Buffalo Law Review

Volume 33 | Number 2 Article 5

4-1-1984

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INTRODUCTION

IN the past few decades, the use of hypnosis as an aid in criminal investigations by law enforcement agencies has been on the rise. Large cities are increasingly providing special training in the use of hypnotic procedures for selected police personnel, as have some federal law enforcement agencies.[1] At the same time, the ease of learning hypnotic induction in a short amount of time has enabled local sheriffs and police officers to receive similar training.[2] Retaining qualified psychologists to invoke hypnosis in an investigatory context has likewise become an easy task.[3]

Not surprisingly, this revolution in investigatory practice has been accompanied by a substantial number of cases attempting to judicially define the limits of the proper use in the trial setting of material retrieved by hypnosis. One line of cases has held nearly unanimously that actual statements made by a witness while under hypnosis may not be introduced to establish the truth of the statements, with the court in each instance relying to some extent on the probable unreliability of such statements.[4] In sharp contrast to this unanimity, a varied range of results has characterized cases where pretrial hypnosis has been utilized to refresh the memory

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1. Police departments in New York, Los Angeles, Houston, Seattle, Denver, Washington D.C., and Portland all provide special training in hypnotic induction as do the FBI and the Bureau of Alcohol, Tobacco and Firearms. *See* Monrose, *Justice With Glazed Eyes: The Growing Use of Hypnosis in Law Enforcement*, JURIS DR. Oct.-Nov. 1978, at 54, *cited in* Diamond, *Inherent Problems in the Use of Hypnotism on a Prospective Witness*, 68 CALIF. L. REV. 313, 313 n.1 (1980).

2. Diamond, *supra* note 1, at 314.

3. *Id.* at 313.

4. *See, e.g.*, People v. Smith, 117 Misc. 2d 737, 459 N.Y.S.2d 528, 540 (Sup. Ct. 1983); People v. Blair, 25 Cal. 3d 640, 602 P.2d 738, 159 Cal. Rptr. 818 (1977); Greenfield v. Commonwealth, 214 Va. 710, 204 S.E.2d 414 (1974); State v. Pusch, 77 N.D. 860, 46 N.W.2d 508 (1951); Jones v. State, 542 P.2d 1316 (Okla. Crim. App. 1975); Greenfield v. Robinson, 413 F. Supp. 1113 (W.D. Va. 1976); Strong v. State, 435 N.E.2d 969 (Ind. 1982); State v. Pierce, 263 S.C. 23, 207 S.E.2d 414 (1974).

of a witness who subsequently seeks to testify at trial. It is this latter, unsettled issue which the New York Court of Appeals addressed for the first time in *People v. Hughes*.[5]

In *Hughes*, the victim of a brutal rape, after suffering traumatic injuries in the attack, was unable to positively identify her assailant.[6] After a series of hypnotic sessions aimed at refreshing her memory, and another using sodium pentothal, she subsequently identified a neighbor as her assailant, repeating the identification at trial.[7] The court held that the testimony of a victim or witness subjected to hypnosis prior to trial is not admissible with respect to details recalled only after the hypnotic sessions.[8] With respect to matters recalled prior to hypnosis, the court ruled that a trial court should decide at a pretrial hearing, on a case-by-case basis, both the extent of the prospective witness's pre-hypnotic recollection and whether the hypnotic sessions were so impermissibly suggestive as to preclude trial testimony regarding pre-hypnotic recall.[9]

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5. 59 N.Y.2d 523, 453 N.E.2d 484, 466 N.Y.S.2d 255 (1983).

6. The victim had suffered traumatic injuries to the head and neck. After inquiries by her sister over several visits to the hospital, the victim stated that at times she "saw Kirk," the neighbor-defendant. Three days later she recalled being grabbed by the throat by a man with glasses and smooth hair. She later stated that when her head stopped spinning she "kept seeing Kirk."

She was informed that the police suspected the defendant prior to the hypnotic sessions. A first hypnotic session in the presence of a psychologist, her husband, and an investigative officer did not result in any increased recall. A second resulted in a positive identification of the defendant.

Subsequently the victim consulted an independent psychiatrist to confirm the earlier identification. The two additional hypnotic sessions were unsuccessful in making the confirmation. A third session, this time under the influence of sodium pentothal or "truth serum," resulted in her confirming the defendant as her attacker. A final hypnotic session with the clinical psychologist five weeks after the incident failed to reaffirm a positive identification of the defendant. *Id.* at 528-31, 453 N.E.2d at 486-87, 466 N.Y.S.2d at 256-57.

7. *Id.* at 528-32, 453 N.E.2d at 486-87, 466 N.Y.S.2d at 256-58.

8. *Id.* at 545, 453 N.E.2d at 493, 466 N.Y.S.2d at 266.

9. *Id.* at 546, 453 N.E.2d at 494-95, 466 N.Y.S.2d at 546. The constitutional standard to determine if a pretrial identification procedure amounts to a violation of due process is whether the procedure was impermissibly suggestive based on a totality of the circumstances. United States v. Wade, 388 U.S. 218 (1967); Neil v. Biggers, 409 U.S. 188 (1972). Applying this standard, the trial court found the identification testimony admissible in *Hughes*. 59 N.Y.2d at 532, 453 N.E.2d at 496, 466 N.Y.S.2d at 256.

In a subsequent decision, the Court of Appeals has made mandatory the pretrial hearing to determine if the hypnotic session was impermissibly suggestive whenever a prosecution witness has been hypnotized prior to trial, even if no new information is elicited from the session. *See* People v. Tunstall, 63 N.Y.2d 1, 468 N.E.2d 30, 479 N.Y.S.2d 192 (1984).

This distinction in treatment of post-hypnotic and pre-hypnotic recall with respect to admissibility[10] invoked by New York's highest court is by no means the generally accepted approach of the states to the problem of using hypnotically refreshed testimony at criminal trials. Other recent approaches of state courts range from a per se inadmissible rule declaring a previously hypnotized witness incompetent to testify at trial,[11] to the case-by-case determination of admissibility adopted by the New Jersey Supreme Court in *State v. Hurd*.[12] The former approach, adopted by the California Supreme Court in *People v. Shirley*,[13] affords a defendant the greatest protection from the inherent unreliability of hypnotically refreshed testimony. Under the latter approach, the trial court must determine in each case whether, under the particular circumstances, the hypnotic procedure used is reasonably likely to result in recall comparable in reliability to normal recall.

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10. For other instances where state courts have drawn the same distinction in treatment as the *Hughes* court, see Commonwealth v. Kater, 388 Mass. 519, 447 N.E.2d 1190 (1983); Commonwealth v. Taylor, 294 Pa. Super. 171, 439 A.2d 805 (1982); State *ex rel.* Collins v. Superior Court, 132 Ariz. 180, 644 P.2d 1266 (1982); People v. Quintanar, 659 P.2d 710 (Colo. Ct. App. 1982); State v. Koehler, 312 N.W.2d 108 (Minn. 1981). *See also* State v. Palmer, 210 Neb. 206, 313 N.W.2d 648 (1981) (post-hypnotic testimony inadmissible with respect to subject matter of the hypnotic session, but making no finding as to pre-hypnotic recall while encouraging the proper use of hypnosis to gain leads in a difficult case); Peterson v. State, 448 N.E.2d 673 (Ind. 1983) (general testimony of witness subject to hypnosis admissible though identification induced and tainted by hypnosis inadmissible); State v. Seager, 341 N.W.2d 420 (Iowa 1983) (trial testimony offered that is substantially the same as that given by witness prior to hypnosis is admissible). Cases adopting the *Hughes* type approach were characterized as the "emerging majority" by Justice Calogero, dissenting in part in State v. Wren, 425 So. 2d 756, 760 (La. 1983).

11. People v. Shirley, 31 Cal. 3d 18, 641 P.2d 775, 181 Cal. Rptr. 243, *cert. denied*, 459 U.S. 860 (1982). The per se approach reflects the highest judicial concern for the inherent unreliability of hypnotically refreshed testimony and the resulting danger posed to the defendant's right to confrontation by cross examination. *Id.* at 66-67, 641 P.2d at 804, 181 Cal. Rptr. at 272-73.

This right, arising from the confrontation clause of the Sixth Amendment, was applied to the states through the Fourteenth Amendment in Pointer v. Texas, 380 U.S. 400 (1965) and Smith v. State, 390 U.S. 129 (1968). In *Pointer*, Justice Black, writing for the majority, expressed the importance of this basic constitutional right as follows: "There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." *Pointer*, 380 U.S. at 405. For a detailed discussion of how pretrial hypnosis may impair effective defense cross-examination, see *infra* notes 34-46 and accompanying text.

12. 86 N.J. 525, 432 A.2d 86 (1981).

13. 31 Cal. 3d 18, 641 P.2d 775, 181 Cal. Rptr. 243, *cert. denied*, 459 U.S. 860 (1982).

This determination is based in part on required compliance with six procedural safeguards promulgated by the court.[14]

After a brief analysis of the inherent reliability problems in using hypnosis to induce retrieval of details previously unavailable in normal memory, this Comment will summarize and scrutinize the rationale of these three recent approaches.[15] Each approach

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14. *Hurd*, 86 N.J. at 543, 432 A.2d at 92.

15. Thus the scope of this Comment excludes cases adopting the rule that testimony refreshed by pretrial hypnosis is admissible with the credibility of such testimony to be weighed by the trier of fact. *See, e.g.*, Harding v. State, 5 Md. App. 230, 246 A.2d 302 (1968), *cert. denied*, 395 U.S. 949 (1969). This rule carried the day without significant criticism for a number of years. *See* State v. Jorgensen, 8 Or. App. 1, 492 P.2d 312 (1971); State v. McQueen, 295 N.C. 96, 244 S.E.2d 414 (1978); Clark v. State, 379 So. 2d 372 (Fla. Dist. Ct. App. 1980); State v. Greer, 609 S.W.2d 423 (Mo. Ct. App. 1980); Wyller v. Fairchild Hiller Corp., 503 F.2d 506 (9th Cir. 1974); United States v. Narciso, 446 F. Supp. 252 (E.D. Mich. 1977); United States v. Awkward, 597 F.2d 667 (9th Cir. 1979), *cert. denied*, 444 U.S. 885 (1980); Kline v. Ford Motor Co., 523 F.2d 1067, 1069 (9th Cir. 1975); Emmet v. Rickets, 397 F. Supp. 1025 (N.D. Ga. 1975). *See also* United States v. Adams, 581 F.2d 193, 198-99 (9th Cir. 1978) (adopting the *Harding* rule but warning that great care must be taken that hypnotized subjects' recollection is actual memory).

The approach of the *Harding* court has since been widely criticized for its lack of judicial notice of the inherent effects of hypnosis contributing to the unreliability of hypnotically induced recall, its reliance on the testimony of the previously hypnotized witness that her recall was from her normal memory, and its reliance on expert testimony by a self-proclaimed "expert" contrary to the basic scientific understanding of hypnosis. *See, e.g.*, State v. Mena, 128 Ariz. 226, 229-30, 624 P.2d 1274, 1277-78 (1981) (*Harding* and its progeny contain no analysis of the effects of hypnosis on the subject and rely on erroneous assumptions that the subject can distinguish hypnotically suggested memory and that cross-examination is an effective means of insuring that no false or distorted evidence is admitted at trial). *Shirley*, 31 Cal. 3d at 36, 641 P.2d at 785, 181 Cal. Rptr. at 253. *Accord* People v. Gonzalez, 108 Mich. App. 145, 155, 310 N.W.2d 306, 311 (1981); People v. Hughes, 59 N.Y.2d at 537-41, 453 N.E.2d at 490-93, 466 N.Y.S.2d at 261-64; State v. Mack, 292 N.W.2d 764, 770 (Minn. 1980); State *ex rel.* Collins v. Superior Court, 132 Ariz. 180, 644 P.2d 1282 (1982). Increasing judicial notice of the effects of hypnosis on a subject's memory has led to general rejection of the *Harding* rule in subsequent cases. Indeed, a court initially adopting the *Harding* rule has recently reversed itself in favor of applying the general acceptance standard for admission of novel scientific evidence. Polk v. State, 48 Md. App. 382, 396, 427 A.2d 1041, 1049 (1981); Collins v. State, 52 Md. App. 186, 447 A.2d 1272 (1982), *aff'd*, 296 Md. 670, 464 A.2d 1028 (1983). For a general discussion of this standard, see *infra* note 75.

As Justice Mosk, writing for the majority of the California Supreme Court, stated in *Shirley*, 31 Cal. 3d at 48, 641 P.2d at 792, 181 Cal. Rptr. at 261: "This dramatic turn of events would appear to give the *coup de grace* to the moribund precedent [of *Harding*] relied on here . . . ." Clearly the continuing vitality of the *Harding* approach is dubious. *But cf.* Chapman v. State, 638 P.2d 1280, 1282 (Wyo. 1982) (asserting that the *Harding* rule leaves ample opportunity to test the credibility of a witness through cross-examination and that a majority of states are in accord); Gee v. State, 662 P.2d 106, 108 (Wyo. 1983); Note, *Evidence—Safeguarding the Admissibility of Hypnotically Enhanced Testimony*—State v. Hurd, 5 W. NEW ENG. L. REV. 281, 287, 289 (1982) (asserting that the *Harding* approach still com-

will be considered with respect to judicial notice of the nature of hypnotically induced recall, the practicality of the legal rules adopted, and the policy assumptions and considerations implicit in each. This analysis will suggest that the compromise approach of *Hughes* is based on an astute awareness of both the inherent unreliability of hypnosis as a memory-jogging device and the tremendous promise hypnosis holds as a useful and efficient investigative aid when applied in certain types of crimes. As such the *Hughes* approach strikes the proper balance between society's interest in law enforcement use of hypnosis as an investigative aid and the fundamental right of the defendant to a fair trial.

I. THE NATURE OF HYPNOTICALLY INDUCED RECALL

Theories[16] and definitions[17] explaining hypnotic phenomena are numerous and varied. The underlying theme of most definitions is consistent with the general description that hypnosis is "a state of narrowly focused attention in which the hypnotized person somehow becomes extremely suggestible."[18] Despite some disagreement among experts as to why this occurs, certain characteristics of the hypnotized subject have generally been verified through scientific observation.[19]

A. *Reliability: The Reality and the Myth*

The first such verified characteristic is the hypersuggestibility of the hypnotized subject due to the close emotional bond developed with the hypnotist.[20] As a result, suggestions of an overt na-

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mands a majority).

16. For a discussion of the various theories attempting to explain hypnosis, see Diamond, *supra* note 1, at 317.

17. BLACK'S LAW DICTIONARY 668 (5th ed. 1979) defines hypnotism 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. It is generally characterized by extreme responsiveness to suggestions by the hypnotist." At the same time it has been described as an increased state of suggestibility "in which the subject is neither asleep nor unconscious, but is in a reduced state of consciousness." Dilloff, *The Admissibility of Hypnotically Induced Testimony*, 4 OHIO N.U.L. REV. 1, 3, (1977). Dr. Bernard Diamond, testifying as an expert in State v. Brown, 337 N.W.2d 138, 143 (N.D. 1983), described hypnosis as "an artifically [sic] induced state of altered consciousness characterized by increased suggestibility, suspension of critical judgment and psychological and physical relaxation."

18. E. LOFTUS, MEMORY 54 (1980).

19. Diamond, *supra* note 1, at 316.

20. *Shirley*, 31 Cal. 3d at 63-64, 641 P.2d at 802-03, 181 Cal. Rptr. at 271.

ture or leading questions by the hypnotist may direct the response of the subject.[21] However, the heightened suggestibility of the subject is best observed in the effect that subconscious or subtle cues may have on the hypnotized subject. One commentator maintains that

> such suggestions cannot be avoided. The suggestive instructions and cues provided to the subject need not be, and often are not, verbal. The attitude, demeanor, and expectations of the hypnotist, his tone of voice, and his body language may all communicate suggestive messages to the subject. Especially powerful as an agent of suggestion is the context and purpose of the hypnotic session. Most hypnotic subjects aim to please.[22]

This "aim to please" may lead the subject to confabulate or fantasize to fill in memory gaps with "facts" of which he actually has no memory.[23] These gaps may be filled in with information which is untrue though reasonable in light of the subject's past experience, actual memory of surrounding details,[24] and perception of what the hypnotist desires to hear. An example of such confabulation is the use of hypnotic age regression to aid a subject in "remembering" the future. Thus, a deeply hypnotized individual may be induced into giving a detailed account of what "occurred" in the distant future if given the proper suggestion.[25]

Another problem in using hypnosis to jog a witness's memory is the possibility of deliberate lying by a self-interested witness.[26] Self-interest, unrelated to guilt, may arise merely out of pressure from police and family to recall the details of a crime, and may result in the hypnotized subject deliberately lying in a convincing manner.[27] Paradoxically, this deception may be "honest in the sense that the subject is not aware that he is fabricating."[28] When considered with the fact that even an expert hypnotist cannot dis-

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21. Dilloff, *supra* note 17, at 4; Spector & Foster, *Admissibility of Hypnotic Statements: Is the Law of Evidence Susceptible?*, 38 OHIO ST. L.J. 567, 591 (1977).

22. Diamond, *supra* note 1, at 333. *See also* Dilloff, *supra* note 17, at 4, 7; Spector & Foster, *supra* note 21, at 578, 591-93; Orne, *The Use and Misuse of Hypnosis in Court*, 27 INT'L J. OF CLINICAL & EXPERIMENTAL HYPNOSIS 311, 328-31 (1979).

23. Orne, *supra* note 22, at 314, 317; Diamond, *supra* note 1, at 335; Spector & Foster, *supra* note 21, at 577, 588; Dilloff, *supra* note 17, at 4.

24. Orne, *supra* note 22, at 317; Spector & Foster, *supra* note 21, at 588.

25. Orne, *supra* note 22, at 321-22.

26. Orne, *supra* note 22, at 313; Diamond, *supra* note 1, at 330; Spector & Foster, *supra* note 21, at 594; Dilloff, *supra* note 17, at 6.

27. Orne, *supra* note 22, at 314.

28. Diamond, *supra* note 1, at 330.

tinguish a simulated hypnotic state from a real one,[29] this effect is disturbing. The resulting risk of either inadvertent or intentional deception is significant.

A closely related and observed trait of the hypnotized subject is a curious loss of critical judgment with respect to his own memory. Dr. Martin T. Orne, a prominent authority on the subject of hypnosis,[30] explains that hypnosis allows a person to accept "approximations of memory as accurate" though in the "wake state he is unwilling to consider approximate or fragmentary memories as acceptable recall."[31] Since the subject's threshold for what is acceptably accurate memory to allow recall is lowered, he will present more information than in the normal waking state, although it may be clearly inaccurate.[32] In addition, due to this enhanced confidence, the subject readily is willing to speculate on questions to which he would normally give at best a tentative response.[33]

This factor of increased confidence has properly been an important concern of state courts.[34] Since juries frequently use the subtleties of body language, hesitation in response, and expressions of doubt to measure the certainty and credibility of a witness,[35] this altering of confidence level may prove to be a substan-

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29. This difficulty in distinguishing real from simulated hypnosis results from a lack of any objective scientific criteria on which to make the determination as to when a hypnotic state has actually been induced. Diamond, *supra* note 1, at 337.

30. Martin Orne, M.D., Ph.D., is a professor of psychiatry at the University of Pennsylvania and an expert in the clinical and research aspects of the study of hypnosis. In addition to the article cited *supra* note 22, he has authored numerous other publications over the years on both his research and related legal aspects of the uses of hypnotic procedures. He has testified as an expert on the reliability of hypnosis as a memory-jogging device in a number of criminal cases. *See* United States v. Narciso, 446 F. Supp. 252 (E.D. Mich. 1977); Peterson v. State, 448 N.E.2d 673, 677 (Ind. 1983); State v. Seager, 341 N.W.2d 420, 423, 431 (Iowa 1983). *See also, e.g.*, State v. Hurd, 173 N.J. Super. 333, 414 A.2d 291 (Law Div. 1980), *aff'd* 86 N.J. 525, 432 A.2d 86, (1981). There Dr. Orne, as an expert witness for the defense, suggested the procedural safeguards that were adopted by the court. *Id.* at 363, 414 A.2d at 297.

31. Orne, *supra* note 22, at 319.

32. *Id.*

33. Orne, *supra* note 22, at 332; Diamond, *supra* note 1, at 339-40; Putnam, *Hypnosis and Distortions in Eyewitness Testimony*, 27 INT'L J. OF CLINICAL & EXPERIMENTAL HYPNOSIS 437, 444 (1979).

34. *Shirley*, 31 Cal. 3d at 65-66, 641 P.2d at 803-04, 181 Cal. Rptr. at 272; *Hurd*, 86 N.J. at 539, 432 A.2d at 93; State *ex rel.* Collins v. Superior Ct., 132 Ariz. at 185, 644 P.2d at 1287; People v. Gonzalez, 108 Mich. App. 145, 156-57, 310 N.W.2d 306, 312 (1981), *aff'd*, 415 Mich. 615, 329 N.W.2d 743 (1982).

35. Diamond, *supra* note 1, at 339.

tial obstacle to effective cross-examination by defense counsel. The potential for abuse is clear in the case of a witness telling varying stories over time. By reviewing events while under hypnosis, the credibility of the witness may be enhanced, although prior to hypnosis his credibility would easily have been undermined by cross-examination.[36] The witness "becomes quite impervious to such efforts, repeating one particular version of his story with great conviction."[37]

Another effect incident to this loss of critical judgment is the inability of the subject to distinguish facts recalled prior to hypnosis from those recalled solely as a result of the hypnotic session.[38] This occurs when the subject receives a post-hypnotic suggestion[39] that after the hypnotic session he will remember facts he was previously unable to recall, a technique used frequently in criminal investigations.[40] The subject then fills in gaps in his memory about which he was previously uncertain. After the session, since he does not know when particular facts were recalled, he may believe that his recall of the entire event came about through normal waking memory.[41] This confusion of memory source is also immune from challenge by cross-examination before the jury.[42]

Both of these effects incident to the general loss of critical

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36. Orne, *supra* note 22, at 332-33. *See, e.g.*, State v. Long, 32 Wash. App. 732, 649 P.2d 845, 847 (1982) (subjecting witness to "improper hypnotic episode" deprived the defendant of a material witness and thus was reversible error).

37. Orne, *supra* note 22, at 332.

38. Diamond, *supra* note 1, at 337-38; Orne, *supra* note 22, at 320; Putnam, *supra* note 33, at 437, 446.

39. Posthypnotic suggestions are given to a subject during hypnosis to induce compliance with the particular suggestion in the waking state subsequent to the hypnotic session. For a general discussion of this technique, see Spector & Foster, *supra* note 21, at 572-73. Ethically the use of a posthypnotic suggestion in this manner is preferable to the use of hypnotic age regression since the latter technique causes the subject to actually "relive" the trauma of being a victim or witness of crime.

40. Orne, *supra* note 22, at 320.

41. *Id.*

42. Dr. Orne writes:

> Even though prior to hypnosis he had been very uncertain about his memory, had changed his story many times, and had not reported many of the details that emerged only during hypnosis, he now will report his "memories" consistently and with conviction. As a consequence memories which occurred only during hypnosis may be incorrectly presented in court as though they represented recollections based on original memory traces of the events that actually occurred on the day in question.

Id.

judgment are even greater obstacles to insuring the reliability of the witness's testimony than they first appear in light of the fact that even experts are unable to detect them. The expert is unable to determine if the subject is simulating the hypnotic state[43] or if any particular piece of memory is actual fact or mere confabulation.[44] If those knowledgeable in the field can't detect falsity or distortion in hypnotically refreshed testimony,[45] a juror would undoubtedly find the task impossible.

In contrast to these empirically demonstrated effects of hypnosis on human memory is the generally held laymen's view that hypnosis is a proven, reliable technique for unlocking previously hidden memories in accurate form.[46] Thus, a jury informed that the testimony of a calm and confident witness was hypnotically induced may be unduly influenced by the testimony. Courts adopting all three approaches considered in this Comment have expressed concern over this potential undue influence.[47] Accordingly, each has eliminated the risk of undue influence by opting for a determination of admissibility as a matter of law prior to trial, either by a per se rule,[48] a case-by-case approach,[49] or the

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43. Diamond, *supra* note 1, at 337; Dilloff, *supra* note 15, at 6.

44. Diamond, *supra* note 1, at 337. Dr. Orne states that " . . . even a psychologist or psychiatrist with extensive training in the field of hypnosis" cannot make this distinction. Orne, *supra* note 22, at 318.

45. *See, e.g.*, Diamond, *supra* note 1, at 340 (arguing that the best experts can do is speculate on the probability of accurate and reliable recall).

46. Dr. Elizabeth Loftus suggests that this widely held belief may result from public response to widely publicized instances of successful recall of additional facts by the use of hypnosis. E. LOFTUS, *supra* note 18, at 57. Regardless of source, generally all commentators acknowledge the fallacy of this widely held view. Diamond, *supra* note 1; Dilloff, *supra* note 17, at 5, 9; Orne, *supra* note 22, at 321; Spector & Foster, *supra* note 21, at 595, 596.

This myth relies on the erroneous permanence or "videotape" theory of memory. Dr. Loftus reports that approximately three-fourths of those replying in an informal survey revealed a belief that everything learned or observed was permanently stored in the mind, and that inaccessible details could eventually be discovered through hypnosis or some other special technique. E. LOFTUS, *supra* note 18, at 42-43. Dr. Loftus and other commentators all agree that this permanence theory of memory is inaccurate. Rather, memory is a constructive and changing process where many items are permanently lost. *Id.* at 41-45; Orne, *supra* note 22, at 321. *See also* the California Supreme Court's discussion of theories of memory in *Shirley*, 31 Cal. 3d at 57-62, 641 P.2d at 798-801, 181 Cal. Rptr. at 266-70.

47. *Hughes*, 59 N.Y.2d at 543, 453 N.E.2d at 494, 466 N.Y.S.2d at 265; *Shirley*, 31 Cal. 3d at 51, 641 P.2d at 794, 181 Cal. Rptr. at 262; *Hurd*, 86 N.J. at 542-43, 432 A.2d at 91 (recognizing the potential for undue influence on the layman juror but expressing faith in the adversary system as a means to inform the jury, thus avoiding the problem).

48. *See, e.g., Shirley*, 31 Cal. 3d 18, 641 P.2d at 804, 181 Cal. Rptr. at 272-73.

49. *E.g., Hurd*, 86 N.J. at 525, 432 A.2d at 86.

hybrid propounded in *People v. Hughes*. The application of hypnotic techniques to criminal investigations clearly warrants such a determination in light of the inherent unreliability of hypnosis as a memory-jogging device. A more time-tested procedure fully understood by laymen would make such caution less necessary.

B. *The Utility of Hypnotic Procedures, Past and Present*

In contrast to its traditional uses in other fields, the increasing use of hypnosis in forensic contexts is a relatively recent trend. Hypnosis has been used successfully in psychotherapy to treat both mental and emotional disorders.[50] In medicine it has been used to treat psychosomatic disorders[51] and to anesthetize patients.[52] Perhaps its oldest use is as a source of entertainment in the theatre and circus.[53] The foregoing medical and psychiatric uses, first viewed as proper subjects for research in the immediate post-World War II period,[54] have gained widespread acceptance in their respective scientific fields in recent years. In contrast, the use of hypnosis to enhance accurate recall of events forgotten in the normal waking state has been consistently rejected as unreliable in the scientific and legal literature.[55] The characteristics of a previously hypnotized subject with respect to his newfound recall of prior events discussed above support this general rejection of this latter use of hypnosis.

However, despite the inherent problems of unreliability and its detection, all commentators agree that hypnotic procedures are useful in retrieving increased amounts of information from a witness previously unable to remember specific details of an event.[56]

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50. Diamond, *supra* note 1, at 320.

51. Dilloff, *supra* note 17, at 3; Spector & Foster, *supra* note 21, at 579.

52. Dilloff, *supra* note 17, at 3; Spector & Foster, *supra* note 21, at 579.

53. Dilloff, *supra* note 17, at 3; Diamond, *supra* note 1, at 320.

54. This was due to the increased therapeutic use of hypnosis after World War II to treat war neurosis. Diamond, *supra* note 1, at 320. In addition to these more traditional uses, there is some empirical evidence suggesting that visual imagery hypnosis may be an effective means to achieve breast enlargement. *See* Willard, *Breast Enlargement Through Visual Imagery and Hypnosis*, 19 AM. J. CLINICAL HYPNOSIS 195 (1977); Staib & Logan, *Hypnotic Stimulation of Breast Growth*, 19 AM. J. CLINICAL HYPNOSIS 201 (1977).

55. *See generally* E. LOFTUS, *supra* note 18,at 57; Diamond, *supra* note 1; Orne, *supra* note 22; Putnam, *supra* note 33;

56. Spector & Foster state: "The value of hypnosis lies in its scientifically-established reliability as a device for retrieving relevant testimony previously forgotten or psychologically suppressed, *regardless* of the factual truth or falsity of that testimony." Spector & Fos-

So long as the assumption that this information is truthful and accurate is avoided,[57] hypnosis may be useful in obtaining objective facts as potential leads to be further investigated.[58]

Thus in the difficult case where there are no suspects, witnesses to the crime are traumatized, and little or no other evidence is available, the investigatory use of hypnosis appears appropriate to induce recall of details which may lead to other admissible evidence.[59] An oft-cited example of such use is to retrieve a potentially useful license plate number on an unidentified vehicle connected with a crime.[60] Reported instances where similar leads have proven fruitful are many.[61] However, as at least one

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ter, *supra* note 21, at 584 (emphasis original). *See also* Diamond, *supra* note 1, at 337; Orne, *supra* note 22, at 318.

57. The retrieved details may be truthful or totally false. Orne, *supra* note 22, at 318.

58. *Id.*

59. *See* State *ex rel.* Collins v. Superior Ct., 132 Ariz. 180, 192, 644 P.2d 1266, 1278 (1982) where Chief Justice Holohan, in dissent, applied a similar analysis in arguing strenuously that the per se rule, practically precluding such use of hypnosis, went too far. Though courts have not made such a fact pattern a prerequisite for their approval of the use of hypnosis to refresh a witness's recall, most cases where it is utilized are of this type. For an exception, see Commonwealth v. Taylor, 294 Pa. Super. 171, 439 A.2d 805 (1982). There the victim of a brutal rape had had her throat slit in the course of the attack. At the crime scene she identified the location of one of the defendants, though she could not speak, by pointing in the direction of the house next door, where the defendant lived. Later, at the hospital, she made a positive photo identification of the first defendant, subsequently bolstered by a line-up identification of the second defendant. *Id.* at 807-08. All three identifications were made before hypnosis was used. The court ridiculed the police for invoking hypnosis where the victim had present recollection of her assailants, thereby jeopardizing the admissibility of her testimony and a conviction for this heinous crime. *Id.* at 807 n.2.

60. For example, in the infamous Chowchilla kidnapping case of 1976, twenty-six children and their school bus driver were abducted. While under hypnosis, the bus driver, who had earlier fled his captors, recalled accurately all but one number of the license plate on the van involved in the crime. This lead in the investigation eventually resulted in the solution of the crime. Orne, *supra* note 22, at 318.

61. After the 1973 Nahariya-Haifa bus bombing by terrorists, the Israeli National Police questioned the driver to no avail about his recall of any suspicious passengers. Under hypnosis the driver recalled one rider on the bus carrying a brown paper package. This lead eventually led to the apprehension of those responsible. E. LOFTUS, *supra* note 18, at 55.

Another interesting case involved the abduction of two young girls, ages seven and fifteen, in San Francisco. The girls were taken to Mexico by car where the older girl was repeatedly raped before both were released a few days later. The initial investigation retrieved little information from the girls due to their traumatized states of mind. Under hypnosis the older girl recalled specific rust spots on the defendant's car, specifics about boxes of cookies and tissues on the back seat of the car, and a San Diego gas station where the defendant had stopped for car repairs. She recalled conversations between the attend-

commentator has pointed out, for each anecdotal instance of success there are many cases where retrieved "facts" only resulted in dead ends after subsequent investigation.[62]

Clearly, independent verification is necessary to confirm the historical accuracy of details recalled only under hypnosis.[63] Only after each fact is verified can the dangers of unreliability and suggestibility be minimized. However, facts such as license plate numbers, identified as the same by individuals with adequate eyesight and easily verified with minimal intrusion into the lives of potentially innocent persons, are of a much different nature than hypnotically refreshed eyewitness identifications. With the latter, the unreliability due to hypnosis is compounded by uncertainty resulting from the normal subjective perceptions of the witness.[64] Thus

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ant and the defendant, the nature of the repairs, and that the repairs were paid for by credit card. She stated that the air conditioning didn't work since it needed "freon," uttering the word in an inquisitive tone. This was explained by the fact that she had never heard this word before. A trace through the gas station and credit card transaction quickly resulted in an arrest of the suspect and his eventual conviction. Koger & Doucé, *Forensic Uses of Hypnosis*, 23 AM. J. CLINICAL HYPNOSIS 86, 91-92 (1980).

62. Though acknowledging the success of the use of hypnosis in the Chowchilla case, *see supra* note 60, Dr. Orne states: "On the other hand, a good many license plate numbers that have been recalled under hypnosis by witnesses in other cases in fact belonged to individuals where it turned out, after investigation, that neither they nor their cars could have been involved." Orne, *supra* note 20, at 318.

63. *Id.* However, Dr. Diamond points out that independent verification does not necessarily insure the reliability of hypnotically retrieved statements since the statements may still be the product of inadvertent suggestion by the hypnotist. Diamond, *supra* note 1, at 338. Simply stated, the corroborative or independent source may actually be the initial source of the evidentiary material. This slight qualification of Dr. Orne's assertion that independent verification may insure reliability is of little practical importance. If criminal investigators already possessed a positive identification of a suspect or an incriminating license plate number, the issue of invoking hypnosis might never arise in the first instance.

64. *See generally*, Buckhout, *Eyewitness Testimony*, 231 SCI. AM., Dec. 1974, at 23, 25-26; Starkman, *The Use of Eyewitness Identification Evidence at Criminal Trials*, 21 CRIM. L.Q. 361 (1979). *See also* Karlin, *Forensic Hypnosis—Two Case Reports: A Brief Communication*, 31 INT'L J. CLINICAL & EXPERIMENTAL HYPNOSIS 227 (1983). There the author reviewed two criminal cases where, despite the fact that a significant amount of confabulation affected the recall of hypnotized witnesses, the prosecutors were willing to try the defendants on the sole evidentiary basis of hypnotically aided eyewitness identifications. The author's displeasure is noted as follows:

> I have served as an expert for both the prosecution and the defense in hypnosis cases. I am sure that both prosecutors in the above two cases were well intentioned. Nevertheless, the cause of justice was not well served by the use of hypnosis to "refresh recollection" in either instance. This suggests to me that the great care which one must take in the forensic use of hypnosis must be redoubled when hypnosis is used to obtain an eyewitness identification of the perpetrator. It also suggests, to the degree that such anecdotes can, that exclud-

it appears that the use of the license plate number as a lead to further investigation poses less of a threat to traditional values of fairness than does the use of hypnotically-aided eyewitness identification.

II. HYPNOTICALLY REFRESHED TESTIMONY AND CRIMINAL TRIALS: THE *Shirley* AND *Hurd* APPROACHES

The foregoing analysis of the inherent problems of hypnosis when used as a memory-jogging device provides a basic foundation for evaluating the three approaches to the issue of the admissibility of hypnotically refreshed testimony prevalent in recent case law.

A. *The* Shirley *Approach*

The per se inadmissibility rule is best exemplified by the position taken by the California Supreme Court in *People v. Shirley*.[65] There the complainant alleged that she was raped in her apartment. The defendant claimed that she had consented. The complainant generally testified that the defendant had forced her to commit sexual intercourse and oral copulation, the former while gagged and bound.[66] The defendant testified that the complainant had invited him to her apartment earlier that evening while both were in the bar where she worked.[67] He claimed he went by, knocked on the door, and later called through a screen door after hearing sounds suggesting the complainant was ill inside the apartment.[68] He stated that he entered through the front door

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ing "hypnotically refreshed" testimony may be the least of the evils available to our courts in this regard.

Id. at 233.

The enhanced unreliability of hypnotically refreshed testimony with respect to eyewitness identifications has led a few courts to adopt a narrow per se rule only applied to such identifications. *See, e.g.*, United States v. Valdez, 722 F.2d 1196, 1203 (5th Cir. 1984) ("when, as here, a hypnotized subject identifies for the first time a person he has reason to know is already under suspicion, the post-hypnotic testimony is inadmissible whatever procedural safeguards were used to attempt to sanitize the hypnotic session.") The result in *Valdez* is more similar to *Hughes* than *Shirley* since the witness may testify to an identification made prior to hypnosis.

65. 31 Cal. 3d 18, 641 P.2d 775, 181 Cal. Rptr. 243, *cert. denied*, 459 U.S. 860 (1982).

66. *Id.* at 24-25, 641 P.2d at 777, 181 Cal. Rptr. at 245-46.

67. *Id.* at 27, 641 P.2d at 779, 181 Cal. Rptr. at 247.

68. *Id.* at 28, 641 P.2d at 779, 181 Cal. Rptr. at 247-48.

after she opened it and engaged in intercourse with her only after she made certain advances toward him. He denied breaking in and using any force.[69] Investigators invoked hypnosis in an attempt to resolve these discrepancies. The complainant was hypnotized more than three months after the disputed events.[70] At trial her testimony contradicted statements made on two previous occasions with respect to a number of details.[71] The defendant was convicted of rape and unlawful entry with intent to commit a felony, based primarily on the alleged victim's testimony.[72]

On appeal, in a lengthy decision authored by Justice Mosk, the California Supreme Court held that a witness or victim who has undergone hypnosis prior to trial is incompetent to testify to matters which were the subject of the pretrial session. The court did impose certain limitations on the rule. The rule does not apply to a defendant choosing to testify at trial or to subject matter outside the scope of the hypnotic session. Additionally, the court expressly endorsed the proper use of hypnosis for investigative purposes.[73]

The *Shirley* decision included a brief discussion of the fifteen year evolution of case law on the issue of the admissibility of hypnotically refreshed recall.[74] The court noted the early tendency of state courts to admit such testimony at trial and allow the jury to evaluate the credibility of the witness, an approach characterized by lack of judicial consideration of the inherent unreliability of hypnotically induced recall.[75] By the late 1970's a number of state

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69. *Id.*, 641 P.2d at 780, 181 Cal. Rptr. at 247-48.

70. *Id.* at 29, 641 P.2d at 780, 181 Cal. Rptr. at 248.

71. At trial she testified that she awoke on the couch and was forced to strip in the bedroom. She also testified that the act of oral copulation preceded sexual intercourse and that her hands were not tied during the former act. In addition, she testified that she saw the defendant's knife for the first time when she awoke on the couch.

Her accounts of these details were in sharp contrast to the descriptions she gave of them on two occasions prior to hypnosis. Earlier, she stated that she had fallen asleep on the couch, only to awake naked, gagged, and bound in the bedroom, and that the defendant had sexual intercourse with her before and after oral copulation. She also stated that her hands were tied during oral copulation. Finally, she initially contended that the first time she saw the knife was after returning to the living room, after sexual intercourse. *Id.* at 30, 641 P.2d at 777, 181 Cal. Rptr. at 249.

72. *Id.* at 23 n.1, 641 P.2d at 776, n.1, 181 Cal. Rptr. at 245 n.1.

73. *Id.* at 67-68, 181 Cal. Rptr. at 273. An earlier version of *Shirley* appears at 641 P.2d 775 but does not contain the portion of the opinion cited here.

74. *Id.* at 35-51, 641 P.2d at 784-94, 181 Cal. Rptr. at 252-63.

75. *Id.* at 36, 641 P.2d at 785, 181 Cal. Rptr. at 253. For a discussion of this early

courts had taken notice of this unreliability. These courts applied the standard of whether such testimony was generally accepted as reliable in the scientific community relevant to the inquiry.[76] Find-

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trend and its subsequent fall from grace, *see supra* note 15.

76. This standard of "general acceptance," commonly known as the *Frye* standard, was originally proposed in Frye v. United States, 293 F. 1013 (D.C. Cir. 1923). The standard has received wide acceptance in state and federal courts as the proper test of admissibility for evidence produced by novel scientific techniques. *See, e.g.*, Reed v. State, 283 Md. 374, 381-89, 391 A.2d 364, 368-72 (1978) (*Frye* standard applied to voiceprint analysis). However, the standard has been criticized by commentators both generally as an approach to novel scientific evidence and in its application to forensic hypnosis. *See, e.g.*, Gianelli, *The Admissibility of Novel Scientific Evidence—Frye v. United States, a Half-Century Later*, 80 COLUM. L. REV. 1197, 1208-19 (1980) (problems in applying *Frye* standard include lack of clarity with respect to what is the relevant field which must assess reliability, what degree of acceptance is "general" acceptance, what must be generally accepted (procedures or theory underlying production of the evidence), and what constitutes "scientific evidence"); McCormick, *Scientific Evidence: Defining a New Approach to Admissibility*, 67 IOWA L. REV. 879, 908-11 (1982) (advocating rejection of *Frye* in favor of traditional balancing approach of probative value against the risk of prejudice, confusion of issues, and consumption of trial resources); Note, *Pretrial Hypnosis and Its Effect on Witness Competency in Criminal Trials*, 62 NEB. L. REV. 336, 351-53 (1983) (*Frye* test inappropriately applied to hypnotically induced testimony since witness's knowledge of events in question determines competence, not reliability, and thus the former should be emphasized); *see also* Brown v. State, 426 So. 2d 76, 87-88 (Fla. Dist. Ct. App. 1983) (rejecting *Frye* as proper standard to be applied to eyewitness testimony refreshed by hypnosis).

Besides hypnotically refreshed testimony, the standard has been invoked to determine the admissibility of numerous other types of evidence produced by forensic "scientific" techniques.

One of the more publicized forensic techiques to which the standard has been applied is the testing of truth and deception by means of the polygraph. The polygraph measures the deceptiveness of a subject's response to a series of questions by closely monitoring blood pressure, pulse rates, respiration rate and depth, and galvanic skin response. *See* Annot. 53 A.L.R. 3d 1005, 1007. Polygraph results have been estimated to be as low as 70% accurate. *See* Burkey, *The Case Against the Polygraph*, 51 A.B.A. J. 855, 856 (1965). Other commentators have estimated the percent accuracy of the polygraph to be significantly higher. *See* F. INBAU & J. READ, LIE DETECTION AND CRIMINAL INTERROGATION 111 (3d ed. rev. & enlarged 1953) (claiming 95% accuracy in the hands of skilled operator). Commentators agree that a major factor in achieving reliable results is the skill and experience of the examiner. *See* Note, *The Role of the Polygraph in Our Judicial System*, 20 S.C.L. REV. 804, 816 (1968). Other key factors include the proper functioning of the apparatus and the mental and emotional state of the witness. Despite their asserted reliability, as a general rule the results of lie detector tests are inadmissible absent a stipulation by the parties. 29 AM. JUR. 2D *Evidence* § 831 (1967). This is due to the lack of general scientific recognition as to the reliability of polygraph results. *See, e.g.*, Henderson v. State, 95 Okla. Crim. 45, 230 P.2d 495, *cert. denied*, 342 U.S. 898 (1951) (polygraph has not gained scientific recognition or accuracy necessary to establish admissibility); State v. Chavez, 80 N.M. 786, 461 P.2d 919 (1969) (polygraph results not admissible over objection even if parties stipulated to admissibility prior to the examination).

However, as Professor Gianelli has noted, a stipulation freely entered into by both parties to a criminal proceeding may circumvent the requirement of general acceptance as

ing that hypnotically refreshed testimony did not meet this test,

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reliable within the scientific community. Gianelli, *supra*, at 1221 n.185. *See also* State v. Valdez, 91 Ariz. 274, 371 P.2d 894 (1962) (admissible at discretion of trial judge if stipulation signed by defendant and both counsel and if proper foundation laid); People v. Davis, 270 Cal. App. 2d 841, 76 Cal. Rptr. 242 (1969) (though normally inadmissible may stipulate to admissibility beforehand). Other courts require both a stipulation and other more stringent conditions to be met before the polygraph is admitted. *See* State v. Forgan, 104 Ariz. 497, 455 P.2d 975 (1969) (probative value sufficient if stipulation as to admissibility signed by all parties, examiner qualified, and test conducted under proper conditions); State v. McDavitt, 62 N.J. 36, 297 A.2d 849 (1972) (polygraph sufficiently reliable if clear, unequivocal, and complete stipulation, freely entered into by defendant with full knowledge of right to refuse, examiner qualified, test administered according to established techniques, and jury instructed that polygraph results not directly probative on issue of guilt or innocence); State v. Ross, 7 Wash. App. 62, 497 P.2d 1343 (1972). Why such a stipulation makes polygraph results more "reliable" is unclear.

Another scientific technique commonly used in the forensic context is the "truth serum" interview, used to induce a subject to freely give previously inhibited responses to questions. Most cases in this area deal with the extent to which an expert witness can testify as to the results of a "truth serum" test. A number of cases have allowed the psychiatrist-expert to testify to his opinion based on the results of the test, that an examination took place, and the nature of the examination, but do not allow hearsay testimony on the actual statements made by the subject during the session. *See, e.g.*, People v. Hiser, 267 Cal. App. 2d 47, 72 Cal. Rptr. 906 (1968); People v. Myers, 35 Ill. 2d 311, 220 N.E.2d 297, *cert. denied*, 385 U.S. 1019 (1966); People v. Seipel, 108 Ill. App. 2d 334, 247 N.E.2d 905, *cert. denied*, 397 U.S. 1057 (1969). A rare few cases have admitted testimony of an expert as to statements made by a subject during the test or an actual recording of the statements themselves. *See, e.g.*, Lemmon v. Denver & Rio Grande Western Railroad Co., 9 Utah 2d 195, 341 P.2d 215 (1959) (civil case admitting testimony of psychiatrist as to conversation under sodium amytal); People v. Cartier, 51 Cal. 2d 590, 335 P.2d 114 (1959) (In Bank) (reversible error to exclude tape recorded interview under sodium pentothal when offered to support opinion as to sanity of defendant), *aff'd*, 54 Cal. 2d 300, 353 P.2d 53, 5 Cal. Rptr. 573 (1960). More frequently such tapes or recordings are excluded due to reliability concerns of the court. *See, e.g.*, People v. Cox, 85 Mich. App. 314, 271 N.W.2d 216 (1978).

The *Frye* standard has also been applied to identifications by spectrographic voiceprint analysis. The early cases in this area excluded such an identification as not having gained general acceptance as reliable in the relevant scientific field. *See* People v. King, 266 Cal. App. 2d 437, 72 Cal. Rptr. 478 (1968); *see also* State v. Cary, 49 N.J. 343, 230 A.2d 384 (1967). A few years later, after significant research into the reliability of voiceprint evidence was conducted, a number of courts found that this technique did meet the requirements of *Frye*, and thus the evidence was admissible. *See* Commonwealth v. Lykus, 367 Mass. 191, 327 N.E.2d 671 (1975); Hodo v. Superior Court, 30 Cal. App. 3d 778, 106 Cal. Rptr. 547 (1973). However, the tendency of the legal community to lag behind scientific research in altering its analysis under the *Frye* standard, and perhaps the ambiguity of the standard itself, is suggested by more recent cases asserting that voiceprint identification does not meet the general acceptance requirement. *See, e.g.*, United States v. Addison, 498 F.2d 741, 745 (D.C. Cir. 1974) (spectrographic voiceprint identification of defendant as maker of phone call *not* admissible); People v. Kelly, 17 Cal. 3d 24, 32, 549 P.2d 1240, 1251, 130 Cal. Rptr. 144, 149 (1976) (record in instant case insufficient to support reliability of voiceprint evidence). *See also* Gianelli, *supra* at 1224-25 n.212 (discussion of decisions rejecting reliability of gunshot "paraffin" test).

these cases generally held such testimony inadmissible at criminal trials.[77] The *Shirley* court accepted the application of this standard as the better reasoned means of resolving the issue.[78]

Applying the "general acceptance" standard requires review of the opinions of experts in the relevant scientific community. The court noted that the only major proponent of the use of hypnosis to aid witness recall[79] relies on the premise that memory is like a videotape machine, recording and permanently storing each visual stimulus. In theory, this "recording" is then replayed accurately when the subject is hypnotized.[80] After reviewing extensive scientific literature on human memory, the *Shirley* court found that this videotape theory of memory has been overwhelmingly rejected in the research community.[81] In addition, the court found that "each of the phenomena found by such research to contribute to the unreliability of normal memory reappears in a more extreme form when the witness is hypnotized for the pur-

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Neutron activation analysis to determine trace elements in minute samples of a substance has also been subjected to scrutiny under the *Frye* test. In State v. Coolidge, 109 N.H. 403, 260 A.2d 547 (1969), *rev'd*, 403 U.S. 443, *reh'g denied*, 404 U.S. 874 (1970), identification of hair samples by this technique was properly excluded under *Frye*. By 1971, use of this technique to detect hair samples was found to be generally accepted as reliable in the relevant scientific community. *See* State v. Stevens, 467 S.W.2d 10, 23 (Mo. 1971). Another forensic technique subjected to scrutiny under the *Frye* standard is identification by bitemark comparison. *See, e.g.*, People v. Milone, 43 Ill. App. 3d 385, 397-98, 356 N.E.2d 1350, 1351-60 (1976) (dental bitemark comparison admissible; *Frye* does not require unanimity); People v. Marx, 54 Cal. App. 3d 100, 111, 126 Cal. Rptr. 350, 356 (1975). For a list of cases concerning the array of other forensic techniques to which *Frye* has been applied, see Gianelli, *supra*, at 1206 n.54.

77. 31 Cal. 3d at 41-51, 641 P.2d at 787-94, 181 Cal. Rptr. at 256-63.

78. *Id.* at 51-54, 181 Cal. Rptr. at 262-65. For the California adaptation of the general acceptance standard, see People v. Kelly, 17 Cal. 3d 24, 31-32, 549 P.2d 1240, 1244, 130 Cal. Rptr. 144, 148-49 (1976). In *Kelly*, the court expressly defined the primary purpose of the general acceptance standard as preventing the jury from being misled by unproven and ultimately unsound scientific methods. *Id.* at 31, 32, 549 P.2d at 1245, 130 Cal. Rptr. at 140.

79. Martin Reiser, head of the Los Angeles Police Department's behavioral sciences services, believes that investigatory hypnosis is a field distinct from therapeutic hypnosis, and that police personnel passing his four day course become eminently qualified to administer hypnosis in the forensic context. *See* Holden, *Forensic Use of Hypnosis on Increase*, 208 SCI. 1443, 1443-44 (1980). However, this distinction between the fields of therapeutic and investigatory hypnosis, and the "videotape" theory of memory which Reiser's approach relies on have been largely discredited by the experts. *Id.* at 1444.

80. 31 Cal. 3d at 57, 641 P.2d at 798, 181 Cal. Rptr. at 266.

81. *Id.* at 61, 641 P.2d at 800-01, 181 Cal. Rptr. at 269.

pose of improving his recollection."[82]

Specific effects of hypnosis noted by the *Shirley* court include hypersuggestibility,[83] the tendency to confabulate,[84] and the tendency to mix true memories with concocted ones.[85] A primary concern of the *Shirley* court was the increased confidence of an initially uncertain witness in reporting his recollection after hypnosis. When combined with the inability to determine the source of enhanced recall of details, this phenomenon leads a subject to believe his memory is clear and accurate. As such, the *Shirley* court observed, the traditional means for revealing the uncertainty of a witness—cross-examination—is rendered totally ineffective.[86] The review of scientific authorities, consistent with the views of the defense expert testifying at the trial level, led the court to conclude that the general acceptance standard had not been met and that the per se inadmissibility rule was appropriate.[87] As such, the denial of the defendent's motion to exclude was reversible error.[88]

The per se rule embraces the highest possible judicial concern for problems of inaccuracy and potential undue influence on the jury of hypnotically induced recall. Though this recognition is commendable in light of the early case law admitting such evidence with little analysis,[89] the rule has its shortcomings.

B. *Critique of* Shirley

First, the rule of *Shirley* is overinclusive in practical application to certain cases where hypnosis is utilized. Often a witness will recall certain sporadic details of an event prior to hypnosis or experience a block in memory for an interval of time, though remembering events immediately before and after this period. This

82. *Id.* at 63, 641 P.2d at 802, 181 Cal. Rptr. at 270.

83. *Id.* at 63-64, 641 P.2d at 802, 181 Cal. Rptr. at 271.

84. *Id.* at 64, 641 P.2d at 802-03, 181 Cal. Rptr. at 271.

85. *Id.* at 65, 641 P.2d at 803, 181 Cal. Rptr. at 271-72.

86. *Id.* at 66, 641 P.2d at 803-04, 181 Cal. Rptr. at 272.

87. *Id.*, 641 P.2d at 804, 181 Cal. Rptr. at 272-73.

88. After showing reversible error, the defendant had the burden of showing prejudice. Since the sole incriminating evidence against the defendant was the complainant's testimony, the prejudicial error test was met and the conviction overturned. *Id.* at 68-70, 641 P.2d at 806, 181 Cal. Rptr. at 274-75.

89. *See supra* note 15.

material, clearly relevant[90] and normally admissible as the product of normal memory, becomes inadmissible assuming the hypnotist makes the sequence of details surrounding the criminal event the subject of the hypnotic session.

A second shortcoming concerns the inevitable tainting of this evidence under the *Shirley* rule should hypnosis be invoked. As a result the rule places a difficult strategy decision before law enforcement authorities at an early stage in a criminal investigation.[91] Assuming consent, investigators may hypnotize a witness in the hope of gaining access to objective facts leading to significant progress in their investigation. Of course, the price of this strategy is the loss of the witness's testimony at trial. In the alternative, investigators may decide against hypnosis in the hope that other means of investigation will prove fruitful, thereby preserving the witness's limited or uncertain recall for trial.

The typical case where this choice is necessary is where a violent crime results in a witness whose memory is blocked by trauma,[92] where no positive identification of a suspect has been made, and where the police have few leads. Public pressure to solve such a crime may be considerable. Thus, the efficacy of putting such a choice in the hands of law enforcement authorities,

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90. Ruffra, *Hypnotically Induced Testimony: Should It Be Admitted?*, 19 CRIM. L. BULL. 293, 321 (1983).

91. Beaver, *Memory Restored or Confabulated by Hypnosis—Is it Competent?* 6 U. PUGET SOUND L. REV. 155, 203 (1983). Professor Beaver takes notice of the difficult decision the police must make, but he then suggests that making a deposition of the pre-hypnotic statements of a witness may solve the difficulty. *Id.* at 204. Presumably such a deposition might be read in evidence as past recollection recorded. However, the *Shirley* court made no exception for such use of a deposition, holding that the testimony of a witness or victim subjected to pretrial hypnosis was inadmissible as to all matters which were the subject of the hypnotic session. It is doubtful that prosecutors in hypnosis cases would be successful using such a deposition in this manner since the primary incriminating evidence would be read into the record, a much less effective means of presentation than testimony in person before a jury. In addition, the deposition proposal fails to address the difficulty of judging an essential witness's credibility and demeanor without the benefit of cross-examination, precisely the concern of the *Shirley* court in the context of hypnotically refreshed testimony.

92. One exception to the general observation that investigations invoking hypnosis are violent crimes where the witness in question is traumatized or suffering from blocked memory is Brown v. State, 426 So. 2d 76 (Fla. Dist. Ct. App. 1983). There the defendant was charged with forgery and grand theft for receiving and cashing the checks of a bankrupt company. Not surprisingly, the bank teller's recollection of the transactions had faded in the two year interim between commission of the crime and the trial. After a hypnotic session the teller selected the defendant-suspect's picture from a group of photos. *Id.* at 77-78.

unqualified to evaluate the many psychological variables[93] related to the success of any prospective hypnosis and unable to know what new evidence may be revealed, is dubious. While taking difficult determinations of reliability out of the hands of trial courts and juries, the *Shirley* rule throws the equally difficult burden of the aforementioned investigatory strategy decision into the laps of law enforcement agencies.

Still a third weakness of the *Shirley* court approach, noted by the court in *Hughes*,[94] is the failure to extend the rule to its logical conclusion in the case where a defendant chooses to testify in his own behalf. The court limited the rule, stating "when it is the defendant himself—not merely a defense witness—who submits to potential hypnosis, the experience will not render his testimony inadmissible if he elects to take the stand . . . ."[95] In this context the court abandons its great concern for unreliability.

Clearly, protecting the defendant's fundamental right to be heard[96] in this manner is susceptible to abuse. Defense counsel confronted with a client with conflicting stories on different occasions, or faint recollection of events during the alleged crime, may utilize highly suggestive hypnotic procedures to clarify or even construct his client's memory. This would significantly alter an otherwise unconvincing presentation of the defendant's testimony. Another potential misuse of this loophole is in the preparation of a nervous or inexperienced defendant for trial.[97] Though ethical-

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93. Variables which may determine the likelihood of success in obtaining leads in any prospective hypnosis include the hypnotizability of the particular subject and the psychological cause of the subject's memory loss. Spector & Foster, *supra* note 21, at 571-74 (describing the hypnotic state).

94. *Hughes*, 59 N.Y.2d at 540, 453 N.E.2d at 492, 466 N.Y.S.2d at 263.

95. *Shirley*, 31 Cal. 3d at 67, 181 Cal. Rptr. at 273. An earlier version of *Shirley* appears at 641 P.2d 775 but does not contain the portion of the opinion cited here.

96. The defendant's right to be heard at trial should he so choose is fundamental to a fair trial. *See, e.g.*, People v. Robles, 2 Cal. 3d 205, 215, 46 P.2d 710, 716, 85 Cal. Rptr. 166, 172 (1970) (defendant's right to take the stand is of such fundamental importance that where the defendant insisted on doing so over the strenuous objections of his appointed counsel, the trial court acted properly in allowing him to testify).

97. Hypnosis has clearly been recognized as useful in polishing a witness's testimony in this manner:

> The second application of forensic hypnosis is in the preparation of a nervous witness for examination in the witness box. Inexperienced witnesses are seldom at their best in this situation, and under cross-examination may become so muddled or forgetful that their evidence may lose value. The use of post-hypnotic relaxation is one method of enabling the nervous witness to stand up to the

ly more acceptable than use of hypnosis to alter a defendant's testimony,[98] this sanctioned use is not extended to the prosecution in cases where witness accounts are inconsistent or the witness is merely inexperienced or anxious. The failure of the *Shirley* court to precisely define this limitation on the per se rule makes both uses available to the defense regardless of the suggestibility of the procedures employed. As one commentator suggests, clear definition of the scope of this exception and possibly a minimal standard of reliability may be proper to curb future abuse by defense counsel of this gap in the law.[99]

The *Shirley* court expressly encourages the future legitimate use of hypnosis to gain objective facts as leads to more traditional evidence, implying that their adoption of the per se rule in no way precludes such use.[100] In practical application, however, the deterrent effect of the per se rule may have just that effect. Assuming again a violent crime, little evidence to go on, no positive identification of a suspect, and a witness with limited memory of details, law enforcement officials have no idea what type of details may become available under hypnosis. The entire sequence of events occurring in the witness's presence is reasonably the subject of any prospective hypnotic session. However, under the *Shirley* rule such an inquiry would make all the witness's prior recall inadmissible. The disqualification of a key witness in this manner may be too high a cost to pay for the potentially limited benefits hypnosis may

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> stress imposed by cross-examination and to give his evidence with maximum effectiveness.

Haward & Ashworth, *Some Problems of Evidence Obtained by Hypnosis*, 1980 CRIM. L. REV. 469, 469-70.

98. Disciplinary Rule 7-102(A)(6) of the MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1979) states that a lawyer shall not "[p]articipate in the creation or preservation of evidence when he knows or it is obvious that the evidence is false." Changing the substance of a defendant's testimony through a suggestive hypnotic procedure would seemingly fall clearly within the scope of this rule. Minimizing the nervous tendencies of a witness would not, assuming counsel's belief in the truth of the witness's testimony.

99. One commentator suggests two alternative solutions to shore up this exception to the per se rule:

> The scope and extent of this "necessary exception" is not clearly defined. In the future, the court could require that the defendant who wishes to testify after being hypnotized make a showing of reliability or could conclude that knowing voluntary submission to hynopsis constitutes a valid waiver of the right to testify . . . .

Ruffra, *supra* note 90, at 321.

100. 31 Cal. 3d at 67-68, 641 P.2d at 805, 181 Cal. Rptr. at 272.

afford,[101] especially if public sentiment for the apprehension and conviction of the perpetrator is running high. At the same time the rule creates a conflict between a crime victim's interest in access to hypnosis for therapeutic reasons and his interest in being heard at trial.

The basic problems in *Shirley* of overinclusiveness, of burdening investigators with a nearly impossible investigation strategy decision at an early stage following a crime, and of practical foreclosure of the more legitimate investigative uses of hypnosis, have not been overlooked by other state courts considering this issue. State courts which had recently adopted the *Shirley* rule, either expressly[102] or implicitly,[103] have since been reassessing the per se rule. Realizing the utility and efficiency of hypnosis as an investigative tool, state courts in Arizona,[104] Pennsylvania,[105] Michigan,[106] and Minnesota[107] have recently qualified their versions of

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101. State *ex rel.* Collins v. Superior Court, 132 Ariz. 180, 209-10, 644 P.2d 1266, 1295-96 (1982) (Feldman, J., supplemental opinion).

102. State v. La Mountain, 125 Ariz. 547, 551, 611 P.2d 551, 555 (1980); State v. Mena, 128 Ariz. 226, 624 P.2d 1274 (1981).

103. State v. Mack, 292 N.W.2d 764, 771 (Minn. 1980) (neither defense nor prosecution witness whose memory was refreshed by hypnosis allowed to testify to matters recalled under hypnosis); People v. Tait, 99 Mich. App. 19, 29, 297 N.W.2d 853, 857 (1980) (holding the victim-witness's testimony so tainted by hypnosis that it cannot be used at all on retrial); Commonwealth v. Nazarovitch, 496 Pa. 97, 111, 436 A.2d 170, 178 (1981) (holding that hypnotically refreshed testimony was inadmissible at criminal trials due to absence of conclusive proof as to its reliability, despite the court's reluctance to adopt a per se rule of inadmissability); Collins v. State, 52 Md. App. 186, 205-06, 447 A.2d 1272, 1283 (1982) (hypnotically refreshed testimony inadmissible due to failure to meet the general acceptance test, though use for investigative purposes is permissible under strict guidelines as set forth in State v. Hurd, 86 N.J. 525, 432 A.2d 86 (1980)).

104. State *ex rel.* Collins v. Superior Court, 132 Ariz. 180, 644 P.2d 1266 (1982). The initial decision in *Collins* upheld the per se inadmissible rule over the dissent of Justice Holohan, who suggested that pre-hypnotic statements preserved and untainted should be admitted. *Id.* at 192-93, 644 P.2d at 1278-79 (Feldman, J., supplemental opinion). A motion for rehearing was granted by a reconstituted court and, in an extensive supplemental opinion of May 2, 1982, the court held that hypnosis does not render a victim incompetent to testify to facts demonstrably recalled prior to hypnosis. *Id.* at 209, 644 P.2d at 1295 (Feldman, J., supplemental opinion). The court found that the benefit of investigative hypnosis far outweighs the danger to the defendant's right to confrontation and suggested that cross-examination, expert testimony, a recording of the hypnotic session and procedures, and timely disclosure of the use of hypnosis to the adversary party would minimize the risks of tainting the pre-hypnotic recall. *Id.* at 210, 644 P.2d at 1296 (Feldman, J., supplemental opinion).

105. Commonwealth v. Taylor, 294 Pa. Super. 171, 177-78, 439 A.2d 805, 808 (1982) (an identification clearly established prior to hypnosis admissible).

106. People v. Wallach, 110 Mich. App. 37, 312 N.W.2d 387 (1981); People v. Gonza-

the per se rule, stating that pretrial hypnosis does not necessarily render inadmissible the testimony of a witness as to matters recalled prior to hypnosis. Whether the California Supreme Court will take a similar step back is uncertain, though it has been suggested by at least one commentator.[108]

C. *The Case-by-Case Approach:* State v. Hurd

In sharp contrast to *Shirley* is the view that a witness subjected to hypnosis before trial may testify to matters recalled both before and after hypnosis so long as certain procedures designed to minimize the risk of unreliability are complied with in administering the hypnosis. This approach is best exemplified by the decision of the New Jersey Supreme Court in *State v. Hurd*.[109] As in *Shirley*, the court there make no distinction in its policy with respect to pre-hypnotic and post-hypnotic recall. Also similar to *Shirley*, the facts in *Hurd* typify the type of case where hypnosis is frequently used in investigating a crime.

The victim in *Hurd* was stabbed repeatedly in the early morning hours of June 22, 1978.[110] In the hospital following the attack, she did not or could not identify her assailant. However, she asked the police to "check out" her ex-husband, the defendant, and to watch her children.[111] She consented to hypnosis to refresh her memory and was subsequently hypnotized by a prominent New York psychiatrist.[112]

The psychiatrist, two police officers, and a medical student were present during the session, which was recorded. The victim knew the identity of one of the police suspects prior to being hyp-

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lez, 108 Mich. App. 145, 310 N.W.2d 306 (1981).

107. State v. Koehler, 312 N.W.2d 108, 110 (Minn. 1981) (holding a witness may not testify to matters adduced at pretrial hypnotic interview except as to such matters as were previously and unequivocally disclosed by him prior to hypnosis). In *Koehler*, the witness's incomplete and inaccurate recollection of the defendant's car near the scene of the murder of a twelve-year-old girl became a positive identification of the car after hypnosis, eventually leading to a conviction for first degree murder.

108. Ruffra, *supra* note 90, at 323. In one California case the court already took such a step back, distinguishing *Shirley* on facts and admitting hypnotically refreshed testimony. People v. Adams, 137 Cal. App. 3d 346, 352, 187 Cal. Rptr. 505, 509 (1982).

109. 86 N.J. 525, 432 A.2d 86 (1981).

110. *Id.* at 529, 432 A.2d at 88.

111. *Id.* at 530, 432 A.2d at 88.

112. *Id.*

notized.[113] Under hypnosis she identified her ex-husband as the assailant after a series of leading questions, one referring to him by name.[114]

After the session, the victim's skepticism about the identification was overcome by the psychiatrist and detective. They suggested that without the identification her present husband would remain a suspect, her assailant would remain free to strike again, and her children could become motherless.[115] Six days later she positively confirmed the earlier identification, setting the stage for the trial of her ex-husband.

The trial court suppressed the proffered identification. The court found that the state had failed to show by clear and convincing evidence: (1) that it had complied, when administering the hypnosis, with procedural safeguards adopted by the court,[116] and (2) that "no impermissably suggestive or coercive conduct by the hypnotist and law enforcement personnel took place."[117]

On appeal, the New Jersey Supreme Court affirmed, holding that "testimony enhanced through hypnosis is admissible at criminal trial if the court finds that the use of hypnosis in the particular case was reasonably likely to result in recall comparable in accuracy to normal human memory."[118] The court stated that in applying this rule the trial court must first consider the appropriateness of the hypnotic procedure used in light of the type of memory loss encountered.[119] The trial court should also look to the self-interestedness of the subject as part of this inquiry.[120]

The second inquiry for the trial court under this standard is whether the procedures followed were reasonably reliable. Accordingly, the court enumerated six guidelines which the proponent of the evidence must show compliance with as a prerequisite for admission.[121] The six, simply stated, are: (1) the hypnotist

113. *Id.* at 531, 432 A.2d at 88.

114. *Id.* 432 A.2d at 89.

115. *Id.* Overzealousness on the part of law enforcement personnel such as this may provide the best argument for prudent consideration and regulation by the courts of the use of hypnosis as an investigative aid.

116. State v. Hurd, 173 N.J. Super. 333, 366, 414 A.2d 291, 307 (1980), *aff'd*, 86 N.J. 525, 432 A.2d 86 (1981).

117. *Id.* at 369, 414 A.2d at 306.

118. *Hurd*, 86 N.J. at 543, 432 A.2d at 95.

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

120. *Id.*

121. *Id.* at 545, 432 A.2d at 96.

must be a professional and must qualify as an expert to later aid the court in evaluating reliability; (2) the hypnotist should be neutral and not regularly employed by parties-at-interest in criminal proceedings; (3) information acquired by the hypnotist from law enforcement authorities prior to hypnosis must be recorded, either in writing or another suitable form, so the court may evaluate any suggestion which may have been communicated to the subject; (4) the hypnotist must compile a detailed description of any facts remembered prior to hypnosis and avoid any suggestion of new information in the process; (5) all contacts between the subject and the hypnotist during the hypnotic session must be recorded, preferably by videotape; and (6) only the hypnotist and subject should be present during any phase of the hypnotic session.[122] The court placed the burden of showing compliance with these guidelines by clear and convincing evidence on the party seeking to introduce the testimony.[123]

The *Hurd* court also found it appropriate to apply the general acceptance standard to hypnotically refreshed testimony.[124] In applying this standard the court relied on assertions that reliable scientific procedures will produce accurate recall;[125] on contentions that a large portion of the population is susceptible to hypnotic memory restoration;[126] and on scientific literature and expert testimony at the hearing below.[127] The court held that in instances where the hypnosis employed is able to yield memory as accurate as normal memory, which is itself unreliable, the procedure satisfied the general acceptance standard and the evidence should be admitted at trial.[128]

While it did take notice of the effects of enhanced suggestibil-

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122. *Id.* at 545-46, 432 A.2d at 96-97.

123. *Id.* at 546, 432 A.2d at 97.

124. The New Jersey version of the general acceptance standard is that the results of scientific tests are admissible if they have "sufficient scientific basis to produce uniform and reasonably reliable results and will contribute materially to the ascertainment of truth." *Id.* at 536, 432 A.2d at 91 (citing State v. Cary, 49 N.J. 343, 352, 230 A.2d 384, 389 (1967)).

The *Hurd* court stated that "the policy reasons embodied in the general acceptance standard were germane to hypnotically refreshed testimony . . . ." *Hurd*, 86 N.J. at 536, 432 A.2d at 91.

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

126. *Id.* at 537, 432 A.2d at 92.

127. For the *Hurd* court's discussion of the scientific authorities relied upon, see *id.* at 538-43, 432 A.2d at 92-95.

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

ity, loss of critical judgment, and the tendency to confuse source of memory on the typical hypnotic subject,[129] the *Hurd* court expressly rejected the per se approach. The court reasoned that the per se rule utilized in *Shirley* was overinclusive since it excluded testimony as trustworthy as that of a normal eyewitness.[130] Noting that suggestibility and the constructive nature of normal memory result in inherent inaccuracies, the court reasoned that normal recollection refreshed may also render cross-examination less effective.[131] Clearly the rationale of the *Hurd* court rests largely on the asserted analogy between problems of reliability of hypnotically refreshed recall and those of normal human memory. The court saw reliability on a par with that of normal memory as the key to admissibility of hypnotically refreshed recall, assuming throughout the feasibility of such a determination. As such, just as testimony based on normal memory in some instances may be admissible though inaccurate, the *Hurd* court felt the same possibility properly permissible with respect to hypnotically refreshed recall.

D. *Critique of* Hurd

Despite its implicit yet clear statement to the contrary,[132] the court in *Hurd* undermined a number of the policy considerations traditionally embodied in the general acceptance standard. Those policy considerations, seen as appropriately applied to novel scientific evidence even by the standard's critics,[133] include: (1) deferring decisionmaking to those most qualified to assess the validity of the scientific procedures used; (2) shielding the jury from the misleading aura of such evidence through adoption of a conservative standard of admissibility; (3) assuring the availability of experts to assist interested parties; and (4) establishing clear appel-

129. *Id.* at 539-40, 432 A.2d at 93.

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

131. *Id.* at 541-42, 432 A.2d at 94-95.

132. *Id.* at 536, 432 A.2d at 91.

133. *See, e.g.*, Gianelli, *supra* note 76, at 1207, 1245-50. Professor Gianelli takes notice of the underlying values of the *Frye* standard, but advocates replacing the ambiguous standard with some kind of enhanced burden of proof; perhaps a beyond a reasonable doubt standard as to reliability. *See also* McCormick, *supra* note 76, at 880, 883, 911-15. Professor McCormick, while recognizing the propriety of the policies behind the general acceptance standard, argues that these same goals may be achieved by applying a traditional relevancy approach to scientific evidence.

late precedent until acceptance of hypnosis as a reliable memory-jogging device by the relevant scientific community occurs.[134]

The *Hurd* court undermined the first value of the general acceptance standard by moving the determination of reliability from experts in the relevant scientific community to the trial court at a pretrial hearing. The case-by-case approach similarly fails to insure the input of expert witnesses to aid in the determination since adversaries must provide their own experts at the hearing. While providing expert witnesses is a minor burden on the vast resources of the state, an indigent defendant seeking to rebut the reliability of a prosecution witness's memory may find this burden a substantial one. Avoiding the economic burden of such a battle of the experts is another basic value underlying the general acceptance standard when applied to novel scientific evidence.[135]

Similarly, the value of uniformity and clear precedent is undermined by the uncertainty of outcome inherent in the *Hurd* approach. Even assuming compliance with the six procedural guidelines, similar fact situations may result in different outcomes on the admissibility issue. Differences in expert testimony at the suppression hearing, the nature of the questioning by the hypnotist, the hypnotizability of the subject, the professed reason for loss of memory, and the extent of the subject's pre-hypnotic recall might tip the determination one way or the other. Evaluation of these and other factors relevant to the admissibility issue, a considerable task for even a qualified psychotherapist well versed in the use of hypnosis, is the responsibility of the trial judge under *Hurd*. This may lead to an array of results of little precedential value, some-

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134. *See generally* McCormick, *supra* note 76, at 883 (outlining the virtues of the general acceptance standard as various courts have identified them). *See also* United States v. Brown, 557 F.2d 541, 556-57 (6th Cir. 1977) (discussing the goals achieved by the *Frye* standard).

135. The Supreme Judicial Court of Maine characterized this economic burden in the following manner:

> To adhere to the *Frye* standard requiring general—but not universal—acceptance within the scientific community will enhance the fairness of the trial, especially in criminal cases. It will avoid the difficulty of rebutting the expert's opinion except by other experts or by cross-examination grounded upon a thorough acquaintance with the novel application of scientific principles. This burden of rebuttal is generally borne in these criminal cases by defendants without the economic means to marshal scientific witnesses for a battle of the experts.

State v. Williams, 388 A.2d 500, 506 (Me. 1978).

times owing to personal biases of particular judges. This complex web of precedent may in turn deter law enforcement authorities from assuming the risk of utilizing hypnosis in the most appropriate of cases. Such uncertainty also provides incentive for frequent challenges to hypnotically refreshed testimony both at a preliminary hearing and on appeal—an unattractive consequence in light of already overtaxed court calendars.

Thus, the consumption of time and trial resources the case-by-case approach requires has been a frequently cited criticism prevalent in the cases expressly rejecting it.[136] In *Commonwealth v. Kater*[137] the Supreme Judicial Court of Massachusetts, in rejecting *Hurd*, zeroed in on the problem, stating that such a "time-consuming and expensive course is precisely what the [general acceptance] test seeks to avoid."[138]

While the *Hurd* approach does shield the jury from potentially misleading evidence when the determination is made that the testimony is inadmissible, it may potentially admit post-hypnotic testimony which is the product of suggestibility and confabulation. Again this is due to the assumption adopted by the court that hypnotically refreshed testimony may be shown to be as reliable as normal recall, a premise to be addressed below.

The *Hurd* court's assertion that its manner of applying the general acceptance standard invokes the beneficial policies underlying the standard lacks merit in light of the foregoing analysis. The increasing use of forensic hypnosis and the variation in state court approaches to the admissibility issue may be added reasons for courts to stick closely to the values underlying the conservative general acceptance standard. When reliability and its ultimate legal consequences are so uncertain, clear guidelines with respect to

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136. The *Hurd* court itself expressed concern over the potential consumption of trial resources and confusion of the issues should the testimony be introduced before the jury and both adversaries subsequently address the reliability of the testimony with experts. 86 N.J. at 537, 432 A.2d at 92. However, the court failed to consider this same problem in light of its own decision to let the trial judge make a pretrial determination of reliability in each case.

137. 388 Mass. 519, 447 N.E.2d 1190 (1983).

138. *Id.* at 526, 447 N.E.2d at 1196. *See also* State v. Palmer, 210 Neb. 206, 217, 313 N.W.2d 648, 654 (1981) (case-by-case approach neither sound nor practical); State *ex rel.* Collins v. Superior Court, 132 Ariz. 180, 198, 644 P.2d 1266, 1284 (1982) (Feldman, J., supplemental opinion) (case-by-case approach is prohibitively expensive). For an explanation of the general acceptance standard and a discussion of a number of its applications, see *supra* note 76 and accompanying text.

post-hypnotic testimony for the sake of lower courts and criminal investigators adapting police practices to legal rules are a necessity.[139] This consideration was apparently overlooked by the *Hurd* court.

A second flaw of the *Hurd* court rationale is its reliance on the similar degree of unreliability of hypnotically refreshed testimony and normal memory. The *Shirley* court, finding that factors contributing to the unreliability of normal memory were enhanced by hypnosis,[140] expressly rejected this premise. Empirical studies suggest that hypnotically retrieved memory is significantly less accurate than normal memory and thus tend to support the latter view.

One such study tested the accuracy and confidence level of two sets of subjects in remembering the details of a videotape shown to all. One group was asked the fifteen questions, including six of a leading nature, while under hypnosis. The others were questioned in the waking state.[141] On the six leading questions posed, the hypnotized subjects made a statistically-significant greater number of errors than those in the waking state. However, the previously hypnotized subjects expressed the same confidence in their answers as the others, felt they had been more accurate due to hypnosis, and stated that in a real situation they would prefer to be questioned under hypnosis to improve their recall.[142] The author of the study suggests that in a criminal investigation greater inaccuracy could result due to witness self-interest in providing the information.[143] It must be noted that proponents of the forensic use of hypnosis would disavow these results. In their view, hypnosis is effective in overcoming the psychological blocks resulting from the trauma of witnessing the criminal event, a factor unaccounted for in the use of the nonstressful film in the study.[144]

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139. *See* note 123 *infra*.

140. 31 Cal. 3d at 62-63, 641 P.2d at 801, 181 Cal. Rptr. at 270. The *Shirley* court expressly states that disagreement with the *Hurd* court on this point is why it rejects the *Hurd* approach. *Id.* at 62-63 & n.44, 641 P.2d at 802 & n.44, 181 Cal. Rptr. at 270 & n.44.

141. *See* Putnam, *Hypnosis and Distortions in Eyewitness Memory*, 27 INT'L J. CLINICAL & EXPERIMENTAL HYPNOSIS 437, 441 (1979). The videotape shown to both groups of subjects was of a car-bicycle accident.

142. *Id.* at 444.

143. *Id.* at 445-46.

144. Putnam was well aware of this argument in discussing his results:

To better test this thesis a subsequent study exposed subjects to a highly stressful film.[145] Twenty factual questions, five of which were leading, tested the subjects on the accuracy of their recall.[146] The hypnotized subjects gave significantly less accurate answers to leading questions than the non-hypnotized subjects. Again, the confidence levels of both groups were largely the same.[147] Although stress levels in actual forensic applications may still vary slightly from experimental ones,[148] the results still suggest that eyewitnesses subjected to hypnosis will have significantly less accurate recall of stressful events than normal eyewitnesses. The court's reliance on a similar degree of accuracy of both types of memory was clearly misplaced and contrary to the weight of empirical evidence. It follows that a trial court determination of whether a hypnotized witness's memory is *reasonably likely* to be as accurate as normal memory cannot be based on a review of the procedures employed. Such a determination would only be conjectural and would be unsupported by the best available empirical evidence.

A third shortcoming of the *Hurd* approach is that the required procedures are on their face insufficient to guard against all the effects contributing to the unreliability of hypnotically refreshed recall. As the *Shirley* court observed,[149] the requirement

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> In the present experiment, no attempt was made to upset [subjects] because of the obvious ethical considerations involved. The data indicate that hypnosis may not aid recall when there is little emotional involvement on the part of the witness; they do not indicate that hypnosis will never aid recall. It may be that hypnosis aids recall by reducing retrieval difficulties caused specifically by emotionally upsetting events. However, there is currently no evidence from rigorous empirical studies to support this notion. This topic is ripe for further investigation and the research is long overdue.

Id. See also Zelig & Beidleman, *The Investigative Use of Hypnosis: A Word of Caution*, 29 INT'L J. CLINICAL & EXPERIMENTAL HYPNOSIS 401, 404 (1981) (discussing how Putnam's study did not necessarily contradict the theory espoused by proponents of forensic hypnosis and how their study would more directly address this theory).

145. The film viewed by subjects was of a number of industrial accidents. In one scene a worker lost a finger in a router. Another scene depicted a worker mishandling a circular saw, thereby causing a board to be ejected, impaling and killing a co-worker. The first accident was vividly presented and occurred unexpectedly while the second was less spontaneous due to visual and verbal cues which built up the subjects' anticipation. Zelig & Beidleman, *supra* note 144, at 404-05.

146. *Id.* at 405.

147. *Id.* at 407-08 & Table 2.

148. *Id.* at 409.

149. 31 Cal. 3d at 39 n.24, 641 P.2d at 787 n.24, 181 Cal. Rptr. at 255 n.24.

that the hypnosis session be recorded does not insure that the trial court can identify the subtle cues of demeanor, voice inflections, body language, and subtlely leading questions.[150] The California court labelled the *Hurd* court's assumption that the trial court judge was qualified to detect and evaluate suggestibility based on such a recording "vain."[151] In addition, the guidelines adopted do not address the loss of critical judgment affecting the previously hypnotized witness.[152] The court's failure to address this effect, which jeopardizes the defendant's right to confrontation by effective cross-examination, suggests a dangerous ambivalence towards traditional values of fairness in criminal trials.

Finally, the required procedures may simply prove to be unworkable. To adequately record the hypnosis session, cameras trained on both subject and hypnotist are necessary. Thus the requirement that the two be alone during the session appears to be difficult to comply with.[153] Hypnosis rooms with hidden dual cameras would be impractical and prohibitively costly for most law enforcement agencies. The ambiguity of the required procedures with respect to the proper qualifications of the hypnotist, the extent of the hypnotist's neutrality, and how best to record a witness's certainty with respect to prior recall, make compliance with the procedures burdensome and unpredictable. While adoption of administrative guidelines for implementation of hypnosis might remedy problems of clarity,[154] emphasis on such guidelines may enhance the myth of reliability in the minds of both judges and jurors. As one court cynically noted: "The standards, themselves, would give the hypnotic process an aura of reliability which, in actuality, it does not possess. It is far too likely that a jury would be even less critical of the testimony because of the indicia of reliability provided by such standards."[155]

Despite these shortcomings, courts in a few states have adopted approaches similar to that of *Hurd*. In rejecting the per se inadmissible rule of its sister state Arizona, the New Mexico Court

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150. *See supra* note 20 and accompanying text.

151. 31 Cal. 3d at 39 n.24, 641 P.2d at 787 n.24, 181 Cal. Rptr. at 255 n.24.

152. *Id.* at 39, 641 P.2d at 787, 181 Cal. Rptr. at 255.

153. *Id.* at 40 n.25, 641 P.2d at 787 n.25, 181 Cal. Rptr. at 255 n.25.

154. The FBI has adopted such administrative guidelines. *See* Ault, *FBI Guidelines for the Use of Hypnosis*, 27 INT'L J. lCLINICAL & EXPERIMENTAL HYPNOSIS 449, 449-50 (1979).

155. People v. Gonzalez, 108 Mich. App. 145, 160, 310 N.W.2d 306, 313 (1981).

of Appeals[156] proclaimed:

> The better rule is that testimony of pre-hypnotic recollections is admissible in the sound discretion of the trial court, but post-hypnotic recollections, received by hypnotic procedure, are only admissible in a trial where a proper foundation has also established the expertise of the hypnotist and that the techniques employed were correctly performed, free from bias or improper suggestibility.[157]

The court then went on to adopt the required procedures of the *Hurd* court, again assuming their effectiveness in guarding against suggestibility.[158]

Most state courts confronting the issue in recent years have opted not to follow this view, however. In fact, a significant number of courts that have expressly considered the *Hurd* approach have rejected it, citing one or more of the foregoing shortcomings.[159] This alone suggests that the trend is away from the case-

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

157. *Id.* at 688, 643 P.2d at 252.

158. *Id.* at 689-90, 643 P.2d at 253-54. For other authority supporting the case-by-case approach, see Warner, *The Use of Hypnosis in the Defense of Criminal Cases*, 27 INT'L J. CLINICAL & EXPERIMENTAL HYPNOSIS 417, 427-30 (1979); Brown v. State, 426 So. 2d 76, 90-93 (Fla. Dist. Ct. App. 1983) (rejecting the applicability of *Frye* standard; calling for a case-by-case determination of admissibility to be based upon compliance with *Hurd*-like safeguards and consideration of independent corroborating evidence, and requiring liberal cross-examination and cautionary jury instructions; People v. Smrekar, 68 Ill. App. 3d 379, 388, 385 N.E.2d 848, 855 (1979) (applying a case-by-case determination considering the competence of the hypnotist, the suggestiveness of the hypnotic session, independent corroborating evidence not known to the witness, and the opportunity of the witness to view the alleged defendant); People v. Gibson, 117 Ill. App. 3d 270, 274, 277, 452 N.E.2d 1371, 1372, 1374 (1983) (renewing support for *Smrekar* standards but declining to adopt the *Hurd* safeguards *in toto*); Comment, *Hypnosis—Should the Courts Snap Out of It?—A Closer Look at the Critical Issues*, 44 OHIO ST. L.J. 1053, 1071-73 (1983) (advocating *Hurd*-type safeguards as proper foundation for admissibility). Prior to *Hughes* a few lower New York courts had adopted an analagous safeguards approach. *See* People v. Lewis, 103 Misc. 2d 881, 883-84, 427 N.Y.S.2d 177, 179 (Sup. Ct. 1980) (employing nine procedural safeguards similar to those promulgated in *Hurd*); People v. McDowell, 103 Misc. 2d 831, 427 N.Y.S.2d 181 (Sup. Ct. 1980).

159. People v. Hughes, 59 N.Y.2d 523, 543-44, 453 N.E.2d 484, 494-95, 466 N.Y.S.2d 255, 265-66 (1983); People v. Shirley, 31 Cal. 3d 18, 40, 641 P.2d 775, 787-88, 181 Cal. Rptr. 243, 256 (1982) (in bank); Commonwealth v. Kater, 388 Mass. 519, 526-28, 447 N.E.2d 1190, 1196 (1983); State v. Palmer, 210 Neb. 206, 217-18, 313 N.W.2d 648, 654-55 (1981); State *ex rel.* Collins v. Superior Court, 132 Ariz. 180, 186-87, 644 P.2d 1266, 1272-73 (1982) (in banc); Commonwealth v. Nazarovitch, 496 Pa. 97, 109, 436 A.2d 170, 177 (1981); People v. Gonzalez, 108 Mich. App. 145, 159-60, 310 N.W.2d 306, 313 (1981); Chapman v. State, 638 P.2d 1280, 1282-84, 1284-85 (Wyo. 1982). *But cf.* People v. District Court, 652 P.2d 582 (Colo. 1982) (en banc) (refusing to upset ruling of trial court adopting *Hurd* approach).

by-case approach.

III. The Preferred Approach of *People v. Hughes*

A. *The* Hughes *Rationale*

The foregoing criticisms of the *Shirley* and *Hurd* approaches shed light on the policy reasons for the distinction in treatment of pre-hypnotic and post-hypnotic memory drawn by the court in *People v. Hughes*. The *Hughes* court took judicial notice of the case-by-case approach of *Hurd*,[160] the per se inadmissible rule of *Shirley*,[161] and the hybrid approach it eventually adopted.[162] In declaring its preference, the court noted that in New York an increased standard of reliability has been adopted whereby testimony as to a scientific procedure utilized has a direct, potentially damaging effect on the jury's assessment of eyewitness credibility.[163] This, and the inherent suggestibility of forensic hypnosis, led the court to apply the *Frye* standard of general acceptance in the scientific community relevant to the issue at hand.[164] The court quickly disposed of the question of general acceptance: "It is evident, however, that at the present time hypnosis has not achieved that status."[165]

The *Hughes* court then proceeded to consider the case-by-case approach of *Hurd*. The court noted that regulating the conduct of the hypnotist and investigators in no way protected the resulting recall from taint due to a particular subject's greater susceptibility to suggestion or tendency to confabulate. Nor do the adopted guidelines guard against the undetectibility of unreliable facts.[166] The court refused to adopt the *Hurd* approach, finding recall that is solely the result of hypnosis to be always inadmissible.[167]

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160. *Hughes*, 59 N.Y.2d at 539, 453 N.E.2d at 492, 466 N.Y.S.2d at 260.

161. *Id.* at 539-40, 453 N.E.2d at 492, 466 N.Y.S.2d at 263.

162. *Id.* at 539, 453 N.E.2d at 492, 466 N.Y.S.2d at 263.

163. *See, e.g.*, People v. Allweiss, 48 N.Y.2d 40, 50, 396 N.E.2d 735, 740, 421 N.Y.S.2d 341, 345 (1979) (no enhanced standard since expert testified as to results of hair strand analysis, not as to credibility of witness).

164. *Hughes*, 59 N.Y.2d at 543, 453 N.E.2d at 494, 466 N.Y.S.2d at 265. For a discussion of the *Frye* standard, see *supra* note 76 and accompanying text.

165. *Hughes*, 59 N.Y.2d at 543, 453 N.E.2d at 494, 466 N.Y.S.2d at 265.

166. *Id.* at 543-544, 453 N.E.2d at 494-95, 466 N.Y.S.2d at 265-66.

167. *See id.* at 545, 453 N.E.2d at 495, 466 N.Y.S.2d at 266. The *Hughes* court also noted that had the safeguards approach been adopted, the facts of the case showed that hypnosis had not been used in compliance with all the required procedures. *Id.* at 544, 453

With respect to pre-hypnotic recall, the *Hughes* court refused to extend the inadmissibility rule, stressing the utility of hypnosis as a means of gaining increased, though potentially inaccurate, recall of leads in difficult criminal cases.[168] However, the court found that the danger of increased confidence on the part of the subject in his original recall necessitated resolution at the pretrial stage of two issues: the precise extent of the subject's pre-hypnotic recall, and the suggestiveness of the hypnotic procedures used in the particular case.[169] The proponent of the evidence assumes the burden of showing by clear and convincing evidence that the subject's testimony as to his pre-hypnotic memory will not substantially impair the defendant's right to confrontation.[170]

Under this scheme, the scope of the witness's pre-hypnotic memory will be determined on the basis of testimonial and documentary evidence of events prior to and during the hypnotic session. Thus a detailed recording in some form of the subject's pre-hypnotic statements may be useful in making the required showing. As to the suggestiveness of the procedures, the *Hughes* court stated that safeguards recommended in other cases may be pertinent, though it did not make them mandatory.[171] Thus the narrower issue of the admissibility of testimony as to pre-hypnotic memory must still be resolved in a case-by-case manner.

The *Hughes* court thus adopted a component of the *Shirley* rule with respect to testimony as to post-hypnotic recall without finding the subject totally incompetent to testify. The inadmissibility of such testimony stemmed from the determination that testimony that was solely the product of hypnosis was not generally accepted as reliable in the relevant scientific community. Testimony as to pre-hypnotic recall, not necessarily affected by the hypnosis, was excluded from the scope of the inadmissibility rule.

N.E.2d at 495, 466 N.Y.S.2d at 266. Thus the court clearly went further than necessary to resolve the problem presented by the fact pattern at hand. This suggests the court's strong displeasure with the *Hurd* approach and desire to set strong precedent in dealing with this issue in the first instance.

168. *Id.* at 545, 453 N.E.2d at 495, 466 N.Y.S.2d at 266.

169. *Id.* at 546-47, 453 N.E.2d at 496, 466 N.Y.S.2d at 266-67.

170. *Id.* at 547, 453 N.E.2d at 497, 466 N.Y.S.2d at 267. A useful practice aid for the prosecutor or defense attorney trying to establish or refute this burden of proof in such a pretrial hearing is the transcript of the testimony of the clinical psychologist who conducted the hypnosis in *Hughes*. *See* 1 NEW YORK EVIDENCE (MB) § 26.08, at 244.1-244.101 (Dec. 1984).

171. *Id.* at 547, 453 N.E. 2d at 496, 466 N.Y.S.2d at 267.

Accordingly, the *Hughes* court adopted the *Hurd* case-by-case approach with respect to pre-hypnotic recall. A brief review of the shortcomings of these alternatives in light of *Hughes* suggests that the bifurcated approach is a prudent method of resolving or minimizing these practical and policy difficulties.

B. *The Promise of the* Hughes *Approach*

The *Hughes* approach clearly resolves the basic practical and policy shortcomings of the *Shirley* rule. The overinclusiveness of *Shirley* is not present in this approach since properly preserved facts recalled prior to hypnosis may be testified to at trial. The difficult strategy decision confronting law enforcement officials discussed above is eliminated. They only need decide what procedures to employ to properly safeguard facts already known from the potential taint of the hypnosis, rather than whether to hypnotize or not. It follows that the practical deterrent effect of the *Shirley* rule on the use of this valuable law enforcement tool may be minimized with the adoption of procedural guidelines in accordance with the *Hughes* opinion. At the same time, the adoption of the conservative "clear and convincing" evidence standard to show the reliability of pre-hypnotic recall before admitting such testimony will have the effect of deterring abusive uses of hypnosis, such as calming a nervous witness or bolstering a key witness's confidence in an uncertain story. The danger of tainting a primary witness's testimony only becomes worth the risk in the proper cases, such as where the witness's recall is limited, no suspect has been positively identified, and little or no other evidence is presently available or likely to become available by other means.[172]

Similarly, the shortcomings previously identified as being im-

172. The *Hughes* court expressly placed the burden of proof as to reliability of pre-hypnotic recall on the prosecution and stated that the defendant should have the opportunity to rebut such a showing. *Id.* at 547, 453 N.E.2d at 496-97, 466 N.Y.S.2d at 267. Thus, the *Hughes* court implicitly failed to address the status of this approach in the case where the defendant is subjected to pretrial hypnosis. However, if this approach is extended to such a case, a balance between logical application of the evidentiary rule to both situations and minimal interference with the defendant's right to be heard, conspicuously absent in *Shirley*, would be present. In addition, the potential abusive uses by defense counsel, see *supra* notes 94-98 and accompanying text, would be deterred since the threshold burden of establishing the scope of pre-hypnotic recall and the certainty of that recall would now be on the defendant.

plicit in the *Hurd* approach[173] are eliminated or minimized under *Hughes*. By adopting a per se rule with respect to post-hypnotic recall, *Hughes* invokes the policies of the traditional general acceptance standard overlooked in *Hurd*.[174] This component of the rule adopts clear precedent with respect to post-hypnotic testimony for trial courts. The complexity of the task of evaluating both the subtle psychological factors contributing to the success of any prospective hypnosis[175] and the incidental effects that hypnosis may have on the reliability and credibility of a witness[176] must be viewed in the context of the ever increasing use of hypnosis in criminal investigations. The burden placed on trial courts by *Hurd*, the responsibility for a determination with respect to post-hypnotic testimony that experts can only speculate on,[177] is clearly unreasonable. The per se rule recognized the unsuitability of the trial court to determine the reliability of post-hypnotic recall and leaves for a later day the opportunity for courts to liberalize the rule in response to greater scientific understanding of when and under what circumstances hypnotic procedures will produce reliable recall.

Adoption of the per se inadmissible rule with respect to post-hypnotic recall also implies recognition by the *Hughes* court that no means are currently available to determine if hypnotically refreshed testimony in a given instance is as accurate as normal memory. This is a prudent position in light of the available scientific empirical evidence suggesting the enhanced unreliability of hypnotically refreshed testimony.[178]

The *Hughes* approach also mitigates the inherent unfairness of the state's greater resources in providing expert witnesses to aid in the case-by-case determination and eliminates the need for extensive and time-consuming pretrial hearings.[179] While hearings

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173. *See supra* notes 131-57 and accompanying text.

174. *See supra* notes 131-34 and accompanying text.

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

176. *See supra* notes 18-43 and accompanying text.

177. *See supra* note 43 and accompanying text.

178. *See supra* notes 138-46 and accompanying text.

179. Some alternative proposals appear to give inadequate consideration to these policy considerations, proposing virtual mini-trials on the reliability of hypnosis in each instance. *See, e.g.*, Note, *The Admissibility of Testimony Influenced By Hypnosis*, 67 VA. L. REV. 1203 (1981). The author proposes a three stage procedure which includes application for a warrant to hypnotize, a pretrial hearing, and presentation of the evidence at trial. The party seeking to invoke hypnosis would apply to the court showing the circumstances under

and experts may still be important to the determination with respect to pre-hypnotic recall, the relevant issues are narrowed to what pre-hypnotic facts were actually known and with what certainty. It is conceivable that a defendant subjected to pretrial hypnosis who seeks to testify as to pre-hypnotic recall could meet the burden of showing lack of taint without any experts at all. A video or audio tape of the defendant narrating the facts of the incident that he can recall, or a detailed deposition and subsequent testimony as to the subject's demeanor and certainty, may meet the burden for admissibility of pre-hypnotic testimony without putting hypnosis itself on trial in each case.[180] Accordingly, the burdens imposed on trial resources and the defendant's pocketbook by the *Hurd* approach are minimized.

Additional refinement of *Hughes* might further reduce these burdens. Requiring the proponent of the use of hypnosis to make an application for a court order granting permission to invoke hypnosis and obtain such an order before any pre-hypnotic statements of a witness subjected to pretrial hypnosis would be admitted may be such a refinement. The application might consist of a detailed deposition or recording of the witness's present recall, af-

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which it would be used and would be required to notify opposing counsel of this application. If the opponent objected, a hearing could be held on the merits of the court order. *Id.* at 1229. The argument assumes that a defendant is already in custody if it assumes that opposing counsel can be notified. This is contrary to the observation that most cases where hypnosis is invoked relate to difficult investigations where little or no identification evidence exists and the investigation is stalled. *See, e.g., supra* notes 6, 58, 60, 91, and accompanying text. After hypnosis was used, the proponent would still have the burden of proving that the hypnosis was not unreliable in light of the procedures used to admit the testimony at trial. Again the defendant would have the opportunity to rebut its reliability. Once admitted at trial, the jury would not be informed that the subject had been hypnotized unless the opponent raised the point on cross-examination.

If raised in this manner the testimony could be challenged at trial by use of experts and cross-examination. *Id.* at 1229-30. Even assuming hypnosis would be needed if the defendant is already identifiable, it is doubtful that such a time consuming, costly, and potentially issue-confusing process would be worth the trouble. Note, *The Continuing Controversy of Hypnosis in the Legal Setting—The Need for a More Flexible Approach*, 12 MEM. ST. U.L. REV. 471, 526 (1982). The traditional concerns of confusion of the issues and consumption of time at trial might preclude the third stage of this process before the jury alone. In addition, this proposal assumes that the witness subjected to hypnosis may still be vulnerable to effective cross-examination should defense counsel challenge his or her testimony at trial; an assumption unwarranted in light of the views of the experts. *See supra* notes 41-47 and accompanying text.

180. For other cases similar to *Hughes* where the proponent must show that the subject demonstrably and unequivocally recalled pre-hypnotic facts before they would be admitted at trial, see cases cited *supra* note 10.

fidavits of investigators as to the nature and circumstances of the crime and evidence or other witnesses presently available, and a statement by the psychologist potentially administering the hypnosis as to what techniques would be employed. The court could look to the necessity of using hypnosis to aid in the investigation and the probability that the techniques employed will avoid taint of pre-hypnotic recall to determine whether to sanction the hypnosis. If court permission is given, at the later pretrial hearing the proponent of the pre-hypnotic testimony need only make a showing that the techniques in the psychologist's affidavit previously presented were followed to create a presumption of admissibility. The opponent of the evidence could only rebut the presumption by challenging the scope of the witness's pre-hypnotic recall or its certainty, as reflected in the material submitted in support of the hypnosis order. Shifting the burden in this manner allows the court to regulate the use of forensic hypnosis, confining it to those cases where such use is most proper.[181] In addition, since the presumption of admissibility is established at an early stage of an investigation when the order is granted (often when no suspect has yet been identified), no unintended bias or prejudice against a particular defendant would enter into the determination with respect to admissibility of pre-hypnotic testimony. The proponent's showing at the pretrial hearing is reduced, further shortening the time expended in such a hearing. The result is close judicial regulation of the use of forensic hypnosis with minimal consumption of time and defense resources at a pretrial hearing.[182]

The *Hughes* court left flexibility as to guidelines and factors to be considered by the trial court in gauging the taint of pre-hypnotic recall. In this manner the court avoided the trap that a strict set of procedural guidelines may pose, giving testimony an aura of reliability in the eyes of the court or jury which is unwarranted due to inadequate procedural safeguards.[183] The broader issues of the suggestibility of the hypnosis and its effect on the witness's credibility are best addressed by a complete and up-to-date set of

181. *See supra* note 58 and accompanying text.

182. Closer judicial regulation might prevent the overuse of hypnosis in cases where it may not be necessary. For an example of a case where hypnosis probably should not have been used, see Commonwealth v. Taylor, 294 Pa. Super. 171, 439 A.2d 805 (1982) (discussed *supra* note 59).

183. *See supra* note 153 and accompanying text.

guidelines rather than the strict judicial checklist proposed in *Hurd*.[184] While the six guidelines outlined in *Hurd* may be a starting point, a requirement that the hypnotist receive, in written memorandum form, only those facts from the police that are necessary to frame the interview should be added.[185] An expression of judicial preference for a narrative account by the subject rather than a question and answer type interview while under hypnosis would also be appropriate. A narrative of the facts reduces the likelihood of leading questions by the hypnotist as well as other forms of subtle suggestion.[186] In addition to these guidelines, the flexibility allowed by the court allows other courts in the future to adopt new safeguards as scientific memory research in the area of forensic hypnosis discovers additional factors tending to increase or decrease suggestibility.

CONCLUSION

The approach towards hypnotically refreshed testimony adopted in *People v. Hughes* resolves or minimizes many of the practical and policy defects of recent alternatives with respect to the issue of admissibility at criminal trials. It affords maximum protection of a defendant from the inherently unreliable and potentially harmful testimony of a witness as to events only recalled under hypnosis. At the same time, it preserves the availability to criminal investigators of a useful forensic technique under circumstances where little other evidence is available and a witness's memory is blocked or limited. As such it represents a carefully conceived compromise designed to protect two legitimate and compelling values underlying our criminal justice system: the right of a criminal defendant to a fundamentally fair trial and the inter-

184. As has previously been noted, the *Hurd* safeguards appear inadequate to protect against all the effects of the suggestibility of hypnosis. *See supra* notes 147-53 and accompanying text.

185. This will reduce the possibility that the hypnotist will convey any subtle suggestions to the subject during the hypnotic session and allow the court to evaluate at the pretrial hearing what may have been conveyed between hypnotist and subject. *See, e.g.*, People v. McDowell, 103 Misc. 2d 831, 834, 427 N.Y.S.2d 181, 183 (Sup. Ct. 1980); People v. Lewis, 103 Misc. 2d 881, 883, 427 N.Y.S.2d 177, 179 (Sup. Ct. 1980).

186. A narrative account by the subject during the hypnotic session is less susceptible to suggestion than an account conveyed through a normal question-and-answer type interview. Hilgard & Loftus, *Effective Interrogation of Eyewitnesses*, 27 INT'L J. CLINICAL & EXPERIMENTAL HYPNOSIS 342, 348 (1979); Orne, *supra* note 20, at 324.

est of society in enhancing the efficiency of law enforcement by equipping investigators under the proper circumstances with this valuable forensic technique. It is the inherent balancing of these often competing values which makes the bifurcated approach of *Hughes* the most attractive alternative and the likely trend for the immediate future.

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