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Judicial Approaches to the Question of Admissibility of Hypnotically Refreshed Testimony: A History and Analysis

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JUDICIAL APPROACHES TO THE QUESTION OF ADMISSIBILITY OF HYPNOTICALLY REFRESHED TESTIMONY: A HISTORY AND ANALYSIS

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I. INTRODUCTION

Judicial attitudes and approaches toward hypnosis and hypnotically adduced evidence have oscillated markedly over the past century. Hypnosis

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issues first appeared in American courts in the late nineteenth century.[1] At that time, judicial wariness of hypnosis and hostility to hypnotically adduced evidence was manifest.[2] In 1897, the California Supreme Court seemed to speak for all American courts when it boldly declared that "the law does not recognize hypnosis."[3] The evidentiary problem of hypnotic evidence largely vanished shortly after the court's pronouncement. The issue remained dormant until the late 1950s and early 1960s, when various branches of the medical community recognized and once again widely used hypnosis.[4]

Medical recognition of the use of hypnosis awakened investigatory use by law enforcement agencies, and soon the evidentiary problem of hypnotically refreshed testimony was again before the courts.[5] This time, the judiciary did not take as quite a hostile view of hypnosis. Almost two decades of uncritical acceptance of hypnotically refreshed testimony began in the late 1960s. Towards the end of that period, in 1977, one writer stated that "[t]he older cases, in which suspicion of such evidence [hypnotically refreshed testimony] was sufficient to summarily deny its admissibility, are no longer of persuasive weight."[6] In the same year, two other commentators boldy asserted that courts would soon take the next step and admit statements made by witnesses while under hypnosis.[7]

What these writers did not foresee was yet another change in the attitude of a significant segment of the American judiciary.[8] Renewed skepticism caused some courts to admit hypnotically refreshed testimony only after careful scrutiny convinced them that the proposed testimony was both reliable and probative. The same doubts caused other courts to exclude hypnotically refreshed testimony *per se*. Consequently, three judicial approaches to the question of admissibility of hypnotically refreshed testimony have developed. None command a majority. The law is in a state of flux.

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1. For a useful and interesting early forensic history of hypnosis, see Laurence & Perry, *Forensic Hypnosis in the Late Nineteenth Century*, 31 INT'L J. CLINICAL & EXPERIMENTAL HYPNOSIS 266 (1983). For a briefer discussion, see Diamond, *Inherent Problems in the Use of Pretrial Hypnosis On a Prospective Witness*, 68 CAL. L. REV. 313, 316-21 (1980).

2. *See infra* notes 62-65 and accompanying text.

3. People v. Ebanks, 117 Cal. 652, 655, 49 P. 1049, 1053 (1897).

4. *See infra* notes 40-46 and accompanying text (discussion of increased medical and investigative uses of hypnosis).

5. The evidentiary problem usually at issue is the admissibility of hypnotically refreshed testimony, i.e., the admissibility of the testimony of a witness hypnotized prior to trial. Courts have been nearly unanimous in refusing to allow a witness to testify in court while under hypnosis, and this article does not discuss that issue. For an interesting discussion of an exception to the general rule of inadmissibility of testimony of a witness hypnotized on the stand, see Teitelbaum, *Admissibility of Hypnotically Adduced Evidence and the Arthur Nebb Case*, 8 ST. LOUIS U.L.J. 205 (1963).

6. Dilloff, *The Admissibility of Hypnotically Influenced Testimony*, 4 OHIO N.U.L. REV. 1, 21 (1977).

7. Spector & Foster, *Admissibility of Hypnotic Statements: Is the Law of Evidence Susceptible?* 38 OHIO ST. L.J. 567, 613 (1977).

8. *See infra* notes 109-22 and accompanying text (discussing the re-emergence of judicial skepticism of hypnotism and development of alternative approaches to use of hypnotically refreshed testimony).

To place the evidentiary problem of hypnotically refreshed testimony in proper perspective, this article first examines the nature, methodology, and uses of hypnosis. The article then traces the development of the three currently competing judicial approaches to hypnotically refreshed testimony. Finally, an analysis of each approach leads to the conclusion that both the approaches of *per se* exclusion and of *per se* admissibility contain significant analytical flaws and practical difficulties. The approach of *per se* exclusion is especially pernicious. In contrast, the third approach—guarded admissibility—recognizes the risks of hypnosis but uses procedural safeguards and balancing tests to minimize or negate those risks. This approach allows reliable and relevant evidence to reach the trier of fact. It is, therefore, preferable.

II. The Art and Science of Hypnosis

Although this article focuses on the in-court admissibility of testimony of a previously hypnotized witness, a general review of hypnosis is first required in order to fully understand the evidentiary concerns that confront the judiciary. The following sections briefly survey the nature, methods, and uses of hypnosis as a medical-therapeutic technique, and examine the utility of that technique when its results enter a courtroom.

A. Nature and Methodology

Simply defined, hypnosis is an altered state of awareness or perception.[9] This altered state of mind is characterized by "heightened suggestibility as a result of which unusual or extraordinary changes in sensory, motor and memory functions (cognitive processes) may be more readily experienced."[10] The subject's altered state of consciousness is achieved by a process known as induction, in which the hypnotist induces a hypnotic state with the

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9. W. Wester & A. Smith, Clinical Hypnosis: A Multidisciplinary Approach 19 (1984). Hypnosis has also been defined as "the act of inducing artificially 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 object." Black's Law Dictionary 668 (5th ed. 1979). The American Medical Association has defined 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.

Council on Mental Health, *Medical Use of Hypnosis,* 168 J. A.M.A. 186, 187 (1958). For other definitions, see Encyclopedia Britannica, *Hypnosis,* 139 (15th ed. 1974), and 9 New Encyclopedia Britannica (Macropaedia) 133 (1979). Although most contemporary definitions have much in common with one another, there appears to be no consensus on a single, authoritative definition. "[T]here are as many definitions as there are definers." W. Kroger, Clinical and Experimental Hypnosis 113-18 (2d ed. 1977).

10. Alderman & Barrette, *Hypnosis on Trial: A Practical Perspective on the Application of Forensic Hypnosis in Criminal Cases,* 18 Crim. L. Bull. 5 (1982).

cooperation of the subject.[11] Various induction techniques are available,[12] but the processes have certain factors in common: the establishment of a rapport between the subject and the hypnotist, progressive relaxation by the subject, and progressive narrowing of the subject's attention due to the specific suggestions by the hypnotist.[13] The resulting hypnotic state may be separable into several levels, or stages, with each level manifesting distinct characteristics.[14] A fully hypnotized subject may experience a broad range of mental, emotional, and physical responses and effects, including alterations in heartbeat and respiration, production of hallucinations and fantasies, and recovery of forgotten memories.[15]

Induction techniques need not be complicated. Professionals develop their own style based on individual training and experience. Induction of hypnosis can be direct or indirect. Use of indirect, subtle suggestions has gained popularity among practitioners when working therapeutically with patients. Most forensic work involves direct techniques such as progressive relaxation, eye fixation, or imagery. The subjects are simply asked to close their eyes and then given suggestions that all of the muscles of their bodies are relaxing in a progressive way from the top of their head to their toes. The progression can be followed with a "deepening" technique, such as asking the subject to count or to imagine being in their favorite place. A variety of "tests" can be used to check on the level and depth of a trance.[16]

There is some controversy about the level and depth of a trance. Some practitioners believe that it is important for the subject to achieve a very deep trance in order for hypnosis to be effective. Others experts believe that

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11. W. KROGER, *supra* note 9, at 36-37. Hypnotic states are commonplace occurrences in daily life, and neither are they induced by a professional hypnotist nor is the subject aware of being hypnotized.

> Hypnotic phenomena are common in everyday experiences, albeit rarely recognized as such. Examples include the lulling of an infant to sleep, advertising, and involvement with a spell-binding orator, a skillful advocate, or a good entertainer. Although each of these occurrences involves the superconcentrated state of mind that results in an increased susceptibility to suggestion that is typical of the hypnotic state, these occasions of indirect susceptibility are distinguishable from an induced hypnotic state. Under direct [sic] susceptibility, a person might respond fleetingly to a variety of suggestive stimuli, whereas in induced hypnosis, the suggestible state is purposefully created to permit the subject to be guided by the hypnotist. Under the influence of indirect suggestion, the subject is generally unaware of his unusually responsive condition, and therefore, may succumb to harmful suggestions. In induced hypnosis, however, the subject is aware of his vulnerability and remains capable of protecting himself from harmful suggestion.

Spector & Foster, *supra* note 7, at 567 (footnotes omitted).

12. *See* W. KROGER, *supra* note 9, at 11-22.

13. H. ARONS, HYPNOSIS IN CRIMINAL INVESTIGATION 156-59 (1967); W. HIBBARD & R. WORRING, FORENSIC HYPNOSIS 64-90 (1981).

14. H. ARONS, *supra* note 13, at 137; Spector & Foster, *supra* note 7, at 571-72.

15. Spector & Foster, *supra* note 7, at 570-71; E. HILGARD, THE EXPERIENCE OF HYPNOSIS 6-10 (1968); G. ULETT & D. PETERSON, APPLIED HYPNOSIS AND POSITIVE SUGGESTION 1-13 (1965).

16. For a more detailed discussion of various techniques used to induce a hypnotic state, see W. KROGER, *supra* note 9, at 11-22.

the subject will develop the proper depth of trance in order to reach a predetermined goal. Under this latter view, a light-medium state is appropriate in most cases.

One of the older scales of trance level was devised in 1931, and is still used to demonstrate the kinds of phenomena associated with the different stages of trances:

1) Hypnoidal - general relaxation, fluttering of the eyelids, eye closure and complete physical relaxation;
2) Light trance - catalepsy of the eyes, limb catalepsies, rigid catalepsy, and glove anesthesia;
3) Medium trance - partial amnesia, post-hypnotic anesthesia, personality changes, simple post-hypnotic suggestions, kinesthetic delusions, and complete amnesia; and
4) Deep (somnambulistic) trance - eye open trance, bizarre post-hypnotic suggestions, complete somnambulism, positive and negative visual and auditory hallucinations, and post-hypnotic amnestic.[17]

A forensic hypnosis session usually consists of four phases: pre-hypnosis, induction and trance-deepening, recall, and termination. The most common techniques used to elicit information and to enhance recall include: age regression, revivification, screen techniques, and hyperamnesia.[18] In age regression, the hypnotist directs the subject back to a particular age in the subject's life, enabling the subject to role-play the age, including age-appropriate behavior.[19] In revivification, the subject actually relives a past event, once again experiencing all of the cognitive, emotive, and sensory factors present at the time of the event.[20] Screen techniques are a form of regression in which subjects are told that they can see the past event(s) in question unfolding on a movie or television screen. Hyperamnesia is the simplest of the memory restoration techniques. This technique enables recall simply as a result of the relaxation effect produced by hypnosis; by allowing the mind to release memories stored in the subconscious even though the subject could not release them volitionally while not hypnotized.[21] The first three methods, respectively, require the subject to role-play, relive, or watch past events as they happened and to describe them in detail. Hyperamnesia is of greater use as an enhancement technique when a subject remembers portions of an event but is unsure of the details.

B. History and Uses of Hypnosis

Hypnosis has had a long, colorful, and somewhat checkered history. While

17. Davis & Husband, *A Study of Hypnotic Susceptibility in Relation to Personality Traits*, 26 J. ABNORMAL SOC. PSYCHOLOGY, 175, 175-82 (1931). *See also* Spector & Foster, *supra* note 7, at 571-72.

18. *See* R. UDOLF, FORENSIC HYPNOSIS (1983).

19. *See* R. REIF, HYPNOTIC AGE REGRESSION (1959); W. KROGER, *supra* note 9, at 11-22.

20. W. KROGER, *supra* note 9, at 16-17.

21. *Id. See also* White, Fox, & Harris, *Hyperamnesia for Recently Learned Material*, 35 J. ABNORMAL PSYCHOLOGY 88 (1968).

the nature of the phenomena of hypnosis was not understood until relatively recently, the practice of hypnosis is at least as old as recorded civilization.[22] Although primitive practitioners may have used hypnosis to establish and maintain their positions of tribal power, the primary historical use of hypnosis has been therapeutic.[23] Hypnosis was used by Assyrian and Babylonian priests over fifty centuries ago to cure various afflications. Induced hypnosis was a regular form of therapy in Egyptian "sleep temples" over thirty centuries ago.[24] It was similarly practiced by doctors and medicine men in ancient India, Africa, and pre-Columbian America.[25]

Hypnosis acquired a negative image during the Middle Ages, in Christian Europe, where it became known more as an evil power than a natural and beneficial practice. Hypnotists "were considered agents of the devil victimizing helpless subjects under their strange spells."[26]

Early attempts to establish hypnosis as a science, or more accurately, as a pseudo science, are attributable to the efforts of Franz Mesmer, a Viennese physician in Paris, who attracted attention in the late eighteenth century. Mesmer developed a theory and practice of medical therapy that he called "animal magnetism."[27] He believed that all reality was filled with an invisible fluid, that illness was the product of an imbalance of this fluid in the body, and that by using magnets and an elaborate ritual, he had the power to cure illness by increasing the flow of magnetic fluids in the body.[28]

Mesmer placed his patients in a tub filled with glass, iron filings, and cold water. Wearing flowing robes, and accompanied by soft background music, Mesmer would touch iron rods protruding from the tub to the afflicted parts of his patient's body. This practice would induce a "convulsive crisis" in the patient.[29] In reality, the "crisis" was "a true state of hypnosis, produced through suggestion and the patient's own beliefs and expectations of cure."[30] Mesmer and his techniques were thoroughly discredited by an investigatory commission of the French government.[31] It was not until the middle of the nineteenth century that an English physician, James Braid, was successful in bringing a measure of scientific credibility to hypnosis.[32]

Additional incremental research and experimentation during the next century resulted in the gradual use, popularity, understanding, and legitimacy of hypnosis. In 1955, the British Medical Association officially endorsed

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22. S. KREBS, THE FUNDAMENTAL PRINCIPLES OF HYPNOSIS 3-4 (rev. ed. 1957).
23. Douce, *Hypnosis: A Scientific Aid in Crime Detection*, 46 POLICE CHIEF 60 (May, 1979).
24. *Id.*
25. *Id. See also* S. KREBS, *supra* note 22, at 3-4.
26. Douce, *supra* note 23, at 60.
27. K. BOWERS, HYPNOSIS FOR THE SERIOUSLY CURIOUS 7-8 (1976).
28. G. ULETT & D. PETERSON, *supra* note 15, at 7-8.
29. K. BOWERS, *supra* note 27, at 7-8.
30. Douce, *supra* note 23, at 60.
31. K. BOWERS, *supra* note 27, at 8-9.
32. Douce, *supra* note 23, at 60. Braid coined the word hypnosis, after *Hypnos*, the Greek god of sleep. Realizing later that the nature of hypnosis was not that of sleep, he tried to change the name, but the term had already become established. *Id.*

hypnosis as a therapeutic technique.[33] The American Medical Association gave a similar endorsement in 1958, stating that hypnosis has "a recognized place on the medical armamentarium and is a useful technique in the treatment of certain illnesses . . . ."[34] Two years later, the American Psychological Association recognized hypnosis as a branch of psychology by establishing a special Hypnosis Division.[35] Today, hypnosis is widely accepted by the various branches of the medical community. It is used to treat various illnesses and addictions, including smoking, asthma, burns, chronic pain, grief, impotency, obesity, migraine and tension headaches, and warts.[36]

C. *Forensic Application and Benefits*

The growing popularity and use of hypnosis by the medical community for therapeutic purposes ultimately stimulated an interest in and use of hypnosis for forensic purposes.[37] Since one of the traditional salient uses of hypnosis was memory restoration and enhancement, the technique appeared to have great potential for law enforcement agencies as an aid in enhancing the memory of witnesses and victims.[38]

In the late 1950s and early 1960s, many of the dangers and deficiencies of hypnosis as a memory refreshing device were unknown,[39] and evidentiary problems relating to the testimony of previously hypnotized witnesses had not yet manifested themselves in court. At the same time, the number of psychiatrists and psychologists professionally trained in hypnotic techniques was not extremely large, and the services of these individuals were fairly expensive. Moreover, it is easy for laymen to learn quickly the techniques of hypnotic induction, at least superficially.[40] Thus, for one or more of the above reasons, a pattern emerged in which many law enforcement agencies did not rely exclusively upon trained psychiatrists and psychologists to perform hypnosis, but instead established ad hoc and regular training programs for their own personnel.

By 1978, police in many large cities and agents of the Federal Bureau of Investigation and Alcohol, Tobacco and Firearms Bureau, had received

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33. D. CHEEK & L. LECRON, CLINICAL HYPNOTHERAPY 19 (1968).

34. Council on Mental Health, *supra* note 9, at 187.

35. E. HILGARD, HYPNOTIC SUSCEPTIBILITY 4 (1965) (Division 30).

36. *The Admissibility of Hypnotically Induced Recollection,* 70 KY. L.J. 187, 190 n. 18 (1981-82). Hypnosis is also utilized in certain investigations of various physiological systems, primarily the cardiovascular, gastrointestinal, and sensory systems, but including also the renal, respiratory, and endocrine systems. Hypnosis is employed in the study of areas such as emotions, psychopathology, defense mechanisms, dreams, physiological processes, and test validation. Spector & Foster, *supra* note 7, at 579 n.66.

37. *See generally* Kroger & Douce, *Hypnosis in Criminal Investigation,* 27 INT'L J. CLINICAL & EXPERIMENTAL HYPNOSIS 358 (1979).

38. Monrose, *Justice with Glazed Eyes: The Growing Use of Hypnotism in Law Enforcement,* 8 JURIS DR. 54 (1978).

39. *See infra* notes 47-51 and accompanying text (examples of such dangers and deficiencies).

40. *See generally* Diamond, *supra* note 1.

hypnosis training.[41] By 1981, thousands of detectives and police officers, at local, state, and federal levels, also had received some hypnosis training.[42] Recently, there has been increased attention and effort in the law enforcement field to standardize training procedures and improve the competency of law enforcement practitioners of hypnosis.[43] Perhaps this is partly because of growing criticism by professional and scholarly organizations of the use of hypnosis by inadequately trained law enforcement personnel,[44] and partly because of growing judicial concerns about evidentiary problems related to the testimony of previously hypnotized witnesses.[45]

Hypnosis is of significant potential benefit not only to law enforcement authorities in criminal investigations, but also to criminal civil lawyers in the pre-trial discovery process. A witness may have been the victim of a crime or accident who suffered physical and/or emotional trauma that caused varying degrees of amnesia or psychological blocking of their memory. A witness may suffer trauma and a consequent memory loss, or block the experience simply by witnessing a crime or tragic event. A witness may have a poor memory or their memory may have eroded due to the passage of time. In all of these examples, hypnosis may provide considerable assistance to the witness in recovering lost or repressed memories.

Alternatively, a witness may have a perfectly normal memory, that nonetheless could be further enhanced through hypnosis. As one forensic hypnosis expert explains:

> Hypnosis, much like a surgeon's scalpel, cuts through inhibitory fears enabling the subject to experience a relaxed, concentrated state of awareness in which all five senses are heightened to a marked degree. He thinks and remembers better because the conscious mind swings aside permitting direct access to the vast repository of the subconscious.[46]

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41. *Id.* at 313-14. This is not to say that local police invariably received the same training as federal agents. Generally, federal agents' training is more extensive; unlike many local police forces, federal agencies do not allow their own personnel to perform hypnosis. When hypnosis is used as an investigative tool by federal agencies, only medical professionals may induce hypnosis. *See* Ault, *FBI Guidelines for Use of Hypnosis*, 27 INT'L J. CLINICAL & EXPERIMENTAL HYPNOSIS 449, 449-51 (1979).

42. Graham, *Should Our Courts Reject Hypnosis?* St. Louis Post Dispatch, Oct. 25, 1981, *cited in* Margolin & Coliver, *Forensic Uses of Hypnosis: An Update*, TRIAL, Oct. 1983, at 45, 105 n.2; Feldman, *Hypnosis: Look Me in the Eyes and Tell Me That's Admissible*, BARRISTER, Spring 1981, at 4, 54.

43. For example, the Michigan Society for Investigative and Forensic Hypnosis was founded in 1981 to address the concerns of competency in the application of hypnosis for investigative purposes. Powell, *Law Enforcement Hypnosis in Michigan*, 32 L. & ORDER 52 (1984). "The organization consists of law enforcement officers as well as health care professionals. Proof of successful completion of an approved course of study, as well as demonstrated proficiency, are prerequisites for membership in this organization." *Id.* at 52.

44. *See, e.g.*, 27 INT'L J. CLINICAL & EXPERIMENTAL HYPNOSIS 452, 453 (1979) (resolutions passed by Society for Clinical and Experimental Hypnosis in October 1978 and by International Society of Hypnosis in August 1979).

45. *See infra* notes 182-215 and accompanying text.

46. Douce, *supra* note 23, at 60. "The use of hypnosis often helps an eyewitness more accurately recall the incident, including many important details that would not have been

D. Problems with Hypnosis in a Forensic Setting

Although hypnosis is a valuable procedure for memory retrieval and enhancement, its use is not without dangers. The hypnotic state is one of heightened suggestibility. In this state there is the danger that false memories will be created by the subject's desire to please, by his expectations of appropriate behavior for hypnotized individuals, or by his ready acceptance of either deliberate suggestions or inadvertent cues by the hypnotist.[47] The subject may confabulate, attempting to fill in gaps in his memory with logical deductions of what should have occured.[48] Fantasies known as "screen memories" may be produced by the subject as a defense to prevent the retrieval of real but traumatic memories.[49] Hypnosis does not guarantee historical accuracy. Therefore, hypnotic recall may contain error or distortion due to the erosion of memory over time and/or the subconscious intermingling of memory of the original event with memory of subsequent events.[50] Lastly, it is also possible for a subject to willfully lie if he is motivated to protect himself or another person.[51]

It must be emphasized that these problems are not peculiar to hypnotized subjects.[52] Moreover, many of these problems are avoidable by using hypnosis only with appropriate subjects and under appropriate circumstances. Hypnosis makes "no promises other than to confuse, mislead, and misdirect resources if it is not carefully applied."[53] It should not be viewed as a "short cut" in the investigative process. Hypnosis should be used sparingly, in serious and difficult cases in which there are no suspects, or where there are disinterested but forgetful or traumatized witnesses and there is a likelihood that information derived from hypnosis can be independently verified.[54]

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remembered otherwise, it is possible that the relationship with the hypnotist provides a comfortable setting which makes it easier for the person to remember . . . ." Schafer & Rubio, *Hypnosis to Aid the Recall of Witnesses,* 26 INT'L J. CLINICAL & EXPERIMENTAL HYPNOSIS 81 (1978). In one recent study, a hypnotized group of subjects recalled twice as much information as did a non-hypnotized control group. Unfortunately, the hypnotized group also made three times as many errors. Dockasi, *Validity of Hypnosis-Enhanced Testimony Questioned,* TRIAL, Dec. 1983, at 6 (citing findings of study published in SCIENCE, Oct. 14, 1983, 184-85).

47. Kroger & Douce, *supra* note 37, at 366; Spector & Foster, *supra* note 7, at 591.

48. Dilloff, *supra* note 6, at 4, 5.

49. *See generally* Kroger & Douce, *Forensic Uses of Hypnosis,* 23 AM. J. CLINICAL & EXPERIMENTAL HYPNOSIS 86-93 (1980).

50. *Id.*

51. Dilloff, *supra* note 6, at 5. It is for this reason that a suspect in a crime is never an appropriate subject for hypnosis.

52. *See infra* notes 239-46 and accompanying text.

53. Hibler, *Forensic Hypnosis: To Hypnotize, or Not to Hypnotize, That Is the Question* 27 AM. J. CLINICAL & EXPERIMENTAL HYPNOSIS 52, 55 (1984).

54. The investigative departments of the Armed Forces, the Secret Service, the Treasury Department, and the FBI have established a single standard for the use of hypnosis. *Id.* These guidelines, known as the Federal Model, ensure the proper use of hypnosis with appropriate subjects. For these reasons, the authors recommend the model as the ideal standard for investigative uses of hypnosis. The Federal Model is discussed at greater length *infra* notes 276-80 and accompanying text.

Restricting hypnosis to proper subjects and investigative uses is not sufficient to avoid hypnotic hazards. The key safety factors are the training and conduct of the hypnotist.[55] One does not need to be a surgeon to make an abdominal incision, but training in medicine and surgery is essential in knowing what to do next. Similarly, induction techniques are easily learned, but when hypnosis is performed by an unqualified person, the results can be detrimental to the interests of justice and to the health of the subject. Hypnosis should therefore be conducted by a competent professional "possessing an advanced level of training and experience directly related to eyewitness recall, hypnosis, and the application of forensic hypnosis techniques."[56]

Ideally, the hypnosis professional should be a psychiatrist or a psychologist whose qualifications and conduct are regulated by state statutes and administrative regulations as well as by professional codes.[57] These professionals can use recall techniques appropriate for the particular type of memory loss from which the patient suffers. They are also skilled in the art of using nonleading questions and appropriate suggestions designed to minimize the possibility of distorted recall.[58] Moreover, the trained professional can detect behavior which indicates that the subject wants to help so badly that they are risking distortion by pushing themselves. Finally, the professional can employ a variety of techniques to deal with this problem.[59]

The reliability of procedures used and the qualifications of the hypnosis specialist are valid evidentiary concerns. As will be seen in the following sections, courts have proposed safeguards that adequately address these concerns.[60]

III. THE CASE LAW

Although hypnosis has had nearly a century of legal history in the United States,[61] it has had little impact upon case law until recently. Most judicial

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55. *See* Dilloff, *supra* note 6, at 7.

56. Timm, *The Factors Theoretically Affecting the Impact of Forensic Hypnosis Techniques on Eyewitness Recall*, 11 J. POLICE SCI. & ADM. 442, 448 (1983).

57. Orne, *The Use and Misuse of Hypnosis in Court*, 27 INT'L J. CLINICAL & EXPERIMENTAL HYPNOSIS 311, 335 (1979); *accord* Council on Scientific Affairs, *Scientific Status of Refreshing Recollection by the Use of Hypnosis*, 253 J. A.M.A. 1918, 1923 (1985). All states now require licensing for psychologists. Typical state legislation establishes administrative boards with the authority to reprimand, suspend, or revoke licenses of psychologists for practicing in areas for which they are untrained. Hypnosis is a recognized area of specialization of psychology. The American Society of Clinical Hypnosis sets stringent training standards, which the Federal Model incorporates by reference. *See* Hibler, *Investigative Aspects of Forensic Hypnosis*, in W. WESTER & W. SMITH, CLINICAL HYPNOSIS: A MULTIDISCIPLINARY APPROACH 555-57 (1984).

58. *See, e.g.*, Mutter, *The Use of Hypnosis with Defendants*, 27 AM. J. CLINICAL & EXPERIMENTAL HYPNOSIS 42, 44-47 (1984).

59. *Id.*

60. *See infra* notes 133-55 and accompanying text. *See also* Timm, *Suggested Guidelines for the Use of Forensic Hypnosis Techniques in Police Investigations*, 29 J. FORENSIC SCI. 865 (1984).

61. *See generally* Laurence & Perry, *supra* note 1.

activity has taken place only within the past twenty years, and that activity has centered on the question of the admissibility of testimony from a previously hypnotized witness.

A. *Brief History and Contemporary Patterns*

The earliest hypnosis cases appeared during the twenty-year period from 1895-1915. In these cases, counsel for the defense used hypnosis as a defense to a crime[62] or advanced the admissibility of exculpatory statements made by a defendant under hypnosis.[63] Other cases dealt with alleged seduction of the hypnotized subject by the hypnotist.[64] One scholar summed up the early judicial history of hypnosis:

> [J]udicial hostility was manifest, and in none of these cases did the interjection of the hypnosis issue have any appreciable effect. The result was that just as suddenly as the problem of hypnosis had become important in American criminal law, so it lost its importance, and from 1915 until 1950, there was but one reported case dealing with any medical-legal aspect of hypnosis. [65]

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62. People v. Worthington, 105 Cal. 166, 38 P. 689 (1895). In *Worthington* a young woman was given a revolver by her husband, along with a husbandly instruction that she should use the revolver to murder the paramour she had acquired while her husband was abroad. She complied, was found guilty of second-degree murder, and was sentenced to 25 years in prison. She appealed raising the defenses of insanity and hypnotism. On the defense of hypnotic influence, the appellate court held:

> The [trial] court ruled out the evidence, and, I think, rightly. There was no evidence which tended to show that the defendant was subject to the disease (hypnosis), if it be such. Merely showing that she was told to kill the deceased, and that she did it does not prove hypnotism, or, at least, does not tend to establish a defense to a charge of murder.

Id. at 172, 38 P. at 691.

63. People v. Ebanks, 117 Cal. 652, 49 P. 1049 (1897).

64. State v. Donovan, 128 Iowa 44, 102 N.W. 791 (1905) Austin v. Baker, 110 App. Div. 510, 96 N.Y. Supp. 814 (1906) (civil action for seduction); Tyrone v. State, 77 Tex. Crim. 493, 180 S.W. 125 (1915) (seduction asserted as provocation for homicide). In *Donovan,* the plaintiff prevailed, with the court holding that a combination of flattery, love-making, and hypnotism was sufficient to find seduction. In *Austin,* however, the defendant prevailed. The plaintiff alleged that she had been seduced as a result of hypnotic suggestion, and given a suggestion that she would forget the incident later. The defendant produced testimony by two medical doctors who were skeptical that the plaintiff could have been made to forget her acts of intercourse with the defendant, especially since she was allegedly a virgin prior to the incidents.

65. Herman, *The Use of Hypno-Induced Statements in Criminal Cases,* 25 OHIO ST. L.J. 1, 2 (1964) (citations omitted). The "one reported case" referred to by Professor Herman was the 1930 case of Louis v. State, 24 Ala. App. 120, 130 So. 904 (1930). In *Louis,* the defendant allegedly used hypnosis to obtain money from his victim. The appellate court reversed his conviction for robbery, accepting the argument that mere hypnotism of the victim was insufficient to establish the necessary element of force or fear required for the crime of robbery. Apparently, it did not occur to the prosecution to charge the defendant with larceny by trick nor did it occur to the court to apply the doctrine of constructive force.

In the year following Professor Herman's time reference (1915-1950), a New York court held an *inculpatory* statement by a defendant under hypnosis to be inadmissible on the grounds that it was an involuntary confession. People v. Leyra, 302 N.Y. 353, 98 N.E.2d 553 (1951).

While there have been exceptions,[66] the overwhelming authority in this skimpy line of cases since 1895 is that statements made by the defendant under or as a result of hypnosis are inadmissible. It does not matter whether the statements were made in or out of court or whether they were made on a voluntary or involuntary basis.[67] Judicial rationale for this exclusion has, of course, varied with the facts of each case, but generally has ranged from "bald conclusions that such evidence is *prima facie* inadmissible"[68] to justifications such as "the self-serving and hearsay nature of the accused's exculpatory statements, the involuntary nature of a defendant's statements which have proven to be inculpatory, and the lack of qualifications of the hypnotist."[69]

As previously discussed, official approval and increased use of hypnosis by the various branches of the medical community in the 1950s and 1960s gave impetus to a similar increased forensic use of hypnosis in criminal investigations and in the discovery process generally. This reawakening consequently produced a profusion of previously hypnotized witnesses. The eventual result has been a flurry of judicial activity in the past two decades on an issue that previously had been largely dormant. Now, however, the context is somewhat different since the previously hypnotized witnesses are generally not defendants, but victims. Even more commonly, they are neither victims nor defendants but simply individuals who have witnessed a crime or accident who have been hypnotized in the process of their cooperation with litigating attorneys and/or law enforcement agencies.

Should the courts exclude the testimony of these individuals as they had previously excluded the testimony of defendant witnesses? In addressing the issue, the courts have groped for decisional rationales, used different tests, applied the same tests in different ways, and, not surprisingly, reached different conclusions. "Judicial analysis of hypnosis," as two commentators have noted, "has been uncertain, if not inconsistent, in finding an appropriate definition of the qualities of hypnosis, and thus the proper application, if any, of hypnosis to the resolution of disputes within the judicial system."[70]

The result of this uncertainty and inconsistency is a drastic and continuing

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66. *See, e.g.*, State v. Nebb, No. 39,540 (Ohio C.P., Franklin County, May 28, 1962). By stipulation of counsel, the defendant was hypnotized before the jury and testified while under hypnosis. After questioning by both the prosecutor and the defense counsel, the state reduced the charge of first degree murder to that of manslaughter, to which the defendant eventually pled guilty. The case is the focal point of the article by Herman, *supra* note 65.

67. Dilloff, *supra* note 6, at 11-12.

68. *Id.* at 12.

69. *Id.* (footnotes omitted). Dilloff observed that just because testimony from hypnotized witnesses is not generally admissible there is no reason for the courts to prohibit the use of hypnosis to assist the defense where defense counsel believes such assistance may be helpful. Indeed, Dilloff cites Cornell v. Superior Court, 52 Cal. 2d 99, 338 P.2d 447 (1959), in which the refusal to allow the defendant's attorney to employ a hypnotist in an effort to enable the accused to recall crucial events was held to be an abuse of discretion by the trial court. *Id.* at 14.

70. Alderman & Barrette, *supra* note 10, at 6.

splintering of opinion among jurisdictions. Worse, many state high courts find themselves in the embarrassingly sticky situation of rendering authoritative pronouncements, only to modify or overrule their decisions within a few years, or, in some cases, within a few months. What had become the majority position in the states over a period of time from ten to twenty years ago has, during just the past few years, been relegated to a distinct minority position. As of 1985, there is no majority position among the states on the issue of admissibility of hypnotically influenced testimony. Three different approaches have emerged.[71]

B. The Admissibility Approach

Courts using the admissibility approach will admit hypnotically influenced testimony, leaving to the trier of fact the role of according the proper weight to such testimony. The modern case that established this approach was *Harding v. State.*[72]

In *Harding,* the previously hypnotized witness was not a defendant, but a victim who had been abducted, raped, and shot. There was corroborative evidence to support her claim, and evidence showing that she was with the alleged assailants during the night in question. The trauma, however, had impaired the victim's memory. Her recollection of events varied during her first three interviews with the police. At the instigation of the police, the victim was hypnotized by a clinical psychologist about a month after the night in question. While in a hypnotic state, and "without prompting,"[73] she was able to recall the events and implicate the defendant. Given a post hypnotic suggestion to remember what she had related under hypnosis, she recounted the same story at trial.[74]

The admission of her testimony was upheld on appeal. The court found that the witness had "recited the facts and stated she was doing so from her own recollection. The fact that she . . . achieved her knowledge after being hypnotized concerns the question of the weight of the evidence which the trier of fact, in this case the jury, must decide."[75] In examining the victim's testimonial evidence, the court found other indicia of reliability in the corroborating facts, the credentials of the hypnotist, and his testimony that he did not prompt the victim and had no reason to doubt the truth of her statement.[76] The court also noted that the trial judge had instructed the jury to give the hypnotically refreshed testimony no more weight than any other testimony presented in the trial.[77]

The *Harding* court did not treat hypnotically refreshed testimony as either scientific evidence or the product of a novel scientific device, but rather as

71. *See infra* notes 72-228 and accompanying text.
72. 5 Md. App. 230, 246 A.2d 302 (1968), *cert. denied,* 395 U.S. 949 (1969).
73. *Id.* at 234, 246 A.2d at 305.
74. *Id.* at 234, 241-42, 246 A.2d at 305, 309.
75. *Id.* at 236, 246 A.2d at 306.
76. *Id.* at 248, 246 A.2d at 312.
77. *Id.* at 244, 246 A.2d at 310.

merely another means of refreshing the memory of a witness. Testimonial lapses in memory are common and the principle of "present recollection refreshed" is well established law in every American jurisdiction.[78] This principle allows counsel to refresh the memory of the witness by various means, including leading questions or the perusal of a document or memorandum.[79] Once convinced that the witness is clearly unable to testify due to a lapse in memory, the courts have been extremely liberal regarding what may be used to refresh memory. "Anything may in fact revive a memory; a song, a scent, a photograph, even a past statement known to be false."[80] Or, as another court has stated, it could be "the creaking of a hinge, the whistling of a tune, the smell of seaweed . . . the taste of nutmeg, the touch of a piece of canvas."[81] Once witnesses testify that their memory has been revived, it is their continued testimony - not the device or article that revived their memory - that is admitted into evidence. The reliability and credibility of that testimonial evidence are matters of weight for the trier of fact to determine.

Although the same court reversed itself fifteen years later,[82] the approach it established in 1968 was widely followed by courts in other states during the next decade.[83] As recently as 1983, one court observed that "[u]ntil 1980 the *Harding* rule has been uniformly, almost automatically, followed in other jurisdictions and still commands a majority."[84] Other courts tended to embrace *Harding* uncritically[85] and added nothing to *Harding's* rationale

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78. 81 AM. JUR. 2D *Witnesses* § 438 (1976).

79. *See generally* 3 J. WIGMORE, EVIDENCE § 758-63 (Chadbourn rev. ed. 1970); C. MCCORMICK, THE LAW OF EVIDENCE § 9, at 14-19 (2d ed. 1972).

80. United States v. Rappy, 157 F.2d 964, 967 (2d Cir.), *cert. denied*, 329 U.S. 806 (1946).

81. Fanelli v. United States Gypsum Co., 141 F.2d 216, 217 (2d Cir. 1944). While courts have been liberal regarding what may be used to refresh a witness's memory, it is within a court's discretion to determine if the memory of the witness is indeed impaired and in need of such aid. C. MCCORMICK, *supra* note 79, § 9.

82. State v. Collins, 296 Md. 670, 464 A.2d 1028 (1983).

83. *See, e.g.*, Creamer v. State, 232 Ga. 136, 205 S.E.2d 240 (1974) (evidence not tainted by pretrial hypnosis); People v. Smrekar, 68 Ill. App. 3d 379, 385 N.E.2d 848 (1979) (hypnosis not unduly suggestive); State v. Greer, 609 S.W.2d 423 (Mo. App. 1980), *vacated on other grounds*, 450 U.S. 1027 (1981) (hypnosis evidence not inadmissible as a matter of law); State v. McQueen, 295 N.C. 96, 244 S.E.2d 414 (1978) (credibility of testimony was a matter for the jury); State v. Jorgensen, 8 Or. App. 1, 492 P.2d 312 (1971) (credibility was issue for jury and cross examination was effective safeguard); Chapman v. State, 638 P.2d 1280 (Wyo. 1982) (appellant's attack on credibility of witness was an issue for the jury).

84. People v. Hughes, 59 N.Y.2d 523, 538, 466 N.Y.S.2d 255, 262, 453 N.E.2d 484, 491 (1983).

85. In overruling *Harding*, the Maryland Court of Appeals reviewed a number of cases that followed *Harding* and found "little discussion . . . other than reliance upon *Harding*." State v. Collins, 296 Md. 670, 693, 464 A.2d 1028, 1035 (1983). The "lack of careful judicial scrutiny" and "the dearth of helpful precedent" in the cases following *Harding* is also noted in Margolin & Coliver, *supra* note 42, at 45. *See also* State v. Mena, 128 Ariz. 226, 229-30, 624 P.2d 1274, 1277-78 (1981) (*Harding* handled admissibility cursorily and subsequent cases failed to analyze effects of hypnosis); State v. Mack, 292 N.W.2d 764, 770-71 (Minn. 1980) (assumptions of *Harding* unwarranted).

other than to point out that skillful cross-examination of the previously hypnotized witness would act as a safeguard and would assist the trier of fact to evaluate the reliability of the hypnotized witness's testimony.[86] While some courts did reconsider the issue and overrule themselves, others first adopted or reaffirmed their earlier adoption of the *Harding* rule, even after the Maryland Court of Appeals overruled *Harding* in 1983.[87]

There have been relatively few cases that involve the admissibility of hypnotically refreshed testimony in federal court.[88] Among the federal circuit courts of appeal, most have not addressed the issue at all, two have only tangentially touched the issue,[89] and another has dodged the issue.[90] The two circuits that have directly tackled the issue adopted, at least initially, a position similar to *Harding*.

The Ninth Circuit has, among federal courts, been the most active in ruling on hypnotically refreshed testimony. In *Wyller v. Fairchild Hiller Corp.*,[91] the court applied the *Harding* approach in a civil case.

In *Wyller*, the victim-plaintiff was the sole survivor and only eyewitness of a helicopter crash. His recollection was impaired by the trauma of the accident and a four-year delay in litigation. He underwent hypnosis prior to trial to refresh his memory.[92] On appeal, the court rejected the defense counsel's argument that the plaintiff's post-hypnotic testimony was "inherently untrustworthy."[93] The court stated that the witness "testified from his present recollection, refreshed by the treatments."[94] The court noted that

86. *See, e.g.*, State v. McQueen, 295 N.C., 96, 120-121, 244 S.E.2d 414, 427-28 (1978); State v. Jorgensen, 8 Or. App. 1, 9, 492 P.2d 312, 315 (1971).

87. *See, e.g.*, State v. Little, 34 CRIM. L. RPTR. (BNA) 2338 (Mo. App. 1984) (state has burden of proving absence of impermissibly suggestive hypnotic session); State v. Brown, 337 N.W.2d 138 (N.D. 1983) (attack on credibility is proper method of determining value of hypnotically induced testimony); Pote v. State, 695 P.2d 617 (Wyo. 1985) (attack on credibility, not on competency, is proper method for determining value of testimony; testimony of previously hypnotized witness did not violate defendant's right of confrontation).

88. Perhaps this is the case because most trials involving the use of hypnotically enhanced testimony are criminal and often involve violent crimes. There is, of course, relatively little federal criminal law, especially with respect to most common crimes of violence.

89. United States v. Dailey, 759 F.2d 192, 200 (1st Cir. 1985) ("nothing in the facts of this case to suggest a degree of unreliability comparable to that associated with witnesses who have undergone hypnosis"); Rucker v. Wabash R.R., 418 F.2d 146 (7th Cir. 1969) (no error in exclusion of plaintiff's taped statement made under hypnosis because tape did not clarify or explain, but merely corroborated and restated testimony).

90. United States v. Harvey, 756 F.2d 636 (8th Cir. 1985):

> Whether hypnotically enhanced testimony is admissible is a question of first impression for this court . . . . However, it is unnecessary . . . to rule on the admissibility of hypnotically refreshed testimony . . . . We hold that, because of the overwhelming evidence of guilt in the present case, substantial rights of appellants were not affected and thus, even if this testimony was erroneously admitted, the error was harmless.

Id. at 644-45.

91. 503 F.2d 506 (9th Cir. 1974).

92. *Id.* at 508-09.

93. *Id.* at 509.

94. *Id.*

the defense "was entitled to, and did, challenge both the remembered facts and the hypnosis itself by extensive and thorough cross-examination"[95] of the plaintiff and the hypnotist. It ruled that "the credibility and weight to be given such testimony were for the jury to determine."[96]

The following year, the Ninth Circuit followed *Wyller* in *Kline v. Ford Motor Co.*,[97] and found that although the victim-plaintiff had undergone hypnotic refreshment of her memory, she was competent to testify because "she was present and personally saw and heard the occurrences at the time of the accident."[98] The court noted that the "device by which recollection was refreshed is unusual," but "in legal effect her situation is not different from that of a witness who claims that his recollection of an event that he could not earlier remember was revived when he thereafter read a particular document."[99]

Three years later, the Ninth Circuit extended this approach to criminal cases in *United States v. Adams*.[100] The court, however, observed that hypnosis "carries a dangerous potential for abuse," and, as a result, recommended certain minimal procedural safeguards to protect against that potential.[101] It nevertheless reasserted its position that "the fact of hypnosis affects credibility, but not admissibility."[102]

The Fifth Circuit Court of Appeals has rendered similar decisions. In *Connolly v. Farmer*,[103] the court addressed the issue in a round about fashion. The court held that it was unnecessary to review whether the trial court erred by refusing to admit a doctor's testimony and tapes into evidence that the plaintiff had made under hypnosis. The court reached this decision since the trial court did admit plaintiff's post-hypnotic testimony. "In effect, the jury did learn the results of the hypnosis, and no prejudice to plaintiff resulted from the exclusion of either the doctor's testimony or the tapes."[104] In *U.S. v. Valdez*,[105] the Fifth Circuit court directly addressed the issue and adopted a rule of admissibility for hypnotically refreshed testimony, albeit differing from *Harding* in requiring that "adequate procedural safeguards" be followed.[106]

The two circuits discussed above continue, as of 1986, to admit hypnotically refreshed testimony, although both circuits now require procedural

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95. *Id.* at 509-10.
96. *Id.* at 509.
97. 523 F.2d 1067 (9th Cir. 1975).
98. *Id.* at 1069.
99. *Id.* at 1069-70.
100. 581 F.2d 193 (9th Cir. 1978).
101. *Id.* at 198-99.
102. *Id.* at 198.
103. 484 F.2d 456 (5th Cir. 1973).
104. *Id.* at 457.
105. 722 F.2d 1196 (5th Cir. 1984).
106. *Id.* at 1203.

safeguards to protect against the hazards of this testimony.[107] Federal district courts generally favor admission of such testimony.[108]

C. *The Eclipse of* Harding *and the Rise of Alternative Approaches*

Increased use of hypnosis, growing recognition in research, reports of limitations and problems inherent in the use of hypnosis, and emerging criticism of the *Harding* approach, eventually combined to create new patterns of judicial attitudes toward, and treatment of, hypnotically refreshed testimony. Although distinct from each other, the new patterns had two things in common: a rejection of the uncritical acceptance of hypnotism as a method of refreshing memory and, therefore, an unwillingness to freely admit hypnotically refreshed testimony into evidence.

In the middle to late 1970s, a new form of judicial analysis emerged that reflected the concerns mentioned above. Courts began to address, at least implicitly, one or both of the following two questions. First, is hypnosis so inherently unreliable that, as a matter of law, the results of the procedure should not be admitted into evidence, either because the use of hypnosis has destroyed the competence of a witness or because the hypnotically refreshed testimony of a witness would unduly prejudice or mislead the trier of fact? There is, of course, another question hidden within this one: unreliable as to what—as a truth-detection device, or as a memory refresher, or as an interview technique? Courts can, and have, answered the first question in different ways because they viewed the nature and purpose of hypnosis differently, although the decisions do not always clearly reflect the court's opinion of the nature and purpose of the procedure. In any event, if hypnosis is considered to be inherently unreliable, then the analysis must stop; the evidence will be inadmissable, and the second question need not be reached. If, however, the answer is negative, or at least ambiguous, then the second question is addressed: admitting that there are certain problems with the process of hypnotic interviews and defects in hypnotically refreshed memory, are there procedural safeguards that may be employed to minimize those hazards to the point where the testimonial product of hypnosis may be safely admitted by the judge and be evaluated by the trier of fact?

One of the problems associated with the first question is finding a standard to measure reliability. If hypnotic evidence is considered to be the same as any other evidence, then the only standard is the Federal Rules of Evidence and the corresponding state rules (which do not mention reliability, but

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107. *See, e.g.*, United States v. Harrelson, 754 F.2d 1153 (5th Cir. 1985); United States v. Solomon, 753 F.2d 1522 (9th Cir. 1985) (rationale for admitting hypnotically refreshed testimony extended by analogy to testimony refreshed by prior narcoanalysis).

108. *See, e.g.*, United States v. Narcisco, 446 F. Supp. 252, 282 (D. Mich. 1977): "The relation of events . . . depends on many factors, e.g., the ability to observe, memory, interest, mental condition, probability and corroboration. Consequently, the resolution of that type of factual situation has traditionally been the function of the jury and relies on the strength of the adversarial process." *See also* United States v. Waksal, 539 F. Supp. 834 (S.D. Fla. 1982).

liberally state that relevant evidence is generally admissible),[109] and evidence is relevant as long as it is probative regarding any fact of consequence to the determination of the action.[110] If, however, hypnotic evidence is considered as *scientific* evidence, then the courts may choose between two standards of admissibility: (1) the so-called "reliability" or "relevancy" test, which has been identified with Professor McCormick, and which is nothing more than the "probative/prejudicial" test of the Federal Rules;[111] and (2) the judicial rule of evidence known as the *Frye*[112] test, established by a 1923 decision of the United States Court of Appeals for the District of Columbia Circuit. The widely-quoted passage establishing the test reads:

> Just when a scientific principle of discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while the courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.[113]

In addition to these two rules or tests, some courts have borrowed from both to create a hybrid test, the exact nature of which, of course, will vary with the jurisdiction and the case.[114]

If the McCormick relevancy test is used, a foundation is laid via expert testimony on the reliability of the technique, and the evidence derived from that technique is then admissible if it is relevant and not found by the court to be unduly prejudicial, misleading, cumulative, etc. [115] As Professor Giannelli explains:

> Under the relevancy approach, novel scientific evidence is treated the same as other kinds of evidence. Thus, if an expert testifies that an innovative technique is valid, a court could find that evidence derived from that technique is probative. Admissibility, however, would not be automatic. As with all relevant evidence, a court would have discretion to exclude the evidence if the probative value were outweighed by considerations of undue prejudice, misleading the jury, and undue consumption of time.[116]

If the *Frye* test is used, proponents of the evidence have a heavier burden because they are required not only to show that the technique is in the

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109. *See, e.g.*, FED. R. EVID. 402.

110. FED. R. EVID. 401.

111. *See* C. MCCORMICK, *supra* note 79, at 491.

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

113. *Id.* at 1014.

114. *See, e.g.*, Bundy v. State, 471 So. 2d 9 (Fla. 1985). "Some jurisdictions have held that the testimony of witnesses who have undergone hypnotic memory enhancement is inadmissible per se, either because the technique has not been established as reliable under *Frye* or because the scientifically recognized danger of unreliability of such testimony outweighs its probative value as a matter of law, or for a combination of such reasons." *Id.* at 13.

115. *See* FED. R. EVID. 401-03.

116. Giannelli, *The Admissibility of Novel Scientific Evidence:* Frye v. United States, *a Half-Century Later*, 80 COLUM. L. REV. 1197, 1204 (1980).

demonstrable or working stage, but that it is "generally accepted" as reliable by the appropriate scientific community. As Giannelli states: "In contrast to the relevancy approach, it is not enough that a qualified expert, or even several experts, believes that a particular technique has entered the demonstrable stage: *Frye* imposes a special burden — the technique must be *generally accepted by the relevant scientific community.*"[117] Clearly, then, of the two tests, *Frye* is the more difficult and restrictive regarding the admissibility of scientific evidence.

The issues of whether hypnosis, a technique that has been employed for at least four thousand years, should be treated as a novel type of scientific evidence, whether *Frye* is superior to the relevancy test in determining the scientific reliability of hypnosis, and whether *Frye* should be applied to eyewitness testimony, are all questions discussed in section IV of this article. For now, it is sufficient to note that in the decade following *Harding,* no federal appellate court or state supreme court applied the *Frye* test to analyze the admissibility of hypnotically refreshed testimony. Apparently, the courts either were not overly concerned with the reliability of hypnotically refreshed testimony, or they did not consider such testimony to be scientific or the product of a scientific technique or device, or they preferred to leave the question of reliability, as a component of credibility, to the trier of fact, or some combination of the above. "Most courts," according to two commentators, "have circumvented the issue by either defense counsel's failure to raise it before the trial, or simply by treating the issue, *ipso facto,* as a matter of credibility for the trier of fact."[118]

In the middle to late 1970s, as judicial concern over the reliability of hypnotically refreshed testimony increased, courts became more disposed to view hypnosis as a science, and hypnotically refreshed memory as a scientific product. They also became increasingly disposed to choose *Frye* as the test of hypnotic reliability. As one court recently explained:

> Given the mysterious and unfamiliar nature of hypnosis and its significant potential for abuse, a number of courts have approached the problem of hypnotically refreshed testimony as courts have historically dealt with other novel scientific methods or procedures: through application of the test set forth in *Frye* . . . .[119]

Interestingly, this was not true in the federal courts, which continued to ignore or refuse to apply *Frye.* The federal courts either continued to follow the *Harding* approach of admissibility,[120] refused to consider hypnotically

117. *Id.* at 1205.

118. Alderman & Barrette, *supra* note 10, at 28 (footnotes omitted).

119. State v. Western, 16 Ohio App. 3d 279, 283, 475 N.E.2d 809, 810 (1984). This typical quotation not only implies that hypnosis is a "novel scientific method," but it equates science with things which are "mysterious and unfamiliar" and which have a "significant potential for abuse." (citations and footnotes omitted).

120. *See, e.g.,* United States v. Awkard, 597 F.2d 667, 669 (9th Cir. 1979): "[A]dmissibility of such evidence has not been an issue in the federal courts of this circuit since *Wyller* . . . . Because there is no issue about the admission of hypnotically refreshed evidence, there is no need for a foundation concerning the nature and effects of hypnosis."

refreshed evidence as scientific evidence, rejected *Frye* as the appropriate test of reliability, or employed some combination of the above.[121]

In the state courts, however, beginning with the 1980 case of *State v. Mack,*[122] the *Frye* test was planted, took root, and flourished. Since *Mack,* every state supreme court that had elected not to follow, or that abandoned, the *Harding* approach has invoked and applied the *Frye* test in some fashion or another. But the consistent use of the *Frye* test has not produced consistent results.

Some courts, like the *Mack* court, applied *Frye* and found that hypnosis was not generally accepted, and hence, unreliable with respect to one or more purposes. These courts proceeded either to bar testimony regarding both post and pre-hypnotic memories, or to bar hypnotically refreshed testimony while admitting testimony relating to pre-hypnotic memory. Other courts applying *Frye* found hypnosis to be generally accepted and reliable with respect to one or more purposes, provided that various procedural safeguards had been employed to minimize the possibility that unreliable testimony would result from a previous hypnotic session. These courts proceeded to admit hypnotic evidence that had been subjected to such safeguards.

D. Guarded Admissibility: Procedural Guidelines and Balancing Tests

The first state supreme court to articulate clearly and adopt a delineated procedural approach to hypnosis was the New Jersey Supreme Court in the 1981 case of *State v. Hurd.*[123] By the time the court reviewed *Hurd,* the case of *State v. Mack,*[124] which used the *Frye* test and rejected hypnotic evidence as unreliable, had been decided. Thus, the New Jersey Supreme Court had three alternative models to choose from: the admissibility approach of *Harding,* the *per se* exclusion approach of *Mack,* and an alternative procedural safeguard model that had been roughly sketched by the Ninth Circuit and fine-tuned and applied by some lower state courts. One of those lower state courts was the trial court in *Hurd.*

This alternative model recognizes the hazards of hypnosis, especially the dangers of confabulation and hypersuggestiveness, but asserts that procedural safeguards can be employed to minimize or negate those problems. The Ninth Circuit had firmly established the general principle that the fact of hypnosis goes to the credibility of the testimony and not the admissibility, but in two cases the court had implicitly qualified the general rule: the testimony may be inadmissible if the procedures employed during the hypnotic session were improper.

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121. *See, e.g.,* United States v. Valdez, 722 F.2d 1196 (5th Cir. 1984).
122. 292 N.W.2d 764 (Minn. 1980).
123. 86 N.J. 525, 432 A.2d 86 (1981).
124. 292 N.W.2d 764 (Minn. 1980).

In *United States v. Adams,*[125] the Ninth Circuit Court of Appeals expressed the concern "that investigatory use of hypnosis on persons who may later be called upon to testify in court carries a dangerous potential for abuse."[126] The court stated that "[g]reat care must be exercised to insure that statements after hypnosis are the product of the subjects' own recollections, rather than of recall tainted by suggestions received while under hypnosis."[127] As minimum procedural insurance, the court suggested maintenance of a complete stenographic record of the hypnosis interview, and added that "an audio or video recording of the interview would be helpful."[128] The court stated that only when "the judge, jury, and the opponent know who was present, questions that were asked, and the witness's responses can the matter be dealt with effectively."[129] Lastly, the court implied that a "certified" hypnotist should conduct the interview.[130]

Trial procedures that should be followed with respect to these safeguards were established the following year in the case of *United States v. Awkard:*[131] "[o]bjections to the subject testimony on the ground that such procedures were not followed should be heard by the district judge before trial, or out of the presence of the jury on *voir dire* of the witness. If the trial court overrules the objection and permits the subject to testify, the adverse party may, if it wishes, expose the details of the hypnosis to the jury."[132]

In the same year as *Awkard,* a Wisconsin trial judge established a far more elaborate set of procedural guidelines in the case of *State v. White.*[133] In *White,* the trial judge found that the reliability of testimony free of undue suggestion and other potential hazards of hypnosis was dependent upon

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125. 581 F.2d 193 (9th Cir. 1978).

126. *Id.* at 198.

127. *Id.* at 198-99.

128. *Id.* at 199, n.12.

129. *Id.*

130. *Id.* at 199, n.13.

131. 597 F.2d 667 (9th Cir. 1979).

132. *Id.* at 699, n.2. It is interesting to note that this procedure is analoguous, albeit less detailed and stringent, to the procedures required by the Federal Rules of Evidence to determine the admissibility of writings which are sought to be used to refresh a witness' recollection. The Rules provide:

> [A]n adverse party is entitled to have the writing produced at the hearing, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If it is claimed the writing contains matters not related to the subject matter of the testimony, the court shall examine in camera, excise any portions not so related and order delivery of the remainder to the party entitled thereto. Any portions withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing is not produced or delivered pursuant to order under this rule, the court shall make any order justice requires, except that in criminal cases when the prosecution elects not to comply, the order will be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial.

FED. R. EVID. 612(2).

133. 26 CRIM. L. REP. 2168 (Milwaukee County Cir. Ct. Mar. 27, 1979).

compliance with nine procedural safeguards.[134] The *White* court stressed that compliance with the guidelines did not guarantee admission of the testimony, nor did failure to comply require automatic exclusion. The guidelines were designed to assist the trial judge in assessing the reliability of the testimony of a previously hypnotized witness. "The central inquiry remains whether, as a result of events occurring during the hypnotic session, any subsequent statements made by the hypnotized subject should be considered so unreliable as not to be admissible [sic] at trial."[135] The *White* safeguards were based upon the four guidelines originally suggested by the psychiatrist, Martin Orne.[136] In 1980, the *White* guidelines were adopted by courts in New York[137] and, in modified form, by the New Jersey trial court[138] in *Hurd*.

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134. The nine guidelines are:

1. The person administering the hypnotic session ought to be a mental health person with special training in the uses of hypnosis, perferably a psychiatrist or psychologist.

2. This specially trained person should not be informed about the case verbally. Rather, such person should receive a written memorandum outlining whatever facts are necessary to know. Care should be exercised to avoid any communication that might influence the person's opinion.

3. This specially trained person should be an independent professional not responsible to the prosecution, investigators, or defense.

4. All contact between the specially trained person and the subject should be videotaped from beginning to end.

5. Nobody representing the police, prosecutor, or defendant should be in the same room with the specially trained person while working with the subject.

6. Prior to induction a mental health professional should examine the subject to exclude the possibility that the subject is physically or mentally ill and to confirm that the subject possesses sufficient judgment, intelligence, and reason to comprehend what is happening.

7. The specially trained person should elicit a detailed description of the facts as the subject believes them to be prior to hypnosis.

8. The specially trained person should strive to avoid adding any new elements to the subject's description of her/his experience, including any implicit or explicit cues during the pre-session contact.

9. Consideration should be given to any other evidence tending to corroborate or challenge the information garnered during the trance or as a result of post-hypnotic suggestions.

Id.

135. *Id.* The *White* guidelines were adopted by the Wisconsin Supreme Court in State v. Armstrong, 110 Wis. 2d 555, 571 n.23, 329 N.W.2d 386, 394-95 (1983).

136. Orne's four guidelines were first proposed in his 1979 article. *See* Orne, *supra* note 57.

137. *See* People v. Lewis, 103 Misc. 2d 881, 883, 427 N.Y.S.2d 177, 179 (1980) (*White* guidelines used as prerequisite to admission of expert testimony on a hypnotic interview to insure reliability of statements). People v. McDowell, 103 Misc. 2d 831, 834-37, 427 N.Y.S.2d 181, 182-84 (1980), is a useful illustration of the discretionary nature of the *White* guidelines. The New York court found compliance with the *White* safeguards even though the hypnotist had not conducted a pre-hypnotic interview and had been in contact with the local sheriff's department. Moreover, there had been no transcription or recording of contacts between the hypnotist and the subject beyond the actual hypnotic session, and the video recording of that session was poor. *Id.*

138. State v. Hurd, 173 N.J. Super. 333, 363, 414 A.2d 291 (1980).

In *Hurd,*[139] the prosecution's sole witness, a victim of a night knife attack, was "unable or unwilling" to identify her assailant.[140] At the suggestion of the prosecutor's office, the victim underwent hypnosis by a psychiatrist to enhance her recollection. Through a process of hypnotic revivification, the victim was able to identify her assailant as the defendant, her former husband.[141] Although she subsequently expressed doubts about her identification, the police and the psychiatrist encouraged her to stick to it, explaining to her that unless she made an identification, the defendant would "remain free to attack her again, possibly leaving her children without a mother."[142] With this encouragement, the victim reaffirmed her identification and the defendant was indicted as a result. Prior to jury selection, the defense moved to suppress the proposed in-court identification, arguing that the testimony failed to meet the *Frye* test for admissibility of scientific evidence.[143] The trial court applied *Frye* but declined to hold that hypnotically refreshed testimony is *per se* inadmissible. The court did, however, suppress the proposed identification because the state failed to meet the court's two-part test for admissibility.[144]

On appeal, the New Jersey Supreme Court accepted the trial court's test and reasoning. It agreed that hypnotically refreshed testimony must satify the *Frye* general acceptance standard of reliability in order to be admitted into evidence.[145] Unlike the court in *Mack,* however, it did not demand that hypnosis be generally accepted as a reliable means of "reviving truthful or historically accurate recall."[146] The *Hurd* court found that the purpose of using hypnosis "is not to obtain truth, as a polygraph . . . is supposed to do," but rather, to overcome anmensia and restore the memory of a witness.[147] The court noted that, "in light of this purpose, hypnosis can be considered reasonably reliable if it is able to yield recollections as accurate as those of an ordinary witness, which likewise are often historically inaccurate."[148] The court examined the evidence submitted at trial and concluded

139. State v. Hurd, 86 N.J. 525, 432 A.2d 86 (1981).

140. *Id.* at 530, 432 A.2d at 88. The chief suspects were the husband and ex-husband of the victim. *Id.*

141. *Id.* at 531, 432 A.2d at 88-89. Besides the victim and the psychiatrist, a medical student and two police officers were present at the session. *Id.*

142. *Id.* at 531-32, 432 A.2d at 89.

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

144. *Id.* The trial court's test required, first, that the state prove, by clear and convincing evidence, that it complied with six procedural safeguards suggested by Martin Orne, an expert witness for the defense. State v. Hurd, 173 N.J. Super. 333, 363, 414 A.2d 291, 306 (1980). For an itemization of those safeguards, see *infra* text accompanying note 151. Second, if these procedures had been followed, the state would then have to show, again by clear and convincing evidence, that "there had been no impermissibly suggestive or coercive conduct by the hypnotist and law enforcement personnel connected with the hypnotic exercise." 173 N.J. Super. at 363, 414 A.2d at 306.

145. *Hurd,* 86 N.J. at 536, 432 A.2d at 91.

146. *Id.* at 538, 432 A.2d at 92.

147. *Id.*

148. *Id.*

that hypnosis was generally accepted as reliable for this purpose if it was conducted properly and used only in appropriate cases. Thus, the court formulated the rule that "hypnotically-induced testimony may be admissible if the proponent of the testimony can demonstrate that the use of hypnosis in the particular case was a reasonably reliable means of restoring memory comparable to normal recall . . . ."[149]

Admissibility is not automatic. Thus, the *Hurd* court established a two-step process for determining admissibility. First, after the proponent of hypnotically refreshed testimony has informed his opponent of his intention to introduce such testimony and has provided him with a record of the session, the trial court will conduct a hearing out of the jury's presence to determine whether the use of hypnosis was appropriate to overcome the particular type of memory loss involved.[150] The second step involves a determination as to whether the procedures used were reasonably a reliable means of restoring the witness' memory. In order to provide an adequate record for evaluating reliability of procedures, and to ensure a minimum level of reliability, the court adopted the six procedural safeguards used by the trial court:

> 1) the hypnotic session should be conducted by a licensed psychiatrist or psychologist trained in the use of hypnosis;
>
> 2) the qualified professional conducting the hypnotic session should be independent of and not responsible to the prosecutor, investigator, or the defense;
>
> 3) any information given to the hypnotist by law enforcement personnel prior to the hypnotic session must be in written form so that subsequently the extent of the information the subject received from the hypnotist may be determined;
>
> 4) before induction of hypnosis, the hypnotist should obtain from the subject a detailed description of the facts as the subject remembers them, carefully avoiding adding any new elements to the witness' description of events;
>
> 5) all contacts between the hypnotist and the subject should be recorded so that a permanent record is available for comparison and study to establish that the witness has not received information or suggestion which might later be reported as having been first described by the subject during hypnosis. Videotape should be employed if possible, but should not be mandatory;
>
> 6) only the hypnotist and the subject should be present during any phase of the hypnotic session, including the pre-hypnotic testing and post-hypnotic interview.[151]

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149. *Id.*

150. *Id.* at 544, 432 A.2d at 95.

151. *Id.* at 545-46, 432 A.2d at 96-97. It is ironic that Dr. Orne, an opponent of the use of hypnotically refreshed testimony, was the individual who recommended these safeguards originally. Orne did say, however, that as long as hypnotically refreshed testimony is subject to independent verification, "its utility is considerable and the risk attached to the procedure minimal." Orne, *supra* note 57, at 318. Orne's recommendations are, of course, also the basis for the guidelines in *White, Lewis,* and *McDowell. See supra* notes 134, 137.

In demonstrating the appropriate use of hypnosis and compliance with the required procedures, the burden of proof is on the proponent of the evidence and the standard of proof is by clear and convincing evidence.[152] The court recognized that this standard is a "heavy burden" but one that is justified due to "the potential for abuse of hypnosis, the genuine likelihood of error, and the consequent risk of injustice."[153]

Hurd is arguably the best known case in which a court took a guarded admissibility approach to hypnotically refreshed testimony by clearly articulating a list of guidelines designed to protect against undue suggestiveness and the other risks of hypnosis to assure the reliability of such testimonial evidence. Numerous other courts have adopted a guarded admissibility approach to hypnotically refreshed testimony, but the variations in employing guidelines and tests are so great as to make generalizations extremely difficult.

The term "procedural safeguards" has been treated differently by courts. To some, like the *Hurd* court, it has meant the establishment of predicate guidelines to ensure and measure reliability. To others, especially those courts that have rejected *Frye* as an appropriate test, procedural safeguards have required the use of balancing tests that described and named in various ways by different courts, but which essentially embody the relevancy and probative/prejudicial principles of the Federal Rules of Evidence. Texas appellate courts, for example, ignoring or rejecting *Frye,* have referred to a "totality of the circumstances" test.[154] The Fifth Circuit, in rejecting the *Frye* test as inappropriate, declined to formulate a list of guidelines, but instead used a

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152. *Id.* at 546-47, 432 A.2d at 97. The court applied this standard to criminal proceedings. It left unanswered the question of whether the proponent in a civil proceeding also had to establish the reliability of hypnotically refreshed testimony by means of the clear and convincing standard. Also unanswered was whether a proponent in a civil proceeding would need to comply with all six safeguards. The court did suggest, however, that a recording of the hypnotic session was an essential minimum requirement. *Id.*

153. *Id.* at 547, 432 A.2d at 97-98. The court noted that the imposition of the clear and convincing standard may relate in an interesting fashion to due process challenges regarding suggestive identification procedures. The United States Supreme Court has held that "reliability" is the key in determining the admissibility of identification testimony. Manson v. Braithwaite, 432 U.S. 98, 114 (1977). Because the defendant normally bears the burden of demonstrating the unreliability of an identification procedure by a preponderance of the evidence, any such due process challenge will be closely related to the threshold question of admissibility of hypnotically refreshed testimony.

> If the hypnotically refreshed testimony is inadmissible because of its unreliability, there will be no need to consider the due process issue. Conversely, it is difficult to imagine that an identification would violate due process once the court has determined that the testimony meets the more stringent standard for reliability we have established today.

Hurd, 86 N.J. at 548, 432 A.2d at 98.

154. *See, e.g.*, Walters v. State, 680 S.W.2d 60 (Tex. App. 1984):

> [T]his Court rejected mechanistic approaches and emotional overreactions to the problem of hypnotically refreshed testimony, preferring instead to evaluate such testimony just as all other evidence is evaluated: Is it reliable? . . . Posthypnotic testimony is admissible where the totality of the circumstances surrounding the hypnotic session shows that the session was not so impermissibly suggestive as to give rise to a substantial likelihood of . . . mis-identification.

test that involved an assessment of relevancy and a balancing of probative value versus prejudicial value.[155]

Even among courts adopting a *Hurd*-type set of predicate guidelines, considerable variance exists . An Ohio appellate court has adopted the *Hurd* test, using the *Frye* test to find that hypnosis is generally accepted as a reliable scientific means of refreshing memory.[156] The Wisconsin Supreme Court rejected the *Frye* test as inappropriate but has adopted *Hurd*-type guidelines (actually the nine guidelines of *White).*[157] Appellate courts in Illinois have also rejected *Frye* as inappropriate and have adopted *Hurd* guidelines, although disagreement exists among appellate courts as to the application of the guidelines to similar fact patterns.[158] An appellate court in New Mexico largely ignored the *Frye* test and adopted the *Hurd* guidelines.[159] The New Mexico Supreme Court also ignored *Frye* and cited the appellate court with approval to affirm a conviction in which the established

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Id. at 63. *See also* Zani v. State, 679 S.W.2d 144, 150 (Tex. App. 1984) ("Posthypnotic identification testimony by a nondefendant witness is admissible when the totality of the circumstances surrounding the hypnotic session shows the session was not so impermissibly suggestive to give rise to a substantial likelihood of an unreliable . . . identification").

155. United States v. Valdez, 722 F.2d 1196 (1984).

> Our evaluation . . . considers three basic evidentiary precepts: first, the principle embodied in Federal Rules 402 and 601 that "all relevant evidence is admissible" and "every person is competent to be a witness," subject only to certain explicit exceptions; second, the jurisprudential rule that, in determining admissibility, the trial judge's discretion is wide . . . ; and finally, the limiting rule that even relevant evidence may be excluded if its probative value is substantially outweighed by such factors as "the danger of unfair prejudice, confusion of the issues, or misleading the jury."

Id. at 1201.

156. State v. Weston, 16 Ohio App. 3d 279, 286-87, 475 N.E.2d 805, 813 (1984).

157. State v. Armstrong, 110 Wis. 2d 555, 567-72, 329 N.W.2d 836 (1983).

158. The guidelines used in Illinois differ from those accepted by *Hurd.* Although the purposes of assuring, and measuring, reliability are the same, the guidelines are less stringent in determining the threshold question of admissibility since emphasis is placed on the trier-of-fact's evaluation of reliability as a component of witness credibility. The guidelines, established in People v. Smrekar, 68 Ill. App. 3d 379, 385 N.E.2d 848 (1979), involve an examination of the qualifications and independence of the hypnotist, the presence or absence of suggestiveness in the hypnotic session, the existence of independent corroboration of witness testimony, the opportunity of the witness to observe the events which he or she purported to recall during hypnosis, and the similarity of the witness' pre-hypnotic and post-hypnotic statements.

The application of these guidelines to similar fact patterns has, however, led to different emphases and conclusions. In People v. Gibson, 117 Ill. App. 3d 270, 452 N.E.2d 1368 (1983), the court held that it was error (albeit harmless) to admit the testimony of a previously hypnotized witness because the hypnotic session had been conducted by an unqualified hypnotist—a police officer with one week of hypnosis training at police school. In People v. Cohoon, 120 Ill. App. 3d 62, 457 N.E.2d 263 (1984), however, the court rejected the *Gibson* court's application of the *Smrekar* guidelines, holding that a police officer with 30 hours of training was a qualified hypnotist. Concerning the guideline of consonance of the pre-hypnotic and post-hypnotic statements, the *Cohoon* court seemed impressed that the only difference between the victim's original description of her attacker and the description given under hypnosis was that during the latter she remembered that the rapist had very large ears.

159. State v. Beachum, 97 N.M. 682, 643 P.2d 246 (App. Ct. 1981).

guidelines had not been followed. The court justified its decision instead on the consonance of the pre-hypnotic and post-hypnotic statements of the witness.[160] Oregon has codified *Hurd*-type guidelines that require that the hypnotic session be recorded and made available to the adverse party as a precondition to admissibility.[161]

Elsewhere, Alabama has straddled the fence, holding that *Frye* is the appropriate test for hypnotically refreshed testimony but refusing to apply either a *per se* rule of admissibility or inadmissibility, and failing to adopt procedural guidelines. The Alabama court, nevertheless, cautions proponents of such testimony to use safeguards to assure reliability.[162] Lousiana's Supreme Court has rejected a *per se* exclusion rule[163] but also refused to establish procedural guidelines. Instead they have advised law enforcement authorities to follow "the guidelines and safeguards adopted in other jurisdictions."[164]

What almost all of these courts have in common is an aversion to the exclusion of relevant evidence, a recognition of the risks of hypnotically refreshed testimony, and a belief that procedural safeguards in the form of predicate guidelines and/or balancing tests can minimize or negate those risks. The guarded admissibility approach, then, rejects the unquestioning admissibility approach of *Harding* without automatically excluding relevant evidence by means of the *per se* inadmissibility approach of *Mack*.

E. The Per Se *Exclusion Approach: Hypnotic Evidence Fried by* Frye

While many courts responded to the potential hazards of hypnosis by employing balancing tests and procedural guidelines to ensure reliability, other courts, beginning with *State v. Mack*,[165] have dealt with the problems of hypnotically refreshed testimony by simply excluding such testimony. These courts find hypnosis, and its products or results, to be scientifically unreliable and have excluded hypnotically refreshed testimony by means of a *per se* rule of inadmissibility. Such a rule is, of course, a draconian device that effectively renders a previously hypnotized witness incompetent, at least regarding the details of the hypnotic session and any memories recalled by means of hypnosis. Nonetheless, this approach to the problem is popular. In the five years following the *Mack* decision, a *per se* rule of inadmissibility

160. State v. Hutchinson, 99 N.M. 616, 661 P.2d 1315 (1983).

161. OR. REV. STAT. §§ 136.675, 136.685, 136.695 (1977). *See also* State v. Luther, 663 P.2d 1261 (1983) (judicial application of the statute).

162. In Prewitt v. State, 460 So. 2d 296 (Ala. Crim. App. 1984), the court stated: "We caution those who so use it to properly document pre-hypnosis evidence to insure its admissibility in appropriate cases and refute claims that it is somehow 'tainted' by hypnosis. We also caution the proponents of hypnotic evidence to take every possible precaution to assure its reliability." *Id.* at 304.

163. State v. Wren, 425 So. 2d 756 (La. 1983).

164. State v. Goutro, 444 So. 2d 615, 618 (La. 1984).

165. 292 N.W.2d 764 (Minn. 1980).

was adopted by the high courts in more than a dozen states and by lower appellate courts in several other states.[166]

Among the courts taking this approach, "[t]he most frequently employed rationale used to support a per se ban on the use of hypnotically refreshed testimony is that hypnosis as a memory enhancing technique fails. . . . [T]he general test for the admission of evidence resulting from the use of a new scientific technique originally articulated in *Frye* . . . ."[167] Actually, these courts have invariably used the *Frye* test, or the "theory underlying *Frye*,"[168] to bar this hypnotically refreshed testimony.[169] The only variance among these courts is in their enthusiasm for the *Frye* test and in their interpretation of what the test is supposed to measure.

Several cases are especially noteworty: *State v. Mack*,[170] *People v. Shirley*,[171] *State ex rel. Collins v. Superior Court*,[172] and *State v. Collins*.[173] Mack is noteworthy because of its bold break from the *Harding* approach.[174] *Shirley* has attracted attention and criticism for its sweeping scope and for its polemical tone.[175] *State ex rel. Collins* attracted attention for its supplemental opinion that modified its original holding announced just four months previously. In *State v. Collins*, the Maryland Supreme Court undercut the foundation for the *per se* admissibility approach when it overruled its prior holding in *Harding*.

State v. Mack involved a prosecution in Minnesota for criminal sexual conduct and aggravated assault. The victim, apparently intoxicated and suffering from various "emotional problems" at the time of the incident, gave medical personnel and police conflicting versions as to how she acquired a serious injury to her vagina.[176] At the instigation of the police, the victim underwent hypnosis by a self-taught lay hypnotist. During the session, attended by two police officers, the victim recalled that her injury had been inflicted by the repeated plunging of a switchblade knife, wielded by the defendant.[177] The defendant was subsequently arrested but moved to suppress

166. *See* State v. Peoples, 311 N.C. 515, 319 S.E.2d 177 (1984) (list of cases applying per se inadmissibility rule).

167. State v. Armstrong, 110 Wis. 2d 555, 567, 329 N.W.2d 386, 392 (1982).

168. State v. Peoples, 311 N.C. 511, 319 S.E.2d, 177, 187 (1984).

169. *See, e.g.*, State v. Davis, 490 A.2d 601 (Del. Super. 1985) (hypnosis scientifically unreliable).

170. 292 N.W.2d 764 (Minn. 1980).

171. 31 Cal. 3d 18, 181 Cal. Reptr. 243, 641 P.2d 775 (1982).

172. 132 Ariz. 180, 644 P.2d 1266 (1982).

173. 296 Md. 670, 464 A.2d 1028 (1983).

174. Prior to *Mack*, courts followed *Harding* and admitted hypnotically refreshed testimony. Courts refused to admit hypnotic evidence only if such evidence consisted of prior out-of-court statements made by the witness while actually under hypnosis. *See, e.g.*, State v. Pierce, 263 S.C. 23, 207 S.E.2d 414 (1974); Jones v. State, 542 P.2d 1316 (Okla. Crim. App. 1975).

175. People v. Williams, 132 Cal. App. 3d 920, 926, 183 Cal. Rptr. 498, 500-01 (1982) (Gardner, J., concurring) ("*Shirley* is really more of a polemic than an opinion. As a polemic it makes interesting reading.").

176. 292 N.W.2d at 765-66.

177. *Id.* at 766.

the victim's testimony on the grounds that it was unreliable and that it would deny his right to confront the witness.[178] The trial court certified the issue of admissibility to the Minnesota Supreme Court after an extensive hearing on the motion to suppress.

The Minnesota Supreme Court considered legal and scientific authority[179] and determined that "although hypnotically-adduced memory is not strictly analogous to the results of mechanically testing, we are persuaded that the *Frye* rule is equally applicable in this context."[180] The court then reviewed the expert testimony and found that although there was agreement that "historically valid memory can result from hypnotic recall,"[181] there were also indications of hypnotic hazards. The court noted the following problems: (1) the subject's increased susceptibility to suggestion; (2) the subject's tendency to creatively fill in gaps in memory; (3) the inability of the subject or of experts to determine which parts are fanciful, and which are lies; and (4) the "hardening" of memory, which makes the subject convinced of the truth of hypnotically recalled accounts and which would make it impossible to meaningfully cross-examine the witness.[182] For these reasons, the court concluded that hypnotically refreshed testimony was not scientifically reliable in being historically "accurate."[183] Thus, unlike *Hurd,* in which the court found hypnosis to be reliable in yielding "recollections as accurate as those of an ordinary witness, which likewise are often historically inaccurate,"[184] the *Mack* court found hypnosis to be unreliable by applying *Frye* to a higher standard of historical accuracy.

Within the following year and a half, the highest courts in Arizona,[185] California,[186] Michigan,[187] Nebraska,[188] and Pennsylvania[189] followed the example set by the Minnesota Supreme Court in *Mack.* In each case, the courts examined the issue of admissibility of testimony by a previously hypnotized witness, used some application of the *Frye* test to conclude that hypnosis was not generally accepted as a reliable scientific technique of restoring

178. *Id.* at 767. The court did not rule on the confrontation right argument because it found for the defendant on the issue of admissibility. *Id.* at 772.

179. The Minnesota State Public Defender and the California Attorneys for Criminal Justice filed amicus curiae briefs. Five experts on hypnosis testified at the trial hearing. *Id.* at 765-66.

180. *Id.* at 768.

181. *Id.*

182. *Id.* at 768-69.

183. *Id.* at 768.

184. 86 N.J. 525, 538 432 A.2d 86, 92 (1981).

185. State v. Mena, 128 Ariz. 226, 624 P.2d 1274 (1981) (post-hypnotic testimony excluded until hypnosis gains general acceptance as reliable tool to restore memory accurately).

186. State v. Shirley, 31 Cal. 3d 18, 181 Cal. Rptr. 243, 641 P.2d 775 (1982) (lack of reliability of statements following hypnosis renders testimony inadmissible).

187. State v. Gonzales, 415 Mich. 615, 329 N.W.2d 743 (1982) (hypnosis to enhance memory not yet proven reliable).

188. State v. Palmer, 210 Neb. 206, 313 N.W.2d 648 (1981) (hypnotic evidence inadmissible until hypnosis gains wide acceptance as accurately improving memory).

189. Commonwealth v. Nazarovitch, 496 Pa. 97, 436 A.2d 170 (1981) (hypnosis has gained sufficient acceptance as means of accurate restoration of memory).

historically accurate memory, and barred the admissibility of such testimony. This effectively rendered the witness incompetent. In these cases, the question of whether testimony relating to pre-hypnotic memory was included in the ban was either unanswered or was answered in the affirmative. Belatedly recognizing the severe burdens that a total ban would place on the police and the prosecution, the courts in five of the six states mentioned above moved with suprising speed to clarify or to modify their decisions in order to allow witnesses to testify regarding those matters that they were able to recall prior to hypnosis. By the end of 1983, only the California Supreme Court had retained, as it still does, its sweeping rule that the testimony of previously hypnotized witness is "inadmissible as to all matters relating to those events [in issue], from the time of the hypnotic session forward."[190] No other high court has subsequently adopted California's approach.

The California decision of *People v. Shirley* is significant for reasons other than its singular sweeping rule of inadmissibility. The alternative procedural safeguard approach had been established by the time of the *Shirley* decision, and had gained authority and forward inertia as a result of the 1981 decision in *State v. Hurd.* Thus, the court in *Shirley* not only had the opportunity to reaffirm and broaden the *Mack* approach, but it also had the opportunity to attack the procedural guidelines approach of *Hurd.*

The facts in *Shirley* represented a classic case of a rape prosecution in which the only two witnesses had conflicting versions of the same events, with the victim alleging rape and the defendant claiming voluntary participation. In order to "fill the gaps" in her stories,[191] the victim was hypnotized by a deputy district attorney three months after the events in question. The defense moved to suppress the complainant's testimony on the ground that "this is an improper use of hypnosis" because "it is not in fact refreshing

190. 31 Cal. 3d at 47, 181 Cal. Rptr. at 272, 641 P.2d at 804.

191. 31 Cal. 3d 18 at 25-29, 181 Cal. Rptr. 248 at 245-48, 641 P.2d 775 at 777-80. The complainant's refreshed testimony was not only in sharp contrast to her statements made prior to hypnosis, but she continued to contradict her own testimony during the trial. "[H]er testimony was vague, changeable, self-contradictory, or prone to unexplained lapses in memory. Indeed, on occasion she professed to be unable to remember assertions that she herself made on the witness stand only the previous day." *Id.* at 24, 131 Cal. Rptr. at 245, 641 P.2d at 777. Her inconsistent and self-contradictory testimony may be partly attributed to the fact that she was intoxicated during a portion of the period in question and had shortly thereafter consumed 100 milligrams of Mellaril, a major tranquilizer used for treatment of psychotic states, schizophrenia, and manic-depressive cases. *Id.* at 24-29, 181 Cal. Rptr. at 245-48, 641 P.2d at 777-780. One may question the suitability of hypnosis to refresh the memory of a woman who "was having problems," "couldn't be emotionally turned on by men," and yet had seven children in the "Knightstown Home for Children," and who used "Mellaril and alcohol frequently." *Id.* One may wonder how much memory she had to be "refreshed" by hypnosis, yet, curiously, the majority did not address this question. Only Justice Kaus, concurring and dissenting, noted that "it is by no means clear to me that the facts of this case are typical of hypnosis cases in general." *Id.* at 74, 181 Cal. Rptr. at 277, 641 P.2d at 809. The majority did, however, hold that complainant's intoxication had not rendered her incompetent as a witness. *Id.* at 72, 181 Cal. Rptr. at 276, 641 P.2d at 807. In other words, the majority believed that the jury was capable of weighing the possible effects of alcohol and tranquilizers on the memory of a witness, but not capable of weighing the possible effects of hypnosis on a witness' memory.

a witness's recollection" but "it is in fact manufactured evidence."[192] The trial court denied the motion on the ground that the fact of hypnosis went to the credibility of the witness not to the admissibility of her testimony. At trial, the defense produced only one expert witness, who testified that there is significant danger that hypnosis can result in inaccurate memory.[193]

Although the trial court did not address the issue of admissibility in terms of the *Frye* test, on appeal, the California Supreme Court deemed it appropriate to decide the issue using the *Frye* test. The supreme court relied on the sole witness who testified at trial as well as various scientific and legal literature to conclude that it is not generally accepted that hypnosis produces reliable memory restoration.[194] Although the language of the *Shirley* opinion is somewhat muddled, the majority apparently considered reliable memory to be historically accurate memory. The majority considered hypnosis to be unreliable in restoring historically accurate memory, reasoning that the subject's increased susceptibility to suggestion and tendency to confabulate or lose critical judgment about his memory rendered the subject objectively unable to distinguish accurate memory from confabulation, notwithstanding the subjective belief that his post-hypnotic memory was accurate.[195]

The majority stated that the procedural safeguards approach failed because it does not avoid the problems of confabulation, the subject's increased confidence in post-hypnotic memory, and loss of critical judgment.[196] Noting that the Attorney General proposed no safeguards to deal with those problems, the court added that even if guidelines had been proposed and adopted, they doubted that such guidelines could be administered "without injecting undue delay and confusion into the judicial process."[197] The court referred to the *Hurd* guidelines as "pretense" and rejected any attempt at formulating such guidelines, stating that "the game is not worth the candle."[198]

Having found hypnotically refreshed testimony to be unreliable and having rejected procedural safeguards to ensure and measure reliability, the court held that the testimony of witnesses who have undergone hypnosis for the purpose of restoring their memory of the events in issue is inadmissible as to all matters relating to those events "from the time of the hypnotic session forward."[199] The court stated that this rule did not foreclose the continued use of hypnosis for investigative purposes. However, the court proposed no guidelines for use in investigations, and reiterated that anyone hypnotized for such purposes "will not be allowed to testify as a witness to the events of the crime."[200]

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192. *Id.* at 29, 181 Cal. Rptr. at 248, 641 P.2d at 780.
193. *Id.* at 31-32, 181 Cal. Rptr. at 250, 641 P.2d at 781-82.
194. *Id.* at 53-59, 181 Cal. Rptr. at 263-66, 641 P.2d at 795-98.
195. *Id.* at 64-66, 181 Cal. Rptr. at 271-72, 641 P.2d at 802-04.
196. *Id.* at 39, 181 Cal. Rptr. at 255, 641 P.2d at 787.
197. *Id.*
198. *Id.*
199. *Id.* at 47, 181 Cal. Rptr. at 272, 641 P.2d at 804.
200. *Id.* at 67-68, 181 Cal. Rptr. at 273-74, 641 P.2d at 805.

Shirley has been sharply criticized for, among other reasons, its language and tone, its broad ban on pre-hypnotic and post-hypnotic testimony, its application of the *Frye* test, and its practical foreclosure of investigative uses of hypnosis.[201] In an attempt to mitigate the harsher effects of a *Shirley*-type rule, the state supreme courts that had rendered similar or analogous decisions moved to clarify or modify their opinions. In short order, the supreme courts in Arizona,[202] Michigan,[203] Nebraska,[204] Pennsylvania,[205] and Minnesota[206] rendered decisions that retained a ban on post-hypnotic memory, but that allowed witnesses to testify as to matters they recalled prior to hypnosis.

In January of 1982, the Arizona Supreme Court initially ruled in *State ex*

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201. *See, e.g.*, State v. Contreras, 674 P.2d 792 (Alaska Ct. App. 1983); Comment, People v. Shirley: *An Unwarranted Per Se Exclusion of Hypnotically Enhanced Testimony?* 14 SW. U.L. REV. 777 (1984). What is perhaps the strongest criticism of the language and tone of *Shirley* may be Justice Gardner's concurring opinion in People v. Williams, 132 Cal. App. 3d 920, 183 Cal. Rptr. 498 (1982):

> Shirley is more of a polemic than an opinion. As a polemic it makes interesting reading. The protagonists are so clearly defined.
>
> The prohypnosis expert is a lowly police psychologist, wretchedly educated ("Ed. E."), who is, of all things, a director of a "proprietary school" . . . . (Just what that has to do with this case escapes me.)
>
> . . . .
>
> On the other hand, the anti-hypnosis experts are "highly experienced," "nationally known," "pioneers," and "respected authorities" who present the "generally accepted view" which is set forth in "scholarly articles" and "leading scientific studies." Thus, the guys in the white hats and those in the black hats are clearly defined and appropriately labeled.
>
> . . . .
>
> Somehow, lost in the shuffle, is the fact that the majority rule in this country is that hypnotically induced testimony is admissible.
>
> . . . .
>
> According to *Shirley*, cases following that rule rely on an authority which "summarily disposed" of this issue with "little or no analysis." The part I really like is the classification of all contra authorities as "moribund."
>
> . . . .
>
> Of course the cases to the contrary [to the *Harding* and *Hurd* approaches] are "well reasoned" and "leading." Certainly.

Id. at 926-27, 183 Cal. Rptr. at 500-01 (citations omitted).

202. State *ex rel.* Collins v. Superior Court, 132 Ariz. 180, 644 P.2d 1266 (1982).

203. People v. Gonzales, 417 Mich. 968, 336 N.W.2d 451 (1982). The Michigan Supreme Court modified an earlier ruling in the same case, 415 Mich. 615, 329 N.W.2d 743, stating that it had not announced a per se prohibition on the testimony of a previously hypnotized witness. On remand, the court of appeals decided that a witness was not disqualified from testifying regarding pre-hypnotic information. People v. Perry, 126 Mich. App. 86, 337 N.W.2d 324 (1983). The Michigan Supreme Court later approved of the appellate court's approach by People v. Nixon, 364 N.W.2d 593 (Mich. 1984) (witness may testify at trial to facts which the witness recalled and related prior to hypnosis).

204. State v. Patterson, 213 Neb. 686, 331 N.W.2d 500 (1983).

205. Commonwealth v. Smoyer, 476 A.2d 1304 (Pa. 1984); Commonwealth v. Taylor, 249 Pa. Super. 171, 439 A.2d 803 (1982).

206. State v. Koehler, 312 N.W.2d 108 (Minn. 1981).

rel. Collins v. Superior Court[207] that any person who had been hypnotized would "be incompetent to testify to *any* fact."[208] Justice O'Holohan filed a forceful dissent, pointing out some of the negative practical effects of such a holding.[209] The state's motion for a rehearing was granted and the supreme court delivered an extensive supplemental opinion in May of 1982, which modified its January opinion.[210]

The court's supplemental opinion noted that the month and a half old decision in *People v. Shirley* had found the *Frye* test useful in serving "the salutary purpose of preventing the jury from being misled by unproven and ultimately unsound scientific methods."[211] The court then offered its version of the *Frye* test, holding that it is satisfied when knowledgeable experts "have come to recognize the methodology as having sufficient scientific basis to produce reasonably uniform and reliable results that will contribute materially to the ascertainment of the truth."[212] Having said that, the court did not rely on expert testimony but upon a review of case law plus some scientific and legal commentary to find that hypnosis was unreliable due to a variety of factors.[213] Analyzing procedural safeguards, the court found that such procedures may increase the reliability of hypnosis and allow it "to cross the *Frye* threshold."[214] Ultimately, however, they rejected the safeguard approach because it "will consume too much in the way of judicial resources, will produce conflicting results in different trial courts, and will produce few situations in which hypnotic recall is ever admitted."[215]

The court then recognized that hypnosis has value for investigative purposes; the use of hypnosis for those purposes somehow entails less serious risks. Consequently, the court modified its January opinion, holding that a previously hypnotized witness could testify "with regard to those matters which he or she was able to recall *and* relate prior to hypnosis."[216] The court ruled, however, that any investigating party is henceforth *required* to record

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207. 132 Ariz. 180, 644 P.2d 1266 (1982).

208. *Id.* at 193, 644 P.2d at 1279 (Feldman, J., supplemental opinion). The court had earlier extended its rule of total incompetency to civil cases in Lemieux v. Superior Court, 131 Ariz. 214, 644 P.2d 1300 (1982).

209. "It is indeed a sorry result when the victim of a rape cannot even take the stand to say she was raped." 132 Ariz. at 192, 644 P.2d at 1279.

210. "A decent respect for the doctrine of *stare decisis* [is overcome] . . . where issues of important public policy are involved . . . [and] . . . where the rule in question is not of long-standing duration." *Id.* at 194, 644 P.2d at 1280 (Feldman, J., supplemental opinion).

211. *Id.* at 199, 644 P.2d at 1285.

212. *Id.*

213. The court enumerated the various familiar problems: hypersuggestibility, hypercompliance, confabulation, increased subject confidence in recalled memories, and inability to distinguish between true memories and pseudo memories. The latter two problems impair effective cross-examination and effectively deny the defendant the right to confront an accusor. *Id.* at 200-05, 644 P.2d at 1286-1292.

214. *Id.* at 202-07, 644 P.2d at 1288-93.

215. *Id.* at 208, 644 P.2d at 1294.

216. *Id.* at 209, 644 P.2d at 1295.

a witness' pre-hypnotic recollections prior to placing the witness under hypnosis.[217] Admission of pre-hypnotic testimony absent such a procedure would be error. Finally, the court suggested that parties intending to use hypnosis for investigative purposes follow some, if not all, of the Orne procedural guidelines.[218]

Over the next three years, courts in several states followed the approach of *per se* exclusion of post-hypnotic testimony. In addition to the states mentioned above, the approach has been clearly adopted by courts in Colorado,[219] Massachusetts,[220] New York,[221] Maryland,[222] North Carolina,[223] Oklahoma,[224] Washington,[225] Delaware,[226] and most recently Florida.[227] Of these, Maryland's adoption was especially notable, for in overruling *Harding*, the supreme court undercut the foundation of the admissibility approach.[228] While all of the states mentioned in this section, except California, allow pre-hypnotic testimony, most have either required or suggested guidelines for investigative parties in order to avoid "tainting" pre-hypnotic memories with post-hypnotic memories.

IV. ANALYSIS

Three competing approaches to the issue of admissibility of previously hypnotized witnesses now exist: the admissibility approach, the guarded admissibility approach, and the *per se* exclusion approach. While it is difficult to describe the last approach as the "majority" position, its adoption is at least currently a strong, if not dominant, trend among state courts. This is unfortunate, for it is the approach of *per se* exclusion that contains the most significant analytical flaws and produces the most serious negative practical effects.

A. Critique of the Per Se *Exclusion Approach*

Courts excluding hypnotically refreshed testimony have done so primarily because in applying some variation of the *Frye* test, they have found that

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217. *Id.* at 210, 644 P.2d at 1296.
218. *Id.*
219. People v. Quintanar, 659 P.2d 710 (Colo. App. 1982).
220. Commonwealth v. Kater, 388 Mass. 519, 447 N.E.2d 1190.
221. People v. Hughes, 59 N.Y.2d 523, 452 N.Y.S.2d 408, 453 N.E.2d 484 (1983).
222. State v. Collins, 296 Md. 670, 464 A.2d 1028 (1983).
223. State v. Peoples, 311 N.C. 515, 319 S.E.2d 177 (1984).
224. Robinson v. State, 677 P.2d 1080 (Okl. Crim. 1984).
225. State v. Martin, 101 Wash. 2d 713, 684 P.2d 651 (1984).
226. State v. Davis, 490 A.2d 601 (Del. Super. Ct. 1985).
227. Bundy v. State, 471 So. 2d 9 (Fla. 1985).
228. The influence of the recent Maryland decision in State v. Collins, *supra* note 222, can be seen in the North Carolina decision of State v. Peoples, *supra* note 223: "We followed *Harding* in *McQueen* and the recent overruling of *Harding* . . . erases the cornerstone of the credibility approach to hypnotically refreshed testimony and, hence, the basic premise of *McQueen*." 311 N.C. at 532, 319 S.E.2d at 187.

hypnosis lacks general scientific acceptance as a means of restoring historically accurate memory. Hypnotically refreshed testimony is unreliable as scientific evidence and must not be admitted lest it confuse or mislead the trier of fact. While this argument may seem superficially appealing, close scrutiny reveals a number of analytical flaws.

First, the *Frye* test is not an appropriate method of determining whether hypnotically refreshed testimony is admissible. As previously discussed, the *Frye* test explicitly applies to the admissibility of expert opinion deduced from a scientific test or principle. As it was originally applied, "the *Frye* test prevented an expert from vouching for the credibility of a witness and then supporting his (the expert's) testimony by reference to some scientific principle that purportedly proved that the initial witness was telling the truth."[229] Applying *Frye* in order to exclude eyewitness testimony is clearly an improper use of the test. In rejecting *Frye's* applicability to hypnosis, the Alaska Court of Appeals correctly noted that "[s]trictly speaking, no expert is involved."[230] What is involved is eyewitness testimony which, whether refreshed by hypnosis or not, is simply not the same thing as expert opinion deduced from a scientific test. As the Fifth Circuit Court of Appeals recently stated: "The issue here is not the admissibility of a hypnotist's observations or statements made by the witness during hypnosis but instead the admissibility of the testimony of a lay witness in a normal, waking state."[231] To use the *Frye* test to exclude such testimony is "to turn the . . . test on its head."[232]

Secondly, mere employment of the *Frye* test will not exclude hypnotically refreshed testimony if the court applies the standard correctly in framing the issue. If the court understands the true nature and purpose of hypnosis it will frame the issue, as the court did in *State v. Hurd,* by inquiring as to whether hypnosis is generally accepted as a "reliable means of restoring memory comparable to normal recall."[233] Even critics of the use of hypnosis do not deny that the technique may enhance the memory of a witness.[234]

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229. State v. Contreras, 674 P.2d 792, 817 (Alaska Ct. App. 1983).

230. *Id.* at 816.

231. United States v. Valdez, 722 F.2d 1196, 1201 (5th Cir. 1984).

232. *Contreras,* 674 P.2d at 817. The Alaska Court of Appeals was harshly critical of the California Supreme Court's use of the *Frye* test in its *Shirley* decision.

> In *Shirley* the California Supreme Court permitted an expert, Dr. Diamond, to attack the credibility of a class of witnesses, *i.e.,* those who had been hypnotized prior to trial, based on scientific principles derived from the results of studies of the impact of improper interrogation techniques on the memory of hypnotized subjects. Based on this testimony, the California Supreme Court disqualified previously hypnotized witnesses as a class. Curiously, the court did not examine whether Dr. Diamond's views had received general scientific acceptance. Dr. Diamond readily concedes that his view regarding the effects of memory distortion in eyewitnesses is a minority view among experts familiar with the subject.

Id. (footnote omitted).

233. State v. Hurd, 86 N.J. 525, 528, 432 A.2d 86, 92 (1981).

234. *See, e.g.,* Diamond, *supra* note 1, at 340; Orne, *supra* note 57, at 317-18.

Properly framing the issue according to the nature and purpose of hypnosis can easily enable a court to conclude, as the *Hurd* court did, that hypnosis is generally accepted as a reasonably reliable method of restoring a person's memory, at least "[i]f it is conducted properly and used only in appropriate cases."[235]

The analytical error lies in incorrectly framing the issue by asking whether hypnosis is generally accepted as reliable in producing historically accurate memory. Framing the issue in this fashion ignores the nature and purpose of hypnosis and creates a discriminatory and unrealistic standard.[236] The *Frye* test is normally employed as a standard in assessing the reliability of expert opinion and experimental data commonly associated with technological devices capable of producing objectively measurable results.[237] Unlike the technological hardware with which some courts have forced it to associate, hypnosis has no dials to spin; it produces no hard results capable of precise and objective calibration or measurement. Most importantly, hypnosis is a technique that may prove to be helpful in refreshing the memory of a witness. It is not a guarantor of truth or of historical accuracy and should not be treated as such. Given popular misconceptions about hypnosis, it is understandable that some courts have equated hypnosis with techniques such as narcoanalysis and with machines such as polygraphs. But while this comparison may be understandable, it is nonetheless incorrect, as two writers have stated:

> Requiring hypnosis to perform a truth-determinant function . . . distorts the scientific process and aborts its potential benefit to litigation. The value of hynosis lies in its scientifically-established reliability as a device for retrieving relevant testimony previously forgotten or psychologically repressed, *regardless* of the factual truth or falsity of that testimony.[238]

A third flaw in the *per se* exclusionary-approach is the assumption that hypnotically refreshed testimony is qualitatively different from, and inferior

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235. *Hurd*, 86 N.J. at 528, 432 A.2d at 92.

236. The standard of historical accuracy is discriminatory because it is applied selectively. Courts do not demand that the memories of non-hypnotized witnesses be historically accurate. This standard is unrealistic because by requiring historical accuracy, the courts equate reliability with infallibility, for one cannot be "a little" historically accurate any more than one can be "a little" pregnant. McCormick has noted that courts using the *Frye* test tend to require that scientific techniques produce infallible results. He has criticized that tendency by pointing out that a requirement of infallibility effectively eliminates the need to ask the scientific community whether a device produces results generally accepted as reliable. "In the case of matters labelled 'lie detector,' 'truth serum,' 'voiceprint,' . . . the courts seem to conclude that the jury will consider the tests infallible, and so require that they be shown to be infallible before they are submitted." C. MCCORMICK, *supra* note 79, at 490 n.32.

237. The *Frye* test has been applied, *inter alia*, to neutron activation analysis, ion miroprobic analysis, atomic absorption, remote electro-magnetic sensing, bitemark comparisons, sound spectrometry, gaschrome-biographic analysis, chromotographic analysis, and forward looking infrared systems. *See* Giannelli, *supra* note 116, at 1198-1201 (list of cases applying *Frye* types of novel scientific evidence). Amidst this array of evidence from the natural sciences, hypnosis appears, and is incongruously placed.

238. Spector & Foster, *supra* note 7, at 584.

to, other memory. It is not. Courts that have refused to admit hypnotically refreshed testimony have recited the litany of potential hypnotic dangers: suggestibility, hypercompliance, confabulation, deliberate falsification, and an increased witness confidence in, and a "hardening" of, hypnotically refreshed testimony. What these courts fail to realize, or at least admit, is that these phenomena are not exclusive to memory enhanced by hypnosis. They are phenomena that may afflict, just as easily and in equal measure, the memory of non-hypnotized witnesses. Our minds selectively record and store information and as new data is incrementally added, original perceptions become distorted and so intermixed with subsequent additions that it becomes impossible to distinguish original perceptions from sequential increments. As a noted authority on memory, Dr. E. F. Loftus, explains:

> Memory is imperfect. This is because we often do not see things accurately in the first place. But even if we take in a reasonably accurate picture of some experience, it does not necessarily stay perfectly intact in memory . . . . The memory traces can actually undergo distortion. With the passage of time, with proper motivation, with the introduction of special kinds of interfering facts, the memory traces seem sometimes to change or become transformed. These distortions can be quite frightening, for they can cause us to have memories of things that never happened.[239]

On a daily basis, we round out incomplete knowledge by confabulating, filling in gaps in our memory with our "biases, expectations, and past knowledges."[240]

Inaccuracies in normal memory may become magnified in the mind of an individual who has been a victim or witness of a crime.[241] Eyewitness testimony often is further distorted by the process of interrogation by police and lawyers.[242] One court recently observed that "the danger of confabulation, the danger that information supplied through suggestion will become a part of a witness's memory, and the danger that the witness will be as confident about the inaccurate recollections as the accurate recollections, are possible side effects of the interrogation process."[243] Increased confidence

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239. E. LOFTUS, MEMORY 37 (1980).

240. *Id.* at 40.

241. *See* E. LOFTUS, EYEWITNESS TESTIMONY (1979); P. WALL, EYEWITNESS IDENTIFICATION IN CRIMINAL CASES 1965); Loftus, *Eyewitness: Essential But Unreliable,* 18 PSYCHOLOGY TODAY 22 (1984); Note, *Did Your Eyes Deceive You? Expert Psychological Testimony on the Unreliability of Eyewitness Identification,* 29 STAN. L. REV. 969 (1977).

242. *See* Marshall, Marquis & Oskamp, *Effect of Kind of Question and Atmosphere of Interrogation on Accuracy and Completeness of Testimony,* 84 HARV. L. REV. 1620 (1971).

243. *Contreras,* 674 P.2d at 817. The court concluded that, because of the variables of witness motivation and the interrogation process, any effect of the hypnotic process could be produced in a non-hypnotized witness:

> Further, . . . any hypnotic effect will be duplicate with a subject who has not been hypnotized, so long as the subject has sufficient interest in the success of the experiment and rapport with the experimentor . . . .[I]t would be inappropriate to say that a previously hypnotized witness's trial testimony was any more the product of the hypnotic session than a nonhypnotized witness's trial testimony is the product of the interviews she previously had with police and prosecutors.

and hardening of testimony may occur in non-hypnotized witnesses simply as a result of cross examination.[244] Because of the similarity of problems between hypnotically refreshed testimony and normal testimony, the exclusion of the former is completely unwarranted.[245] In fact, where a qualified hypnotist follows predicate guidelines designed to avoid these problems, hypnotically refreshed testimony should prove *more* reliable than testimony not subject to such safeguards.[246]

The *per se* exclusionary approach not only contains serious analytical flaws, it also poses significant practical problems as well. The total exclusionary approach of *Shirley* was criticized as effectively ending the investigatory use of hypnosis by law enforcement agencies[247] and as being unduly

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Id. The Alaska Court of Appeals relied heavily on the work of psychologist Thomas Barber, who explains hypnotic behavior as a function of the subject's attitudes, motivations, and expectations of a given experiment. Barber argues that any effect of hypnosis can be duplicated without a formal hypnotic induction process. *See* T. BARBER, HYPNOSIS: A SCIENTIFIC APPROACH (1969); Barber & Calverley, *Empirical Evidence for a Theory of Hypnotic Behavior: Effects on Suggestibility of Five Variables Typically Included in Hypnotic Induction Procedures,* 29 J. CONSULTING PSYCH. 98 (1965). The New Jersey Supreme Court, in State v. Hurd, 86 N.J. 525, 543, 432 A.2d 86, 94 (1981), did not refer to Barber but recognized other psychological research that demonstrates the similarity of problems common to both normal and hypnotically enhanced memory. The California Supreme Court, in People v. Shirley, 31 Cal. 3d 18, 181 Cal. Rptr. 243, 641 P.2d 775 (1982), did not adequately take into account this similarity, and Justice Kaus, concurring and dissenting, was sharply critical of the majority for its failure to do so. *Id.* at 76, 181 Cal. Rptr. at 279, 641 P.2d at 810 (Kaus, J., concurring and dissenting).

244. Two commentators note that cross-examination may cause the witness to feel attacked and abused. "This kind of interrogation may force the witness to defend his perception and memory of the event and elicit defense mechanisms that make the witness appear more assertive and confident than the accuracy of his testimony may warrant." Spector & Foster, *supra* note 7, at 584.

245. One court has noted:

> The argument that previously hypnotized witnesses should be disqualified from testifying gains force only if hypnotism creates a risk of distorting memory that is substantially greater than, or qualitatively distinct from, the risk ordinarily posed by interrogating a victim who has rapport with her questioner and who has a vital interest in the identification of her assailant. In contrast, if improper interrogative techniques and the normal experiences encountered by eyewitnesses account for virtually all instances of memory distortion, then no special rule for hypnotism would appear warranted.

Contreras, 674 P.2d at 802.

246. Some commentators have observed that:

> [t]he array of complexities inherent in the attempt to glean accurate information, while relying upon the functioning of errant human faculties, encourages support for the courts' responsiveness to testimony retrieved through pretrial hypnotic induction. A witness whose memory has been refreshed through hypnosis may be able to recount an observed event more fully and accurately than any other witness.

Spector & Foster, *supra* note 7, at 590.

247. *See, e.g.*, State *ex rel.* Collins v. Superior Court, 132 Ariz. 180, 193, 644 P.2d 1266, 1277 (1982) (Holohan, C.J. dissenting from original opinion) ("[n]o law enforcement agency can risk using hypnosis because the person subjected to hypnosis cannot thereafter be used as a witness").

harsh on victims of crime.[248] To avoid the problems resulting from *Shirley's* total ban, other *per se* exclusionary approach courts have adopted a modified rule that permits a witness to testify as to facts remembered prior to hypnosis. Unfortunately, this compromise rule only creates additional problems. It is illogical and unworkable. It presupposes that a witness had[249] a pre-hypnotic memory of which a record has been made. If both of those assumptions prove correct, then the witness may testify only with respect to what is on the record.[250] This may raise ethical problems for a witness who may be forced to violate his oath by testifying to pre-hypnotic memory he no longer accepts as truth, as well as for a prosecutor who may be forced to violate disciplinary rules by instructing the witness to stick to a record the witness no longer accepts as true. The rule also creates tactical problems for the defense, whose cross-examination is restricted by fear of eliciting recall tainted by hypnosis. The rule creates a procedural nightmare for the trial judge who must insure that the parties do not stray from the pre-hypnotic script.[251] Additionally, while the modified rule was adopted in part to encourage investigatory uses of hypnosis, it does not have that effect. Many of these courts have stated that even pre-hypnotic evidence would be barred unless proper procedural hypnotic safeguards were used, but they have not specified what those safeguards are.[252] Guessing at procedures must have a chilling effect on law enforcement authorities and others wishing to use hypnosis. Lastly, these *per se* exclusionary-approach courts seem to ignore

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248. *See, e.g.*, People v. Williams, 132 Cal. App. 3d 920, 928, 183 Cal. Rptr. 498, 502 (1982) (Gardner, J., concurring) ("The idea that the predator may testify and yet his victim may not offends my sense of justice. It appears to me that the scales of justice are tilted—dangerously"). *Williams* is one of several decisions in which California appellate courts have, by distinguishing facts or interpretations of *Shirley*, evaded the precedent of their own state's highest court. *See, e.g.*, People v. Glaude, 141 Cal. App. 3d 633, 190 Cal. Rptr. 479 (1983) (admission of testimony not prejudicial to defendant); People v. Parrison, 137 Cal. App. 3d 529, 187 Cal. Rptr. 123 (1982) (using test of relevancy, not *Frye*, to admit hypnotic testimony); People v. Adams, 137 Cal. App. 3d 346, 187 Cal. Rptr. 505 (1982) (hypnotic testimony uncontaminated, unlike *Shirley*).

249. The past tense is used because, by the reasoning of these courts, it is impossible for a person to "have" a pre-hypnotic memory. Exclusionary-approach courts assert that the act of hypnosis terminates pre-hypnotic memory and substitutes a new, inaccurate, and unreliable memory.

250. In this situation there is no real need for the witness to testify, for the record itself can be admitted either under the recorded recollection hearsay exception of FED. R. EVID. 803(5) or, if the requisite conditions are met, under the former testimony hearsay exception of FED. R. EVID. 804(B)(1).

251. Most of the problems of the modified rule discussed in the text to this point are treated in greater detail in State *ex rel.* Collins v. Superior Court, 132 Ariz. 180, 201, 644 P.2d 1266, 1297-98 (1982) (Gordon, V.C.J., concurring and dissenting).

252. The *Collins* court is one of several courts that did not specify what hypnotic standards were necessary, and Vice Chief Justice Gordon, concurring and dissenting, criticized that omission. "I would not have litigants guess at which or how many standards would be enough to satisfy this Court that pre-hypnotic testimony was properly admitted." *Id.* at 202, 644 P.2d at 1299 (Gordon, V.C.J., concurring and dissenting).

the fact that if a witness had a good pre-hypnotic memory, it is unlikely that hypnosis would have been needed to refresh it. Ergo, the only memory to which a previously hypnotized witness may testify to is a faulty memory in need of refreshing.

A final criticism of the *per se* exclusion approach concerns both the *Frye* test and the reasons why some courts have applied it to hypnosis. One of the purported advantages of the *Frye* standard is that it "promotes uniformity of decision."[253] As has been seen, however, uniformity has not been achieved. There have been inconsistencies in application and in results. Some courts have used the *Frye* standard, while others have rejected it as inappropriate. Among those courts that have employed the test, some have found hypnotically adduced evidence to be reliable, while others have not. McCormick has labelled the application of the test as "highly selective,"[254] and Giannelli has observed that "inconsistencies in application abound."[255] As to why this is the case, Professor Giannelli argues that instead of using *Frye* as a neutral tool, "it appears that many courts apply it as a label to justify their own views about the reliability of particular forensic techniques."[256] Similarly, Professor Weyrauch has observed that rules of evidence function as "legal masks" that hide the deep-seated value choices of judges.[257] One can only speculate as to the true reasons why some judges have chosen to exclude hypnotically refreshed testimony. Perhaps they genuinely misunderstand the nature and purpose of hypnosis. Perhaps they distrust the ability of jurors to properly weigh such testimony. Perhaps they fear such testimony will excessively benefit the prosecution in criminal cases.[258]

A better approach would require judges to cease hiding behind the mask of the *Frye* reliability test and openly expose and clearly articulate their true reasons for rejecting hypnotically refreshed testimony so that their concerns may be adequately debated and evaluated. Such debate is foreclosed and justice is impaired by the expedient employment of an inappropriate standard that may result in an automatic and overly broad exclusion of relevant evidence.[259]

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253. Margolin & Coliver, *supra* note 42, at 47.

254. C. MCCORMICK, *supra* note 79, at 490.

255. Giannelli, *supra* note 116, at 1219.

256. *Id.*

257. Weyrauch, *Law as Mask—Legal Ritual and Relevance,* 66 CALIF. L. REV. 699, 710-77 (1978).

258. *See, e.g.*, People v. Hughes, 59 N.Y.2d 523, 530, 452 N.Y.S.2d 408, 415, 453 N.E.2d 484, 491 (1983) ("like the present case, evidence is usually offered by the prosecutor"); State v. Mack, 292 N.W.2d 764, 770 ("significant, however, that this . . . clearly favors only the prosecution").

259. In declaring previously hypnotized witnesses competent to testify, the *Contreras* court was critical of courts that seemed more concerned with developing general evidentiary rules than with the interests of justice in the particular case before them.

> We recognized that a number of the cases addressing these issues approach them from a slightly different perspective. They view the case *sub judice* purely as a vehicle for announcement of a broad prophylactic rule of general application. To reach a conclusion these cases ask whether pretrial hypnotism is a good or bad

B. Critique of the Admissibility Approach

The admissibility approach presents certain advantages. It does not automatically disqualify an entire class of witnesses. It encourages the use of hypnosis as an investigatory tool. Perhaps most importantly, it allows relevant testimony to reach the trier of fact. However, the approach has several serious defects that render it unacceptable.

First, the approach fails to adequately recognize the potential for the abuse of hypnosis. While it is true that the possible negative effects of hypnosis may be produced in non-hypnotized witnesses, there is a difference between hypnosis and other techniques of investigation and interrogation. Hypnosis is inherently suggestive; the subject must be willing to comply with suggestions if hypnosis is to have any value. The danger lies in the possibility that the hypnotist will, either inadvertently or deliberately, suggest the identity or culpability of a suspect. This danger is greatest when hypnosis is performed by unqualified personnel and/or law enforcement authorities or their agents. In allowing the testimony of all previously hypnotized witnesses to reach the trier of fact, the court does not bar evidence made unreliable by undue suggestiveness.

Courts taking the admissibility approach answer that reliability is a component of credibility and is, as such, to be evaluated by the trier of fact. But this answer only betrays a second defect of this approach. Unlike most methods of refreshing the memory of a witness, hypnosis normally takes place prior to trial. Absent a video tape recording, the jury is unable to observe the demeanor of the witness prior to hypnosis. Absent assurances that procedural guidelines were followed to prevent suggestiveness, the jury has no way of knowing whether, or to what extent, suggestiveness occurred. The trier of fact, in short, has a markedly impaired ability to evaluate adequately either the reliability of the hypnotic procedures or the credibility of the witness' hypnotically refreshed memory.

A third, closely related, deficiency of this approach is that by placing such an unrealistic burden on the jury, the trial judge abdicates some of his own responsibility. Under the Federal Rules of Evidence, and analogous state evidentiary rules, a trial judge must subject even relevant evidence to a probative/prejudicial test. A *per se* admissibility approach effectively evades this obligation, shifting it to litigating counsel and the jury.

In *United States v. Valdez*,[260] the Court of Appeals for the Fifth Circuit acknowledged the potential value of hypnotically adduced evidence but found

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> practice as a general rule . . . . These conclusions motivate these courts to establish a "per se" rule barring testimony by witnesses hypnotized prior to trial . . . . [T]he cases before us are not solely vehicles for the announcement of general rules of evidence. They are equally concerned with whether Contreras sexually assaulted S. J. and E. L. and whether Grumbles burglarized Hall's residence and assaulted her.

674 P.2d 792, 795-96 (Alaska Ct. App. 1983).

260. 722 F.2d 1196, 1203 (5th Cir. 1984) (concluding that prejudicial effect outweighs probative value where a hypnotized subject identifies for the first time a person he has reason to know is already under suspicion).

reversible error in the decision of a United States district court to admit such evidence by means of a *per se* rule of admissibility, as opposed to an application of the probative value versus the prejudicial value test. The court stated:

> Post-hypnotic testimony can obviously be relevant . . . . And we cannot say that it is always without probative value. In this case, however, the district court did not expressly weigh probative value against potential for prejudice. Admissibility was based instead on a rule of law decision that post-hypnotic testimony was admissible and the jury might assess credibility.[261]

A final problem with this approach is that the rule of *per se* admissibility of hypnotically adduced evidence does nothing to encourage law enforcement agencies and other investigators to employ qualified hypnotists and to follow procedures designed to avoid improper suggestions and to minimize other risks of hypnotic interrogation. Lacking any incentive to invest time, money, and effort in obtaining trained personnel and in using proper procedures, many agencies will understandably use personnel and procedures that, however unintentionally, increase the probability of distorting the memory of a witness and prejudicing the rights of a defendant.[262]

C. Critique of the Guarded Admissibility Approach

The guarded admissibility approach has been subjected to various criticisms, especially by the courts that have rejected it in favor of a rule of *per se* exclusion. One of the more common criticisms is that the use of predicate guidelines does not adequately ensure reliability of testimony because the guidelines only protect against suggestiveness and not against the other risks of hypnosis.[263] This argument is meritless since it misunderstands the nature and purpose of both hypnosis and the guidelines. As previously stated, the purpose of hypnosis is to refresh memory and not to guarantee truth.[264] The guidelines ensure that proper hypnotic procedures are used. As previously

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261. *Id.* at 1201.

262. One of the better known recent decisions taking a general admissibility approach is Chapman v. State, 638 P.2d 1280 (Wyo. 1982). The facts represent a near-perfect antithesis of the Orne safeguards. The hypnotist was a police officer with little training in hypnosis. There was no record made of the witness' recollection prior to hypnosis. Several other people, including police officers, were present at the hypnotic sessions. No written transcript of the sessions was made nor did anyone take notes. The sessions were videotaped but one videotape was lost and the other two were mostly inaudible. In his dissent, Justice Brown took note of these facts in commenting: "Stripped of its veneer, this case holds that a police officer who occasionally plays around with hypnotism can manipulate the recall of a witness and receive the blessing of this court . . . . The admission of hypnotically enhanced testimony, developed by a rank amateur absent any scientific procedure is totally unreliable." *Id.* at 1286-87 (Brown, J., dissenting).

263. *See, e.g.*, People v. Hughes, 59 N.Y.2d 523, 543-44, 466 N.Y.S.2d 255, 265-66, 453 N.E.2d 484, 494-95 (1983); People v. Shirley, 31 Cal. 3d 18, 39, 181 Cal. Rptr. 243, 255, 641 P.2d 775, 786-87 (1982).

264. *See supra* notes 233-38 and accompanying text.

shown, if proper hypnotic procedures are used, restored memory should be at least as reliable as the memory of a non-hypnotized witness.[265]

The approach has also been criticized on the gound that the monitoring of compliance with the guidelines would prove difficult in practice, would be time consuming, and would not lead to uniform results.[266] These are ironic criticisms in view of the inconsistencies and practical problems of the *per se* exclusion approach.[267] They are also of little merit. A guarded admissibility approach provides a general standard in asserting that hypnotically refreshed testimony is reliable when hypnotic procedures were conducted properly. Guidelines provide uniformity of investigative practices within the jurisdiction. As investigative bodies and courts become familiar with the guidelines, the monitoring of compliance should be easier and inconsistent results should be minimized. In any event, inconsistencies due to the peculiarities of a given case and any increased judicial expenditure of time in reviewing the facts of each case seem preferable to the intentional exclusion of relevant evidence and the disqualification of a class of witnesses.

Another criticism of the guarded admissibility approach is that it may admit evidence that could confuse the trier of fact since "[h]ypnosis is cloaked in a veil of mysticism."[268] The same courts assert, however paradoxically, that because jurors are confused by hypnosis, they will give it added weight and place "undue emphasis on what transpired during a hypnotic session."[269] This criticism exhibits an unfounded mistrust of jurors which, fortunately, all courts do not share.[270] Complex litigation, often involving expert testimony on subjects more esoteric than hypnosis, is a common feature of modern trials. There is no reason to isolate hypnosis as *ipso facto* confusing. Besides, as one judge commented in a recent hypnotism decision, "I am firmly of the belief that jurors are quite capable of seeing through flaky testimony and pseudo-scientific claptrap."[271] Vigorous cross-examination and cautionary instructions from the bench should adequately assist juries in this task.

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265. *See supra* notes 239-46 and accompanying text. As the *Contreras* court noted, the Orne safeguards specifically protect against confabulation as well as suggestion. Confabulation occurs when someone with no memory of an event is placed under pressure to recall a memory by someone he wishes to please. The Orne safeguards attempt to minimize the pressure on the witness to have memories. State v. Contreras, 674 P.2d 792, 809 (Alaska Ct. App. 1983).

266. Such a "time consuming and expensive course is precisely what the [Frye] tests seeks to avoid." Commonwealth v. Kater, 388 Mass. 519, 526, 447 N.E.2d 1190, 1196 (1983); *see also* People v. Shirley, 31 Cal. 3d 18, 30, 181 Cal. Rptr. 243, 255, 641 P.2d 775, 787 (1982); People v. Quintanar, 659 P.2d 710, 712-13 (Colo. Ct. App. 1982).

267. *See supra* notes 249-59 and accompanying text.

268. State *ex. rel.* Collins v. Superior Court, 132 Ariz. 180, 186, 644 P.2d 1266, 1272 (1983).

269. *Id.*

270. "We are content to rely upon the good sense and judgment of American juries, for evidence with some element of untrustworthiness is customary grist for the jury mill. Juries are not so susceptible that they cannot measure intelligently the weight of identification testimony that has some questionable feature." Manson v. Braithwaite, 432 U.S. 98, 116 (1977).

271. People v. Williams, 132 Cal. App. 3d 920, 928, 183 Cal. Rptr. 498, 502 (1982) (Gardner, J., concurring).

Given the previous discussions of the analytical and practical shortcomings of the approaches of *per se* exclusion and of *per se* admissibility, it is obvious that an alternative to both approaches is preferable. Although it too has suffered criticism, the guarded admissibility approach appears, on balance, to offer the best solution to the problems of hypnotically refreshed testimony.

Perhaps the central problem with this approach is that its component elements lack clear definition. Some courts have emphasized the probative/prejudicial test of the Federal Rules of Evidence or analogous state evidentiary rules.[272] Other courts have emphasized predicate guidelines.[273] Among the latter, some have referred to guidelines only vaguely, while most have articulated an explicit set of suggested or required guidelines. Among the courts requiring guidelines, there has not been complete agreement as to what the guidelines should require, although all of the guideline sets have their primordial genesis in the safeguards proposed by Martin Orne.[274]

In the author's opinion, a guarded admissibility approach should contain three elements: (1) the establishment of predicate guidelines for hypnotic use, (2) the use of the probative/prejudicial analysis, and (3) the consideration of the existence and nature of corroborating evidence.

The establishment of procedural guidelines is the best way to ensure that investigatory bodies will use hypnosis only in appropriate cases, and that they will conduct hypnotic interviews only with qualified personnel who utilize procedures designed to protect against the attendant hazards of the hypnotic interview process. Appropriate use and procedural compliance should be determined by the court at a hearing out of the jury's presence. As the *Hurd* court required, the burden of proof should be on the proponent of the evidence and the standard of proof should be that of clear and convincing evidence.[275]

In deciding which guidelines to promulgate, the court has a variety of existing sets from which to choose. The guideline sets adopted by courts to date are understandably similar to one another, and all are adequate. Preferable to them, however, the guidelines known as the "Federal Model,"[276] a standard used by the investigative departments of the Armed Services, the Secret Service, the Treasury Department, and the Federal Bureau of Investigation.[277] The "Federal

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272. *See, e.g.*, United States v. Valdez, 722 F.2d 1196, 1201 (5th Cir. 1984); Zani v. State, 679 S.W.2d 144, 150 (Tex. App. 1984); Walters v. State, 680 S.W.2d 60, 63 (Tex. App. 1984).

273. *See, e.g.*, People v. Smrekar, 68 Ill. App. 3d 379, 385 N.E.2d 848 (1979); State v. Hurd, 86 N.J. 525, 432 A.2d 86 (1981); State v. Weston, 16 Ohio App. 3d 279, 475 N.E.2d 805 (1984); State v. Armstrong, 110 Wis. 2d 55, 329 N.W.2d 836 (1983).

274. *See supra* notes 128-51 and accompanying text.

275. State v. Hurd, 86 N.J. 525, 547, 432 A.2d. 86, 97-98 (1981).

276. *See* Ault, *FBI Guidelines for Use of Hypnosis*, 27 INT'L J. CLINICAL & EXPERIMENTAL HYPNOSIS 449-51 (1979); Hibler, *supra* note 57, at 555-57.

277. The Federal Model, in contrast to Orne's recommendations, requires that an investigator be present during the hypnotic session. In the FBI version, the investigator is known as the "coordinating Agent," an individual who has been trained, not as a hypnotist, but in the theory, techniques, and hazards of hypnosis. The required guidelines are contained in a checklist used by the coordinating Agent. The checklist is partially reprinted below:

Model" is also similar to Orne's,[278] but it is an improvement on earlier models

Preliminary

1. Only witnesses and victims should be hypnotized and only after other methods of investigation have been exhausted . . . .
2. Refer to and follow existing FBI policy.
3. Video tape requirements will be planned in advance of the first interview and should include:
   - — Location . . . .
   - — Equipment . . . .
   - — Properly cleared personnel to operate equipment.
   - — A proper briefing for camera crew.
4. Choice of professional—only a psychiatrist, psychologist, physician, or dentist . . . .
5. Items to be discussed with professional:
   - — FBI requirements.
   - — Dangers of cueing.
   - — Desire for coordinator to do the interviewing. [This is not an inflexible rule. At this time, many psychiatrists and psychologists have done enough work with FBI Agents that the professional himself can and does conduct much of the interview.]
   - — Agreement on payment . . . .
   - — Long-term arrangements, such as the possibility of obtaining security clearance for the doctor and the doctor's future participation in FBI cases.
   - — Comfort of witness.

The Hypnosis Session

1. The preinduction interview, that portion conducted on tape prior to the hypnosis session, should include:
   - — Discussion of hypnotist's background.
   - — Voluntary participation of witness. Signing consent form.
   - — Brief description of procedures.
   - — Removal of misconceptions.
   - — Discussion of basic health of witness . . . Any health problems must be resolved prior to interview.
2. Prior to taped interview, coordinating Agent will confer with others who may be present to advise them of the need for keeping quiet and unobtrusive.
3. Prior to hypnotic induction, the witness will be allowed to relax and recount all the details he/she can recall of the incident in question. Do not lead or question. Merely allow the witness to recount details in any order he desires.
4. The induction will be done by the professional. The coordinator should note for his records the doctor's opinion of the depth of the trance and by what method the doctor estimates that depth.
5. The doctor may then transfer rapport to the coordinator for questioning about the incident. The coordinator will again simply let the witness recall the incident without prompting. After the witness has recalled the incident, the coordinator may go back and "zero in" on specific details.
6. Rapport will be transferred back to the doctor who will dehypnotize the witness. The doctor is in charge of the session.
7. The original video tapes obtained from the interview are evidence and are treated accordingly. The chain of custody is maintained, and the tapes are provided to the Behavioral Science Unit of the Training Division at the FBI Academy for assessment and research.

Ault, *Hypnosis—The FBI's Team Approach*, 49 FBI LAW ENFORCEMENT BULL. 5, 5-8 (1980); Hibler, *supra* note 57, at 555-57.

278. The Federal Model is similar to Orne's safeguards except that the federal guidelines are

because it is richer in protective detail and because it expands "the concept of procedural safeguards beyond the hypnotic interview to the more basic considerations of circumstances for which such interviews are warranted."[279] By placing "appropriate use" within the guidelines, the "Federal Model" saves the court the task of making a separate determination. If it finds compliance with the guidelines, appropriate use is guaranteed.[280]

After the court has determined that its hypnotic procedural guidelines have been followed, the court should apply the probative/prejudicial balancing test of the Federal Rules of Evidence or analogous state evidentiary rules.[281] Procedural guidelines, for all of their importance, are not suggested procedures to guide investigatory agencies and courts. Even if all of the guidelines are followed, the court may justifiably conclude that the hypnotically adduced evidence is irrelevant because it is not probative, or that its probative value is substantially outweighed by its potentially prejudicial effect.

Alternatively, the evidence could be admitted even if some of the guidelines were not followed if the court determines, under the totality of the circumstances, that the hypnotic process was not unduly suggestive and that the resulting evidence is sufficiently probative. The Federal Rules of Evidence create a presumption in favor of the admission of relevant evidence. If the guidelines are followed, the trial judge will likely find the hypnotically refreshed memory of the witness to be as reliable as that of an ordinary witness. Therefore, sufficiently probative and non-prejudicial testimony should be put before the trier of fact. Nonetheless, guidelines cannot take away the sound discretion of the trial judge nor can they remove the court's responsibility to exercise such discretion.

Lastly, in applying this probative/prejudicial analysis, the court should consider the existence of corroborating evidence. This is not to say that

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more detailed, indicate appropriate uses of hypnosis, proscribe inappropriate uses, and provide for the presence of an investigator at the hypnotic interview. By providing that both a qualified hypnotist and a trained criminal investigator be present at the interview, "there is confidence that the well-being of the interviewee, the stipulated use of hypnosis, and the proper forensic exploration of the event in question are maintained. Thus, investigators do not function as doctors, and doctors do not function as investigators." Hibler, *supra* note 53, at 55.

279. *Id.* at 53.

280. Under the Federal Model, hypnosis is appropriate when *all* of the following conditions apply: (1) as a last resort in an attempt to provide information obtainable by no other means; (2) where a felony offense is involved; (3) where the witness or victim was able to perceive details which may have the potential for further enhancement; and (4) where there is the likelihood of independent corroboration. Hypnosis should not be used in known-subjects cases and may not be used where the credibility of the interviewee is in question or the witness has a medical or psychological history that indicates that hypnosis could exacerbate that condition. *Id.* at 54-55.

281. Evidence is relevant if it is probative. All relevant evidence should be admitted unless its probative value is substantially outweighed by the dangers of unfair prejudice, confusion of the issues, or misleading the jury. *See* FEDERAL R. EVID. 401-03.

corroborating evidence should be the only factor used to determine the admissibility of hypnotically refreshed testimony. A judge may have sound reasons for admitting, or refusing to admit, such testimony apart from the issue of corroborating evidence. The existence of corroborating evidence is, however, a powerful guarantor of the reliability and probative value of hypnotically refreshed testimony.[282] If the "Federal Model" is used for procedural guidelines, corroborating evidence should always exist by the time of trial. The model precludes the use of hypnosis absent the likelihood of independent corroboration and states that information obtained through hypnosis may not form the basis of investigative conclusions without corroboration evidence.[283]

V. CONCLUSION

Hypnosis is a valuable technique to assist a witness to recall previously forgotten or psychologically repressed memories. Its use, however, is not without some risk that a hypnotized subject will recall false memories. This risk is greatest when unqualified personnel induce hypnosis by using improper procedures. Many state courts have recently responded to this risk by excluding *per se* the testimony of previously hypnotized witnesses, holding that hypnosis is unreliable as a means of producing historially accurate recall. This approach is unwarranted—it distorts the nature and purpose of hypnosis, exaggerates hypnotic risks, and fails to adequately consider the ability of procedural guidelines and balancing tests to ensure the reliability of hypnotically refreshed testimony. Moreover, this approach is undesirable because it discourages the investigatory uses of hypnosis by law enforcement agencies and excludes relevant evidence by rendering virtually incompetent an entire class of witnesses.

On the other hand, almost equally unacceptable is the older judicial approach of *per se* admission of hypnotically refreshed testimony, which leaves to the jury the role of according proper weight to such evidence. This approach ignores the differences between hypnotism and other means of refreshing the memory of a witness and overlooks the possiblity of undue suggestiveness during the hypnotic interview. It places an unrealistic burden

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282. It is interesting to observe that corroborating evidence existed in many of the cases using a guarded admissibility approach, and the courts noted this fact in their decisions. On the other hand, in a number of cases using a per se exclusion approach (e.g., *Mack, Shirley),* corroborating evidence was absent, yet the courts seemed to ignore this fact. "Since the cases adopting *per se* rules are frequently cases in which eyewitness testimony was not corroborated, it is strange that the courts do not even consider limiting the *per se* rule to cases in which no corroboration exists." State v. Contreras, 674 P.2d 792, 816 (Alaska Ct. App. 1983).

283. Hibler, *supra* note 53, at 54. Even in the absence of the Federal Model, the percentage of corroboration may be quite high. "A police study of the Los Angeles Police Department demonstrated that 91% of all testimony from 500 witnesses under hypnosis was verified by independent corroboration." Comment, *Hypnosis: A Primer For Admissibility,* 5 GLENDALE L. REV. 51, 61 (1983).

on the factfinder and does nothing to encourage law enforcement authorities to use proper hypnotic procedures and qualified personnel.

Between these two extremes lies the approach of guarded admissibility. Under this approach, a court would, ideally, adopt hypnotic procedural guidelines, consider corroborating evidence or its absence, and employ standard probative/prejudicial analysis in determining the admissibility of hypnotically refreshed testimony in a given case. Procedural guidelines guarantee that undue suggestion did not occur during hypnosis and that the refreshed memory of the witness is as reliable as that of a non-hypnotized witness. Corroborating evidence further guarantees the reliability and probative value of hypnotically refreshed testimony. If, considering the totally of the circumstances, standard evidentiary analysis determines that the probative value of the testimony is high and that its prejudicial potential is low, the testimony should be admitted. Vigorous cross examination by counsel and cautionary instructions from the bench will assist the jury, the final determiner of truth, in properly weighing the credibility of hypnotically refreshed testimony.