

Washington University Law Review

Volume 60 | Issue 3

January 1982

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Recommended Citation

Deborah J. Carter, *The Use of Hypnosis to Refresh Memory: Invaluable Tool or Dangerous Device?*, 60 WASH. U. L. Q. 1059 (1982).

Available at: https://openscholarship.wustl.edu/law_lawreview/vol60/iss3/4

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NOTES

THE USE OF HYPNOSIS TO REFRESH MEMORY: INVALUABLE TOOL OR DANGEROUS DEVICE?*

Two recent cases exemplify the controversy surrounding the use of hypnosis, an increasingly popular technique for enhancing the recall of witnesses to crimes.¹ In the first case,² a young man who witnessed an assault was unable to describe the assailant. He agreed to undergo hypnosis³ to enhance his memory.⁴ After hypnosis, he described the assailant in convincing detail and recalled attending high school with him.⁵ At trial, however, an ophthalmologist demonstrated that the witness could not possibly have clearly seen the assailant's face.⁶ Other evidence established the inaccuracy of the high school memory.⁷ The suspect was acquitted.

* The author gratefully acknowledges the invaluable assistance of Dr. Martin T. Orne, Mr. Ephraim Margolin, and Professor Edward J. Imwinkelried.

1. By 1981, over 1000 detectives in the United States had been taught the use of hypnotism. Graham, *Should Our Courts Reject Hypnosis?*, St. Louis Post-Dispatch, Oct. 25, 1981, (Magazine) at 10. See also Levitt, *The Use of Hypnosis to "Freshen" the Memory of Witnesses or Victims*, TRIAL, April, 1981, at 56. Levitt notes that the use of hypnosis in the legal process has increased dramatically in the last three years. *Id.*

2. *People v. Kempinsky*, No. W80CF352 (Cir. Ct., Will. Co., Ill., Dec. 21, 1980) reported in Orne, *The Use and Misuse of Hypnosis in Court*, in 3 CRIME AND JUSTICE: AN ANNUAL REVIEW OF RESEARCH 61, 87-88 (Torry and Morris eds. 1981).

3. "[H]ypnosis . . . refers to a sleeplike state that nevertheless permits a wide range of behavioral responses to stimulation Even memory and awareness of self may be altered by suggestion, and the effects of the suggestions may be extended (post hypnotically) into subsequent waking activity." 9 ENCYCLOPEDIA BRITANNICA 133 (15th ed. 1974). For historical information on hypnosis, see *id.* at 134; Diamond, *Inherent Problems in the Use of Pretrial Hypnosis on a Prospective Witness*, 68 CALIF. L. REV. 313, 317-21 (1980); Spector & Foster, *Admissibility of Hypnotic Statements: Is the Law of Evidence Susceptible?*, 38 OHIO ST. L.J. 567, 567-68 (1977).

4. While under hypnosis, the witness was told that his mind could function as a television camera, and that he had the ability to "zoom-in" for a close-up view of the assailant's face. Orne, *supra* note 2, at 87-88 (citing *People v. Kempinsky*, No. W80CF352 (Cir. Ct., Will. Co., Ill., Dec. 21, 1980)).

5. The witness recalled that the assailant was a senior at his high school while he was a sophomore. *Id.*

6. The assailant was more than 250 feet away from the witness at all times. Under the weather conditions existing on the night of the crime, the witness could not have identified anyone at a distance greater than 30 feet. *Id.*

7. The accused could not have been a senior at the witness' high school because the accused dropped out of school in the tenth grade. *Id.*

In the second case,⁸ a woman, her husband, and their children surprised a burglar in their home.⁹ The burglar killed the husband and fled. The wife became hysterical when questioned by police about the incident. The oldest child was vague and unresponsive. During and following hypnosis, however, both the wife and the child described the murderer in detail. From their descriptions, the police drew a picture and arrested a suspect. Strong circumstantial evidence¹⁰ linked him to the crime.

Meanwhile, however, the Supreme Court of Arizona had ruled that once questioned about a matter under hypnosis, a witness is precluded from testifying about the matter in court.¹¹ In this case, without the eyewitness testimony, the state was forced to drop its charges. The mother and child are now forever barred from testifying for or against anyone accused of the murder.

These two cases merely hint at the complexity of the issues surrounding the admissibility of testimony by persons who have been hypnotized. An examination of the case law in this area reveals the sharp disagreement that exists as to the actual effect of hypnosis on the memory of an individual. Part one of this Note describes that case law. Part two analyzes the relevant scientific literature in an attempt to ascertain whether the new recall produced by hypnotic enhancement is accurate and whether the use of hypnosis to refresh a witness' memory contaminates the original memory. Part three examines the case law in light of the psychological literature and addresses two critical issues: first, whether the use of certain procedural safeguards can control contamination; second, whether a court should allow a previously hypnotized witness to testify on matters remembered prior to hypnosis, or whether it should absolutely preclude the witness from testifying.¹²

8. For a description of this case, see Graham, *supra* note 1, at 9.

9. A shootout ensued between the husband and the burglar. *Id.*

10. The suspect had checked into a Los Angeles emergency room 10 days after the murder with a bullet wound and an unlikely story about a hunting accident. *Id.*

11. *State v. Mena*, 128 Ariz. 226, 624 P.2d 1274 (1981). *But see Arizona ex rel. Collins v. Superior Court*, ___ Ariz. ___, 644 P.2d 1266 (1982) (Arizona Supreme Court modified its previous position, holding that a witness may testify to matters recalled and related prior to hypnosis).

12. This Note does not address the use of hypnosis for purely investigative purposes. As long as it is unnecessary for the witness to later testify about the subject matter of the hypnotic session, this appears to create few problems. A recent Arizona opinion recognizes, however, that if a witness' testimony is essential, and hypnosis will render that witness incompetent, police will sel-

I. CASE LAW CONCERNING THE USE OF HYPNOSIS

In *Harding v. State*,¹³ the court held that the use of hypnosis to refresh the recall of a witness relates to the credibility, but not to the admissibility of that witness' testimony.¹⁴ In *Harding*, a local psychologist hypnotized a rape victim. Although she had previously told different, incomplete stories,¹⁵ under hypnosis the victim recalled all of the events surrounding the incident and, after the hypnotic session, testified coherently in court about those events.¹⁶ The court stated that even if the witness had told different stories previously or had achieved her present knowledge only after being hypnotized, only the weight of the evidence was affected.¹⁷

Many jurisdictions have followed *Harding's* rationale in admitting such testimony.¹⁸ One court followed *Harding* in admitting the testi-

dom use hypnosis as an investigatory tool. *Arizona ex rel. Collins v. Superior Court*, ___ Ariz. ___, 644 P.2d 1266 (1982).

For a discussion of the use of hypnosis to aid a defendant in remembering information which may exonerate him, to aid a defendant in recalling details which may incriminate him, or to enable a party in a civil suit to recall the details of an auto accident, see Orne, *supra* note 2, at 63-68.

13. 5 Md. App. 230, 246 A.2d 302 (1968), *cert. denied*, 395 U.S. 949 (1969).

14. *Id.* at 236, 246 A.2d at 306.

15. *Id.* at 233-34, 246 A.2d at 304-05. Initially, the victim reported that she had been abducted at knife point by three black males, although she had, in fact, been shot. She later recalled details of the incident and reported that the defendant shot her. *Id.*

16. *Id.* at 234-35, 246 A.2d at 305-06.

17. *Id.* at 236, 246 A.2d at 306. The court also noted that the witness stated that she was reciting from her own recollection. The court failed to gather any scientific evidence on the subject other than that of the testimony of the psychologist who hypnotized the victim.

18. See *United States v. Adams*, 581 F.2d 193 (9th Cir. 1977), *cert. denied*, 439 U.S. 1006 (1978); *United States v. Narciso*, 446 F. Supp. 252 (E.D. Mich. 1977); *Clark v. State*, 379 So.2d 372 (Fla. Dist. Ct. App. 1980); *People v. Smrekar*, 68 Ill. App. 3d 379, 385 N.E.2d 848 (1979); *State v. Greer*, 609 S.W.2d 423 (Mo. Ct. App. 1980), *vacated on other grounds*, 450 U.S. 1027 (1981); *State v. McQueen*, 295 N.C. 96, 244 S.E.2d 414 (1978); *State v. Jorgensen*, 8 Or. App. 1, 492 P.2d 312 (1971); *Chapman v. State*, 638 P.2d 1280 (Wyo. 1982). *Accord* *State v. Glebock*, 616 S.W.2d 897 (Tenn. Crim. App. 1981) (following *United States v. Adams*, 581 F.2d 193 (9th Cir. 1978)). See also *People v. Lucas*, 107 Misc. 2d 231, 435 N.Y.S.2d 461 (Sup. Ct. 1980) (defendant may introduce expert testimony as to dangers of hypnosis in order to educate the jury). *But see* *People v. Hughes*, 51 U.S.L.W. 2053 (N.Y. App. Div. July 27, 1982) (hypnotically produced testimony inadmissible in New York criminal trials).

For a critique of the *Harding* decision, see *People v. Gonzales*, 108 Mich. App. 145, 310 N.W.2d 306 (1981). The *Gonzales* court viewed the *Harding* reasoning as riddled with problems. *Id.* at 155-56, 310 N.W.2d at 311. The court noted that: 1) although all other sources indicate otherwise, the hypnotist in *Harding* stated that hypnosis does not result in greater susceptibility to suggestion; 2) the hypnotist was an employee of various law enforcement agencies; 3) the hypnosis was conducted at a police barracks after the defendant was already the prime suspect; 4) the victim modi-

mony, but went one step further. That court refused to allow the parties to reveal that the witness had been hypnotized, thereby preventing that fact from reducing even the weight of the witness' testimony.¹⁹

Other courts have refused to accept the premise that the use of hypnosis should only relate to the credibility of a witness' testimony.²⁰ These courts apply the test established in *Frye v. United States*²¹ to the hypnotic technique itself. Under *Frye*, testimony resulting from the use of a scientific technique is not admissible unless that scientific technique has gained general acceptance in its field.²²

fied her story while under hypnosis; and 5) the court found it significant that the victim stated that she was testifying from her own recollection, although scientific studies indicate that subjects are frequently unable to distinguish actual memories from confabulations. *Id.*

19. *United States v. Awkard*, 597 F.2d 667 (9th Cir.), cert. denied, 444 U.S. 885 (1979). Other courts have allowed a previously hypnotized witness to testify, but have not clearly explained why. In two Georgia cases—*Creamer v. State*, 232 Ga. 136, 205 S.E.2d 240 (1974) and *Emmett v. State*, 232 Ga. 110, 205 S.E.2d 231 (1974)—a prostitute became the prosecution's star witness after her memory was revived through the use of hypnosis. The prostitute was a drug addict and had lived with one of the investigating officers during the investigation. In *Creamer* the court asserted: "We do not agree, however, that the hypnotic sessions tainted [the prostitute's] testimony. . . ." 232 Ga. at 138, 205 S.E.2d at 241, relief granted on other grounds, *Emmett v. Ricketts*, 397 F. Supp. 1025 (N.D. Ga. 1975). In *Emmett*, the court noted that the prostitute "testified at length and in detail" and "was cross-examined extensively and thoroughly." *Id.* at 115, 205 S.E.2d at 235. *Cf. Collier v. State*, 244 Ga. 553, 261 S.E.2d 364 (1979) (cross-examination as to hypnosis allowed for the purpose of determining credibility).

20. *See, e.g., State v. Mena*, 128 Ariz. 226, 624 P.2d 1274 (1981); *People v. Shirley*, 31 Cal. 3d 18, 641 P.2d 775, 181 Cal. Rptr. 243 (1982); *People v. Gonzales*, 108 Mich. App. 145, 310 N.W.2d 306 (1981); *State v. Mack*, 292 N.W.2d 764 (Minn. 1980); *People v. Hughes*, 51 U.S.L.W. 2053 (N.Y. App. Div. July 27, 1982); *Commonwealth v. Nazarovitch*, 496 Pa. 97, 436 A.2d 170 (1981). *Cf. Polk v. State*, 48 Md. App. 382, 427 A.2d 1041 (1981) (court noted that the *Frye* rule (*see infra* notes 22 & 23 and accompanying text) had not been adopted in Maryland at the time of the *Harding* decision and remanded for application of *Frye*). *But see Commonwealth v. Taylor*, — Pa. Super. —, 439 A.2d 805 (1982) (distinguishing *Nazarovitch*, finding testimony of victim who had been questioned under hypnosis admissible where there existed a recollection of facts prior to hypnosis and where there was no attempt to utilize testimony which surfaced for the first time as a result of the session). *See also United States v. Andrews*, General Court Martial No. 75-14 (N.E. Jud. Cir., Navy-Marine Corps. Judiciary, Phila., Pa., October 6, 1975) (hypnotically tainted evidence excluded on grounds of general unreliability and untrustworthiness). Military judges have interpreted the manual for courts martial as allowing testimony only as to matters remembered prior to hypnosis. *Diloff, The Admissibility of Hypnotically Influenced Testimony*, 4 OHIO N.U.L. REV. 1, 20-21 (1977).

21. 293 F. 1013 (D.C. Cir. 1923).

22. The *Frye* court stated: "[W]hile 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 to which it belongs." *Id.* at 1014.

Most state and federal courts follow the *Frye* rule. *Giannelli, The Admissibility of Novel Scientific Evidence: Frye v. United States, a Half-Century Later*, 80 COLUM. L. REV. 1197, 1205 (1980).

In *State v. Mack*²³ the court applied the *Frye* test to hypnotically enhanced testimony.²⁴ The court observed that not even an expert can determine whether a memory refreshed by hypnosis is accurate, and concluded that because the results were not scientifically reliable, the technique did not meet the *Frye* test.²⁵ *Mack* held that a court should not ordinarily permit a witness with hypnotically refreshed memory to testify concerning matters first recalled while under hypnosis.²⁶ The court also emphasized the importance of safeguards²⁷ to assure freedom from suggestion so that the witness could testify about recollections recorded before the hypnotic session.²⁸

The court in *State v. Mena*²⁹ also applied the *Frye* test and found the use of hypnosis to be scientifically unreliable.³⁰ Moreover, the court noted that witnesses often find it difficult to distinguish matters remembered prior to hypnosis from matters remembered only during and following the hypnotic session.³¹ The *Mena* court therefore concluded that a court should completely ban the testimony of a witness previously questioned on the subject matter of the testimony while under hypnosis.³²

For criticism of the rule, however, see C. McCORMICK, *McCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE* § 203 (E. Cleary, ed. 1972) (although general scientific acceptance is a proper condition for taking judicial notice, it should not be a criterion for admissibility); Gianelli, *supra*, at 1250 (accepted the premise, but rejected the standard of *Frye*).

23. 292 N.W.2d 764 (Minn. 1980).

24. The court in *Mack* stated:

Although hypnotically adduced "memory" is not strictly analogous to the results of mechanical testing, we are persuaded that the *Frye* rule is equally applicable in this context, where the best expert testimony indicates that no expert can determine whether memory retrieved by hypnosis, or any part of that memory, is truth, falsehood, or con-fabulation—a filling of gaps with fantasy.

Id. at 768.

25. *Id.*

26. *Id.* at 771.

27. The court took judicial notice of, but did not adopt, the safeguards set forth in Dr. Martin Orne's Affidavit of Amicus Curiae, filed in *Quaglino v. California*, No. 77-1288, *cert. denied*, 439 U.S. 875 (1978) [hereinafter cited as *Orne Affidavit*]. See notes 93-99 *infra* and accompanying text.

28. 292 N.W.2d at 771. See also *State v. Blanchard*, 315 N.W.2d 427 (Minn. 1982); *State v. Koehler*, 312 N.W.2d 108 (Minn. 1981).

29. 128 Ariz. 226, 624 P.2d 1274 (1981).

30. *Id.* at 231, 624 P.2d at 1279.

31. *Id.* at 232, 624 P.2d at 1280.

32. *Id.* Decisions subsequent to *Mack* and *Mena* have not always distinguished the holdings of the two cases. See, e.g., *State v. Palmer*, 210 Neb. 206, ___, 313 N.W.2d 648, 654 (1981) ("better rule to be that followed in the *Mack* and *Mena* cases"). In *People v. Gonzales*, 108 Mich. App. 145, 310 N.W.2d 306 (1981), the court asserted: "Two recent decisions from the Minnesota and

The California Supreme Court adopted a position very similar to that of the *Mena* court. In *People v. Shirley*³³ the California court held that the testimony of a witness who has undergone hypnosis for the purpose of restoring his memory of certain events is inadmissible regarding all matters that relate to those events from the time of the hypnosis forward.³⁴ The *Shirley* court noted that it would, however, admit testimony elicited from the witness by the prosecution on a topic wholly unrelated to the events that were the subject of the hypnotic session.³⁵

Subsequent to *Shirley*, the Arizona Supreme Court modified its *Mena* holding in *Arizona ex rel. Collins v. Superior Court*.³⁶ The court once again applied the *Frye* test to hypnotically enhanced testimony, reaffirming its *Mena* holding concerning the inadmissibility of such testimony. The court, however, re-examined its previous holding that courts should also exclude testimony recalled and recorded prior to hypnosis. It recognized the usefulness of hypnosis as an investigatory tool, but noted that police will seldom use that tool where the hypnosis of a witness automatically renders that witness incompetent.³⁷ The Arizona court observed that three cases from other states, in addition to the Minnesota decision in *State v. Mack*, had adopted positions that exclude hypnotically enhanced testimony, but allow witnesses to testify about previously recalled and recorded matters.³⁸ Although the court held that it, too, would now allow such testimony, it encouraged litigants to adopt certain safeguards in order to protect the testimony from contamination and to provide the court with a record of the proceeding.³⁹

Arizona Supreme Courts are in accord with the position we adopt in this opinion." *Id.* at 160, 310 N.W.2d at 314. The court then quoted the conclusion reached in *Mack*, however, and in a subsequent decision, *State v. Wallach*, 110 Mich. App. 37, 312 N.W.2d 387 (1981), the court held that testimony recalled prior to hypnosis is admissible.

33. 31 Cal. 3d 18, 641 P.2d 775, 181 Cal. Rptr. 243 (1982).

34. *Id.* at ___, 641 P.2d at 804, 181 Cal. Rptr. at 272.

35. *Id.* at ___, 641 P.2d at 804, 181 Cal. Rptr. at 273.

36. ___ Ariz. ___, 644 P.2d 1266 (1982).

37. *Id.* at ___, 644 P.2d at 1295.

38. *See People v. Gonzales*, 108 Mich. App. 145, 310 N.W.2d 306 (1981); *State v. Palmer*, 210 Neb. 206, 313 N.W.2d 648 (1981); *Commonwealth v. Taylor*, ___ Pa. Super. ___, 439 A.2d 805 (1982). *But see supra* note 33.

39. The court suggested that litigants adopt some, if not all, of the safeguards proposed by Dr. Orne. *See infra* notes 97-103 and accompanying text.

In *New Jersey v. Hurd*,⁴⁰ the New Jersey Supreme Court acknowledged the problems inherent in the use of hypnosis,⁴¹ but refused to adopt a per se exclusionary rule.⁴² The court applied the *Frye* test, but stated that a court may consider hypnosis reasonably reliable (and capable of meeting *Frye*) if the hypnosis results in recollections as accurate as those of ordinary witnesses which are also frequently inaccurate.⁴³ In determining whether such evidence is comparable in a given case, the New Jersey Supreme Court instructed the trial court to consider expert testimony in examining both the kind of memory loss the hypnosis restored⁴⁴ and the technique employed.⁴⁵ The court also adopted several procedural safeguards based on those suggested by Dr. Martin Orne, an expert witness in the case.⁴⁶ By adopting these safeguards, the court sought to ensure a minimum level of reliability and to

40. 86 N.J. 525, 432 A.2d 86 (1981).

41. *Id.* at 538-42, 432 A.2d at 92-95. The court stated that "[s]everal features of the hypnotic experience explain why hypnosis, unless carefully controlled, is not generally accepted as a reliable means of obtaining accurate recall." *Id.* at 539, 432 A.2d at 93.

42. *Id.* at 541, 432 A.2d at 94.

43. *Id.* at 538, 432 A.2d at 92. The court emphasized that it did not agree with the courts in *Mack* and in *Mena* that as a precondition of admissibility "hypnosis be generally accepted as a means of reviving truthful or historically accurate recall." *Id.* at 537, 432 A.2d at 92. The court asserted that if the proponent can demonstrate that the use of hypnosis in a particular case was a reasonably reliable method of restoring memory comparable to normal recall in its accuracy, the *Frye* rule is satisfied. *Id.* at 538, 432 A.2d at 92. *See also* State v. Beachum, 97 N.M. 682, 643 P.2d 246 (Ct. App. 1981) (citing *Hurd* with approval).

Some commentators assert that the testimony of a witness whose memory has been refreshed through the use of hypnosis should be admissible because the value of the technique lies not in its ability to uncover accurate testimony, but in its tendency to bring forth forgotten or psychologically suppressed testimony regardless of accuracy. Spector & Foster, *supra* note 3, at 584.

44. The court noted the testimony of Dr. Orne that hypnosis is often reasonably reliable in refreshing the memory of a witness where there is a pathological reason for the witness' inability to remember. 86 N.J. at 544, 432 A.2d at 95. *See* Orne, *supra* note 3, at 69.

45. 86 N.J. at 543, 432 A.2d at 95.

46. Dr. Orne, who is both a psychiatrist and a psychologist, heads the country's major hypnosis research laboratory and is Editor-in-Chief of the *Journal of Clinical and Experimental Hypnosis*.

The court's safeguards differ from Dr. Orne's in three respects: (1) The court strongly encourages the use of videotape while Orne considers it absolutely mandatory; (2) Orne requires a brief evaluation of the subject prior to hypnosis, while the court does not; and (3) Orne notes the importance of tapes of prior interrogations in order to ascertain that the witness has not been cued as to certain information, while the *Hurd* court fails to mention such a procedure. *Id.* at 545, 432 A.2d at 96. *See also* State v. Beachum, 97 N.M. 682, 643 P.2d 246 (Ct. App. 1981) (adopting *Hurd* safeguards); *supra* note 28 & *infra* notes 97-103.

provide an adequate record for evaluating the reliability of the hypnotic procedure.⁴⁷

II. THE SCIENTIFIC LITERATURE

A. Accuracy of Recall Produced by Hypnotic Enhancement

It is all there even if you are not aware of it. Everything that has ever happened to you, from birth to death, is recorded on your brain permanently.⁴⁸

So asserted a detective trained in hypnosis. Expert commentators, however, disagree with that view of the way the human mind functions. They argue that information acquired after an event occurs may be integrated into the memory.⁴⁹ The experts also assert that what the witness remembers depends on the context in which he experienced the event, the knowledge and skills he brought to the event, and the relation between what the witness remembers and the questioner demands.⁵⁰ Experiments suggest that because individuals are more suggestible under hypnosis,⁵¹ hypnotized individuals are even more likely to integrate other data into their memories.⁵²

In a 1932 experiment,⁵³ experimenters suggested to deeply hypno-

47. 86 N.J. at 545, 432 A.2d at 96. Other courts have also emphasized the necessity of following certain procedural safeguards in obtaining the testimony. *But see* *People v. Shirley*, 31 Cal. 3d 18, 641 P.2d 775, 181 Cal. Rptr. 243 (1982) (use of safeguards will not prevent loss of critical judgment, confabulation, and increase in confidence); *People v. Gonzales*, 108 Mich. App. 145, 310 N.W.2d 306 (1981) (use of safeguards may have an "affirmatively detrimental effect" since they will give the process an "aura of reliability"—jurors may be less critical). In *Shirley*, the court maintained that safeguards would result in parades of expert witnesses and special pretrial hearings with all the concomitant delays and expense; indeed, that errors in admissibility would jeopardize otherwise unimpeachable judgments.

48. Putnam, *Hypnosis and Distortions in Eyewitness Memory*, 27 INT'L J. CLIN. & EXP. HYPNOSIS 437, 439 (1979) (citing White, *Hypnosis Given Key Role in Rape Investigation*, *Amarillo Globe-Times*, July 7, 1977, at 1). *See also* W. BRYAN, *LEGAL ASPECTS OF HYPNOSIS* 203 (1962), in which the author asserted that we remember everything we perceive through our sensory organs and must simply "find the correct shelf" in the "warehouse of the subconscious" and "rerun it in front of our eyes." Bryan, however, mentioned no experiments or other authority in support of this assertion.

49. The experiments conducted by Putnam, *supra* note 48, and others reported in his article support this theory. *See also* *People v. Shirley*, 31 Cal. 3d 18, 641 P.2d 775, 181 Cal. Rptr. 243 (1982) (research convincingly undermines "the videotape recorder" theory of memory).

50. J. Jenkins, *Remember That Old Theory of Memory? Well Forget It!*, 29 AM. PSYCH. 785, 793 (1974). *See generally*, E. LOFTUS & G. LOFTUS, *HUMAN MEMORY: THE PROCESSING OF INFORMATION* (1976).

51. *See supra* note 3.

52. *See* Putnam, *supra* note 48.

53. Stalnaker and Riddle, *The Effect of Hypnosis on Long-Deleyed Recall*, 6 J. GEN. PSYCH. 429 (1932).

tized subjects that they would recall a Longfellow poem they had learned in grade school. The subjects purported to have much better recall under hypnosis. A close analysis of the results, however, revealed only a modest increase in recall and a tendency to fabricate appropriate sections⁵⁴ for those they could not recall.

In another experiment, the hypnosis and attempted regression to age six of a group of college students resulted in inconsistent responses.⁵⁵ One subject described his sixth birthday party in detail, including his mother's statements to him at the party in English, although he did not learn the language until several years later. Another subject talked about his first-grade teacher and identified her as Miss Curtis. Miss Curtis was his seventh- or eighth-grade teacher. The researcher noted that these subjects apparently were drawing upon memories that actually arose from periods of life other than the suggested period. The students simply projected the other memories into the suggested time period.⁵⁶

In one early study subjects hypnotized and age-regressed to ages ten, seven, and four were compared to unhypnotized subjects instructed to act as if they were ten, seven, and four.⁵⁷ Experimenters found significant differences between the two groups in behavior, mental and emotional functioning, and recall of events that had occurred at that stage in childhood.⁵⁸ In a replication of that experiment several years later,⁵⁹ experimenters used a greater number of subjects and controlled other variables more closely.⁶⁰ These experimenters found no significant differences between the two groups.⁶¹ They concluded that age regression does not result in an actual return to a childlike mental state, or in a

54. The confabulations were in Longfellow's style and were good enough that they were not readily apparent.

55. See Orne, *The Mechanisms of Hypnotic Age Regression: An Experimental Study*, 46 J. AB. & SOC. PSYCH. 213 (1951). If, while under hypnosis, a person is told that he is six years old, he will act much like a six-year-old. This reaction is generally known as hypnotic regression. *Id.* at 213.

56. *Id.* at 220-22.

57. R. REIFF AND M. SCHEERER, *MEMORY AND HYPNOTIC AGE REGRESSION: DEVELOPMENTAL ASPECTS OF COGNITIVE FUNCTION EXPLORED THROUGH HYPNOSIS* (1959).

58. O'Connell, Shor, & Orne, *Hypnotic Age Regression: An Empirical and Methodological Analysis*, 76 J. AB. PSYCH. 1, 4 (1970) (monograph issue).

59. *Id.* at 1.

60. In the original experiment, the experimenter was aware of which subjects were role playing. In the replication he was not, thus possibly motivating subjects to attempt to "put one over" on the experimenter. *Id.* at 4-5.

61. *Id.* at 25. Accord Putnam, *supra* note 48, at 445-46 (no difference in recall where answers

reliving of childhood memories.⁶²

As these and other studies indicate, it is hardly clear that the use of hypnosis results in a significant increase in the accuracy of recall.⁶³ Some evidence suggests that hypnosis may improve recall where the memory is related to an emotionally upsetting event.⁶⁴ The apparent

to objective questions addressed to hypnotized subjects compared to answers of subjects in a normal waking state).

62. Orne summarized the work on hypnotic age regression in this manner:

Not only is the material recalled during age regression an amalgam of recall from the proper age, recall from earlier and later ages, fantasies, fears, and hopes, but it is not possible to distinguish between these by any techniques presently available.

Affidavit of Dr. Martin T. Orne, notarized April 28, 1982, prepared for use upon appeal of *People v. Shirley*, 31 Cal. 3d 18, 641 P.2d 775, 181 Cal. Rptr. 243 (1982) [hereinafter cited as Orne Affidavit II] (on file with the *Washington University Law Quarterly*).

63. There are no reliable studies showing that a person's recall is more accurate while in a hypnotic state than under ordinary waking conditions. E. LOFTUS, *MEMORY: SURPRISING NEW INSIGHTS INTO HOW WE REMEMBER AND WHY WE FORGET* 58 (1980). One of the earliest studies in this area found that nonsense syllables were not recalled any better under hypnosis than under normal waking conditions. Huse, *Does the Hypnotic Trance Favor the Recall of Faint Memories?*, 13 J. EXP. PSYCH. 513 (1930). Putnam, *supra* note 49, at 438, criticized a study by Arons, a lay hypnotist (author of *HYPNOSIS IN CRIMINAL INVESTIGATION* (1967)) which reported an increase in recall. Observing that the study was not well controlled, Putnam noted that Aron's subjects were first questioned about pictures in a waking state and then under hypnosis, even though studies have shown that recall for pictures improves with subsequent attempts. Other studies reporting increased recall have been conducted in the context of police investigations, not under controlled conditions. See, e.g., Reiser, *Hypnosis as an Aid in a Homicide Investigation*, 17 AM. J. CLIN. HYPNOSIS 84 (1974); Reiser, *Hypnosis as a Tool in Criminal Investigation*, 46 THE POLICE CHIEF 36 (1976); Shafer & Rubio, *Hypnosis to Aid the Recall of Witnesses*, 26 INT'L J. OF CLIN. AND EXP. HYPNOSIS 81 (1978).

Orne suggests that individuals are often able to recall a good deal more while talking to a psychiatrist than when they are with an investigator. Orne Affidavit, *supra* note 27 at 26. Orne also notes that when the effects of hypnosis on increased memory are compared with those of increased motivation (Cooper & London, *Reactivation of Memory by Hypnosis and Suggestion*, 21 INT'L J. CLIN. & EXP. HYPNOSIS 312 (1973)), and procedures analogous to hypnosis with un hypnotizable subjects (Dhanens & Lundy, *Hypnotic and Waking Suggestions and Recall*, 23 INT'L J. CLIN. & EXP. HYPNOSIS 68 (1975)), there is no significantly greater increase in recall with hypnosis. Orne, *supra* note 2, at 74. Cf. T. BARBER & M. HAM, *HYPNOTIC PHENOMENA* 29 (1974) (phenomena known as hypnotism can be explained in terms of such variables as attitudes, motivations, expectancies, and ability to imagine).

64. Putnam notes that most of the reports of increased recall stem from actual police investigations in which witnesses were emotionally upset. He suggests that hypnosis may aid recall "by reducing retrieval difficulties caused by emotionally upsetting events." Putnam, *supra* note 48, at 445-46. The Chowchilla kidnapping case, in which a bus driver and a group of school children were kidnapped and held underground, certainly involved an emotionally upsetting event. Although the bus driver attempted to memorize the license numbers on two of the kidnappers' vans, he was unable to recall them until he was hypnotized. He then recalled one of the numbers accurately, except for one digit. See Kroger & Douce, *supra* note 63, at 368, for an account of that case. Cf. *supra* note 44 and accompanying text (*Hurd* opinion stresses the importance of looking

increase in recall in most situations, however, is attributable to a decrease in critical judgment.⁶⁵ An individual who in a waking state would be unwilling to relate hazy, fragmentary memories may, under hypnosis, freely relate a mixture of accurately recalled fragments and confabulated material.⁶⁶

B. Contamination of Memories Through the Use of Hypnosis

Arizona v. Mena illustrated⁶⁷ that courts are not only concerned that the witness' new purported recall is inaccurate but also fear that the very process of hypnotic enhancement may contaminate all the witness' memories about the event. The subject may mix the hypnotic implantations with his own knowledge, and may so fuse them together that he cannot later tell one from the other.⁶⁸

to possible pathological reasons for gaps in memory). One author observed that "relaxation presupposes emotional indifference and a security born of the lack of need to defend the ego". Rosenthal, *Hypnotic Recall of Material Learned Under Anxiety and Non-Anxiety-Producing Conditions*, 34 J. EXP. PSYCH. 369, 386 (1944) (documented an increase in the recall of meaningful or emotionally disturbing material, although not in the recall of nonsense syllables). See also M. PRINCE, *THE UNCONSCIOUS* (1914); White, Fox & Harris, *Hypnotic Hypermnistia for Recently Learned Material*, 35 J. AB. & SOC. PSYCH. 88 (1940).

65. Orne, *supra* note 2, at 74.

Under hypnosis, anxiety about making a mistake is reduced, willingness to risk being wrong is increased, judgment about the consequences of testimony becomes secondary to suggestibility and hypercompliance, and hey! presto! the memory has been "freshened!" Actually nothing has happened to the memory at all. What has been affected are response characteristics of the witness.

Levitt, *The Use of Hypnosis to "Freshen" the Memory of Witnesses or Victims*, TRIAL, April, 1981, at 57.

66. Orne, *supra* note 2, at 74.

67. See *supra* notes 29-32 and accompanying text.

68. Spiegel, *Hypnosis and Evidence: Help or Hindrance?*, 347 ANNALS N.Y. ACAD. SCIENCE 73 (1980). Spiegel noted that "the risk we take in using the hypnotic state to obtain information is that we may wittingly or unwittingly contaminate the memory of the subject in such a way that we cannot be certain of its credibility." *Id.* at 79. The court in *New Jersey v. Hurd*, 86 N.J. 525, 432 A.2d 86 (1981) observed, however, that Spiegel declared in his testimony in that case that there is a return of critical judgment concerning the material uncovered through hypnosis, and that a posthypnotic session may be especially useful for allowing a subject to accept or reject his recall. *Id.* at 540 n.2, 432 A.2d at 93 n.2.

Orne asserted that subjects hypnotized and told to remember the events of a particular day, may be able subsequently to differentiate between their earlier recollections and their recollections in hypnosis, unless (1) they are either convinced before being hypnotized that what they recall under hypnosis will be accurate; (2) prior to awakening, they are given the suggestion that they will now remember everything as clearly as they did under hypnosis; or (3) they are given the suggestion that they will not remember the session itself. Orne observed that suggestions to subjects that they will subsequently remember the events clearly are now widely used for forensic purposes. Orne, *supra* note 2, at 75. But see Diamond, *supra* note 3, at 314. Diamond contends that "once a

In one experiment,⁶⁹ subjects viewed a videotape recording depicting an accident. The experimenters questioned half of the subjects about the depiction under hypnosis and half in a normal waking state. The hypnotized subjects subsequently could not distinguish between actual events and those events suggested through the use of leading questions.⁷⁰

The use of leading questions indicates only one of many ways in which suggestions may be implanted in the mind of the subject.⁷¹ Other ways include the hypnotist's tone of voice, body language, and general attitude toward the subject.⁷² Previous communications with police officers and others involved in the case can also influence the accuracy of recall.⁷³ Even the context and purpose of the session may

potential witness has been hypnotized for the purpose of enhancing memories his recollections have been so contaminated that he is rendered effectively incompetent to testify After hypnosis the subject cannot differentiate between a true recollection and a fantasy or suggested detail (T)he use of hypnosis by police . . . is tantamount to the destruction or fabrication of evidence." *Id.* Worthington also maintains that hypnotizing the witness before the defense gets a chance to talk with him amounts to destruction of the evidence. Worthington, *The Use in Court of Hypnotically Enhanced Testimony*, 27 INT'L J. CLIN. & EXP. HYPNOSIS 402, 414 (1979).

69. Putnam, *supra* note 48.

70. *Id.* at 444-45. The subjects all felt that they had answered more accurately under hypnosis. One woman was confident that the witness' hair was blond and looked somewhat like her roommate's (the woman's hair was actually dark). Another remembered a license plate as beginning with a certain letter although the number was not actually visible (a friend's plate started with that letter). Putnam noted that there may be an even greater tendency to distort recall in real criminal investigations because the witness may have a personal stake in recalling the information. *Id.* at 444.

Orne suggests that "objective reliving"—in which subjects are told that they will now recall the events—without emotion "seems to bring forth fragmentary recall based not so much on the subject's reliving the experience as upon the hypnotist's detailed questions about what is occurring." Orne, *supra* note 2, at 81.

71. See Margolin & Biren, *Opposing Accepting Hypnotic Enhancement in Identification of Defendant or as Basis for Expert Opinion*, in SCIENTIFIC AND EXPERT EVIDENCE 1117, 1126 (E. Imwinkelried ed., 2nd ed. 1981).

[T]he hypnotist may subconsciously coerce the subject by "cues" to give desired responses or simply ask leading questions. The physical surroundings or other people in the room in which the hypnosis is being done may influence the result. Additionally, the subject may have a desire to conform, to please the hypnotist, or to achieve symmetry in testimony.

Id. See also Diamond, *supra* note 3, at 333; Orne, *supra* note 2, at 93.

72. See Diamond, *supra* note 3, at 333.

73. Orne, *supra* note 2, at 93. Orne discussed four cases and the sources which influenced the "recall" in each. In one case, the victim of an assault had at first been unable to identify his attacker, but later claimed to be able to identify him under hypnosis. Actually, he had seen someone else identify him at a pretrial hearing and knew that he was generally believed to be guilty. In another case, police officers interviewed a young woman several times thinking that her contacts

provide suggestions.⁷⁴

People under hypnosis sometimes “recall” events from their past and fabricate future events with equal confidence.⁷⁵ Orne describes a study in which hypnotized subjects were given the suggestion that it was the year 2000 and were asked to describe the world.⁷⁶ Vivid descriptions resulted. Listeners found the descriptions amusing, for they involved the subjects’ fantasies about the future. As Orne notes, however, where the fabricated memories relate to events which occurred previously and are plausible, there is no way for the hypnotist, the subject, or a jury to distinguish between them and actual recall of what occurred.⁷⁷

The Society for Clinical and Experimental Hypnosis and the International Society of Hypnosis adopted a resolution in response to the increasing use of hypnosis by police officers. The resolution emphasizes that independent verification is the only known way to accurately distinguish between actual recall and pseudo memories.⁷⁸ Dr. Bernard Diamond, who has served as an expert witness in numerous cases con-

with an ex-boyfriend might shed some light on a murder investigation. Following a hypnotic session, she called the police and related some “memories” which were most likely shaped by her conversations with the officers and by suggestions made during the session. In two other cases “memories” were apparently shaped by more unrelated sources. In the first, a doctor’s observation that an internal wound must have been made by a knife led to a change in the victim’s “memory,” and in the second the manner in which a lineup was conducted shaped “memories.” Courts determined the testimony inadmissible in all four of the above-mentioned cases.

74. Dr. Diamond observed that “most hypnotic subjects aim to please.” Diamond, *supra* note 3, at 333. One experimenter found, however, that, with the use of proper question design, hypnotized witnesses did not confabulate any more than un hypnotized witnesses, and that memory was significantly enhanced. Griffin, *Hypnosis: Towards a Logical Approach in Using Hypnosis in Law Enforcement Agencies*, 8 J. POL. SCI. & AD. 385 (1980).

75. See E. LOFTUS, *supra* note 63, at 58.

76. Orne, *supra* note 2, at 77 (discussing Kline & Guze, *The Use of a Drawing Technique in the Investigation of Hypnotic Age Regression and Progression*, BRIT. J. MED. HYPNOTISM 1, Winter 1951).

77. Orne, *supra* note 2, at 77. Worthington agrees: “If the subject confabulates, and the recalled memory is ‘eminently plausible’ then it becomes virtually impossible for even a highly trained expert to distinguish such confabulation from actual memory.” Worthington, *supra* note 68, at 414.

78. For the full text of the resolution, see 27 INT’L J. CLIN. & EXP. HYPNOSIS 452, 453 (1979).

Even independent verification may not ensure accuracy. The information used to independently verify the witness’ testimony may somehow have been transmitted to the witness through a previous interrogation or conversation. See *supra* notes 70-73 and accompanying text. See also Diamond, *supra* note 3, at 337: “No one, regardless of experience, can verify the accuracy of the hypnotically enhanced memory. . . . [E]ven if it has all the earmarks of accuracy, it may still be fantasy.” Hilgard & Loftus, *Effective Interrogation of the Eyewitness*, 27 INT’L J. CLIN. & EXP. HYPNOSIS 342 (1979): “A difficulty of confirmatory evidence is that it may be produced by leading questions” *Id.* at 354.

cerning this issue,⁷⁹ asserts that a subject who has had his memory enhanced through the use of hypnosis may believe that the memory is spontaneous⁸⁰ to his own experience. He may be unable to shake that belief, and will thus be immune to all cross-examination.⁸¹ The subject's belief in the accuracy of his memory is especially likely to be unshakeable if the memory is consistent with his prior beliefs or desires.⁸² This kind of distorted memory may appear genuine to the hypnotized subject and will probably not disappear.⁸³

This hypnotically enhanced memory may also improve the credibility of a witness in the eyes of the jury. One researcher conducted a study involving experimental jurors and concluded that jurors attach undue weight to eyewitness testimony. Moreover, jurors place more emphasis on the confidence with which witnesses relate their testimony than on the likelihood that the testimony is accurate.⁸⁴ Consequently, instructing a jury to consider the use of hypnosis when assessing the credibility of a witness whose memory has been hypnotically refreshed⁸⁵ may not provide sufficient protection. The confidence with which the witness testifies may still unduly impress the jury even though it is a direct result of the hypnotic session.⁸⁶

79. Dr. Diamond has served as an expert witness on the issues of credibility and admissibility of hypnotically enhanced evidence in courts throughout the country. Dr. Diamond is both a professor of law at the University of California at Berkeley and a clinical professor of psychiatry at the University of California at San Francisco.

80. Diamond observes that "[i]t is very difficult for human beings to recognize that some of their own thoughts might have been implanted and might not be the product of their own volition Normally, mental processes are rationalized and experienced as the product of free will, even when it should be obvious that they are not." Diamond, *supra* note 3, at 333-34.

81. *Id.* at 336. See *infra* note 94 and accompanying text.

82. Diamond, *supra* note 3, at 336. "[M]ost clinicians and practitioners say that the hypnotist is unable to manipulate the subject's will If a suggestion from the hypnotist is counter to some latent, but more powerful idea or suggestion already dominating the unconscious it may be refused." Spector & Foster, *supra* note 3, at 576-77. See also T. BARBER & M. HAM, *supra* note 63, at 18-20.

83. Diamond, *supra* note 3, at 336.

84. Loftus, *Psychological Aspects of Courtroom Testimony*, 347 ANNALS N.Y. ACAD. SCI. 27, 36 (1980). Jurors were also influenced by the particular words and phrases used in the testimony. *Id.*

85. See *supra* notes 13-17 and accompanying text.

86. See Putnam, *supra* note 48, at 444 (even though the hypnotic subjects made more errors, they were just as confident of their testimony as the waking subjects); Worthington, *supra* note 68, at 414 (subject himself becomes convinced that what he recalls in hypnosis is the actual memory).

Orne described a California case in which a young girl had given a number of different accounts of what she had observed on the night of a crime. She also maintained that she could not distinguish her memories from her nightmares about the incident. Following hypnosis she was able to

Not even subsequent hypnosis can reverse the effects of the process of memory enhancement or alteration.⁸⁷ Thus, it is impossible to transform a witness, whose testimony contains many confabulations and whose confidence in his testimony stems from hypnosis, back into the less knowledgeable, but more reliable witness who previously existed.

In light of the above research, it is clear that: the use of hypnosis to refresh the memory of a witness may contaminate the original memory;⁸⁸ contamination is difficult to prevent because it stems from many sources;⁸⁹ no one can determine whether any particular piece of information is actual memory or confabulation;⁹⁰ the use of hypnosis increases the subject's confidence in his (perhaps false) account, rendering cross-examination ineffective and the testimony itself more convincing;⁹¹ and that there is no accepted method of reversing the altered memory.⁹²

III. THE CASE LAW IN LIGHT OF THE SCIENTIFIC LITERATURE

A. *Use of Safeguards to Minimize Contamination and to Preserve an Adequate Record*

Some commentators suggest that cross-examination of the hypnotist may effectively uncover contamination.⁹³ This appears highly unlikely, however, because of the many sources of contamination and the hyp-

give an account of the incident with complete confidence. Dr. Orne noted that "[t]he hypnotic process was not utilized in this instance to obtain additional information but to alter the nature of the witness and to convince her that the events she related under hypnosis had actually happened that way." Orne Affidavit, *supra* note 27, at 23.

The court in *State v. Mack*, 292 N.W.2d 764 (Minn. 1980) asserted that "hypnotic subjects have been able to pass lie detector tests while attesting to the truth of statements they made under hypnosis which researchers know to be utterly false." *Id.* at 769.

Bryan notes that hypnosis may be used to relax the nervous witness. The hypnotist suggests to the witness that he is intelligent and that he is certain of his testimony. W. BRYAN, *supra* note 48, at 193-95. Since such a procedure would effectively thwart attempts to cross-examine the witness as to the accuracy of his memory, its propriety appears questionable.

87. See *Worthington*, *supra* note 68, at 414. In his account of the use of hypnosis in a California case, *supra* note 86, Orne asserted that "there is no way in which the process that has taken place, could be reversed. The defense simply does not have the opportunity to cross-examine the witness who existed prior to hypnosis." Orne, Affidavit, *supra* note 27, at 23.

88. See *supra* notes 68-74 and accompanying text.

89. See *supra* notes 71-74 and accompanying text.

90. See *supra* notes 77-85 and accompanying text.

91. See *supra* notes 81-84 and accompanying text.

92. See *supra* note 87 and accompanying text.

93. Spector & Foster, *supra* note 3, at 593-94.

notist's inability to recognize his own nonverbal cues.⁹⁴ Cross-examination of a witness who has been hypnotized is also ineffective, for the witness honestly believes that he is telling the truth.⁹⁵

A growing number of courts and commentators advocate the use of certain procedural safeguards whenever hypnosis is used in questioning a witness.⁹⁶ As noted earlier,⁹⁷ the court in *New Jersey v. Hurd* adopted certain safeguards based upon those set forth by Dr. Martin Orne in his affidavit to the United States Supreme Court in *Quaglino v. California*.⁹⁸ The Orne safeguards are the guidelines most frequently cited by courts and commentators.⁹⁹ They provide that: (1) only a psychiatrist or psychologist with special training in its use should carry out the hypnosis. He should receive a written memorandum outlining the facts, but should avoid any other communication which might affect his

94. See *supra* notes 71-74 and accompanying text.

95. See Diamond, *supra* note 3, at 330; *supra* notes 80-87 and accompanying text. "The dangers attributable to a witness' suggestibility are aggravated when the witness' memory is refreshed through pretrial hypnotic induction The subsequent opportunity for cross-examination at the trial is virtually ineffective as a means of assuring that no false suggestions have been implanted." Spector & Foster, *supra* note 3, at 593. *But see* W. BRYAN, *supra* note 48, at 198. "It is an entirely erroneous conception that false ideas can be placed in the mind of a witness which will stand up under cross-examination." The author does not support this statement by citation to any other authority, nor does he give examples of personal clinical experiences.

96. See *United States v. Adams*, 581 F.2d 193 (9th Cir. 1978), *cert. denied*, 439 U.S. 1006 (1978); *Arizona ex rel. Collins v. Superior Court*, ___ Ariz. ___, 644 P.2d 1266 (1982); *State v. Mack*, 292 N.W.2d 764 (1980); *State v. Hurd*, 86 N.J. 525, 432 A.2d 86 (1981); *State v. Beachum*, 97 N.M. 682, 643 P.2d 246 (Ct. App. 1981); *People v. McDowell*, 103 Misc. 2d 831, 427 N.Y.S.2d 181 (Sup. Ct. 1980); *State v. Glebock*, 616 S.W.2d 897 (Tenn. Crim. App. 1981); *State v. White*, No. J-3665 (Cir. Ct. Milwaukee Co., Wisc., March 27, 1979); Alderman & Barrette, *Hypnosis on Trial: A Practical Perspective on the Application of Forensic Hypnosis in Criminal Cases*, 18 CRIM. L. BULL. 5, 21-22 (1982); Levitt, *supra* note 65, at 59; Warner, *The Use of Hypnosis in the Defense of Criminal Cases*, 27 INT'L J. CLIN. & EXP. HYPNOSIS 417, 428-29 (1979); Note, *Hypnosis—Its Role and Current Admissibility in the Criminal Law*, 17 WILLAMETTE L. REV. 665, 681 (1981).

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

98. No. 77-1288, 1, 25-27, *cert. denied*, 439 U.S. 875 (1978).

99. See *supra* note 46 and accompanying text (*Hurd* court adopted Orne's safeguards with a few changes); *supra* note 27 and accompanying text (*Mack* court took judicial notice of these safeguards); *supra* note 39 and accompanying text (court in *Arizona ex rel. Collins v. Superior Court* encouraged litigants to utilize Orne's safeguards); *State v. White*, No. J-3665 (Cir. Ct. Milwaukee Co., Wisc., March 27, 1979) (adopted Orne's safeguards with some changes); Levitt, *supra* note 65, at 59; Warner, *supra* note 96, at 428-29.

Alderman does not mention the safeguards listed by Orne, but he does incorporate the same requirements into his set of guidelines. Alderman & Barrette, *supra* note 96, at 21-22. The National Legal Aid and Defender's Association and the New York State Defender's Association have adopted his guidelines. *Id.* at 20 n.75.

opinion.¹⁰⁰ The psychiatrist's involvement in the investigation in any way is extremely undesirable. He should not be responsible to the prosecution or to the investigators, but should be an independent professional. (2) All contact between the psychiatrist and the individual to be hypnotized should be videotaped, from their initial meeting until the completion of the entire interaction.¹⁰¹ Prior to the induction of hypnosis, the psychiatrist should evaluate the patient and should elicit a complete description of the facts as the witness or victim remembers them.¹⁰² During the hypnotic session the psychiatrist should strive to avoid adding any new elements to the witness' description of his experiences, lest he alter the nature of the witness' memories or constrain them by reminding him of his waking memories.¹⁰³ (3) Prior to and during the hypnotic session no one other than the psychiatrist and the individual to be hypnotized should be present in the room.¹⁰⁴ If either the prosecution or the defense counsel wish to observe the session, they may do so through a one-way screen or on a television monitor. (4) Tape recordings of prior interrogations are important in order to document that a witness has not been implicitly or explicitly cued on certain information which he might report during the hypnotic session apparently for the first time.

Orne maintains that the use of these safeguards may not prevent contamination.¹⁰⁵ Thus compliance with the safeguards should not automatically result in the admission of the testimony, but compliance

100. This safeguard allows later evaluation of the hypnotist's beliefs and possible biases. Orne Affidavit, *supra* note 27, at 25.

101. Orne asserts that it is just as important to tape casual comments exchanged before and after hypnosis as it is to tape the hypnotic session itself. Orne emphasizes the need for pre-session taping because the hypnotist may, at that time, give suggestions that will act as posthypnotic suggestions. *Id.* at 26. *But see* Diamond, *supra* note 3, at 339. Diamond concluded that "[t]he only adequate record of the hypnotic experience would be a videotape of everything that transpired before, during and after the sessions. Yet that, in itself, would be a powerful distorting factor for the knowledge that one is being recorded can alter one's attitudes and behavior." *Id.*

102. Orne states that it is important to record the witness' statements relating to the case before hypnosis. He also notes that a witness frequently recalls more during conversations with a psychiatrist than with an investigator. Orne Affidavit, *supra* note 27, at 26.

103. Orne, who has served as an expert witness in numerous cases involving the use of hypnosis, notes that in every case in which tapes of sessions conducted under hypnosis have been available "there are clear examples of explicit and implicit suggestions to the subject which unmistakably communicate what is wanted by the hypnotist and/or other questioners." *Id.* at 15.

104. "This is important because it is all too easy for observers to inadvertently communicate to the subject what they expect, what they are startled by, or what they are disappointed by." *Id.* at 26.

105. Telephone conversation with Dr. Martin Orne (May 11, 1982).

should create a record which interested persons can examine for error.¹⁰⁶

In a paper recently presented at a meeting of the American Association for the Advancement of Science,¹⁰⁷ Dr. Diamond¹⁰⁸ asserted that even scrupulous compliance with the Orne safeguards could not prevent contamination of the evidence.¹⁰⁹ He discussed the safeguards at length and made several observations. Dr. Diamond stated, for example, that in a widely publicized criminal investigation it would be extremely difficult to find a hypnotist with an unbiased mind.¹¹⁰ He further noted that police budgets would not permit adequate videotaping of the sessions.¹¹¹ He also stated that if recordings of interrogations prior to the hypnotic session were available, no evidence would ever be admissible because the recordings would always reveal implicit or explicit cues.¹¹²

Orne agrees that a widely publicized case creates an increased risk of contamination, especially where the hypnotist is familiar with the crime and has had an opportunity to formulate his own opinions.¹¹³ He observed, however, that authorities in many situations may question a witness under hypnosis before identifying a suspect, or before investigators have formulated a theory.¹¹⁴ In these situations, bias is much less likely to exist. Orne acknowledges that police departments may find it difficult to follow his safeguards, but he views his method as the only method by which courts can protect the defendant's rights.¹¹⁵

106. *Id.*

107. Diamond, *The Contamination of Evidence by Hypnotic Enhancement of Memory of Witnesses*, (presented in Washington, D.C. on Jan. 6, 1982) [hereinafter cited as *Diamond Paper*] (on file with the *Washington University Law Quarterly*).

108. *See supra* note 79 and accompanying text.

109. *Id.* at 5-6. Note, however, that Orne does not view the safeguards as always preventing contamination. *See supra* note 105 and accompanying text.

110. *See Diamond Paper, supra* note 107, at 6-7.

111. *Id.* at 7-8. Diamond stated that the tapes presently made of such sessions usually include only the subject in the field of vision and do not show the nonverbal communications of the hypnotist. He maintains that an expensive television crew would be necessary in order to videotape the entire picture. *Id.* at 7.

112. *Id.* at 10.

113. Telephone conversation with Dr. Martin Orne (May 11, 1982).

114. *Id. See, e.g., State v. Commeau*, 438 A.2d 454, 458 (Me. 1981) (court noted that hypnotist could not have planted a reference to the defendant in the victim's mind since he was not a suspect until a day after the procedure).

115. Orne Affidavit, *supra* note 97, at 28.

Orne perceives his own position as similar to Dr. Diamond's.¹¹⁶ Viewing the techniques presently used by police hypnotists as very dangerous, Orne also calls for a total exclusionary rule unless courts require utilization of the safeguards that he advocates.¹¹⁷ Nevertheless, Orne considers hypnosis a useful investigatory technique and is unwilling to abandon its use completely.¹¹⁸

In adopting the diluted version of the Orne safeguards,¹¹⁹ the *Hurd* court encouraged, but did not require, the use of video tape, and did not require an evaluation of the subject prior to hypnosis. Furthermore, the court did not mention the importance of recording previous interrogations. Because suggestions may stem from numerous sources,¹²⁰ a complete record is absolutely necessary. Certainly the Orne safeguards provide a much better record than those adopted by the *Hurd* court.

Much controversy surrounds the recent surge¹²¹ in the use of hypnosis by law enforcement officers. Orne and the Resolution adopted by the professional societies,¹²² stress the first safeguard listed in Orne's affidavit,¹²³ namely, use of the technique only by professionals.¹²⁴ Professionals contend that police hypnotists are more likely to contaminate the testimony¹²⁵ and that psychological harm may result from hypnosis conducted by a police officer.¹²⁶

116. Telephone conversation with Dr. Martin Orne (May 11, 1982).

117. Telephone conversations with Dr. Martin Orne (November 5, 1981 and May 11, 1982). *But see* *People v. Shirley*, 31 Cal. 3d 18, ___ n.24, 641 P.2d 775, 787 n.24, 181 Cal. Rptr. 243, 255 n.24 (1982) (as *Hurd* recognized, even an expert examining videotape may not identify all cues).

118. Telephone conversation with Dr. Martin Orne (May 11, 1982).

119. *See supra* note 46 and accompanying text.

120. *See supra* notes 71-74 and accompanying text.

121. *See supra* note 1. "The police, as well as many attorneys, have found that hypnosis can save many hours of investigation and produce a more reliable witness, all at minimum expense." Rothblatt, *The Mental Probe Continued—Hypnosis and Witness Preparation*, 4 AM. J. TRIAL ADVOCACY 615, 615 (1981).

122. *See supra* note 78 and accompanying text.

123. *See supra* note 100 and accompanying text.

124. "[This organization] views with alarm the tendency for police officers with minimal training in hypnosis and without a broad professional background in the healing arts employing hypnosis to presumably facilitate recall of witnesses or victims privy to the occurrence of some crime." 27 INT'L J. CLIN. & EXP. HYPNOSIS 452, 453 (1979).

125. The first of Orne's safeguards emphasizes that the hypnotist should know very little about the facts of the case, should have no involvement in the investigation, and should not be responsible to the prosecution or the investigators. *See supra* note 104 and accompanying text. *See also supra* note 78 and accompanying text.

126. Feldman, *Hypnosis: Look Me in the Eye and Tell Me That's Admissible*, 8 BARRISTER 4, 6

Martin Reiser, founder of the Los Angeles police department's hypnosis program, disagrees. He dismisses the idea that the increased suggestibility of the hypnotic state makes an individual more prone to influence by leading questions.¹²⁷ He contends that hypnosis conducted by a police officer can be therapeutic,¹²⁸ and that persons properly trained in investigative hypnosis know how to question a subject to avoid opening "emotional cans of worms"¹²⁹ Both Reiser and Harry Arons, a lay hypnotist, view the possibility of psychological harm to a subject in a session conducted by a lay hypnotist as insignificant.¹³⁰ Neither Reiser nor Arons are impartial advocates,¹³¹ however,

(1981). Orne notes that a rape victim, for example, may need to discuss her feelings about the rape. A psychiatrist can use an age regression approach which will not only help the victim to overcome the psychological trauma, but may also allow her to remember information that can help the investigation. Only a professional can use this procedure, however, for the hypnotist must be able to help the victim cope with intense emotion. A police hypnotist, on the other hand, suggests to the victim that she can watch the events on a television screen—without emotion—thus discouraging any expression of emotion.

Orne maintains that when victims or witnesses are willing to help in an investigation, the state has an obligation to protect them from psychological damage.

A related issue arises where courts hold the testimony of a person who has been hypnotized concerning the subject matter of the proposed testimony to be per se inadmissible. Does such a ruling deprive a rape victim, for example, of her right to proper medical treatment? Hypnosis may be used to alleviate the consequences of the trauma. A patient might be forced to choose between testifying and obtaining treatment. Dr. Orne does not view this as a problem. He notes that Dr. Frankel, a Harvard professor who directs the Beth-Israel rape center, asserts that there are many ways to treat a rape victim, and that hypnosis has not been used in even one of the numerous cases treated by his center in recent years. Telephone conversation with Dr. Martin Orne (May 11, 1982). See also Orne Affidavit II, *supra* note 62, at 32-38.

127. See Holden, *Forensic Use of Hypnosis on the Increase*, 208 SCIENCE 1443, 1444 (1980). Hypnosis experts maintain that the Reiser approach represents "a complete failure to understand the way memory works." *Id.*

128. Feldman, *supra* note 126, at 6. Cf. Spiegel, *supra* note 68, at 79 (individuals may sometimes go into trances spontaneously while being questioned under stress). Spiegel advocates that all professionals dealing with interrogation become more knowledgeable about hypnosis in order to recognize and cope with such situations. *Id.* at 84. See also Kroger & Douce, *supra* note 63, at 364 (suggesting that psychologists or psychiatrists and trained investigators work as a team).

129. Holden, *supra* note 127, at 1444. Orne, however, emphasizes that feelings are an integral part of reliving an experience and that ignoring them may create struggle and conflict. *Id.*

130. Feldman, *supra* note 126, at 6.

131. In *Arizona ex rel. Collins v. Superior Court*, ___ Ariz. ___, 644 P.2d 1266 (1982), the court discussed the relevant scientific community whose acceptance must be ascertained in applying the *Frye* test. "Acceptance must be by those experts who are relatively disinterested and impartial and whose livelihood . . . is not intimately connected with approval of the technique." *Id.* at ___, 644 P.2d at 1285 (citation omitted).

Putnam notes that most of the reports of the effectiveness of hypnosis stem from police investigations. Putnam, *supra* note 64. Cf. Nachshon & Feldman, *Vocal Indices of Psychological Stress: A Validation of the Psychological Stress Evaluator*, 8 J. POL. SCI. & AD. 40 (1980) (noted that the

because both commercially train police hypnotists.¹³²

Scientific evidence regarding the effect of hypnosis on recall is unsettled.¹³³ Courts must confront this issue when attempting to determine the admissibility of testimony of a witness or victim whose memory has been hypnotically refreshed. Expert witnesses are not readily available¹³⁴ and when they are available, their testimony on the possible contamination or probable accuracy of the witness' testimony may consume vast amounts of the court's time.¹³⁵ These problems have prompted some courts to totally ban testimony by previously hypnotized witnesses.

*Manson v. Brathwaite*¹³⁶ involved an analogous situation that might provide guidance to courts considering whether to admit testimony of previously hypnotized witnesses. In *Manson*, the Court faced the problem of police lineups that were allegedly so suggestive that they tainted the witness' identification. The Court refused to create a per se rule excluding evidence, but held that in deciding whether to admit the evi-

only studies of the Psychological Stress Evaluator (PSE) yielding positive results have been those reported by the manufacturer and others affiliated with it, or by policemen and private practitioners). *Id.* at 53. Reiser demonstrated that

[ninety-one] percent of all the testimony obtained from witnesses under hypnosis was verified by independent investigation. True, but less than half of the cases in which hypnosis had been used by LAPD were able to be included in that study. More importantly, the significance of the witness' testimony for the investigation and the subsequent trial rarely hinges on 90 percent of his or her testimony.

Levitt, *supra* note 65 at 58. See also Diamond, *supra* note 3, at 349. "Further harm is caused by 'expert witnesses' (often self-styled and police oriented) who, testifying in the state's behalf, make extravagant, scientifically unjustified claims about the reliability of hypnotically enhanced testimony." *Id.*

132. At Aron's Ethical Hypnosis Center, police officers take a week-end course which provides 18 hours of training. Feldman, *supra* note 126, at 5-6. Reiser currently charges \$475 per person for his four-day seminars. (Information obtained from the Law Enforcement Hypnosis Institute, Inc., in January, 1982).

133. See *supra* notes 44-83 and accompanying text.

134. "Unfortunately, there are few experts willing and able to present the facts to the courts. The number of serious research scientists working with hypnosis is limited, and it requires an intimate familiarity with both the research and the clinical literature to clarify the problem in any individual instance." Orne Affidavit, *supra* note 27, at 24.

135. According to Orne,

the complexity of the issues is such that it requires appropriate testimony for the courts to fully appreciate the issues involved. The costs that every such trial involves are considerable, not only in terms of money but also in terms of scarce resources on the part of the courts as well as the prosecution and defense.

Id.

136. 432 U.S. 98, 114 (1977).

dence, a court should look to the “totality of the circumstances,”¹³⁷ and especially to factors generally indicative of reliability.¹³⁸ The Court concluded that a total exclusionary rule “goes too far,” because its application automatically keeps some evidence from the jury that is reliable and relevant.¹³⁹

With previously hypnotized witnesses, as with suggestive lineups, a *per se* rule excluding evidence that may be reliable and relevant goes too far.¹⁴⁰ Because a hypnotized subject is extremely susceptible to suggestion from a variety of sources, however, the court must carefully scrutinize the hypnotic process utilized. Without such scrutiny, a court, even aided by expert testimony, cannot determine the reliability of certain evidence. Although the safeguards promulgated by Dr. Orne are expensive¹⁴¹ and time consuming, their use would result in as full and accurate a record of the entire process as possible.¹⁴² Given such a

137. The court noted that in *Neil v. Biggers*, 409 U.S. 188 (1972), the “central question” was “whether under the ‘totality of the circumstances’ the identification was reliable even though the confrontation procedure was suggestive.” 432 U.S. at 106.

138. 432 U.S. at 114. The court looked to the factors set out in *Neil v. Biggers*: (1) opportunity of the witness to view the criminal at the time of the crime, (2) witness’ degree of attention, (3) accuracy of his prior description, and (4) level of certainty demonstrated at the confrontation. *Id.* (quoting *Neil v. Biggers*, 409 U.S. at 199-200).

139. 432 U.S. at 112.

Usually the witness must testify about an encounter with a total stranger under circumstances of emergency or emotional stress. The witness’ recollection of the stranger can be distorted easily by the circumstances or by later actions of the police. Thus, [*United States v. Wade*, 388 U.S. 218 (1967)] and its companion cases reflect the concern that the jury not hear eyewitness testimony unless that evidence has aspects of reliability The *per se* rule, however, goes too far

Id. See *supra* note 38 and accompanying text.

140. Some courts have held that a witness whose memory has been refreshed through the use of hypnosis should not be allowed to testify because the technique does not satisfy the *Frye* standard. See *supra* notes 20-25 and accompanying text. As the court in *Hurd* observed, however, [m]edical research has established that, to varying degrees, a large portion of the population has the capacity to enter a hypnotic trance and that hypnotized subjects who are directed to do so have the ability to concentrate on a past event and volunteer previously unrevealed statements concerning the event. In this limited sense hypnosis has met the test imposed by *Frye*.

86 N.J. at 537, 432 A.2d at 92.

The exclusion of evidence which may be reliable does “go too far.” Courts are beginning to re-evaluate the *Frye* standard. See *supra* note 22.

141. For example, the safeguards require the presence of a psychiatrist or psychologist trained in hypnosis and that all contacts be videotaped. This may prove expensive. See *also supra* note 110 and accompanying text.

142. Orne’s safeguards have other advantages. First, psychologists, psychiatrists, and investigators may be more circumspect in the use of words and gestures, because they may anticipate examination of all tapes for evidence of contamination. Moreover, fewer opportunities for con-

record, and testimony by experts who have examined that record,¹⁴³ a court may reasonably determine the reliability, and thus the admissibility, of the evidence.

B. Testimony on Matters Remembered Prior to Hypnosis

Most of the controversy concerning the hypnosis of witnesses involves the use of testimony obtained during or after hypnosis. A related issue, however, is whether matters remembered prior to hypnosis are admissible.

In *State v. Mack*,¹⁴⁴ the court suggested that prior statements were admissible, but emphasized the importance of utilizing safeguards to protect those memories from contamination.¹⁴⁵ In contrast, the Arizona Supreme Court, in *State v. Mena*, initially excluded previously hypnotized witnesses from testifying¹⁴⁶ because such witnesses are sometimes unable to distinguish actual memories from matters recalled during hypnosis.¹⁴⁷ The court in *People v. Shirley*¹⁴⁸ also held incompetent testimony about events that were the subject of the hypnotic session, including those recalled prior to hypnosis. That court, however, allowed a witness to testify concerning wholly unrelated events.¹⁴⁹

Questioning under hypnosis probably does not affect a witness' memory about events not the subject of the questioning. Courts should therefore allow witnesses to testify about wholly unrelated events. A court, however, should not admit testimony concerning matters which in any way relate to the subject matter of the hypnotic session, unless the proponent complies with the Orne safeguards.¹⁵⁰ These procedures provide the court with a full record which it may scrutinize for evi-

tamination should exist, because as many variables as possible will be controlled. Finally, a witness or victim who is experiencing emotional problems may benefit from the hypnosis, and in any event, should not suffer psychological damage.

143. The admissibility issue should be litigated either at a pretrial hearing or at a hearing out of the jury's presence. For more detailed suggestions as to this procedure, see *infra* notes 166-69 and accompanying text.

144. 292 N.W.2d 764 (Minn. 1980). See also *supra* notes 23-28 and accompanying text.

145. See *supra* notes 27-28 and accompanying text.

146. *State v. Mena*, 128 Ariz. 226, 624 P.2d 1274 (1981). But see Arizona *ex rel. Collins v. Superior Court*, ___ Ariz. ___, 644 P.2d 1266 (1982) (Arizona court modified its position to allow testimony on matters recalled prior to hypnosis.)

147. See *supra* notes 31-32 and accompanying text.

148. 31 Cal.3d 18, 641 P.2d 775, 181 Cal. Rptr. 243 (1982).

149. See *supra* notes 34-35 and accompanying text.

150. See *supra* notes 98-104 and accompanying text.

dence of contamination.¹⁵¹

While the *Mena* and *Shirley* courts precluded the witness from testifying concerning matters remembered prior to hypnosis, they did suggest one possible method of preserving prehypnotic testimony. The court in *Mena* noted that a deposition might be used to preserve a witness' prehypnotic testimony.¹⁵² Citing that statement from *Mena*, the *Shirley* court observed that certain procedural devices might alleviate any difficulty of proof.¹⁵³

Several states have statutes providing for the use of preservation depositions or conditional examinations in criminal trials.¹⁵⁴ If a witness is not likely to be available at a later time,¹⁵⁵ a party may request that the court order a deposition. The opponent has a right to be present and to cross-examine the witness at the deposition. If the witness is unavailable at the time of the trial, a party may introduce the deposition into evidence as prior recorded testimony. Although there are no reported cases in which a party has used such a procedure to protect prehypnotic testimony, it does offer a plausible solution to the problem. Preservation depositions provide the opponent with an opportunity to cross-

151. See *supra* notes 105-06 and accompanying text.

152. 128 Ariz. 226, 232 n.1, 624 P.2d 1274, 1280 n.1 (1981). Rule 15.3(a) of the Arizona Rules of Criminal Procedure provides:

Upon motion of any party or a witness, the court may in its discretion order the examination of any person except the defendant upon oral deposition under the following circumstances: (1) A party shows that the person's testimony is material to the case and that there is a substantial likelihood that he will not be available at the time of trial;

.....

17 ARIZ. REV. STAT. ANN. § 15.3 (1973). The statute also gives the defendant the right to be present at the hearing, and allows the state to introduce the deposition at trial as prior recorded testimony. *Id.*

153. 31 Cal. 3d at ___, 641 P.2d at 805, 181 Cal. Rptr. at 273.

154. For examples other than the Arizona statute, see *supra* note 152, see CAL. PENAL CODE §§ 1335-1345 (Deering 1982); IDAHO CODE ch. 4, § 19-3101 to -3111 (1979); ILL. ANN. STAT. ch. 110A, § 414 (Smith-Hurd 1976); N.M. STAT. ANN. § 29(a) (Pamphlet 6, 1980). See generally C. McCORMICK, *supra* note 22, at § 253, (E. Cleary, ed., 1972).

155. Both the Arizona and Illinois statutes require only that it appear that a witness may later be "unavailable." The New Mexico statute requires that he be uncooperative or unable to attend trial. The California and Idaho statutes, however, require that he be "about to leave the state" or "so sick or infirm as to afford reasonable grounds for apprehension that he will be unable to attend the trial . . ." See, e.g., CAL. PENAL CODE § 1336 (Deering 1982). In jurisdictions where the statutes contain specific "grounds for application" such as New Mexico, California, and Idaho, a party probably could not utilize the statute to preserve prehypnotic testimony. The legislature could, however, easily amend the statute to include hypnosis as one of the "grounds." In contrast, the statutory language in jurisdictions such as Arizona and Illinois could easily apply to a situation in which a party plans to "enhance" a witness' memory through hypnosis.

examine the witness. Furthermore, the procedure does not force the proponent to choose between protecting a witness' testimony from contamination, and hypnotizing that witness in order to obtain further information.

In a jurisdiction which does not allow preservation depositions, one of the exceptions to the hearsay rule may provide grounds for admitting a record of prehypnotic testimony.¹⁵⁶ Under 803(5) of the Federal Rules of Evidence, for example, a proponent may read into evidence a record of information previously related but now forgotten by the witness.¹⁵⁷ In order to trigger this exception, a witness must reduce the record to writing shortly after the event. If the police made a record by making the witness' oral recollections part of the police report, a party might argue admissibility on the theory that the report was cooperative past recollection recorded.¹⁵⁸ Under Rule 803(24), a record may be admissible if it has "circumstantial guarantees of trustworthiness" equivalent to those of the other hearsay exceptions.¹⁵⁹ Courts generally construe this exception quite narrowly, however.¹⁶⁰

In *People v. Shirley*, the court held that the witness' testimony at the preliminary hearing, prior to the hypnotic session, would be admissible upon retrial because the hypnotic session had rendered the witness unavailable within the meaning of the former testimony exception to the

156. See FED. R. EVID. 803, 804. For a detailed discussion of the hearsay exceptions, see C. McCORMICK, *supra* note 22, at §§ 244-324.

157. The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

. . . .
(5) Recorded recollection, a memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in his memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

FED. R. EVID. 803(5).

158. See C. McCORMICK, *supra* note 22, at §§ 303, 714.

159. The Federal Rules of Evidence provide in part:

A statement not specifically covered . . . but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (a) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

FED. R. EVID. 803(24).

160. Imwinkelried, *The Scope of the Residual Hearsay Exceptions in the Federal Rules of Evidence*, 15 SAN DIEGO L. REV. 239 (1978).

hearsay rule.¹⁶¹ Under the California Evidence Code a witness is unavailable to testify if he is "disqualified from testifying to the matter."¹⁶² Thus, in jurisdictions which include similar definitions of unavailability,¹⁶³ courts may allow the admission of testimony given at a hearing prior to hypnosis, as well as testimony recorded in a deposition¹⁶⁴ under the former testimony exception.

IV. CONCLUSION

Most experimenters who have examined the effect of hypnosis on recall have concluded that more research is needed.¹⁶⁵ Perhaps someday experts will have the ability to examine a previously hypnotized witness and distinguish accurate from false memories. At present, however, the testimony of a witness whose memory has been refreshed by hypnosis should be admissible only if there has been strict compliance with the safeguards proposed by Dr. Orne, so that the procedures themselves can be examined.

Ideally, states should enact statutes dealing with this matter.¹⁶⁶ Such statutes should include requirements for total compliance with each of the Orne safeguards, submission of an affidavit outlining the details of compliance with each safeguard, and submission of all videotapes and other materials to both the court and the opposing party.

The statute should prohibit the admission of hypnotically enhanced testimony where a proponent cannot demonstrate compliance with the procedural safeguards. Where a proponent demonstrates compliance, however, the statute should require a pretrial hearing on the admissibility of the testimony. At that hearing, the court should allow parties

161. 31 Cal.3d 18, ___, 641 P.2d 775, 808, 181 Cal. Rptr. 243, 276 (1982). See CAL. EVID. CODE § 1291(a) (Deering 1966 & Supp. 1982).

162. CAL. EVID. CODE § 240(a)(2) (Deering 1966 & Supp. 1982).

163. Rule 804(a) of the Federal Rules of Evidence does not include California's characterization of "unavailability" in its definition of that term.

164. See *supra* notes 152-55 and accompanying text.

165. Hilgard & Loftus, *supra* note 77, at 354 (1979); Orne, *supra* note 2, at 101; Putnam, *supra* note 48, at 446; Worthington, *supra* note 67, at 415.

166. At least one state has enacted such a statute. See OR. REV. STAT. §§ 136.675 to .695 (1979). This statute renders hypnotically enhanced testimony inadmissible unless the parties have complied with certain procedural safeguards. *Id.* The requisite safeguards, however, are not stringent enough. Although the statute requires that the entire procedure be recorded on a "mechanical recording device," it does not require videotape. It does not suggest that previous interrogations be recorded. *Id.* § 136.675. Unless the witness requests a licensed medical doctor or a licensed psychologist, a law enforcement officer may conduct the sessions. *Id.* § 136.685.

to introduce expert testimony regarding the presence or absence of contaminating factors. If the court finds that the evidence does not appear contaminated, it may admit the evidence.

Parties should introduce expert testimony at trial to explain to the jury that the use of hypnosis to enhance recall can contaminate memories.¹⁶⁷ Because the issue of actual evidence of contamination in that particular record will already have been litigated at the pretrial hearing, the parties should not relitigate that matter at trial. In their testimony, experts should assume that the record is free of any real evidence of contamination.¹⁶⁸

The court should allow the proponent to take the witness' deposition before subjecting him to hypnosis. If, subsequent to the hypnotic session, the witness is held incompetent, the court should allow admission of that deposition at trial.¹⁶⁹

The requirements outlined above are stringent ones. Hypnosis as presently used by police hypnotists, however, is very dangerous. Some commentators do not believe that any safeguards can provide sufficient protection.¹⁷⁰ Courts and legislatures must balance the public's interest in utilizing all legitimate tools to obtain evidence upon which to convict those who commit crimes, against the right of a defendant not to be convicted on the basis of unreliable testimony. The above requirements provide one feasible method of accommodating the conflicting interests. Although the use of hypnosis presents numerous problems, and the use of stringent safeguards does not provide a perfect solution, this proposal is preferable to totally excluding what may sometimes be reliable and relevant evidence.

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167. For a discussion of federal cases which have addressed the issue of the necessity and admissibility of expert testimony where a witness' memory has been hypnotically refreshed, see Annot., 50 ALR FED. 602 (1979). One commentator has observed that while jurors tend to be particularly responsive to the confidence with which witnesses relate their testimony, they are still able to scrutinize the evidence after expert testimony on the reliability of such testimony. See Loftus, *supra* note 84.

168. The opponent's expert may, however, point out that contamination can stem from numerous sources, some perhaps not reflected in the record, and he may describe the effects of such contamination. In contrast, the proponent's expert may discuss the significance of the safeguards utilized, and the absence of any evidence of contamination.

169. The opponent should, of course, have the right to be present and to cross-examine the witness at the deposition.

170. See, e.g., Diamond, *supra* note 3; *Diamond Paper*, *supra* note 108.

