L. REV. 1197, 1229 (1980) (survival debatable).

20. *See infra* notes 168-99 and accompanying text.

21. *See infra* note 174 and accompanying text.

22. *See infra* notes 172-73 and accompanying text.

23. *See infra* notes 175-99 and accompanying text.

will submit that a person testifying from a hypnotically induced memory fails to satisfy the purpose underlying each requirement, and therefore, hypnotically induced testimony should be excluded at trial on the same rationale as hearsay. Consequently, all courts which do not currently exclude hypnotically induced testimony should consider excluding such on a rationale analogous to the hearsay rationale.

I. HYPNOSIS: WHAT IS IT?

Although practiced for centuries,[24] it is still unclear what hypnosis is.[25] As a result, numerous definitions[26] and hypotheses[27] con-

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24. *See* Diamond, *supra* note 9, at 317; Ladd, *Legal Aspects of Hypnotism*, 11 YALE L.J. 173, 174 (1902). For a concise summary of the history of hypnosis, its use and practice, see 9 ENCYCLOPEDIA BRITANNICA 133-40 (15th ed. 1974).

25. United States v. Valdez, 722 F.2d 1196, 1201 (5th Cir. 1984) (after reviewing the current legal and scientific literature on hypnosis, the court concluded that the exact nature of the hypnotic state was not understood).

26. The American Medical Association defines hypnosis as:

> [A] temporary condition of altered attention in the subject which may be induced by another person and in which a variety of phenomena may appear spontaneously or in response to verbal or other stimuli. These phenomena include alterations in consciousness and memory, increased susceptibility to suggestion, and the production in the subject of responses and ideas unfamiliar to him in his usual state of mind.

Note, *A Survey of Hypnotically Refreshed Testimony in Criminal Trials: Why Such Evidence Should be Admitted in Iowa*, 32 DRAKE L. REV. 749, 750 (1982-83). Black's Law Dictionary defines hypnotism as "the act of inducing artifically a state of sleep or trance in a subject by means of verbal suggestion by the hypnotist or by the subject's concentration upon some subject. It is generally characterized by extreme responsiveness to suggestions from the hypnotist." BLACK'S LAW DICTIONARY 668 (5th ed. 1979); Webster's Dictionary defines hypnosis as "a state which resembles sleep but is induced by a person whose suggestions are readily accepted by the subject." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 593 (1983).

27. There are numerous schools of thought on the phenomenon of hypnosis, and each school adopts its own model of explanation:

> [T]here are the hereditary models which conceive of hypnosis as an inherited characteristic that reflects a phylogenetic and regressive group of qualities and traits . . . . There is a physiological model which conceives of hypnosis as a product of . . . the brain, such as areas of inhibition and areas of excitation, or the action of the reticular activating system. There is an internal environmental model which deals with the exchanges and interchanges of biochemical substances in the neural system throughout the brain. There is a learning model that conceives of hypnosis as a form of learning, like conditioning. There is a cultural social model which explains hypnosis in terms of contagious suggestibility and role-playing. There is a developmental motivational model which deals with various interpersonal and intrapsychic dimensions, such as dissociation and ontogenetic regression to earlier modes of thinking, feeling, and behavior, involving an anachronistic revival of the child-parent relationship and related transference phenomena.

cerning hypnosis have arisen. This confusion is partly due to the fact that hypnosis is a scientific phenomenon which lacks definitional precision.[28] The fact that the focal point of hypnosis is the inherently ambiguous human mind exacerbates the confusion.[29]

Although science fails in fully understanding hypnosis, the following hypnotic characteristics have been observed in hypnotized subjects highly susceptible to hypnosis: subsidence of the planning function,[30] redistribution of attention,[31] availability of visual memories from the past, and heightened ability for fantasy production,[32] reduction in reality testing and a tolerance for persistent reality distortion,[33] increased suggestibility,[34] role behavior,[35] and amnesia for what transpired while in the hypnotic state.[36] All in all, more is known about the characteristics of a person under hypnosis than is known about the phenomenon itself. Nevertheless, this has not detered the legal world from employing hypnosis as a means of refreshing a victim's memory of a crime.

The use of hypnosis as a means of refreshing a victim's memory of a crime is based on the "exact copy" theory of memory.[37] This theory

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M. KLINE & L. WOLBERG, THE NATURE OF HYPNOSIS: CONTEMPORARY THEORETICAL APPROACHES 6 (1962).

28. Note, *supra* note 26, at 750.

29. London, *Ethics in Hypnosis*, in HANDBOOK OF CLINICAL AND EXPERIMENTAL HYPNOSIS 593-94 (J. Gordon ed. 1967). One conclusion which can be drawn from the plethora of definitions and explanations surrounding hypnosis is that no single, satisfactory explanation of it has yet to emerge. *See* Note, *supra* note 10, at 1208.

30. A hypnotized subject loses the initiative and desire to make and follow through on plans of his own. Diamond, *supra* note 9, at 316 (reporting from E. HILGARD, THE EXPERIENCE OF HYPNOSIS 6-10 (1968)).

31. Hypnosis causes increased selective attention and selective inattention. *Id.*

32. A hypnotized subject can vividly visualize past events in his mind. Moreover, the hypnotist can suggest the reality of memories for events that did not happen. *Id.*

33. While in a hypnotic state, any type of reality distortion, including falsified memories, may be accepted without hesitation by the hypnotized subject. *Id.*

34. The theory that hypnosis is mainly a suggestion and acceptance process is so widely embraced that writers on hypnosis equate one with the other. *Id.*

35. The suggestions that a hypnotized subject will accept are not limited to specific acts or perceptions. If suggested, he will adopt a suggested role and carry on complex activities corresponding to that role. *Id.*

36. Although not a necessary aspect of hypnosis, amnesia for what occurred while under hypnosis is very common and may be furthered through suggestion of such by the hypnotist. *Id.*

37. *See* W. BRYAN, JR., LEGAL ASPECTS OF HYPNOSIS 202-10 (1962); D. CHEEK & L. LECRON, CLINICAL HYPNOTHERAPY 54 (1968). *But cf.* Beaver, *Memory Restored or Confabulated by Hypnosis—Is It Competent?*, 6 U. PUGET SOUND L. REV. 155, 161-63

posits that all information received by the body senses is stored in the brain complete and unaltered.[38] Consequently, an inability to remember is merely an inability to retrieve previously stored information.[39] Under this theory hypnosis operates as a means by which difficulties in retrieving stored information are overcome.[40] The primary hypnotic phenomenons operating to overcome memory recall difficulties are age regression, the posthypnotic suggestion and hypermnesia.[41]

The hypnotic phenomenon of age regression is central in retrieving information stored in a person's mind. Age regression occurs when the hypnotist instructs the hypnotized subject to concentrate upon a past event in the subject's life.[42] If successful, the subject will visualize and relive the suggested event in his mind.[43] While reliving the event, the subject may articulate what he remembers happened.[44] By itself, age regression is insufficient in restoring a victim's memory of a crime; therefore, it is generally used in conjunction with the posthypnotic suggestion.

A posthypnotic suggestion is a request or order to an individual

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(1982-83) (a general discussion of the history of the "exact copy" theory of memory, and how some studies refute it); Orne, *The Use and Misuse of Hypnosis in Court*, 27 INT'L J. OF CLINICAL AND EXPERIMENTAL HYPNOSIS 311, 321 (1979) (the author found the "exact copy" theory of memory unsupported by any scientific data).

38. D. CHEEK & L. LECRON, *supra* note 37 at 54.

39. *Id.*

40. *Id.*

> The idea that one can in hypnosis somehow reactivate original memory traces stems from a widely held view . . that memory involves a process analogous to a multi-channel videotape-recorder inside the head which records all sensory impressions and stores them in their pristine form. Further, there is a belief that while this material cannot ordinarily be brought to consciousness, it can be accessed through hypnosis. . . .

Id.

41. Spector & Foster, *Admissibility of Hypnotic Statements: Is the Law of Evidence Susceptible*, 38 OHIO ST. L.J. 567, 572 (1977).

42. *Id.* at 574. For a concise, scientific discussion on the phenomenon of age regression, see L. WOLBERG, HYPNOSIS: IS IT FOR YOU? 98-103 (2d ed. 1982).

43. Spector & Foster, *supra* note 41, at 574. A person under hypnosis may enter six different levels of depths of trance. *Id.* at 571. The first level is the lightest trance and the sixth level is the deepest. *Id.* A subject who undergoes partial age regression is in a light trance and will maintain an objective viewpoint when reliving the event in his mind. *Id.* at 574. A subject who undergoes complete age regression is in a deep trance and will relive the event both psychologically and sensually. *Id.*

44. *Id.* at 574.

under hypnosis to perform some act[45] or remember[46] something after termination of the hypnotic trance. Where a witness suffers amnesia[47] concerning a crime, the hypnotist will suggest to the subject that upon awakening he will remember the details of the event recalled while hypnotized.[48] This technique assumes the phenomenon of age regression was successful and that the subject was able to recall the desired event. However, a posthypnotic suggestion does not guarantee memory of the desired event upon awakening.[49] Although age regression and the posthypnotic suggestion used together may allow the victim of a crime to later recall the crime, if the hypnotized subject failed to experience hypermnesia there would be no memory retrieval at all.

Where a person under hypnosis has an exceptionally complete memory of the past[50] the experience is called hypermnesia.[51] A person

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45. The following is an example of a non-legal, posthypnotic suggestion to a subject for performing an act after awakening from hypnosis: A young woman under hypnosis was told that she would, upon awakening, remove a shoe and place it on top of a table adjacent to a vase of flowers. After awakening from the hypnosis and subsequently performing the suggested act, the woman explained that she had recently purchased a shoe-shaped vase, and had intended to experiment with flower arrangements for it. Spector & Foster, *supra* note 41, at 573 n.28 (reporting from CHEEK & LECRON, *supra* note 37 at 47-8 (1968)). For a concise, scientific explanation of the past hypnotic suggestion, see L. WOLBERG, *supra* note 42, at 103-11.

46. This note focuses on the posthypnotic suggestion to a subject to remember what has been recalled while under hypnosis. *See* Harding v. State, 5 Md. App. 230, 242, 246 A.2d 302, 309 (hypnotist testified that he instructed the hypnotized witness that when she awakened, she would remember what she had been able to recall while hypnotized); State v. Mack, 292 N.W.2d 764, 767 (Minn. 1980) (hypnotist instructed the hypnotized witness that upon awakening she would remember very clearly everything recalled while under hypnosis).

47. *See supra* note 5 and accompanying text.

48. Comment, *Hypnosis—Its Role and Current Admissibility in the Criminal Law*, 17 WILLAMETTE L. REV. 665, 668-69 (1980-81).

49. Spector & Foster, *supra* note 41, at 573-74. If the subject upon awakening from hypnosis remembers the desired event, the source of this new memory is normally forgotten. Cooper, *Spontaneous and Suggested Posthypnotic Source Amnesia*, 14 INT'L J. OF CLINICAL AND EXPERIMENTAL HYPNOSIS 180, 185 (1966). A subject upon awakening from hypnosis may remember the contents of his new memory but forget its source, *e.g.*, forget that he acquired it during hypnosis. This phenomenon known as posthypnotic source amnesia may arise spontaneously from the subject's expectations as to the nature and effects of hypnosis, or it may be unknowingly suggested by the hypnotist when instructing the subject that upon awakening from the trance he will clearly recall the event remembered while hypnotized. *Id.*

50. R. RHODES, HYPNOSIS: THEORY, PRACTICE AND APPLICATION 27-36 (1950).

51. *Id.* Hypermnesia is premised on the scientific hypotheses that all events and experiences are stored in the memory wholly and in detail. Spector & Foster, *supra* note 41, at 574. *See supra* notes 37-40 and accompanying text. Sigmund Freud recognized the usefulness of hypnosis to induce hypermnesia: "Hypnotism had been

hypnotized may experience hypermnesia upon suggestion by the hypnotist.[52] With a hypnotized subject's entire memory available, the specific event desired may be brought to the forefront of the person's subconscious memory through age regression, and subsequently restored to the subject's conscious, waking memory by the posthypnotic suggestion. The use of these hypnotic techniques on individuals who later testify at trial concerning events recalled while under hypnosis has met with varying results from the state courts.

II. THE DIFFERING JUDICIAL POSTURES CONCERNING THE ADMISSIBILITY OF HYPNOTICALLY INDUCED TESTIMONY

Courts are unable to agree on the admissibility of testimony from a witness who testifies from a hypnotically induced memory. The first state courts to rule on the issue found such testimony admissible, with the fact of hypnosis going only to the witness' credibility. Courts later confronted with the issue responded differently. Some held the testimony admissible only if rigorous safeguards were followed before, during, and after the use of hypnosis, while still others held the testimony *per se* inadmissible on the basis of the *Frye* test. The federal courts followed the lead of the first group of state courts by holding such testimony admissible, with the fact of hypnosis going only to the witness' credibility. In effect, the state courts have come full circle since first finding hypnotically induced testimony directly admissible in the landmark case of *Harding v. State*.[53]

In *Harding*, the victim of an assault and rape was unable to recall crucial facts surrounding the incident.[54] Following three non-hypnotic interviews with the police, the victim was unable to identify her attacker.[55] The victim was then hypnotized in an effort to refresh her memory.[56] After hypnosis the victim remembered and subsequently identified the defendant as her attacker.[57] At trial the victim testified

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of immense help in the cathartic treatment, by widening the field of the patient's consciousness and putting within his reach knowledge which he did not possess in his waking life." S. FREUD, AUTOBIOGRAPHY 50 (1935).

52. *See* R. RHODES, *supra* note 50, at 28.

53. 5 Md. App. 230, 246 A.2d 302 (1968), *cert denied*, 395 U.S. 949 (1969). The *Harding* case was subsequently overruled in State v. Collins, 296 Md. App. 670, 464 A.2d 1029 (1983).

54. *Id.* at 232-33, 246 A.2d at 304.

55. *Id.* at 233-34, 246 A.2d at 305.

56. *Id.* at 234, 246 A.2d at 305. The victim was hypnotized at police headquarters by Ralph P. Oroplo, Chief Clinical Psychologist at Clifton T. Perkins State Hospital. *Id.*

57. *Id.* at 235, 246 A.2d at 305.

not only to this, but to the fact that her testimony came from her present memory of the attack.[58] In support of the victim's testimony, the individual who had hypnotized her testified that hypnosis produced generally reliable recall and was not suggestive.[59] Holding that hypnosis may affect the credibility of a witness' testimony, but not its admissibility, the *Harding* court admitted the hypnotically induced testimony.[60] In effect, the holding in *Harding* legitimized the use of hypnosis as a means of refreshing a witness' memory.[61]

A distinct advantage of the *Harding* approach is that it allows a jury to hear all testimony which may have a bearing on the case.[62] Moreover, such testimony may prove to be critical,[63] as in *Harding*, where the victim's hypnotically induced testimony was the cornerstone of the prosecution's case.[64] Under this rationale traditional legal devices enable the jury to evaluate the credibility of a witness who has undergone hypnosis.[65] Such devices include cross-examination of the witness,[66] expert testimony concerning the risks and limitations of hyp-

58. *Id.* at 235, 246 A.2d at 305.

59. *Id.* at 239-40, 246 A.2d at 308. The hypnotist, a certified psychologist, was allowed to testify as an expert after the court determined he satisfied the standard to testify as an expert. *Id.* at 236, 246 A.2d at 306.

60. *Id.*

61. The court determined that the evidence was a present recollection from the witness' own statements to that effect. *Id.* Judge Learned Hand in United States v. Rappy, 157 F.2d 964 (2d Cir. 1947), *cert. denied*, 329 U.S. 806 (1947), noted that a song, a scent, a photograph, an allusion known to be false, or anything else may be used to refresh a witness' memory. *Id.* at 967. Courts generally agree that a witness' memory of an event may be refreshed by any means. *See* Beaver, *supra* note 37, at 155.

62. The *Harding* approach is in keeping with the trend of opening the courtroom doors to all relevant evidence for jury assessment. Dilloff, *supra* note 7, at 10.

63. Note, *supra* note 10, at 1221 (findings indicate that a rule of absolute exclusion would deprive the trier of fact of valuable evidence).

64. Apart from the testimony of the victim, the only other evidence offered against the defendant was (1) that sperm had been recovered from the victim's vagina, (2) the defendant was one of two males shown to have known where the victim could have been found when the crime was committed, and (3) that the accused had been observed near the vicinity of the crime on the night in question. *Harding*, at 247, 246 A.2d at 312.

65. Ruffra, *Hypnotically Induced Testimony: Should It Be Admitted?*, 19 CRIM. L. BULL. 293, 298-99 (1983).

66. State v. Wren, 425 So. 2d 756, 759 (La. 1983) (courts have presumed that skillful cross-examination will enable the jury to evaluate the effect of hypnosis on the credibility of the witness); State v. Jorgensen, 8 Or. App. 1, 9, 492 P.2d 312, 315 (1971) (cross-examination will reveal the credibility of a witness previously hypnotized).

nosis,[67] and special jury instructions.[68] By finding hypnotically induced testimony admissible, the *Harding* court demonstrated its belief that the jury would be the best arbiter of the credibility of such testimony.

While the *Harding* approach allows a jury to hear all relevant testimony, the approach is functionally limited due to the unreliability of a hypnotically induced memory.[69] There are three problems inherent in hypnosis which work to reduce a hypnotically induced memory's factual accuracy. The first is the hypnotized subject's high susceptibility to suggestion.[70] A hypnotized person automatically surrenders all independent thought and critical judgment to the hypnotist.[71] Consequently, the hypnotized subject's sense of awareness innately heightens.[72] During this state of heightened awareness, the subject becomes highly susceptible to verbal cues unknowingly present in the hypnotist's speech.[73] As a result of this undetectable verbal prompting,

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67. State v. Armstrong, 110 Wis. 2d 555, 573, 329 N.W.2d 386, 395 (1983) (if the defendant is allowed to introduce testimony of a previously hypnotized witness, both sides should be allowed to introduce expert testimony concerning the effects of hypnosis on memory).

68. The trial judge in *Harding* gave the following precautionary jury instructions:

> You have heard, during this trial, that a portion of the testimony of the prosecuting witness . . . was recalled by her as a result of her being placed under hypnosis. The phenomenon commonly known as hypnosis has been explained to you during this trial. I advise you to weigh this testimony carefully. Do not place any greater weight on this portion of . . . testimony than on any other testimony that you have heard during this trial. Remember, you are the judges of the weight and the believability of all of the evidence in this case.

Harding, at 244, 246 A.2d at 310.

69. *See generally* Beaver, *supra* note 37, at 163-67. For an explanation of why hypnosis produces unreliable memory, see *infra* notes 70-81 and accompanying text.

70. Diamond, *supra* note 9, at 333 (almost by definition, hypnosis is a state of increased suggestibility). The enormous influence on a subject's suggestibility is considered by many to be the most outstanding feature of hypnosis. L. WOLBERG, *supra* note 42, at 81. "In hypnosis, as a consequence of submitting to the authoritative intoning of the hypnotist, the subject tends to revert to a childlike submissiveness and heightened suggestibility." *Id.* at 82. Susceptibility to suggestion becomes so strong for a hypnotized subject, that the subject enters a state of "hypersuggestibility." *Id.* at 81.

71. *See supra* note 70.

72. *Id.*

73. Diamond, *supra* note 9, at 333. Not only is the hypnotized subject susceptible to verbal cues from the hypnotist, the expectations, demeanor, attitude and body language of the hypnotist may all communicate suggestive messages to the subject. *Id.*

the hypnotized subject may assimilate these cues into his own memory as being factual occurrences.[74] For example, a hypnotist asking a hypnotized witness of a robbery who is unable to remember if he saw two, three, or four robbers, may unintentionally and unknowingly cue the witness that there were two robbers by lowering his voice when he says "two." The voice intonation, coupled with the hypnotized witness' lack of critical judgment, may cue the subject into correctly remembering there being two robbers. However, if the hypnotist had lowered his voice on "three" instead of "two," the witness could have easily and incorrectly recalled there being three robbers instead of two.[75] Therefore, a hypnotized subject's heightened sense of awareness and high susceptibility to verbal cues may result in a subject's posthypnotic memory not being his own.

The verbal cues problem is compounded by two other problems inherent in hypnosis: the hypnotized subject's need to answer the hypnotist's questions in a manner perceived by the subject as expected by the hypnotist, and the hypnotized subject's ability to unknowingly fill in memory gaps with inaccurate or fictitious bits of information, a process otherwise known as confabulation. A subject under hypnosis experiences a compelling desire to please the hypnotist.[76] This state of hypercompliance results in the hypnotized subject answering questions in a manner perceived by the subject as expected by the hypnotist.[77] If the hypnotized subject lacks memory of an event on which he is being questioned, or the subject fails to distinguish a verbal cue for a preferred answer, the subject's compulsion for positive compliance will make him unwilling to admit "I don't know."[78] Hence, in-

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74. After awakening from hypnosis, a subject is unable to distinguish his own thoughts, feelings, and memories from those implanted by the hypnotic experience, *i.e.* cues picked up from the hypnotist. *Id.*

75. Brown v. State, 426 So. 2d 76, 82 (Fla. Dist. Ct. App. 1983).

76. Hypercompliance results from the fact that a subject under hypnosis is often eager to succeed in being hypnotized and, more important, to please the hypnotist. Diamond, *supra* note 9, at 337. Note, *Safeguards Against Suggestiveness: A Means for Admissibility of Hypno-Induced Testimony*, 38 WASH. & LEE L.R. 197, 200 (1981) (the subject's increased compliance stems from the feelings of a close relationship promoted by the hypnotist to insure cooperation). The motivation or drive to answer questions and "please" the hypnotist is perhaps more pronounced in the criminal trial or investigative setting because of two factors. First, most people want to help solve crimes. Second, if the hypnotized witness is also the victim, the motivation to answer is even more compelling. Brown v. State, 426 So. 2d 76, 83 (Fla. Dist. Ct. App. 1983).

77. *See* Orne, *supra* note 37, at 326 (a hypnotized subject will often incorporate into his responses his notion of what is expected of him). Due to the hypnotized subject's need to relay answers perceived as pleasing to the hypnotist, one commentator has referred to a hypnotized subject as engaging in a "guessing strategy." *Id.* at 326.

78. *Id.*

stead of admitting that he fails to know an answer to a question, the subject will unknowingly confabulate one.[79] Stated another way, a hypnotized subject's desire to answer questions in a manner perceived as pleasing to the hypnotist is so strong that a subject with lapses in his memory[80] will fill these gaps with details unconsciously confabulated.[81] The high susceptibility to suggestion, the need to respond to questions with what is perceived as the desired answer, and the tendency to confabulate all work to reduce the factual accuracy of hypnotically induced testimony.

Apart from these problems, the fatal flaw in the *Harding* approach is the misconception that the cross-examination of a previously hypnotized witness will effectively contest the witness' testimony.[82] During cross-examination, most witnesses not subjected to pretrial hypnosis will communicate uncertainties concerning their recall of an event. Such uncertainties are manifested by expressions of doubt, hesitancy in responding to questions and general body language indicating a lack of self-confidence.[83] These crucial indicators of demeanor are equal to or greater than the bare substance of a witness' testimony in forming the foundation on which a jury determines the weight given such evidence.[84]

Scientific research indicates that a witness' veracity for his posthypnotic memory may be so strong at trial that ordinary indicia of unreliability brought out during cross-examination are erased.[85] A witness who is uncertain of his recollections prior to hypnosis and confabulates while hypnotized, will become convinced that his posthyp-

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79. Diamond, *supra* note 9, at 335.

80. Orne, *supra* note 37, at 321. A currently accepted view in the scientific community is that no one's conscious or subconscious memory recalls everything in minute detail. *See* Note, *supra* note 10, at 1209. *Cf. supra* notes 37-39 and accompanying text.

81. *See supra* note 7. The memory a hypnotized subject produces may be a mosaic of relevant actual facts, irrelevant actual facts taken from an unrelated prior experience of the subject, fantasized material unconsciously created to fill gaps in the memory and conscious lies formulated in as realistic fashion as possible. Diamond, *supra* note 9, at 335.

82. Ruffra, *supra* note 65, at 312.

83. Diamond, *supra* note 9, at 339.

84. *Id.*

85. Note, *supra* note 76, at 203. Because a previously hypnotized witness has an unshakable belief in the veracity of his memory, the ability of counsel to demonstrate problems with a witness' testimony on cross-examination is substantially limited. *See generally* Diamond, *supra* note 9, at 339-40. The conviction a subject has for the veracity of his posthypnotic memory is so strong that hypnotic subjects have passed lie detector tests while attesting to the truth of hypnotically induced falsehoods. Beaver, *supra* note 37, at 173.

notic recollections are accurate.[86] Consequently, cross-examination loses effectiveness as a means of attacking the credibility and the accuracy of the recall.

Given the inherent unreliability of a hypnotically induced memory and the inability to perform effective cross-examination on a previously hypnotized witness, a number of courts have expressed doubt about a jury's ability to assess the credibility of hypnotically induced testimony. In response, some courts have required that the trial judge first rule on the admissibility of such testimony.[87] The ruling would be based on whether or not there was compliance with specified procedural safeguards designed to remedy the dangers of suggestiveness[88] during hypnosis.[89]

By focusing on the particular hypnotic procedure used, a judge could exclude a witness' testimony if he concluded that it was tainted by the hypnosis and therefore unreliable.[90] Courts adopting such an approach recognize the general problems with hypnosis: heightened suggestibility, the tendency to confabulate, and the inability to effectively cross-examine a previously hypnotized witness.[91] However, those courts also realize that the hypnotically induced testimony may be relevant evidence. Therefore, by adopting a procedural safeguards approach, they take a middle-ground between *per se* admissibility and *per se* inadmissibility.

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86. *See* Diamond, *supra* note 9, at 336 (a subject's belief in his posthypnotic memory, be it factual or the result of hypnotic fabrication, is prone to "freeze" if the memory is congruous with the subject's prior beliefs, desires, or prejudices). This is generally caused by the fact that before and during hypnosis the witness is told that he will remember everything clearly. Commonwealth v. Nazarovitch, 496 Pa. 97, 105, 436 A.2d 170, 174 (1981) (the court noted that prehypnosis uncertainty becomes molded under hypnosis into certitude with the subject totally unaware of any suggestions he acted upon or any confabulation in which he engaged). This solidifying aspect of hypnosis has prompted one commentator to note that hypnosis may not produce accurate memories, but it does produce consistent ones. Orne, *supra* note 37, at 333.

87. Brown v. State, 426 So. 2d 76, 90 (Fla. Dist. Ct. App. 1983) (court must first determine the admissibility of hypnotically induced testimony before presentation to the jury); State v. Beachum, 97 N.M. 682, 690, 643 P.2d 246, 254 (N.M. Ct. App. 1981) (trial judge first determines the reliability and therefore the admissibility of hypnotically induced testimony).

88. *See supra* notes 69-81 and accompanying text.

89. Brown v. State, 426 So. 2d 76, 91-93 (Fla. Dist. Ct. App. 1983); State v. Beachum, 97 N.M. 682, 689-90, 643 P.2d 246, 253-54 (N.M. Ct. App. 1981).

90. State v. Iwakiri, 106 Idaho 618, 625, 682 P.2d 571, 578 (1984) (in a pretrial hearing on the procedures used in the particular hypnosis, the trial judge should determine whether the proposed testimony is sufficiently reliable to merit admission).

91. Brown v. State, 426 So. 2d 76, 82-85 (Fla. Dist. Ct. App. 1983); State v. Weston, 16 Ohio App. 3d 279, 286, 475 N.E.2d 805, 813 (1984).

The New Jersey Supreme Court was the first to establish procedural safeguards for the pretrial hypnosis of a witness. In *State v. Hurd*,[92] the victim of a stabbing was unable to recall the identity of her attacker.[93] While under hypnosis the victim identified her ex-husband as her assailant.[94] Although the victim later expressed doubt about her identification,[95] she nevertheless gave a statement identifying her ex-husband as her assailant.[96]

Before jury selection began, the defense counsel moved up to suppress the victim's proposed in-court identification of the defendant as unreliable.[97] The suppression was granted,[98] and the issue of whether a witness' hypnotically induced testimony is admissible in a criminal trial was appealed to the New Jersey Supreme Court.[99] The supreme court found such testimony admissible in a criminal trial if the trial judge first determines that the use of hypnosis in each particular case is reasonably likely to result in recall comparable in accuracy to normal human memory.[100] To provide a record from which the trial judge could make such a determination, the *Hurd* court held that future

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92. 86 N.J. 525, 432 A.2d 86 (1981). Although *Hurd* was the first major decision expressly requiring compliance with court-established safeguards, the approach was earlier recognized in United States v. Adams, 581 F.2d 193 (9th Cir. 1978). The *Adams* court applied the credibility approach to the disputed hypnotically induced testimony, but acknowledged the dangerous potential for abuse accompanying such evidence. *Id.* at 198. To protect against the possibility of undue suggestiveness, the court, in dicta, proposed several safeguards which could be followed during the hypnotic procedure. *Id.* at 199 n.12.

93. Whether the victim was unable or just unwilling to describe her assailant is not known. *Hurd*, at 530, 432 A.2d at 88.

94. *Id.* at 531, 432 A.2d at 89. The hypnotized victim identified the defendant as her attacker only after the investigating officer specifically asked her if it was "Paul" (the defendant). *Id.* Dr. Herbert Spiegel, a New York psychiatrist, performed the hypnosis. *Id.* at 530, 432 A.2d at 88.

95. *Id.* at 531, 432 A.2d at 89.

96. *Id.* at 532, 432 A.2d at 89. The investigating officers encouraged the victim to accept the identification she had made under hypnosis. They advised the victim that unless she made the identification the defendant would remain free to attack her again, and possibly leave her children without a mother. They also told her, over dinner, that if she did not accept the identification, her current husband would remain a suspect in the case. *Id.* at 531, 432 A.2d at 89.

97. *Id.* at 532, 432 A.2d at 89.

98. *Id.* After hearing expert testimony on the reliability of hypnosis as a means of refreshing recollection and the effect of hypnosis on the victim, the trial court suppressed the proposed identification as unreliable. Hurd v. State, 173 N.J. Super. 333, 414 A.2d 291 (1980).

99. *Hurd*, at 529, 432 A.2d at 88. The issue was one of first impression for the court. *Id.*

100. *Id.* at 538, 432 A.2d at 92. This analogy poses significant problems. *See infra* notes 110-21 and accompanying text.

proponents of hypnotically induced testimony must demonstrate compliance with the following six procedural safeguards:[101] (1) a psychiatrist or psychologist experienced in the use of hypnosis must conduct the session;[102] (2) the professional conducting the session should be independent of and not regularly employed by the prosecutor, investigator, or the defense;[103] (3) any information given the hypnotist by law enforcement personnel or the defense prior to the hypnotic session must be recorded, either in writing or another suitable form;[104] (4) before inducing hypnosis, the hypnotist should obtain from the subject a detailed description of the facts as the subject remembers them;[105] (5) all contacts between the hypnotist and subject must be recorded;[106] and (6) only the hypnotist and subject should be present during any phase of the hypnotic session.[107] Further, the party seeking to admit the hypnotically induced testimony must establish by clear and convincing evidence that all procedures were followed.[108] The *Hurd* court held that the State failed to demonstrate the reliability of the hypnotic procedures employed in refreshing the victim's memory.

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101. *Id.* at 545-46, 432 A.2d at 96-97. The procedural safeguards adopted were based on those suggested by Dr. Martin Orne at the trial court suppression hearing. *Id.* at 545, 432 A.2d at 96. The fatal flaw with this approach was later acknowledged by Dr. Orne. *See infra* note 122.

102. *Hurd*, at 545, 432 A.2d at 96. The court recognized that other people are trained to administer hypnosis, but concluded that a professional should administer it if the testimony was to be used in a criminal trial. Moreover, the professional should ideally qualify as an expert in order to aid the court in evaluating the procedures followed. Further, requiring a professional would enable the court to obtain information regarding the pathological reason for the memory loss and the hypnotizability of the witness. The court also reasoned that an expert would conduct the hypnotic interrogation in a manner most conducive to yielding accurate recall. *Id.*

103. *Id.* This condition safeguards against any bias on the part of the hypnotist which may translate into unintentional cues, leading questions, or any other suggestive conduct. *Id.*

104. *Id.* at 546, 432 A.2d at 96. This requirement aids the court in determining the extent of information the hypnotist could have communicated to the witness either directly or through suggestion. *Id.*

105. *Id.* The court cautioned the hypnotist against influencing the subject's description of facts. *Id.*

106. *Id.* Such establishes a record of the pre-induction interview, the hypnotic session, and the posthypnotic period, which subsequently enables a court to determine what suggestions or information were received by the witness and what recall hypnosis first elicited. The court encouraged the use of a video recorder, but did not make it mandatory. *Id.* at 546, 432 A.2d at 97.

107. *Id.* The court recognized that it may be easier for a person familiar with the investigation to conduct at least part of the questioning, but the risk of inadvertent suggestions to the subject outweighed any benefits. *Id.*

108. *Id.*

Therefore, the lower court's suppression of the proposed in-court identification was upheld.[109]

Six courts have subsequently adopted the procedural safeguards approach.[110] Although this approach avoids the difficulty in having jurors initially assess the accuracy of the hypnotically induced testimony,[111] it nonetheless has a number of flaws. One such flaw lies in the comparison[112] of hypnotically induced memory to the often inaccurate normal eyewitness memory.[113] The *Hurd* court and its progeny realize that hypnosis may not induce a factually accurate memory, yet they reason that if hypnosis can induce memory as accurate as normal eyewitness memory, testimony from the hypnotically induced memory should be equally admissible.[114] This reasoning has been criticized for its failure to recognize that hypnotically induced memory is unlike ordinary eyewitness memory.[115]

By its very nature hypnotically induced memory is unlike ordinary eyewitness memory. Most obvious is the fact that hypnosis is employed only when a person is unable to recall facts which could not be remembered through ordinary recall.[116] Further, the hypnotic subject is much more vulnerable to suggestion than the normal person, and the resulting hypnotic distortions persist with greater force into the posthypnotic period.[117] Although the law does not generally ex-

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109. *Id.* at 548, 432 A.2d at 98. The court determined that the procedures outlined were not even close to being followed. Further, the court disapproved of the detective in the case questioning the subject during the hypnotic session. *Id.* at 548-49, 432 A.2d at 98. *See supra* note 94.

110. *See supra* note 13. Oregon has even codified the procedural safeguards approach. OR. REV. STAT. § 136.675 (1983).

111. Note, *supra* note 10, at 1219.

112. The *Hurd* court held that testimony enhanced through hypnosis is admissible in a criminal trial if the trial court finds that the use of hypnosis was reasonably likely to produce recall comparable in accuracy to normal human memory. *Hurd* at 543, 432 A.2d at 95.

113. Research demonstrates that conventional eyewitness testimony is fraught with inaccuracy and distortion. *See generally* Note, *Did Your Eyes Deceive You? Expert Psychological Testimony on the Unreliability of Eyewitness Identification*, 29 STAN L. REV. 969 (1977).

114. *See* State v. Hurd, 86 N.J. 525, 543, 432 A.2d 86, 95 (1981); State v. Weston, 16 Ohio App. 3d 279, 286-87, 475 N.E.2d 805, 813 (1984).

115. State v. Palmer, 210 Neb. 206, 217, 313 N.W.2d 648, 654 (1981) (to compare the "recollections" of a witness whose testimony has been hypnotically induced to the "recollections" of an ordinary witness, and then determine whether the use of hypnosis was a reliable means of restoring memory comparable in accuracy to normal recall, is virtually impossible).

116. State v. Martin, 101 Wash. 2d 713, 727, 684 P.2d 651, 658-59 (1984).

117. Diamond, *supra* note 9, at 342.

clude normal eyewitness testimony for being somewhat distorted or inaccurate,[118] such does not justify the admission of testimony which is known to have been subject to distortion,[119] such as hypnotically induced testimony.[120] Therefore, analogizing hypnotically induced testimony to ordinary eyewitness testimony only sidesteps the problem.[121]

A further flaw of the safeguards approach is its inability to prevent a hypnotized subject from confusing hypnotic confabulation with factual memory.[122] Experts agree that neither the person hypnotized, the hypnotist, nor hypnosis experts are capable of distinguishing a hypnotized subject's factual recall from hypnotically confabulated recall.[123] Therefore, even if procedural safeguards are followed, requiring a trial judge to initially determine the factual reliability of hypnotically induced testimony is an unrealistic expectation.[124]

Under both the credibility approach and the safeguards approach the possibility exists for hypnotically induced testimony being admitted at trial. A third position taken by courts is the *per se* exclusion of all hypnotically induced testimony. Courts adopting the rule of *per se* exclusion possess a concern for the present state of the art of hypnosis. Accordingly, they rely on the common law *Frye* standard of general scientific acceptance as the standard against which hypnosis must be measured in determining the admissibility of its product: hypnotically induced testimony.[125]

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118. *See generally* Note, *supra* note 113. Quite often people claim to see things which did not happen, and fail to see things which did. Diamond, *supra* note 9, at 341-42.

119. Diamond, *supra* note 9, at 342 (this legal attitude is analogous to the claim that we should not even attempt to eliminate the disease of smallpox because chickenpox is so common and cannot be controlled) *Id.*

120. *See supra* notes 69-84 and accompanying text.

121. State v. Martin, 101 Wash. 2d 713, 727-28, 684 P.2d 651, 658 (1984).

122. Dr. Orne, the scientist who initially proposed the use of procedural safeguards, *supra* note 101, subsequently acknowledged that fact that the safeguards cannot prevent a subject from confusing that which he has confabulated under hypnosis with actual previous memory. Ruffra, *supra* note 65, at 315 (quoting from Orne, *Affidavit for Amicus Curiae Brief in Opposition to Petition for Rehearing Before California Supreme Court*, at 15-16).

123. Diamond, *supra* note 9, at 337 (no one, regardless of experience can verify the accuracy of hypnotically induced memory). If the hypnotically induced recall is illogical, incoherent, and incompatible with known facts, one can, with a high degree of certainty, consider it fantasy. *Id.* It has been suggested that if a subject's hypnotically induced testimony is corroborated, its factual accuracy may be ascertained. United States v. Narciso, 446 F. Supp. 252, 282 n.11 (E.D. Mich. 1977) (if a subject under hypnosis states a fact which is later found to be true, the probability that the recall is reliable is increased).

124. *See generally* Diamond, *supra* note 9, at 336-38.

125. People v. Shirley, 31 Cal. 3d 18, 54, 641 P.2d 775, 796, 181 Cal. Rptr. 243, 265 (1982) (hypnosis does not satisfy the *Frye* test of admissibility); State v. Martin,

The *Frye* standard of admissibility for scientific evidence[126] originated in *Frye v. United States*.[127] The issue before the *Frye* court concerned the standard for determining the admissibility of evidence derived from a novel scientific technique.[128] *Frye* was a murder prosecution case in which the trial court rejected the defendant's attempt to introduce an expert's testimony on the results of a "systolic blood pressure test," a predecessor of the polygraph.[129] The *Frye* court held that expert testimony based on the results of a novel scientific technique or procedure is admissible when that technique has gained a general acceptance in the appropriate scientific community for producing reliable results.[130] In effect, the *Frye* court assigned the task of determining the reliability of an evolving scientific technique to members of the scientific community from which the method emerges rather than to the trial judge.[131] In applying this new standard, the *Frye* court held that an expert witness could not testify as to the results of the polygraph test, because the test was not generally accepted in the scientific community as producing reliable results.[132] Subsequently, the *Frye* standard became the dominant standard for determining the admissibility of expert testimony based upon a scientific technique.[133]

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101 Wash. 2d 713, 724, 684 P.2d 651, 657 (1984) (hypnosis in its current state fails to satisfy the *Frye* standard).

126. Traditionally an expert witness may testify if his testimony is relevant and helpful to the trier of facts. However, when an expert witness is to testify about scientific tests or findings, many courts apply a special rule of admissibility. *See generally* Boyce, *Judicial Recognition of Scientific Evidence in Criminal Cases*, 8 UTAH L. REV. 313 (1962-64); Strong, *Questions Affecting the Admissibility of Scientific Evidence*, 1970 U. ILL. L.F. 1.

127. 293 F. 1013 (D.C. Cir. 1923). The *Frye* case was one of first impression. McCormick, *Deception-Tests and the Law of Evidence*, 15 CALIF. L. REV. 484, 499 (1926-27).

128. *Frye*, 293 F. at 1013.

129. *Id.*

130. *Id.* at 1014.

131. This conservative posture has been viewed as the primary advantage of the *Frye* standard. *See* People v. Kelly, 17 Cal. 3d 24, 31, 549 P.2d 1240, 1245-46, 129 Cal. Rptr. 144, 149 (1976) *(Frye* deliberately interposes a substantial obstacle to the unrestricted admission of evidence based on scientific principles, this is logically sound). One court analogized the initial scientific acceptance as a technical jury passing upon the status of an evolving scientific procedure. People v. Barbara, 400 Mich. 352, 405, 255 N.W.2d 171, 194 (1977).

132. *Frye*, 293 F. at 1014.

133. Reed v. State, 283 Md. 374, 382, 391 A.2d 364, 368 (1978) (the *Frye* standard of general acceptance is the standard in almost all courts considering the question of the admissibility of scientific evidence). *See* State ex. rel. Collins v. Superior Court, 132 Ariz. 180, 196, 644 P.2d 1266, 1282 (1982) *(Frye* is the leading standard in determining the admissibility of scientific evidence).

In 1980, the *Frye* standard was judicially adopted in determining the admissibility of hypnotically induced testimony. In *State v. Mack*,[134] the victim of a criminal sexual assault was hypnotized in an effort to restore her memory of the attack.[135] While under hypnosis the victim recalled and related to the hypnotist the attack, the identity of her attacker, and the manner in which she had been attacked.[136] The hypnotist gave the subject a posthypnotic suggestion that upon awakening from the trance she would remember everything she had told him.[137] Upon awakening from the trance the victim remembered who had attacked her and how.[138] She subsequently testified to this in court.

The defense counsel in *Mack* asserted that the scientific technique of hypnosis was not generally accepted by the scientific community as producing reliable recall, and it therefore, failed the *Frye* test. Consequently, the victim's hypnotically induced testimony should be ruled inadmissible as evidence.[139] The court agreed that hypnosis must first satisfy the *Frye* test before admitting hypnotically induced testimony.[140] In determining the accuracy of the defense's assertion, the *Mack* court considered scientific literature on hypnosis as well as testimony by five experts in the field.[141] The court then concluded that hypnosis was not generally accepted in the scientific com-

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134. 292 N.W.2d 764 (Minn. 1980). The question certified to the Minnesota Supreme Court concerned the use of hypnotically induced testimony in a criminal trial. *Id.* at 765.

135. *Id.* at 767. The victim entered the hospital bleeding from a deep cut in her vaginal wall. The victim told one intern the cut had been sustained while having sexual intercourse with the defendant; she then told another intern that the cut was the result of being in a motorcycle accident with the defendant. The doctors informed the victim they believed neither story. Subsequently, the victim telephoned the police and reported being assaulted. However, she also told police she could not remember the incident. *Id.* at 766.

136. *Id.* at 767. Under hypnosis the victim recalled the defendant sticking a knife in her vagina numerous times. *Id.*

137. *Id.*

138. *Id.*

139. *Id.* at 767.

140. *Id.* at 768. The court recognized that hypnotically-adduced memory is not strictly analogous to the results of mechanical testing; however, the court felt that *Frye* is equally applicable where the best expert testimony indicates that no expert can determine whether hypnotically induced memory is factually accurate or the result of hypnotic confabulation. *Id.*

141. *Id.* at 765-66. There are three types of proof which can be used by a court in determining whether there is a general scientific acceptance of a scientific procedure: (1) expert testimony, (2) scientific and legal literature, and (3) judicial opinions. Giannelli, *supra* note 19, at 1215. For a discussion of the problems present in each type of proof, *see id.* at 1215-19.

munity as a means of producing reliable recall,[142] and therefore, failed to satisfy the *Frye* test of admissibility. The court explained that the scientific community's failure to generally accept hypnosis as a means of producing reliable recall was based on the problems of a hypnotized subject's heightened suggestibility, and a subject's tendency to confabulate.[143] The court was also concerned with the fact that cross-examination of a previously hypnotized witness is neutralized by pretrial hypnosis.[144] These findings led the *Mack* court to conclude that the fairest practice was to keep all hypnotically induced testimony out of judicial proceedings.[145]

The *Mack* court approach has not been above reproach. The fact that a state must choose between using a particular witness at trial or using hypnosis on that witness as a investigative tool has been the target of criticism.[146] If a witness is hypnotized in an effort to refresh his memory of the facts surrounding a crime, these facts may prove vital to solving the crime.[147] However, under the inadmissibility approach, the facts recalled under hypnosis and all memory naturally regained after hypnosis are inadmissible as evidence. Requiring a state to choose between using a person as an investigative tool or as a witness at trial exacts too high a price.[148] If hypnosis is not employed the crime may go unsolved; likewise, if hypnosis is employed and inadmissible hypnotically induced testimony constitutes the bulwark of the prosecutor's case, insufficient evidence may preclude the trying of the crime.

The major criticism levied at the *Mack* court approach is the contention that the *Frye* standard is inapplicable in determining the admissibility of hypnotically induced testimony.[149] The issue before the *Frye* court concerned the admissibility of expert opinion on scientifically obtained data.[150] Specifically, the *Frye* court was to determine whether an expert could testify as to the results of a polygraph test administered to the defendant.[151] The expert's testimony was to go

142. *Mack*, 292 N.W.2d at 768.

143. *Id.*

144. *Id.* at 768-69.

145. *Id.* at 772.

146. People v. Gibson, 117 Ill. App. 3d 270, 276, 452 N.E.2d 1368, 1373 (1983) (requiring a state to choose between using hypnosis on a witness to aid in the resolution of a difficult case and using that witness at trial exacts too high a price).

147. *See supra* note 6.

148. People v. Gibson, 117 Ill. App. 3d 270, 276, 452 N.E.2d 1368, 1373 (1983).

149. *See supra* note 17.

150. Frye v. United States, 293 F. 1013, 1013 (D.C. Cir. 1923).

151. *Id.*

to the truth or falsity of what the defendant had stated while taking a lie detector test.[152] In contrast, a witness testifying from a hypnotically induced memory testifies from his present memory of what he previously observed, and not to the results of a scientific procedure.[153] The *Frye* standard is concerned with the admission of expert opinion deduced from the results of a scientific technique; it is not concerned with the admission of eyewitness testimony. Therefore, *Frye* is inapplicable in determining the admissibility of hypnotically induced testimony.[154]

A Federal court has yet to adopt the *Frye* standard for determining the admissibility of hypnotically induced testimony. Since *United States v. Narciso*,[156] federal courts have almost uniformly found hypnotically induced testimony admissible, with the fact of hypnosis going to the witness' credibility.

In *Narciso*, two nurses were convicted of certain offenses arising from induced cardiopulmonary arrests of patients at a veterans hospital.[156] A patient who had experienced such an arrest was unable to recall who had been at his bedside prior to the incident.[157] Twice the patient was hypnotized in an effort to refresh his memory.[158] Twenty-three days after the second hypnosis session the patient announced that he remembered who had been at his bed the night of his heart attack.[159] The patient subsequently identified one of the defendants from photographs.[160] After hearing expert testimony on hypnosis and viewing videotapes of the hypnotic sessions,[161] the court concluded that the testimony of the previously hypnotized patient was admissible, with its credibility to be determined by the jury.[162]

Having adopted the credibility approach towards hypnotically induced testimony, it is unlikely that the federal courts will relinquish it in favor of the *Frye* approach. There are two reasons for asserting such. First, an issue currently in dispute is whether the Federal Rules of

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152. *Id.*
153. *See supra* text accompanying notes 1-6.
154. *See supra* note 17.
155. 466 F. Supp 252 (E.D. Mich. 1977).
156. *Id.* at 262-63.
157. *Id.* at 277.
158. *Id.* at 277-78. While under hypnosis he vaguely described two individuals he believed were at his bedside, but he made no identifications. *Id.* at 277-78.
159. *Id.* at 278.
160. *Id.*
161. *Id.* at 280-81.
162. *Id.* at 284. The court stated that the witness' testimony was not so implausible that it could not be true; therefore, the jury is to determine the credibility of the witness and the weight of the testimony. *Id.*

Evidence even have a *Frye* standard to apply.[163] The Federal Rules do not explicitly distinguish between scientific expert testimony and other forms of expert testimony.[164] The Federal Rules permit experts to rely on facts or data not otherwise admissible into evidence as long as they are "reasonably relied upon by experts in the particular field."[165] "Reasonable reliance" is not synonymous with the *Frye* test notion of "general acceptance."[166] Therefore, even though not expressly revoked by the Federal Rules of Evidence, the common law *Frye* standard may no longer be a viable option for the federal courts. Second, even if the *Frye* standard still exists, one federal court has indicated that *Frye* is only appropriate for determining the admissibility of expert testimony, and not the testimony of one who testifies from a hypnotically induced memory.[167] In short, because a number of federal and state courts alike will not make a *per se* exclusion of hypnotically induced testimony on the basis of the *Frye* test, another rationale which justifies a *per se* exclusion is necessary.

An alternative rationale for the exclusion of hypnotically induced testimony is the rationale underlying the exclusion of hearsay. Hearsay fails to satisfy three testimonial requirements and therefore, is generally excluded from trial as unreliable. Hypnotically induced testimony similarly fails to satisfy these same requirements and should likewise be deemed unreliable and inadmissible in all judicial proceedings. To understand this, a closer look at the hearsay exclusion rationale is imperative.

III. THE PROBLEMS UNDERLYING A WITNESS TESTIFYING FROM A HYPNOTICALLY INDUCED MEMORY ARE THE SAME PROBLEMS UNDERLYING HEARSAY TESTIMONY

"Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove

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163. *See supra* note 19 and accompanying text.

164. Federal Rule of Evidence 703 reads:

Bases of Opinion Testimony by Expert:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

FED. R. EVID. 703.

165. *Id.*

166. C. MCCORMICK, *supra* note 16, § 203 at 607.

167. United States v. Valdez, 722 F.2d 1196, 1200-01 (5th Cir. 1984) (*Frye* test inapplicable in determining the admissibility of hypnotically induced testimony).

the truth of the matter asserted."[168] This definition of hearsay is in effect in all federal courts, and is generally consistent with the views expressed in common law jurisdictions.[169] The hearsay rule is quite simple: hearsay is generally not admissible at trial.[170] Such is due to its unreliability.[171] This lack of reliability is the result of one or more of the three testimonial requirements not being satisfied. A witness should testify under oath or affirmation, in the presence of the trier of fact, and be subject to contemporaneous cross-examination.[172] These requirements encourage witnesses to put forth their best efforts when testifying and to expose any inaccuracies or lies.[173] Testimony which does not satisfy these requirements may be objected to as hearsay.[174] Although

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168. FED. R. EVID. 801(c). *See also* C. MCCORMICK, *supra* note 16, § 246 at 729. *See generally*, Weinstein, *Probative Forces of Hearsay*, 46 IOWA L. REV. 331, 331-34 (1960-61). John Wigmore, noted evidence scholar, classifies the hearsay rule as an analytic rule. "[A] rule which accomplishes the desired aim by subjecting the offered evidence to a scrutiny or analysis calculated to discover and expose in detail its possible weaknesses, and thus to enable the tribunal to estimate it at no more than its actual value." 5 J. WIGMORE, EVIDENCE § 1360 (Chadbourn rev. 1974).

169. For a review of the state provisions, see 4 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 801(a)-(c)[02]. No state provision varies significantly from the federal version.

170. FED. R. EVID. 802 provides: "Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by act of Congress." The Federal Rules of Evidence lists twenty-four hearsay exceptions when availability of declarant as a witness is immaterial. *See* FED. R. EVID. 803. The Federal Rules of Evidence also lists five hearsay exceptions when declarant is unavailable as a witness. *See* FED. R. EVID. 804. *See* Nokes, *The English Jury and the Law of Evidence*, 31 TUL. L. REV. 153, 167 (1956) (although nearly one-third of evidence law is concerned with hearsay problems, most commentators discuss the exceptions, not the rule).

171. *See* Chambers v. Mississippi, 410 U.S. 284, 298 (1973) (the Supreme Court noted that the hearsay rule "is based on experience and grounded in the notion that untrustworthy evidence should not be presented to the triers of fact"); Donnelly v. United States, 228 U.S. 243, 273 (1913) (the Supreme Court commented that hearsay evidence is an unsafe reliance in a court of justice).

172. D. BINDER, THE HEARSAY HANDBOOK 5 (1975). *See generally* J. WEINSTEIN & M. BERGER, *supra* note 169, at ¶ 800[01], C. MCCORMICK, *supra* note 16, at § 245.

173. C. MCCORMICK, *supra* note 16, § 245. (the three testimonial requirements evolved through the Anglo-American tradition). To assure compliance with the testimonial requirements, the rule against hearsay was developed. *Id. See generally* Strahorn, *A Reconsideration of the Hearsay Rule and Admissions*, 85 U. PA. L. REV. 484 (1936-37).

174. C. MCCORMICK, *supra* note 16, § 245. The hearsay objection, like all other exclusionary objections, must be made at the time the objectionable evidence is offered or else the right to object is waived. *Id.* at § 52. *See* Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 HARV. L. REV. 177, 183 (1948-49) ("Today the notion that the court and jury cannot be permitted to rely upon the possible

a witness testifying from a hypnotically induced memory does so under oath or affirmation, in the presence of the trier of fact, and is subject to contemporaneous cross-examination, the rationale and goal underlying each requirement remains unsatisfied.

A. The Oath or Affirmation

Requiring a witness to testify under oath or affirmation [175] is to awaken the conscience of the witness and impress upon him his duty to testify truthfully.[176] This purpose is accomplished by summoning possible religious and legal retribution against the witness who testifies falsely.[177] Religiously the oath calls the witness' attention to God in hopes of instilling in him a fear of Divine punishment for testifying falsely.[178] In this manner the oath operates by setting against the witness' motive to testify falsely the fear of Divine punishment.[179] Legally the oath attempts to impress upon the witness the need to

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credibility of the witness seems to have gone by the board, for unless the adversary objects, the court may admit inadmissible hearsay and the trier of fact may give it such value as is within the bounds of reasons.").

175. Wigmore classifies the oath a s prophylactic rule, for it operates by applying to the evidence prior to its admission. 6 J. WIGMORE, EVIDENCE § 1813 (Chadbourn rev. 1976).

176. *See generally* C. MCCORMICK, *supra* note 16, § 245.

177. *Id.*

178. *Id.* The supposed mental process is best exemplified in the exhortation by the judge in Lady Lisle's Trial, 11 How. St. Tr. 298, 325 (1685) (quoted in J. WIGMORE, *supra* note 175, § 1816):

> Now mark what I say to you, friend . . . . Thou hast a precious immortal soul, and there is nothing in the world equal to it in value . . . . Consider that the Great God of Heaven and Earth, before whose tribunal thou and we and all persons are to stand at the last day, will call thee to an account for the rescinding his truth, and take vengeance of thee for every falsehood thou tellest. I charge thee, therefore, as thou will answer it to the Great God, the judge of all the earth, that thou do not dare to waver one tittle from the truth, upon any account or pretence whatsoever; . . . for that God of Heaven may justly strike thee into eternal flames and make thee drop into the bottomless lake of fire and brimstone, if thou offer to deviate the least from the truth and nothing but the truth.

In the ancient manner, after the oath was administered, testimony given, and the witness left standing unharmed, the court knew the divine judgment had pronounced the witness to be a speaker of truth. J. WIGMORE, *supra* note 175, § 1816.

179. *Id.* at § 1813. Today the theological underpinnings of the oath requirement have been diminished through statutory provisions for affirmation and by holding that religious belief is a non-essential prerequisite to be bound by an oath, *see* Flores v. State, 443 P.2d 73, 77 (Alaska 1968). As Professor Morgan writes: "The deliberate expression by a witness of his purpose to tell the truth by a method which is binding upon his conscience probably still operates as some stimulus to tell the truth; but

testify truthfully or be subjected to criminal punishment for perjury,[180] of which an oath or affirmation is a prerequisite.[181] The perjury penalty substitutes the fear of temporal punishment for that of Divine punishment. Both the religious and legal penalties associated with the oath operate to subjectively influence the witness against testifying falsely.

However, requiring a witness to take an oath or affirmation prior to testifying from a hypnotically induced memory fails to subjectively influence a witness against testifying falsely. As demonstrated earlier, a witness after undergoing hypnosis is unable to distinguish memory of actual facts from the detail filled in through confabulation.[182] Therefore, a previously hypnotized witness may objectively be viewed as violating the sanctity of the oath and committing perjury when testifying to possible hypnotically induced falsehoods; yet subjectively the witness is not violating the oath nor committing perjury, because he believes that such hypnotically induced falsehood is factual and that he is not testifying falsely.[183] In effect, pretrial hypnosis circumvents both the function and purpose for requiring a witness to testify under oath. Therefore, the purpose for requiring a witness to testify under oath is not satisfied when a witness testifies from a hypnotically induced memory. Likewise, the dual purpose underlying the testimonial requirement of personal presence remains unsatisfied when a witness testifies from a hypnotically induced memory.

B. Personal Presence

One reason for requiring a witness' personal presence when testifying is to impress upon him the solemnity of the occasion.[184] By requiring a witness to testify in a courtroom and in the immediate presence of the person against whom he is testifying, the witness will be more inclined to tell the truth.[185] Although this requirement may induce a previously hypnotized witness to testify truthfully, there is

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fear of punishment by supernatural forces for violation of an oath is generally regarded as virtually nonexistent. Morgan, *supra* note 174, at 186.

180. "Perjury is a false oath in a judicial proceeding in regard to a material matter. A false oath is a wilfull and corrupt sworn statement made without sincere belief in its truthfulness." R. PERKINS, & R. BOYCE, CRIMINAL LAW 511 (3d ed. 1982).

181. *Id.* at 512-13.

182. *See supra* notes 122-24 and accompanying text.

183. *See supra* notes 85-86 and accompanying text.

184. C. MCCORMICK, *supra* note 16, § 245.

185. *Id. See* D. BINDER, *supra* note 172, at 5 ("[F]alsehood may be discouraged by the judicial atmosphere of the courtroom, or by the fact that the witness must testify in the presence of the party against whom his testimony offends."); J. WEINSTEIN, *supra* note 169, at ¶ 800[01] ("The requirement of personal presence also un-

one caveat: a previously hypnotized witness is unable to distinguish his factually restored memory from hypnotically fabricated memory.[186] As previously demonstrated, a person who has had his memory hypnotically induced believes that all of his memory is factual.[187] Even though the solemnity of the occasion may prompt a previously hypnotized witness to subjectively wish to testify truthfully, such will not deter him from testifying to a possible falsehood he subjectively believes to be true. Therefore, the first of two reasons for requiring a witness to be personally present when testifying is neutralized by a witness who undergoes pretrial hypnosis.

To enable the trier of fact to determine the witness' credibility is the second reason for requiring a witness' personal presence when testifying.[188] As discussed previously, a witness' credibility is determined by giving the trier of fact the opportunity to observe and consider the demeanor of the witness.[189] Most witnesses aware of deficiencies or fabrications in their recall of an event will subtly communicate this awareness while testifying, by showing signs of doubt, hesitancy, voice intonations, and unconscious gestures.[190] Pretrial hypnosis eliminates this deficiency awareness. Hypnosis strengthens a witness' confidence in the veracity of his recall, regardless of whether the recall is factual or hypnotically fabricated.[191] Doubts and uncertainties concerning the memory of the hypnotically induced event are resolved as factually accurate.[192] Therefore, observing a witness for signs of uncertainty concerning the factual accuracy of his hypnotically induced testimony would be to no avail, since the witness subjectively believes his entire hypnotically induced memory is factual. Such

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doubtedly makes it more difficult to lie against someone, particularly if that person is an accused and present at trial.").

186. *See supra* notes 122-24 and accompanying text.

187. *See supra* notes 85-86 and accompanying text.

188. C. MCCORMICK, *supra* note 16, § 245. *See also* Mattox v. United States, 156 U.S. 237, 242-43 (1895) (a witness should be required "to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief."), *quoted with approval*, Ohio v. Roberts, 448 U.S. 56 (1980).

189. *See supra* notes 83-84 and accompanying text. *See generally* Sahm, *Demeanor Evidence: Elusive and Intangible Imponderables*, 47 A.B.A.J. 580 (1961).

190. Diamond, *supra* note 9, at 339. *See* D. BINDER, *supra* note 172, at 5 (a nervous manner, a shifting of the eyes, a friendly or hostile attitude, all play a role in determining a witness' credibility).

191. Diamond, *supra* note 9, at 340 (the hypnosis may not add any substantive facts to the witness' memory which would even justify the increased confidence). *See supra* notes 85-86 and accompanying text.

192. Diamond, *supra* note 9, at 339-40; *see supra* notes 85-86 and accompanying text.

completely undermines the fact finder's ability to judge the witness' credibility. Therefore, not one but both reasons for requiring a witness to testify in the presence of the trier of fact remain unsatisfied. Similarly, the purpose behind the third testimonial requirement of contemporaneous cross-examination remains unsatisfied when a witness testifies from a posthypnotic memory.

C. Cross-Examination

To expose inaccuracies in a witness' testimony is the purpose underlying the testimonial requirement of contemporaneous cross-examination. A fact finder relying on a witness' testimony need make four assumptions: (1) that the witness accurately perceived the matter he is describing, (2) that the witness retained an accurate memory of this perception, (3) that the fact finder's understanding of the witness' spoken words is the understanding the witness intends to convey, and (4) that the witness is sincere in the belief of his story.[193] The probing of these four factors on cross-examination reduces the risk that the fact finder will reach an invalid conclusion from the witness' testimony.[194] However, due to the components of the hypnotically induced memory, this is not always true.

The hypnotically induced memory is generally a collection of appropriate actual facts, irrelevant actual facts, fantasy, and any details necessary to make the memory logically and factually cohesive.[195] A witness' original perception and memory of an event becomes just a part of the hypnotically induced memory. Which part it becomes is not known.[196] Therefore, because hypnosis fills in memory lapses with indistinguishable fantasized materials,[197] faults in a witness' perception and memory of an event cannot be exposed through cross-examination. Consequently, probing the witness' narrative skills can accomplish two results: it can ensure that the fact finder correctly understands the actual fact which the witness relates or that the fact

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193. Finman, *Implied Assertions as Hearsay: Some Criticisms of the Uniform Rules of Evidence*, 14 STAN. L. REV. 682, 684-85 (1961-62). *See* C. MCCORMICK, *supra* note 16, § 245 (McCormick combines narration and sincerity, resulting in three factors rather than four). *See also* J. WEINSTEIN, *supra* note 169, at ¶ 800[01].

194. C. MCCORMICK, *supra* note 16, at § 19 (the purpose of cross-examination is to ensure that the fact finder will not be misled into mistaking the false for the true). *See also* J. WIGMORE, *supra* note 168, at § 1367. (Wigmore characterizes cross-examination as "beyond any doubt the greatest legal engine ever invented for the discovery of the truth.").

195. *See supra* note 81.

196. *See supra* notes 122-24 and accompanying text.

197. *See supra* note 81.

finder correctly understands the hypnotically fantasized memory which the witness relates as fact. Moreover, probing the previously hypnotized witness' sincerity will expose no shortcomings since such a witness is subjectively unable to distinguish hypnotically induced facts from hypnotic fantasy, resulting in the belief that all posthypnotic memory is factually accurate.[198] Hence, a witness' confidence in the veracity of his posthypnotic memory increases and may be unshakeable during cross-examination.[199] Consequently, a previously hypnotized witness may be as sincere and confident in testifying to hypnotically induced falsehoods as he is in testifying to the factual truth. Therefore, due to the inability to expose error or inconsistency in a previously hypnotized witness' perception, memory, or sincerity through cross-examination, cross-examination is for all practical purposes rendered ineffective and its purpose remains unsatisfied when a witness testifies from a hypnotically induced memory.

As demonstrated, the testimonial requirements of an oath or affirmation, personal presence, and contemporaneous cross-examination remain unsatisfied when a witness testifies from a hypnotically induced memory. Hearsay is generally excluded from evidence as unreliable because it fails to satisfy any one of these same testimonial requirements. Because a witness testifying from a hypnotically induced memory fails to satisfy all three testimonial requirements, hypnotically induced testimony should likewise be excluded from evidence as unreliable.

However, unlike the hearsay rule which is riddled with exceptions,[200] hypnotically induced testimony should be excluded on a *per se* basis. Exceptions to hearsay arise when there is a necessity for the hearsay and the situation in which the hearsay was uttered makes it trustworthy.[201] Hypnotically induced testimony may be necessary, but it can never be trustworthy due to the three previously discussed factors inherent in hypnosis which work to negate its factual accuracy.[202] Therefore, hypnotically induced testimony should be *per se* excluded from trial.

If a court chooses to exclude hypnotically induced testimony on the hearsay rationale, this does not mean that such testimony could

198. *See supra* notes 82-86 and accompanying text.

199. *Id.*

200. *See supra* note 170.

201. J. WIGMORE, *supra* note 168, at §§ 1421-22 (Wigmore lables the two requirements for a hearsay exception as "necessity" and "circumstantial probability of trustworthiness"). *See generally* C. MCCORMICK, *supra* note 16, at § 253.

202. *See supra* notes 70-81 and accompanying text.

still be excluded on this basis if and when hypnosis someday satisfies the *Frye* standard of admissibility. If hypnosis is someday generally accepted as a means of producing reliable recall, the factual hypnotically induced memory must necessarily be distinguishable from that memory hypnotically confabulated. When the problems caused by the inability to distinguish between these two aspects of a posthypnotic memory are gone, the purpose underlying the three testimonial requirements may be satisfied,[203] for the central problem a previously hypnotized witness has in satisfying the testimonial requirements is caused by the subjective and objective inability to distinguish factual recall from hypnotically confabulated recall.[204] Therefore, if hypnosis someday passes the *Frye* standard and hypnotically induced testimony is found admissible, excluding hypnotically induced testimony on a rationale analogous to the hearsay rule will no longer be a viable option.

CONCLUSION

The reliability, or rather the unreliability, of hypnotically induced testimony is a current problem in the courts. As demonstrated, the confusion in the scientific world surrounding the phenomenon of hypnosis has led to equal confusion in court's determining the admissibility of hypnotically induced testimony. Critically analyzed, the three different admissibility positions taken by courts concerning hypnotically induced testimony are: the credibility approach which generally allows such testimony into evidence, the procedural safeguards approach which admits such testimony if stipulated safeguards are first complied with, and the *per se* inadmissibility approach, which usually excludes such testimony on the basis of the *Frye* test.

Note was taken of the fact that some courts feel the *Frye* test is an inappropriate standard against which to judge the admissibility of hypnotically induced testimony. It was also noted that the federal courts may, in fact, no longer have a *Frye* test to apply. An alternative rationale for the *per se* exclusion of hypnotically induced testimony was therefore proposed. The proposed rationale is the same rationale underlying the hearsay rule. How a witness testifying from a hypnotically induced memory fails to satisfy the purpose underlying the testimonial requirements of an oath or affirmation, personal presence, and contemporaneous cross-examination were discussed. The conclusion was drawn that because the hearsay rule is to assure com-

203. *See generally supra* notes 175-99 and accompanying text.
204. *Id.*

pliance with the three testimonial requirements, and a witness testifying from a posthypnotic memory fails to satisfy these requirements, hypnotically induced testimony must necessarily be excluded on the hearsay rationale.

Serious problems require serious solutions. The reliability of hypnotically induced testimony is a serious problem. Courts allowing such testimony into evidence do not know whether the testimony is factual or whether it is the product of hypnotic confabulation. In fact, nobody knows. Therefore, until a way is discovered in which this distinction can be made, courts which do not presently exclude hypnotically induced testimony on the basis of *Frye*, should now *per se* exclude it on the hearsay rationale.

JOEL MARK BARKOW