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The Use of Hypnosis in Criminal Trials: The Black Letter of the Black Art

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THE USE OF HYPNOSIS IN CRIMINAL TRIALS: THE BLACK LETTER OF THE BLACK ART

[T]here are few dangers so great in the search for truth as man's propensity to tamper with the memory of others.[1]

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I. INTRODUCTION

Hypnosis has attracted the attention of psychoanalysts, scientists and lay persons alike, with the premise that it is a way to tap the unconscious mind, and thereby obtain "the truth."[2] In the past few decades, the forensic use of hypnosis has gained popularity in the legal world; in its quest for truth and justice, the legal system has come to solicit the powers of the black art.[3] However, as the use of hypnosis expands into

2. *But see* 9 ENCYCLOPAEDIA BRITANNICA *Hypnosis* 137 (1974) ("It remains controversial whether hypnotic suggestions can improve memory effectively. . . . The popular opinion that hypnosis facilitates recollection has not been supported by adequately controlled subsequent research.").

3. "The practice of hypnotism . . . is about as old as human history and is nearly as widespread as the race itself." Ladd, *Legal Aspects of Hypnotism*, 11 YALE L.J. 173, 174 (1902). The power of suggestion dates back to the cunning serpent who overpowered Adam and Eve in the Garden of Eden. *Genesis* 3:1-6. Hypnosis came to be considered a ritualistic practice used to unnaturally control the forces of nature and was often associated with the occult. "[H]ypnosis is connected with sooth-saying, magic, healing by laying on of hands, and various forms of witchcraft and priestcraft." Ladd, *supra*, at 174. This "magic" was referred to as "black" after the rise of Christianity. 4 ENCYCLOPAEDIA AMERICANA *Black Art* 32 (1958). The use of hypnosis has been popularized as a mysterious force which allows the hypnotist to exercise control over the minds and wills of others. "Who can forget the classic films with John Barrymore as Svengali controlling the helpless Trilby, or Bela Lugosi as Dracula peering into the eyes of his enchanted victims, or Orson Wells as Cagliostro, using mesmerism to steal the diamond necklace which would topple the throne of France." State v. Contreras, 674 P.2d 792, 802 (Alaska Ct. App. 1983), *rev'd*, 718 P.2d 129 (1986). As hypnosis found a place in the legal realm, even the courts recognize it as "one of the dark arts." People v. Hughes, 59 N.Y.2d 523, 533, 453 N.E.2d 484, 488, 466 N.Y.S.2d 255, 259 (1983).

the courtroom, a question arises as to which party is mesmerized—the hypnotized subject or the trier of fact.

Hypnosis has been of scientific and psychological interest primarily for purposes of breaking down barriers to a subject's memory when recall is blocked due to a traumatic or emotionally charged event.[4] It is precisely this potential "remembering" of events previously perceived that created an interest in the forensic use of hypnosis, leading to an increased use of hypnosis as a means of refreshing memory.[5] Hypnosis is undoubtedly helpful as an investigative tool. Many police departments use hypnosis as a means of obtaining leads in seemingly fruitless investigations. Often, these leads successfully result in the discovery of reliable independent physical evidence.[6] When investigating a crime, the goal of

4. M. ORNE, D. SOSKIS, D. DINGES, E. ORNE & M. TONRY, HYPNOTICALLY REFRESHED TESTIMONY: ENHANCING MEMORY OR TAMPERING WITH EVIDENCE? 14 (1985) [hereinafter HYPNOTICALLY REFRESHED TESTIMONY]. Two techniques are used to refresh memory through hypnosis: hypnotic age regression and hypnotically suggested increased recall. Council on Scientific Affairs, *Scientific Status of Refreshing Recollection by the Use of Hypnosis*, 253 J. A.M.A. 1918, 1919 (1985). The former is most commonly used in psychotherapy to reexperience a forgotten traumatic event. *Id.*; M. ORNE, D. DINGES & E. ORNE, THE FORENSIC USE OF HYPNOSIS 3 (1984) [hereinafter THE FORENSIC USE OF HYPNOSIS]. The procedure of hypnotically suggested increased recall is often used to refresh the memory of a witness or victim. This is referred to as the "television technique" since it suggests to the subject that he or she is able to play back the event in question as if watching a documentary, permitting the subject to freeze the action, zoom in for a close-up or replay certain segments for a closer look. THE FORSENSIC USE OF HYPNOSIS, *supra*, at 4; *see also* Council on Scientific Affairs, *supra*, at 1919. "The assumption, however, that a process analogous to a multichannel videotape recorder inside the head records all sensory impressions and stores them in their pristine form indefinitely is not consistent with research findings or with current theories of memory." Council on Scientific Affairs, *supra*, at 1920.

5. The validity of hypnosis as a means of improving memory, however, is the subject of controversy:

> Review of the scientific literature indicates that when hypnosis is used to refresh recollection, one of the following outcomes occurs: (1) hypnosis produces recollections that are not substantially different from nonhypnotic recollections; (2) it yields recollections that are more inaccurate than nonhypnotic memory; or, most frequently, (3) it results in more information being reported, but these recollections contain both accurate and inaccurate details. . . . There are no data to support a fourth alternative, namely, that hypnosis increases remembering of only accurate information.
>
> Contrary to what is generally believed by the public, recollections obtained during hypnosis not only fail to be more accurate but actually appear to be generally less reliable than nonhypnotic recall. . . . The scientific literature indicates that hypnosis can increase inaccurate response to leading questions without a change in confidence, or it can increase the subject's confidence in his memories without affecting accuracy, or it can increase errors while also falsely increasing confidence. In no study to date has there been an increase in accuracy associated with an appropriate increase in confidence in the veracity of recollections.

Council on Scientific Affairs, *supra* note 4, at 1921, *quoted in part with approval in* Rock v. Arkansas, 107 S. Ct. 2704, 2713 n.18 (1987).

6. One of the most notable cases involving the use of hypnosis to obtain leads in a crimi-

hypnotizing a witness is to obtain information leading to the discovery of concrete evidence.[7] In such investigations, the subject's ability or inablility to accurately recall information is of no constitutional concern. When the previously hypnotized witness offers testimony in a criminal *trial,* however, a witness' ability to accurately recall is crucial. Any ill effects of hypnosis inject the danger that a conviction will be based on potentially unreliable evidence.

While the use of hypnosis can potentially refresh the subject's memory, it may also alter that memory. Thus, doubt is cast on the trustworthiness of hypnosis used for the purpose of enhancing[8] the memory of a witness, victim or defendant in preparation for testifying in a criminal trial. Recognizing that hypnosis may, in some cases, be necessary for discovering "the truth," as well as the potential danger of inaccurate recall through the use of hypnosis, courts have yet to resolve the question of the admissibility of hypnotically refreshed testimony in a criminal trial.

This Comment will set forth the dangers that are inherent in the use of hypnosis, specifically considering the ramifications of its use on a subject who seeks to have his or her memory refreshed in anticipation of offering testimony at a criminal trial. Next, this Comment will critically examine how state and federal courts have treated the issue of hypnosis, considering the underlying rationale for their decision to exclude or admit hypnotically refreshed testimony as well as the viability of their theories in light of the rules of evidence. This Comment will propose additional methods of evaluating the reliability of such testimony that are

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nal investigation was the recollection of the license plate number in the Chowchilla kidnapping case. See Kroger & Douce, *Hypnosis in Criminal Investigation,* 27 INT'L J. OF CLINICAL & EXPERIMENTAL HYPNOSIS 358 (1979) for a discussion of the use of hypnosis in that investigation. *See generally* Ault, Jr., *FBI Guidelines for Use of Hypnosis,* 27 INT'L J. OF CLINICAL & EXPERIMENTAL HYPNOSIS 449, 451 (1979) ("The FBI does not intend that hypnosis be used as anything other than a 'tool' in the investigator's repertoire. It is not intended to be a 'hurry-up' substitute for proper investigation and proven investigative techniques.").

7. "The use of hypnosis in an investigative context, with the sole purpose being to obtain leads, is clearly the area where hypnotic techniques are most appropriately employed." Orne, *The Use and Misuse of Hypnosis in Court,* 27 INT'L J. CLINICAL & EXPERIMENTAL HYPNOSIS 311, 327 (1979).

8. For purposes of this Comment, the terms "refresh" and "enhance" will be used synonymously with reference to the effect of hypnosis on a subject's memory or recollection and his or her subsequent testimony at trial. The term "refreshed" suggests that the hypnotic procedure will bring to consciousness that which was always in the subconscious. "Enhanced" leaves open the possibility that a subject's memory has been altered by the addition of information gathered during the hypnotic session, whether it be something simply forgotten or something that was never perceived. However, unless explicitly noted that the subject's posthypnotic memory contains untruths, the terms will be used generically to refer to an increased memory as a result of hypnosis.

in accordance with the rules of evidence. The following section of this Comment will be devoted to exploring the unique constitutional issues which arise when hypnotically enhanced testimony is presented in a criminal trial. This discussion will address both the prosecution's use of such testimony and the use of hypnosis by a criminal defendant in light of the United States Supreme Court's recent holding in *Rock v. Arkansas*.[9] The Comment will conclude by considering the future use of hypnosis in criminal trials, focusing on the influence of *Rock*.

II. THE DANGERS OF HYPNOSIS

First, it is essential to strip away the cloak of mystery surrounding the use of hypnosis and examine its "powers" rationally.[10] Hypnosis is characterized as a sleep-like state in which the subject is able to concentrate deeply on a suggested topic, excluding peripheral stimuli from consciousness.[11] While experts in the field disagree on the reliability of hypnosis in the legal setting, the potential dangers of the procedure are generally recognized.[12] Three dangers may cast doubt on the reliability of hypnotically refreshed memory: suggestibility, confabulation and overconfidence. The possible effects of these dangers are of critical concern when the witness is preparing to testify to his or her enhanced "memory" at a criminal trial, where a witness' statements may determine the guilt or innocence of the accused.

A. Suggestibility

While under the power of hypnosis, the subject is in an extremely relaxed state and becomes susceptible to both verbal and nonverbal suggestions.[13] Such innocuous details as the tone of voice of the hypnotist,

9. 107 S. Ct. 2704.

10. "When we objectively examine the literature, hypnotism becomes far more prosaic and loses its aura of mystery and legerdemain." State v. Contreras, 674 P.2d 792, 802 (Alaska Ct. App. 1983), *rev'd*, 718 P.2d 129 (Alaska 1986).

11. 9 ENCYCLOPAEDIA BRITANNICA *Hypnosis* 133 (1974); *cf.* Council on Scientific Affairs, *supra* note 4, at 1919 ("There is no single, generally accepted theory of hypnosis, nor is there consensus about a single definition. Despite some controversy on technical points among experts, most authorities agree that hypnosis requires at least superficial cooperation of the subject, the development of rapport, and the subject's focusing of attention."). For an account of the history of hypnosis, see 9 ENCYCLOPAEDIA BRITANNICA *Hypnosis* 133, 134-35 (1974).

12. *See generally* HYPNOTICALLY REFRESHED TESTIMONY, *supra* note 4, at 5-27; Diamond, *Inherent Problems in the Use of Pretrial Hypnosis on a Prospective Witness*, 68 CALIF. L. REV. 313, 332-42 (1980); 9 ENCYCLOPAEDIA BRITTANICA *Hypnosis* 137-40 (1974). See Rock v. Arkansas, 107 S. Ct. 2704, 2713 (1987), where the United States Supreme Court acknowledged the dangers of suggestibility, confabulation and "memory hardening" inherent in the use of hypnosis.

13. Suggestion is defined as "the act or process of impressing something . . . upon the mind

the clothes the hypnotist is wearing, the phrasing of the questions[14] or the environment in which the session is conducted have all been found to influence the answers given by a hypnotized subject.[15] "[B]ecause an individual is typically more compliant in accepting suggestions from the hypnotist, less critical in evaluating the suggestions that are given, and more responsive to experiencing suggested events in hypnosis, pre-existing memories may more easily be altered by subtle and often unwitting implicit suggestions."[16] After the subject comes out of the hypnotic trance, it is difficult, if not impossible, for the hypnotist *or* the subject to differentiate between fact and suggested detail.[17]

The danger of suggestibility is even more pronounced when hypnosis is used in anticipation of the subject testifying at a criminal trial. Hypnosis is often used by law enforcement officials on victims or witnesses when little concrete evidence is available and the subject is willing to cooperate.[18] This willingness to cooperate and the suggestibility inherent in any hypnotic session is precisely what can make the fruits of the procedure unreliable. Even with the most stringent safeguards and pre-

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of another" and "a means or process of influencing attitudes and behavior hypnotically." WEBSTER'S NEW INTERNATIONAL DICTIONARY 2286 (3d ed. 1966).

14. Council on Scientific Affairs, *supra* note 4, at 1922. Studies have shown that hypnotized subjects make significantly more errors in response to leading questions and are more apt to report as actual memories information that was merely suggested through leading questions. *See generally* Putnam, *Hypnosis and Distortions in Eyewitness Memory*, 27 INT'L J. OF CLINICAL & EXPERIMENTAL HYPNOSIS 437 (1979); Saunders & Simmons, *Use of Hypnosis to Enhance Eyewitness Accuracy: Does it Work?*, 68 J. OF APPLIED PSYCHOLOGY 70 (1983); Zelig & Beidleman, *The Investigative Use of Hypnosis: A Word of Caution*, 29 INT'L J. OF CLINICAL & EXPERIMENTAL HYPNOSIS 401 (1981).

15. The subject may also be influenced by posthypnotic suggestions, that is, "[s]uggestions given to the individual during hypnosis which are to take effect subsequently, when the subject is no longer hypnotized . . . ." HYPNOTICALLY REFRESHED TESTIMONY, *supra* note 4, at glossary.

State v. Joblin, 107 Idaho 351, 689 P.2d 767 (1984), provides an extreme example of posthypnotic suggestion. In *Joblin*, a witness to a murder was able to give only a general physical description of the assailant. *Id.* at 352, 689 P.2d at 768. A few months after the murder, the witness was hypnotized by a police officer, but was still unable to make a photographic identification of the murderer. *Id.* The witness had been given a posthypnotic suggestion to the effect that he would be able to get a clearer and clearer picture of the assailant. Two years later, after the witness had learned that the Joblin brothers were suspects in the crime, the witness made a highly confident statement identifying the defendant. *Id.* at 353, 689 P.2d at 769. The witness was then able to identify the defendant in a highly suggestive line-up. The trial court ruled that the hypnosis had improperly influenced the witness' memory and excluded the identification testimony of the witness. *Id.* This ruling was affirmed as being properly within the trial court's discretion. *Id.* at 354, 689 P.2d at 770.

16. HYPNOTICALLY REFRESHED TESTIMONY, *supra* note 4, at 24.

17. Diamond, *supra* note 12, at 314; Council on Scientific Affairs, *supra* note 4, at 1922.

18. State *ex rel.* Collins v. Superior Court, 132 Ariz. 180, 184, 644 P.2d 1266, 1270 (1982), *overruled on other grounds by* State v. Nunez, 135 Ariz. 257, 660 P.2d 858 (1983).

cautions, the danger is always present that the hypnotist may be responsible for suggesting the "facts" that the subject is able to remember.[19] This danger is compounded when the hypnotist has an interest in the investigation. Law enforcement agencies often instruct their officers how to use hypnosis to aid in their investigations. However, when the law enforcement agency or a hypnotist hired by that agency conducts the hypnotic session, a danger exists that their inherent bias will be conveyed, consciously or unconsciously, through the hypnotist to the subject.[20] The likely suggestion of the hypnotist in such cases may be sufficient to deem the fruits of the hypnosis irreparably tainted.[21]

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19. See *infra* text accompanying notes 59-70 for a discussion of the use of safeguards.

20. For instance, a law enforcement official may hypnotize a forgetful victim or eyewitness in hopes of obtaining a physical description of the assailant. The police may already have a suspect to the crime and are trying to ascertain whether this suspect fits the witness' description. If the hypnotized witness does not voluntarily provide a sufficient physical description, the hypnotist may ask more pointed questions regarding the assailant's characteristics. If the police have a suspect at the time of the hypnotic session, the questions may be, deliberately or unwittingly, tempered with certain physical characteristics of that suspect. The hypnotized witness will be prone to the suggestions given and may actually supply a description in accordance with those suggestions, thereby describing the suspect, regardless of how the witness actually perceived the assailant. See Orne, *supra* note 7, at 327-28, where the author discusses the use of hypnosis in an investigative setting, drawing distinctions between situations in which no concrete facts are available, when significant facts are known prior to hypnosis and when the witness has made conflicting statements.

These potential biases illustrate the need for the hypnotic session to be conducted by a neutral and detached party. The hypnotist should know little about the investigation to minimize conveying biases to the vulnerable subject during the hypnotic suggestion. However, this safeguard is not always followed. The agency investigating or prosecuting the crime often conducts the hypnotic session, thereby creating a danger that the subject's memory will be influenced by the biases of the agency.

21. Although recognized as an acceptable investigative tool, the use of hypnosis becomes suspect when used strictly for purposes of preparing a witness for testifying at trial. In People v. Angelini, 706 P.2d 2 (Colo. App. 1985), a co-defendant was allowed to plead guilty to sexual assault and conspiracy to commit kidnapping in exchange for testifying against the defendant at trial. *Id.* at 3. This co-defendant was hypnotized on two occasions by the district attorney, who failed to inform the defense of the second session. *Id.* The court followed the rule in People v. Quintanar, 659 P.2d 710 (Colo. App. 1982), which held that the testimony of a previously hypnotized witness was inadmissible per se as to recollections from the time of the hypnotic session onward, but permitted any prehypnosis statements that had been disclosed and recorded by tape recording, video tape or written statement.

In *Angelini*, the co-defendant's prehypnosis statements, recorded in a police report, were substantially corroborated, thereby satisfying *Quintanar*. 706 P.2d at 4. However, the motivations of the district attorney, an obviously biased party, in hypnotizing the co-defendant were questionable. *Angelini* presents a particularly suspicious use of hypnosis because the co-defendant had strong motivations to cooperate with the prosecution for a lesser sentence and other evidence was available to the prosecution.

For a discussion of State v. Hurd, 86 N.J. 525, 432 A.2d 86 (1981), and the undue suggestions of the hypnotist and law enforcement, see *infra* text accompanying notes 220-25.

B. *Confabulation*[22]

A psychological study has shown that hypnotized subjects are able to recall twice as many new items as those subjects not under hypnosis, but make three times as many new errors.[23] Under hypnosis, the subject typically experiences a suspension of critical judgment which can result in the subject's ability to "translate hunches, beliefs, and fantasies into memories, recollections, and reported facts."[24] While in a wake state,[25] prior to hypnosis, a subject may be apt to characterize a certain reported detail as being a guess. The previously hypnotized subject, on the other hand, will credit the detail as accurately representing his or her memory of the event as it occurred.

> Even if people recall more information when hypnotized, the fact that the amount of accurate information recalled increases does not necessarily mean memory has been enhanced. Instead, it may be that subjects' reduced critical judgment in hypnosis results in their willingness to report more things about the to-be-remembered event—including details that they would normally reject as too uncertain to report—and that this leads to an increase in *both* accurate and inaccurate information.[26]

"Thus, the hypnotically recalled memory is apt to be a mosaic of (1) appropriate actual events, (2) entirely irrelevant actual events, (3) pure fantasy, and (4) fantasized details supplied to make a logical whole."[27] Any taint of confabulation may go undiscovered without affirmative evidence to cast doubt on the witness' version, particularly because hypnotized subjects confabulate plausible details to the event in question.[28]

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22. Confabulation is defined as "a filling in of gaps in memory by free fabrication." WEBSTER'S NEW INTERNATIONAL DICTIONARY 472 (3d ed. 1966).

23. Dywan & Bowers, *The Use of Hypnosis to Enhance Recall*, 222 SCIENCE 184 (1983).

24. THE FORENSIC USE OF HYPNOSIS, *supra* note 4, at 4. Research has shown that individuals are capable of lying under hypnosis, or may feign the entire hypnotic session, if so motivated. *Id.* at 2.

25. A wake state is "[a] synonym for the normal, not-in-hypnosis, state. However, 'wake' is used only metaphorically since hypnotized individuals are not asleep." *Id.* at glossary.

26. HYPNOTICALLY REFRESHED TESTIMONY, *supra* note 4, at 19 (emphasis in original). "Such increases are likely to be the result of changes in what researchers call the subject's '*report criterion*'—that is, the level of confidence about recollections at which individuals are willing to report them as memory." *Id.* (emphasis in original).

27. Diamond, *supra* note 12, at 335.

28. Orne, *supra* note 7, at 317-18; *see also* State v. Hurd, 86 N.J. 525, 537-40, 432 A.2d 86, 92-93 (1981).

A hypnotized subject can confabulate details that were never capable of being perceived by the senses. One article on the subject reports a disturbing example of a witness' ability to confabulate. While under hypnosis, a witness was told to remove the mask of the robber. The witness proceeded to describe the robber's face. THE FORENSIC USE OF HYPNOSIS, *supra* note

The theory behind the forensic use of hypnosis is that the hypnotic sessions will enhance the memory of the witness, thereby permitting clearer recall of the details of the crime in question. When a witness is hypnotized at the investigative stage, the authorities are seeking as much information as possible.[29] The witness often feels substantial pressure to provide details and is able to do so while under hypnosis, irrespective of the objective accuracy of the "facts." If the witness is willing to cooperate or has an unconscious wish to please the interviewer, the witness may give answers that he or she thinks the hypnotist or authorities want to hear, even if nothing exists in the witness' prehypnotic memory to recall. To fill the gaps where memory, or actual perception, is lacking, the subject will often confabulate details from prior memories of unrelated events, or even fantasies. The confabulated details become part of the subject's permanent memory of the event in question.[30] No amount of questioning on the witness stand is likely to reveal any confabulated facts, since the witness is convinced of the "facts" as he or she "remembers" them. When the previously hypnotized witness testifies in a criminal proceeding, a substantial danger exists that the testimony is tainted by confabulation.

C. Overconfidence

Hypnosis permits a subject to recall posthypnotically that which was "remembered" during the hypnotic session. Those facts relayed by the subject while under hypnosis become grafted upon the subject's memory and are accepted by the subject as true, whether they were actual facts known by the subject prior to hypnosis, confabulated facts or the fruits of hypnotic suggestion.[31] This phenomenon is created by the subject's suspension of critical judgment while under the power of hypnosis. "[H]ypnosis can reduce the confidence levels required before uncertain recollections are asserted as memories; details about which a person is uncertain before hypnosis may, after hypnosis, be asserted as memories confidently held."[32] Thus, the subject's confidence in details as actual

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4, at 4. With such an extreme degree of confabulation possible, doubt is cast on the reliability of a hypnotized witness who reports, for example, the details of a criminal act he or she observed from a distance or under poor circumstances such as on a dimly lit street late at night.

29. *See supra* note 7.

30. Council on Scientific Affairs, *supra* note 4, at 1922.

31. Diamond, *supra* note 12, at 314; *see also* E. CLEARY, MCCORMICK ON EVIDENCE 19 (3d ed. 1984) [hereinafter MCCORMICK] (" 'Imagination and suggestion are twin artists ever ready to retouch the fading daguerrotype of memory.' ") (quoting Gardner, *The Perception and Memory of Witnesses*, 18 CORNELL L.Q. 390, 401 (1933)).

32. HYPNOTICALLY REFRESHED TESTIMONY, *supra* note 4, at 2.

memories of the event may be a product of the hypnotic session itself. The subject might not have been so sure had the information been relayed without the use of hypnosis.

Overconfidence in the accuracy of one's hypnotically enhanced memory may pose serious problems when hypnosis is used on witnesses or victims in preparation for testifying at a criminal trial. If the witness had taken the stand prior to hypnosis, the manner in which the story is relayed to the trier of fact might have revealed some uncertainty or tentativeness. After hypnosis, however, a witness' memory has been fortified. The witness is now able to testify in detail and with complete confidence, often crediting the knowledge to prehypnotic memory rather than recognizing the possiblity that it is only a pseudomemory[33] concocted during the hypnotic session. "Such misplaced confidence means that the hypnotized individual becomes a more credible witness by virtue of having been interviewed in hypnosis."[34] Unfortunately, once the subject has undergone hypnosis, any changes in his or her demeanor cannot be undone. Thus, a witness' confidence attributable solely to the hypnotic session can potentially mislead the trier of fact.[35]

Even with the assistance of expert testimony regarding the possible dangers of hypnosis, a jury may be unable to properly determine the witness' credibility when he or she testifies with complete confidence.[36] The unshakable demeanor of the witness may nullify any reservations a jury might have about a witness' credibility. Therefore, a witness' testimony might be given more weight than is deserved. Allowing the admission of this overconfident, hypnotically enhanced testimony "would have the defendant's innocence or guilt depend on the jury's speculating, on the ba-

33. Pseudomemory is defined as "[a] false recollection that may be brought about by confabulation, suggestion, and organic factors. Though factually inaccurate, they are accepted by the subject as actual recollections." HYPNOTICALLY REFRESHED TESTIMONY, *supra* note 4, at glossary.

34. *Id.* at 25. "The widespread belief that hypnosis will enhance memory, and the increased detail, emotion, and confidence that typically characterize recall after hypnosis, serve to make the person's testimony more certain, regardless of its accuracy . . . ." *Id.* at 26-27.

35. *But see* 3 WIGMORE, EVIDENCE 72 (Chadbourn rev. ed. 1970) ("It is a commonplace of judicial experience that testimony most glibly delivered and most positively affirmed is not always the most trustworthy.").

36. Two commentators noted:

> What the man on the street is not usually prepared to accept is the empirical fact that much of what is later recalled with vividness and detail, and with complete conviction as to its authenticity, has in fact undergone a degree of distortion between the perception of the event and its recall, in some cases to such an extent that the testimony is completely false. The sense of conviction proves to be entirely unrelated to the validity of the recall.

Haward & Ashworth, *Some Problems of Evidence Obtained by Hypnosis*, 1980 CRIM. L. REV. 469, 474.

sis of conflicting scientific-medical testimony, whether the [witness' testimony] was true recollection or implanted by the hypnosis."[37] Leaving to the trier of fact the determination of guilt based upon such potentially misleading testimony, particularly when there may be no way to objectively evaluate its truthfulness, has dangerous implications when the liberty of a criminal defendant is at stake.

III. A Critical Look at the Use of Hypnosis in Criminal Trials

Due to these potential dangers and the seriousness of the consequences when hypnosis affects the testimony of a previously hypnotized witness, the reliability of hypnosis as a means of refreshing recollection has been questioned. The distrust of hypnosis in the legal realm began with the 1897 case of *People v. Ebanks*.[38] In *Ebanks*, the defendant sought to introduce the testimony of an expert hypnotist who was prepared to testify to the defendant's innocence based upon statements made by the defendant while under hypnosis. The trial court flatly rejected the defendant's offer of proof, stating that " '[t]he law of the United States does not recognize hypnotism.' "[39] The California Supreme Court affirmed.[40]

As hypnosis came to be recognized as a valuable tool in criminal investigations, the phenomenon found its way into courtrooms. An increasing number of cases ruled on the admissibility of hypnotically enhanced testimony when it formed the basis of the case against a criminal defendant. These theories of admissibility and inadmissibility will be examined, exploring the rationale behind each theory and critically analyzing their validity. In order to aid the justice system in resolving this question, this Comment proposes objections that may be raised in re-

37. State v. Hurd, 86 N.J. 525, 549, 432 A.2d 86, 98 (1981) (Sullivan, J., concurring). This view assumes, perhaps improperly, that a trier of fact is unable to evaluate the credibility of an overconfident witness or credit expert testimony on the dangers of hypnosis. *But see* People v. Williams, 132 Cal. App. 3d 920, 928, 183 Cal. Rptr. 498, 502 (1982) (Gardner, J., concurring) ("I am firmly of the belief that jurors are quite capable of seeing through flaky testimony and pseudoscientific claptrap."). While hypnosis may have the potential to manufacture overconfidence in a subject, the same may be true for the witness who has been coached, bribed or intimidated, or who lies on the stand. See *infra* text accompanying notes 52-58 for a discussion of the credibility of previously hypnotized witnesses.

38. 117 Cal. 652, 49 P. 1049 (1897).

39. *Id.* at 665, 49 P. at 1053 (quoting lower court).

40. *Id.* Note that it is generally accepted that witnesses may not testify while under a hypnotic trance. Diamond, *supra* note 12, at 321-22. For cases upholding trial courts' refusal to permit a defendant to testify while under hypnosis, see Annotation, *Admissibility of Hypnotic Evidence at Criminal Trial*, 92 A.L.R.3d 452 (1979).

sponse to potentially unreliable evidence which more effectively guard against the contaminating effects of hypnosis.

A. *Theories of Admissibility*

Courts have generally decided hypnosis cases in four ways:[41] (1) hypnosis testimony is per se admissible;[42] (2) hypnosis testimony is admissible only when certain procedural safeguards are followed;[43]

41. "The approach adopted by a particular court generally reflects its perception of the degree to which the above-mentioned problems affect a person's memory of an event." Little v. Armontrout, 819 F.2d 1425, 1431 (8th Cir. 1987).

42. *See, e.g.*, United States v. Awkard, 597 F.2d 667, 669 (9th Cir.), *cert. denied*, 444 U.S. 885, *cert. denied*, 444 U.S. 969 (1979) (hypnosis affects credibility but not admissibility); United States v. Adams, 581 F.2d 193, 198 (9th Cir.), *cert. denied*, 439 U.S. 1006 (1978) (hypnosis affects credibility, not admissibilty); United States v. Narciso, 446 F. Supp. 252, 281-82 (E.D. Mich. 1977) (although court recognized possibility of misidentification by previously hypnotized witness, final determination of credibility left to jury); Pearson v. State, 441 N.E.2d 468, 473 (Ind. 1982) (previously hypnotized witness permitted to testify, leaving to trier of fact question of weight); State v. Wren, 425 So. 2d 756, 759 (La. 1983) (issue of hypnosis is one of credibility rather than admissibility; court did not directly consider admissibility of hypnotically *induced* testimony in criminal trials); State v. Brown, 337 N.W.2d 138, 151 (N.D. 1983) (hypnosis affects credibility rather than admissibility); State v. Jorgensen, 8 Or. App. 1, 9, 492 P.2d 312, 315 (1971) (hypnosis is issue of credibility rather than admissibility); State v. Glebock, 616 S.W.2d 897, 905 (Tenn. Crim. App. 1981) (testimony of previously hypnotized witness was admissible because witness was able to provide sufficiently detailed description of assailant prior to hypnosis; witness' posthypnotic memory did not affect judgment or prejudice judicial process); State v. Armstrong, 110 Wis. 2d 555, 570-71, 329 N.W.2d 386, 394, *cert. denied*, 461 U.S. 946 (1983) (posthypnotic testimony is admissible upon pretrial hearing demonstrating that no impermissible suggestiveness was involved); Chapman v. State, 638 P.2d 1280, 1284 (Wyo. 1982) ("[a]n attack on credibility is the proper method to determine the value of the testimony of a previously hypnotized witness"); *see also* Kline v. Ford Motor Co., 523 F.2d 1067, 1069 (9th Cir. 1975) ("[t]hat [the witness'] present memory depends upon refreshment claimed to have been induced under hypnosis goes to the credibility of her testimony not to her competence as a witness"); Wyller v. Fairchild Hiller Corp., 503 F.2d 506, 509 (9th Cir. 1974) (credibility of witness whose recollection was refreshed by hypnosis treatments is jury question).

43. *See, e.g.*, United States v. Harrington, 18 M.J. 797, 802-03 (A.C.M.R. 1984) (adopted *Hurd* safeguards, holding that "hypnotically-refreshed testimony . . . is admissible in a criminal trial if the use of hypnosis in that case was reasonably likely to result in recall comparable in accuracy to normal human memory"); People v. Smrekar, 68 Ill. App. 3d 379, 388, 385 N.E.2d 848, 855 (1979) (testimony of previously hypnotized witness not rendered inadmissible, even though witness was hypnotized prior to making identification, so long as proponent complies with certain safeguards); Pearson v. State, 441 N.E.2d 468, 473 (Ind. 1982) (court cautioned that safeguards, such as those enumerated in *Hurd*, must be followed to preserve credibility of witnesses since dangers inherent in use of hypnosis are "well documented"); House v. State, 445 So. 2d 815, 826-27 (Miss. 1984) (before testimony of previously hypnotized witness is admitted in criminal prosecution, trial judge must be satisfied that proponent has complied with certain safeguards and that probative value of witness' posthypnotic memory is not outweighed by prejudicial impact on accused); State v. Hurd, 86 N.J. 525, 545-46, 432 A.2d 86, 96-97 (1981) (trial court to determine reliability and admissibility of hypnotically refreshed testimony when proponent shows compliance with six safeguards); State v.

(3) hypnosis testimony is inadmissible, calling for either the exclusion of any such evidence obtained thereby in criminal trials,[44] or by restricting the testimony of a previously hypnotized witness to prehypnosis memory, barring testimony as to any memory resulting from the hypnotic session;[45] and (4) hypnosis testimony is admissible on an ad hoc basis.[46]

Beachum, 97 N.M. 682, 689-90, 643 P.2d 246, 253-54 (N.M. Ct. App. 1981) (requires compliance with six *Hurd* safeguards); State v. Weston, 16 Ohio App. 3d 279, 287-89, 475 N.E.2d 805, 813-15 (1984) (based on *Hurd* safeguards, testimony of two previously hypnotized prosecution witnesses was admissible; court further noted that testimony of these witnesses was supported by circumstantial evidence, and thus did not prejudice defendant).

44. *See, e.g.*, Contreras v. State, 718 P.2d 129, 138 (Alaska 1986) (prejudice/probity balance weighs per se in favor of exclusion of testimony of previously hypnotized witness); State v. Mena, 128 Ariz. 226, 231, 624 P.2d 1274, 1279 (1981) (testimony of previously hypnotized witness excluded in criminal cases); State v. Atwood, 39 Conn. Supp. 273, 283-84, 479 A.2d 258, 264 (1984) (neither hypnosis nor narcoanalysis has reached general acceptance in scientific community to permit admissibility of testimony of witness previously subjected to these procedures); State v. Davis, 490 A.2d 601, 605 (Del. Super. Ct. 1985) (hypnotic recall is not sufficiently reliable to permit its admission in criminal trials); People v. Gonzales, 415 Mich. 615, 626-27, 329 N.W.2d 743, 748 (1982) (until hypnosis is accepted as method to accurately improve memory and barriers to cross-examination are overcome, testimony of previously hypnotized witnesses must be excluded in criminal cases); Alsbach v. Bader, 700 S.W.2d 823, 830 (Mo. 1985) (posthypnotic testimony lacks scientific support for its reliability and should therefore be inadmissible); State v. Palmer, 210 Neb. 206, 218, 313 N.W.2d 648, 655 (1981) (until hypnosis is accepted as accurate method of improving memory, witness may not testify in criminal proceeding regarding subject matter of hypnotic session); State v. Peoples, 311 N.C. 515, 531-32, 319 S.E.2d 177, 187 (1984) (hypnotically refreshed testimony too unreliable to be admitted in judicial proceeding); Jones v. State, 542 P.2d 1316, 1327 (Okla. Crim. App. 1975) (statements made under hypnosis are inadmissible when offered for truth of those statements); Commonwealth v. Smoyer, 505 Pa. 83, 85, 476 A.2d 1304, 1306 (1984) (testimony of previously hypnotized witness is inadmissible as evidence); *see also* State v. Ture, 353 N.W.2d 502, 513-14 (Minn. 1984) (although Minnesota Supreme Court acknowledged that it has "consistently adhered to the rule of general inadmissibility of hypnotically-induced testimony in criminal cases," court found this to be "rare case" in which conviction may nonetheless be sustained since little difference existed between witness' prehypnotic testimony and posthypnotic testimony, she never positively identified defendant and five other witnesses also provided descriptions); Commonwealth v. Nazarovitch, 496 Pa. 97, 111, 436 A.2d 170, 178 (1981) ("While we do not want to establish a *per se* rule of inadmissibility at this time, we will not permit the introduction of hypnotically-refreshed testimony until we are presented with more conclusive proof than has been offered to date of the reliability of hypnotically-retrieved memory.").

45. *See, e.g.*, State *ex rel.* Collins v. Superior Court, 132 Ariz. 180, 209-10, 644 P.2d 1266, 1295 (1982) (supplemental opinion) (witness permitted to testify to that which was remembered and related prior to hypnosis); People v. Guerra, 37 Cal. 3d 385, 427, 690 P.2d 635, 664-65, 208 Cal. Rptr. 162, 190 (1984) (testimony of previously hypnotized witness inadmissible as to all matters relating to event at issue from time of hypnosis forward); People v. Shirley, 31 Cal. 3d 18, 66-67, 723 P.2d 1354, 1383, 181 Cal. Rptr. 243, 272, *cert. denied*, 458 U.S. 1125, *cert. denied*, 459 U.S. 860 (1982) (testimony of previously hypnotized witness inadmissible as to all matters relating to event at issue from time of hypnosis forward) (*Shirley* was originally reported at 641 P.2d 775; this Comment will cite to the opinion as modified on denial of rehearing at 723 P.2d 1354); People v. Quintanar, 659 P.2d 710, 711 (Colo. App. 1982) (testimony of previously hypnotized witness is per se inadmissible as to that witness'

The effectiveness of these theories in curbing the potential dangers of

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memory from time of hypnotic session, although witness is permitted to testify to prehypnosis recollections that have been adequately disclosed and recorded); Elliotte v. State, 515 A.2d 677, 681-82 (Del. 1986) (witness is not necessarily rendered incompetent due to pretrial use of hypnosis; "[i]f the scope of the witness's prehypnotic recollection can be reliably determined, and if the party proffering the evidence meets its burden of proving no substantial impairment of the right to cross-examination, the witness may testify within the scope of his prehypnotic recollection"); Bundy v. State, 471 So. 2d 9, 18-19 (Fla. 1985), *cert. denied,* 107 S. Ct. 295 (1986) (since previously hypnotized witness is not incompetent in strict sense, witness may testify to all matters other than those remembered only after hypnosis; court approved of use of hypnosis as investigative tool but held inadmissible any posthypnotic testimony when hypnotic session takes place after case is final); Walraven v. State, 255 Ga. 276, 282, 336 S.E.2d 798, 803 (1985) (previously hypnotized witness may testify to recorded statements made prior to hypnosis or to events occurring after hypnotic session); State v. Moreno, 709 P.2d 103, 105 (Hawaii 1985) (witness is permitted to testify to prehypnosis memory but all hypnotically induced recollections are per se inadmissible); State v. Haislip, 237 Kan. 461, 482, 701 P.2d 909, 926, *cert. denied,* 474 U.S. 1022 (1985) (testimony regarding events recalled subsequent to hypnosis not admissible); State v. Collins, 296 Md. 670, 702, 464 A.2d 1028, 1044 (1983) (witness permitted to testify to statements which proponent can clearly demonstrate were made prior to hypnosis); Commonwealth v. Kater, 388 Mass. 519, 529, 447 N.E.2d 1190, 1197 (1983) (testimony regarding matters not remembered prior to hypnosis inadmissible); People v. Nixon, 421 Mich. 79, 90, 364 N.W.2d 593, 599 (1984) (witness permitted to testify only to those facts recalled and related prior to hypnosis; burden on proponent to establish reliability by clear and convincing evidence); State v. Mack, 292 N.W.2d 764, 771 (Minn. 1980) (witness who has undergone hypnosis may not testify in criminal trial regarding post-hyponsis recollection); State v. Patterson, 213 Neb. 686, 692, 331 N.W.2d 500, 504 (1983) (witness not rendered incompetent due to hypnosis; witness is permitted to testify to those matters recalled and related prior to hypnotic session on sufficient showing that evidence was in fact known and related prior to hypnosis); People v. Hughes, 59 N.Y.2d 523, 545, 453 N.E.2d 484, 495, 466 N.Y.S.2d 255, 266 (1983) (pretrial use of hypnosis does not render witness incompetent to testify to matters recalled prior to hypnotic session); State v. Peoples, 311 N.C. 515, 533, 319 S.E.2d 177, 188 (1984) (hypnotically refreshed testimony is inadmissible except for facts related prior to hypnosis); Robison v. State, 677 P.2d 1080, 1085 (Okla. Crim. App.), *cert. denied,* 467 U.S. 1246 (1984) (witness may not be permitted to make in-court identification following hypnosis when identification has not previously been made; however, in this case evidence of guilt was overwhelming even without identification testimony); State v. Martin, 101 Wash. 2d 713, 722, 684 P.2d 651, 657 (1984) (witness may not testify in criminal trial to facts not remembered prior to hypnosis but will be permitted to testify to prehypnotic memory, with burden of proof on proponent to prove that facts were recalled prior to hypnosis).

46. *See, e.g.,* Little v. Armontrout, 819 F.2d 1425, 1433 (8th Cir. 1987) (suggestive identification procedure rendered victim's identification of defendant as her assailant constitutionally unreliable); McQueen v. Garrison, 814 F.2d 951, 960-61 (4th Cir. 1987) (court weighed all factors involved in eyewitness' posthypnosis account of crimes involved, concluding that she testified independent of dangers associated with use of hypnosis); United States v. Kimberlin, 805 F.2d 210, 219 (7th Cir. 1986) (court permitted testimony of six previously hypnotized witness; unlikely that dangers of hypnosis affected jury's verdict); Beck v. Norris, 801 F.2d 242, 244 (6th Cir. 1986) (court considered circumstances surrounding identification testimony of previously hypnotized witness in denying defendant's due process challenge); United States v. Valdez, 722 F.2d 1196, 1203 (5th Cir. 1984) (court excluded uncorroborated personal identification made only after hypnosis; defendant was known suspect at time witness was hypnotized); United States v. Charles, 561 F. Supp. 633, 697 (S.D. Tex. 1983) (court weighed all factors, concluding that probative value of hypnotically refreshed testimony was substantially

hypnosis will be critically examined, recognizing the possible damage caused both by overly liberal and overly restrictive theories of admissibility.

1. Per se admissibility

Courts that consider hypnotically induced testimony to be per se admissible[47] adopt the position that "[t]he hypnotic session is just one of many factors which can affect a witness."[48] Through cross-examination and the introduction of expert testimony regarding the reliability of hypnosis as a means of refreshing recollection, the trier of fact is given the information from which to weigh the possible effects of hypnosis on a witness' testimony presented at trial.[49] The fact finder is then free to decide whether the evidence is credible and should be considered in its decision.

This position is in accord with the Federal Rules of Evidence, which provide for the admissibility of all relevant evidence, absent evidentiary constraints calling for its exclusion.[50] The proponent of hypnotically refreshed testimony should be permitted to submit such evidence to the

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outweighed by danger of unfair prejudice); United States v. Waksal, 539 F. Supp. 834, 838 (S.D. Fla. 1982), *rev'd on other grounds*, 709 F.2d 653 (11th Cir. 1983) (court found testimony of previously hypnotized police officers to be product of witness' own recollection, untainted by hypnosis, and therefore admissible); State v. Iwakiri, 106 Idaho 618, 625, 682 P.2d 571, 578 (1984) (adopted totality of circumstances approach to determining reliability of hypnotically induced or enhanced testimony); Vester v. State, 684 S.W.2d 715, 722 (Tex. Ct. App. 1983), *aff'd en banc*, 713 S.W.2d 920 (Tex. Crim. App. 1986) (totality of circumstances approach to determining reliability of posthypnotic identification testimony); *see also* Spryncznatyk v. General Motors Corp., 771 F.2d 1112, 1122-23 (8th Cir. 1985), *cert. denied*, 106 S. Ct. 1263 (1986) (adopted case by case approach to admissibility of hypnotically enhanced testimony; district court is to conduct pretrial hearing to determine reliability of testimony, placing burden of proof on proponent, taking into account degree to which safeguards were followed, appropriateness of hypnosis in light of facts of case and corroborating evidence and weigh effect against probative value of testimony).

47. *See supra* note 42.

48. Pearson v. State, 441 N.E.2d 468, 473 (Ind. 1982).

49. The United States Supreme Court in Rock v. Arkansas, 107 S. Ct. 2704 (1987), ruled on the admissibility of testimony from a previously hypnotized defendant accused of manslaughter. Although the Court recognized the dangers inherent in the use of hypnosis, the majority opinion noted that its use did not necessarily contaminate the evidence:

> The more traditional means of assessing accuracy of testimony also remain applicable in the case of a previously hypnotized defendant. Certain information recalled as a result of hypnosis may be verified as highly accurate by corroborating evidence. Cross-examination, even in the face of a confident defendant, is an effective tool for revealing inconsistencies. Moreover, a jury can be educated to the risks of hypnosis through expert testimony and cautionary instructions.

Id. at 2714. For a discussion of the *Rock* decision, see *infra* text accompanying notes 243-87 & 288-96.

50. FED. R. EVID. 402. A number of evidentiary provisions exclude evidence which may

jury for resolution of the question of credibility so long as the evidence is not unduly prejudicial.[51] Restricting the admissibility of evidence in any way is to risk the loss of relevant evidence.

The use of hypnosis, however, may affect the ability of the trier of fact to draw the proper inferences from testimony submitted by a previously hypnotized witness. Traditional methods of testing the credibility of a witness may be ineffective in revealing the truthfulness of hypnotically enhanced testimony.[52] One commentator noted:

> When dealing with an unhypnotized witness, inconsistent details and differing versions of an event will often provide the strongest ammunition for impeachment. Such inconsistencies are generally unavailable for use against the hypnotized witness. . . . [A] fantasizing hypnotic subject tends to confabulate in a way that will fill in the gaps in his fantasy so as to create a logical, consistent story. He will also develop rationalizations to explain potential inconsistencies. Coupled with the witness's belief in the truth of his story, these tendencies render cross-examination worthless as a tool to expose the possibility that a hypnotically-aided memory might be the inaccurate product of suggestion.[53]

Thus, impeachment of a witness through cross-examination may prove futile when attacking the credibility of a witness who has been hypnotized for purposes of enhancing his or her memory.[54]

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be relevant, such as unduly prejudicial evidence (*Id.* 403), extrinsic policies (*Id.* 404-12) and hearsay (*Id.* 801).

This theory of per se admissibility also involves the issue of the competency of previously hypnotized witnesses. The Federal Rules of Evidence provide that all persons are competent to be witnesses, absent other evidentiary constraints. *Id.* 601. Courts admitting the testimony of a previously hypnotized witness conclude that hypnosis does not render the witness incompetent to testify. *See infra* note 79. For a discussion of the competency of previously hypnotized witnesses, see *infra* notes 79-86 and accompanying text.

51. FED. R. EVID. 403 provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." For a discussion of Rule 403 and the hypnotized witness, see *infra* text accompanying notes 143-52.

52. *But see Rock*, 107 S. Ct. at 2714; *see supra* note 49.

53. Mickenberg, *Mesmerizing Justice: The Use of Hypnotically-Induced Testimony in Criminal Trials*, 34 SYRACUSE L. REV. 927, 957 (1983); see also *supra* notes 22-30 and accompanying text for a discussion of confabulation.

54. One of the five principle methods used to attack a witness' credibility involves the showing of a defect in the capacity of the witness to observe, remember or recount the events to which he or she testifies. MCCORMICK, *supra* note 31, at 72-73. After hypnosis, these capacities of the witness may be drastically altered. Although a witness may testify to matters that are believed to be within his or her true perceptions of the event, the testimony may be

This issue of credibility necessarily involves consideration of the jury's ability to evaluate scientific or experimental procedures that result in the reconstruction of memory, as presented through expert testimony. "[T]he jury may be so influenced by its suppositions concerning the process of hypnosis that revelation of the fact that a witness's testimony was influenced by hypnosis may give it even greater credence in the jury's eyes."[55] The nature of hypnosis is such that jurors may be unable to "see through" the witness' memory to any possible contamination caused by the hypnosis.

Yet, as those courts favoring admissibility note, hypnosis may not always affect the witness' memory. Hypnosis may cause no ill effects at all, in which case the system of justice would be greatly disadvantaged by excluding testimony on the chance that the witness is not telling the truth. Both the proponent and opponent of the testimony may aid the trier of fact by presenting expert testimony regarding the potential dangers of hypnosis.[56] The fact finder is then left to determine the influence

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without objective support. When this witness takes the stand, he or she may not be able to recognize any possible defect in his or her perception of the event, since hypnosis renders subjects certain of their beliefs. Thus, counsel's attempts to discredit the witness by questioning regarding the hypnotic session will not effectively bring out the inaccuracies of the testimony. This potential impediment to cross-examination may rise to the level of a constitutional violation. For a discussion of the confrontation clause and the previously hypnotized witness, see *infra* notes 154-202 and accompanying text.

That is not to say that the previously hypnotized witness is incapable of being impeached. *See Rock*, 107 S. Ct. at 2714; *see also supra* note 49. The cross-examiner may impeach the witness by presenting evidence demonstrating that the witness' version of the events differed prior to hypnosis. This brings to light the importance of carefully memorializing the witness' story prior to the hypnotic session. Confronting the witness with his or her inconsistent accounts may not cause the witness to change the testimony. However, this method of impeachment may raise a suspicion in the trier of fact, causing the testimony to be questioned rather than accepted for its truth.

55. United States v. Valdez, 722 F.2d 1196, 1202 (5th Cir. 1984). "The jury's assumptions concerning the nature of memory and the accuracy of hypnosis may make the testimony so prejudicial that its weight is impossible to overcome." *Id*; *see also* Giannelli, *The Admissibility of Novel Scientific Evidence:* Frye v. United States, *a Half-Century Later*, 80 COLUM. L. REV. 1197, 1240 (1980) ("the assumption of jury capability provides a shaky foundation upon which to construct an approach to admissibility of novel scientific techniques"). *But see* People v. Williams, 132 Cal. App. 3d 920, 928, 183 Cal. Rptr. 498, 502 (1982) (Gardner, J., concurring) ("jurors are quite capable of seeing through flaky testimony and pseudoscientific claptrap").

56. Dr. Bernard L. Diamond and Dr. Martin T. Orne are two of the most prominent experts in the field of hypnosis, specializing in the effect of hypnosis on a witness' testimony presented in a criminal trial. Dr. Diamond is well-known for his rather extreme view that hypnosis renders the previously hypnotized subject incompetent to be a witness and has served as a defense expert witness numerous times. *See* United States v. Keplinger, 776 F.2d 678, 703 (7th Cir. 1985), *cert. denied*, 106 S. Ct. 2919 (1986); United States v. Waksal, 539 F. Supp. 834, 838 (S.D. Fla. 1982), *rev'd on other grounds*, 709 F.2d 653 (11th Cir. 1983); State v. Wren, 425 So. 2d 756, 758 (La. 1983); People v. Sorscher, 151 Mich. App. 122, 127, 391 N.W.2d 365, 367 (1986); State v. Beachum, 97 N.M. 682, 684, 643 P.2d 246, 248 (1981); State v. Brown, 337

of any dangers in each particular case.

Still, the danger remains that the trier of fact may not be able to determine whether any hypnotically induced change has occurred, particularly when the witness appears to be truthful. While the potential dangers of suggestibility, confabulation and overconfidence inherent in hypnotically induced recall may be understood, the fact finder may not be able to recognize whether these dangers affected the testimony of this witness.[57] Introduction of expert witness testimony does not guarantee

N.W.2d 138, 143 (N.D. 1983). *See generally* Diamond, *supra* note 12. Dr. Orne also disputes the reliability of hypnosis as a means of refreshing recollection and has similarly served as an expert witness in many criminal cases. *See* United States v. Narciso, 446 F. Supp. 252, 281-82 (E.D. Mich. 1977); Peterson v. State, 448 N.E.2d 673, 677-78 (Ind. 1983); State v. Mack, 292 N.W.2d 764, 766 (Minn. 1980); State v. Armstrong, 110 Wis. 2d 555, 566, 329 N.W.2d 386, 392, *cert. denied*, 461 U.S. 946 (1983); *see also* HYPNOTICALLY REFRESHED TESTIMONY, *supra* note 4, foreword (credits Dr. Orne with having served as an expert witness in over thirty cases, including Patty Hearst's trial and the Hillside Strangler case). Dr. Orne developed the procedureal safeguards adopted by the New Jersey Supreme Court in State v. Hurd, 86 N.J. 525, 545-46, 432 A.2d 86, 96-97 (1981). *See* THE FORENSIC USE OF HYPNOSIS, *supra* note 4, at 5; HYPNOTICALLY REFRESHED TESTIMONY, *supra* note 4, at 41-49.

However, reliance on the opinions of experts in determining guilt or innocence in a criminal trial is suspect, particularly when the experts make their livelihood out of espousing their particular view rather than serving as a neutral commentator on a disputed topic. *See* Morgan, *Practical Difficulties Impeding Reform in the Law of Evidence*, 14 VAND. L. REV. 725, 733 (1961) ("[t]he abuse of expert opinion evidence in modern litigation . . . has become in many states a scandal, for the expert witness has become in truth an adovocate for the party who presents him rather than a witness"). While the use of expert testimony is invaluable in educating the trier of fact, expert testimony should be carefully scrutinized, since the neutrality of the expert is often questionable.

57. The California Evidence Code includes a general provision listing possible factors that may affect the credibility of a witness. CAL. EVID. CODE § 780 (West 1966). The Federal Rules of Evidence do not have a similar provision on this point. The California provision, while not all inclusive, provides the trier of fact with a number of common factors that may be useful in evaluating the truthfulness of a witness' testimony. Included among the relevant factors are the witness' "demeanor while testifying and the manner in which he testifies," "[t]he extent of his capacity to perceive, to recollect, or to communicate any matter about which he testifies," and "[t]he extent of his opportunity to percieve any matter about which he testifies." *Id.* § 780 (a), (c), (d).

When considering the testimony of a previously hypnotized witness, evaluation of the witness' credibility based on these factors may be misleading. As seen above, one of the dangers of hypnosis is that it creates overconfidence in the accuracy of the witness' recollection. See *supra* text accompanying notes 31-37 for a discussion of overconfidence. At trial, this translates into effectively altering the witness' demeanor. Thus, while the witness' demeanor seems unshakable, in reality, the witness may be mistaken in the belief that his or her post-hypnotic memory is accurate. Further, the witness' capacity to perceive, recollect or communicate is necessarily questionable, since the witness was hypnotized because of an inability to recall the events that took place or to relay that information to the authorities. The witness' opportunity to perceive the event about which he or she testifies may also have been altered by hypnosis. Under hypnosis, the subject may incorporate suggestions of the hypnotist or confabulate details, resulting in an enhanced memory which may consist of inaccuracies. See *supra* text accompanying notes 13-30 for a discussion of suggestibility and confabulation. Thus, even

that the trier of fact will be able to determine whether hypnosis affected the witness' testimony. The serious consequences which may result from the alteration of a witness' demeanor suggests that the credibility of a previously hypnotized witness may not be a proper issue for the trier of fact.[58] Thus, per se admissibility of hypnosis testimony may invite the introduction of unreliable evidence.

2. Admissible with the use of safeguards

Another theory of admissibility permits the introduction of hypnotically refreshed testimony only if certain procedural safeguards are followed.[59] This theory also recognizes the potential dangers of hypnosis but maintains that a hypnotic session can be conducted in such a manner as to guard against contaminating the witness' memory. In *State v. Hurd*,[60] the New Jersey Supreme Court adopted a number of safeguards to be followed in hypnosis cases to ensure a minimum level of reliability and to establish a record for evaluating the reliability of the procedure used.[61] The *Hurd* safeguards allow the introduction of hypnotically refreshed testimony if the following requirements are met: (1) the session must be conducted by a psychiatrist or psychologist experienced in the use of hypnosis who should also be able to qualify as an expert witness at

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though the jury may hear testimony from a witness describing his or her perception of the event, if that witness was hypnotized prior to trial, the testimony alone may not provide an adequate basis for determining the witness' credibility.

58. *But see* State v. Contreras, 674 P.2d 792, 799-802 (Alaska Ct. App. 1983), *rev'd*, 718 P.2d 129 (Alaska 1986). *Contreras* suggested that the potential problems in evaluating the credibility of a previously hypnotized witness are not unique to the use of hypnosis to refresh recollection. The dangers inherent in the refreshed memory of a hypnotized subject are similarly present in any eyewitness. *Id.* at 799-802.

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

Id. at 802

59. *See supra* note 43.

60. 86 N.J. 525, 432 A.2d 86 (1981).

61. *Id.* at 545-46, 432 A.2d at 96-97. The *Hurd* safeguards are based on the procedural requirements suggested by Dr. Martin T. Orne. *See* THE FORENSIC USE OF HYPNOSIS, *supra* note 4, at 5; HYPNOTICALLY REFRESHED TESTIMONY, *supra* note 4, at 41-49; *see also* CAL. EVID. CODE § 795 (West Supp. 1987). The California Evidence Code adopted a provision which governs the admissibility of testimony of a hypnosis subject. This code section provides as follows:

> (a) The testimony of a witness is not inadmissible in a criminal proceeding by reason of the fact that the witness has previously undergone hypnosis for the purpose

trial if needed; (2) the professional should be independent of the prosecu-

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> of recalling events which are the subject of the witness' testimony, if all of the following conditions are met:
>
> (1) The testimony is limited to those matters which the witness recalled and related prior to the hypnosis.
>
> (2) The substance of the prehypnotic memory was preserved in written, audiotape, or videotape form prior to the hypnosis.
>
> (3) The hypnosis was conducted in accordance with all of the following procedures:
>
> (A) A written record was made prior to hypnosis documenting the subject's description of the event, and information which was provided to the hypnotist concerning the subject matter of the hypnosis.
>
> (B) The subject gave informed consent to the hypnosis.
>
> (C) The hypnosis session, including the pre- and post-hypnosis interviews, was videotape recorded for subsequent review.
>
> (D) The hypnosis was performed by a licensed medical doctor or psychologist experienced in the use of hypnosis and independent of and not in the presence of law enforcement, the prosecution, or the defense.
>
> (4) Prior to admission of the testimony, the court holds a hearing pursuant to Section 402 of the Evidence Code[, the procedure for determining foundational or preliminary facts,] at which the proponent of the evidence proves by clear and convincing evidence that the hypnosis did not so affect the witness as to render the witness' prehypnosis recollection unreliable or to substantially impair the ability to cross-examine the witness concerning the witness' prehypnosis recollection. At the hearing, each side shall have the right to present expert testimony and to cross-examine witnesses.
>
> (b) Nothing in this section shall be construed to limit the ability of a party to attack the credibility of a witness who has undergone hypnosis, or to limit other legal grounds to admit or exclude the testimony of that witness.

CAL. EVID. CODE § 795 (West Supp. 1987). People v. Shirley, 31 Cal. 3d 18, 723 P.2d 1354, 181 Cal. Rptr. 243, *cert. denied*, 458 U.S. 1125, *cert. denied*, 459 U.S. 860 (1982), was controlling in California prior to the enactment of this specific provision in the California Evidence Code. *Shirley* held inadmissible the testimony of a previously hypnotized witness as to the events that were the subject of the hypnotic session. *Id.* at 71-72, 641 P.2d at 1387, 181 Cal. Rptr. at 275-76. Now, California Evidence Code § 795 governs the admissibility of hypnosis in a criminal trial, thereby leading the way to a more consistent application of evidentiary rulings on the issue of hypnosis.

Oregon has also adopted statutes governing the admissibility of testimony of a previously hypnotized witness. Like its California counterpart, Oregon has established prerequisites to the admissibility of hypnotically refreshed testimony and adopted an expansive definition of an hypnotic state. One section provides:

> If either prosecution or defense in any criminal proceeding in the State of Oregon intends to offer the testimony of any person, including the defendant, who has been subjected to hypnosis, mesmerism or any other form of the exertion of will power or the power of suggestion which is intended to or results in a state of trance, sleep or entire or partial unconsciousness relating to the subject matter of the proposed testimony, performed by any person, it shall be a condition of the use of such testimony that the entire procedure be recorded either on videotape or any mechanical recording device. The unabridged videotape or mechanical recording shall be made available to the other party or parties in accordance with ORS 135.805 to 135.873.

OR. REV. STAT. § 136.675 (1985). Additional sections provide for the informed consent of the subject to be hypnotized (*Id.* § 136.685 (1985)) and the inadmissibility of testimony obtained in violation of the conditions and consent requirements of §§ 136.675 and 136.685 (*Id.* § 136.695 (1985)).

In the aftermath of the United States Supreme Court's decision in Rock v. Arkansas, 107 S. Ct. 2704 (1987), the Arkansas Attorney General is currently drafting guidelines for the

tion, investigator or defense; (3) all information conveyed to the hypnotist prior to the session must be recorded; (4) the hypnotist must obtain a detailed description of the facts from the subject prior to hypnosis, so as to avoid undue suggestion; (5) all contacts between the hypnotist and the subject must be recorded, preferably on videotape; and (6) only the hypnotist and the subject may be present through all stages of the hypnotic session.[62] Before the trier of fact considers the admissibility of the evidence, the party seeking to introduce the hypnotically enhanced testimony must prove by clear and convincing evidence that the procedural safeguards have been met.[63]

The *Hurd* safeguards have been criticized for inadequately immunizing the witness from any adverse effects of hypnosis. While the six factors adopted by the *Hurd* court effectively protect against intentional suggestiveness, they are ineffective in protecting the hypnotized subject from unintentional suggestions or problems of confabulation.[64] The use of safeguards can avoid pitfalls at the investigative stage, but they do not ensure that the resulting testimony is reliable.[65] The *Hurd* safeguards do nothing to protect the defendant who is faced with subsequent testimony of the previously hypnotized witness.[66] The traditional tools of attacking a witness' credibility may prove ineffective in hypnosis cases, where the witness' memory is subject to contamination, even if the *Hurd* safeguards are followed.[67] Since the burden is on the accused to prove the unrelia-

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admissibility of posthypnosis testimony based on the *Hurd* safeguards. Stewart, *Hypnotized Witnesses, Loaded Jurors*, 73 A.B.A. J. 54, 57-58 (October 1, 1987). Hopefully, other states will enact similar legislation governing the admissibility of hypnotically refreshed testimony, providing for more consistent resolution of hypnosis cases.

62. *Hurd*, 86 N.J. at 545-46, 432 A.2d at 96-97.

63. *Id.* at 546, 432 A.2d at 97. The court in *Hurd* noted:

> We recognize that this standard places a heavy burden upon the use of hypnosis for criminal trial purposes. This burden is justified by the potential for abuse of hypnosis, the genuine likelihood of suggestiveness and error, and the consequent risk of injustice. Hypnotically refreshed testimony must not be used where it is not reasonably likely to be accurate evidence. The burden of proof we adopt here will assure strict compliance with the procedural guidelines set forth in this opinion. It will also limit the admissibility of this kind of evidence to those cases where a party can convincingly demonstrate that hypnosis was a reasonably reliable means of reviving memory comparable in its accuracy to normal recall.

Id. (footnote omitted).

64. Mickenberg, *supra* note 53, at 964; *see also* Little v. Armontrout, 819 F.2d 1425, 1432 n.18 (8th Cir. 1987); Beaver, *Memory Restored or Confabulated by Hypnosis—Is It Competent?*, 6 U. PUGET SOUND L. REV. 155, 203 (1983).

65. State *ex rel.* Collins v. Superior Court, 132 Ariz. 180, 186-87, 644 P.2d 1266, 1272 (1982), *overruled on other grounds by* State v. Nunez, 135 Ariz. 257, 660 P.2d 858 (1983).

66. Mickenberg, *supra* note 53, at 964.

67. *Id.* at 965.

bility of any indentification submitted against him,[68] "[t]he defendant is faced with potentially false and highly prejudicial testimony, but without means of testing its accuracy or controlling its impact on a jury."[69]

Yet, the use of safeguards is not totally invalid, since they protect against the more apparent dangers of hypnosis. "Such guidelines do not guarantee the accuracy of the testimony, because they cannot control the subject's own motivations or any tendency to confabulate, but they do provide a means of controlling overt suggestions."[70] Their use may yield more reliable "memories" reported at the investigative stage, which may lead to corroborating evidence against an accused. This, in turn, would make the testimony of the previously hypnotized witness less crucial to the prosecution's case. The observance of safeguards can aid the discovery process by placing checks on the use of hypnosis, thereby reducing the negative influence of hypnosis on a witness' memory.

3. Per se inadmissibility

Courts concluding that testimony of a previously hypnotized witness should not be admitted in criminal trials have excluded the witness' testimony either in whole or in part. Some courts conclude that a witness who has been hypnotized is prohibited from testifying at all,[71] while other courts permit the witness to testify to his or her prehypnosis memory, but not to any recollections from the time of the hypnotic session onward.[72] These theories of inadmissibility recognize the severity of the dangers associated with the use of hypnosis, as well as the potential constitutional violations when hypnotically refreshed testimony is admitted against a criminal defendant.[73]

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68. *Hurd*, 86 N.J. at 548, 432 A.2d at 97-98. For a discussion of eyewitness identification and the previously hypnotized witness, see *infra* text accompanying notes 204-26.

69. Mickenberg, *supra* note 53, at 965.

One court rejected the *Hurd* safeguards on the grounds that the determination of admissibility on a case by case basis is impractical. State v. Palmer, 210 Neb. 206, 217, 313 N.W.2d 648, 654 (1981). The *Palmer* court noted that the *Hurd* view of admissibility must necessarily rely on expert opinions—a process which is itself subject to dispute:

> To base the admissibility of evidence in a given case on the testimony of competing expert witnesses imposes unjustified burdens on the criminal justice system in the field of hypnosis where the consensus of expert testimony indicates that no expert can determine whether memory retrieved by hypnosis or any part of that memory is truth, falsehood, or fantasy.

Id. at 217-18, 313 N.W.2d at 655.

70. *Rock*, 107 S. Ct. at 2714.

71. *See supra* note 44.

72. *See supra* note 45.

73. See *infra* notes 153-237 and accompanying text for a discussion of the constitutional issues involved in the prosecution's use of hypnosis in criminal trials.

The Arizona Supreme Court in *State v. Mena*[74] noted:

> The determination of the guilt or innocence of an accused should not depend on the unknown consequences of a procedure concededly used for the purpose of changing in some way a witness' memory. Therefore, until hypnosis gains general acceptance in the fields of medicine and psychiatry as a method by which memories are accurately improved without undue danger of distortion, delusion or fantasy, we feel that testimony of witnesses which has been tainted by hypnosis should be excluded in criminal cases.[75]

At times, these dangers have justified the exclusion of *any* testimony from the previously hypnotized witness.[76] Thus, all evidence regarding the use of hypnosis is kept from the trier of fact and the case against the criminal defendant is based on the presentation of evidence from sources other than the previously hypnotized witness.

The other theory of per se inadmissibility permits the previously hypnotized witness to testify, but restricts the testimony to his or her prehypnosis memory. This approach views the total exclusion of testimony as unnecessarily extreme because it excludes even that which is relevant and untainted by the hypnotic procedure.[77] While the dangers associated with the use of hypnosis may be significant, the practical reality of hypnosis as an indispensable investigative tool outweighs that threat.[78] Still, the potential relevancy of the evidence is not so compelling as to warrant its unconditional admission. Thus, this position in effect salvages that part of the witness' memory before it may have become tainted by hypnosis by permitting the witness to testify to those recollections.

Courts holding the testimony of the previously hypnotized witness inadmissible either in whole or in part have generally done so under two theories of exclusion: first, hypnosis renders the witness incompetent to offer testimony at trial; and, second, hypnosis is not generally accepted as

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74. 128 Ariz. 226, 624 P.2d 1274 (1981).

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

76. *See supra* note 44.

77. *See* State v. Seager, 341 N.W.2d 420, 431 (Iowa 1983) (exclusion of all testimony is unnecessarily extreme because it "will often have the effect of throwing the baby out with the bath water").

78. *Collins*, 132 Ariz. at 187, 210, 644 P.2d at 1273, 1296 (supplemental opinion). "As a practical matter, if we are to maintain the rule of incompetency, the police will seldom dare to use hypnosis as an investigatory tool because they will thereby risk making the witness incompetent if it is later determined that the testimony of that witness is essential." *Id.* at 209, 644 P.2d at 1295 (supplemental opinion).

sufficiently reliable in the scientific community to justify admittance in a criminal trial. These bases for exclusion must be critically examined, questioning their viability in light of the rules of evidence.

a. competency of witnesses

Courts have held hypnosis testimony inadmissible on the grounds that hypnosis renders the witness incompetent to testify.[79] Proponents of this view conclude that the use of hypnosis "renders the potential witness incompetent, literally destroying the probative value of any evidence that the witness might otherwise have been able to produce."[80] The potential dangers of hypnosis and incompetency of any previously hypnotized witness thus justifies keeping from the trier of fact all information about the hypnotic session, regardless of the relevance of the information.

This view, however, does not correspond to the evidentiary standard for competency of witnesses. The Federal Rules of Evidence[81] signifi-

79. *See, e.g., Collins*, 132 Ariz. at 190, 644 P.2d at 1276 (previously hypnotized witness incompetent to testify); *Shirley*, 31 Cal. 3d at 67, 723 P.2d at 1384, 181 Cal. Rptr. at 273 (previously hypnotized witness incompetent, although not in literal sense; court further noted that "if the prosecution should wish to question such a witness on a topic *wholly unrelated* to the events that were the subject of the hypnotic session, [the witness'] testimony as to that topic would not be rendered inadmissible by the present rule") (emphasis in original); State v. Joblin, 107 Idaho 351, 354, 689 P.2d 767, 771 (1984) (within trial judge's discretion to declare previously hypnotized witness incompetent); State v. Iwakiri, 106 Idaho 618, 625, 682 P.2d 571, 578 (1984) (if at pretrial hearing trial court finds testimony to be unreliable—using totality of circumstances test—then witness may be judged incompetent; court established "a rule of competency, not an exclusionary rule intended to punish one side or another for some perceived misconduct in the manner in which the hypnosis was conducted . . ."); Diamond, *supra* note 12, at 314 ("once a potential witness has been hypnotized for the purpose of enhancing memory his recollections have been so contaminated that he is rendered effectively incompetent to testify"). *But see Little*, 819 F.2d at 1435 (fact that hypnosis tainted victim's identification did not make her incompetent as a witness; victim permitted to testify to prehypnotic memory of event); *Valdez*, 722 F.2d at 1204 (court's decision to exclude tainted identification made under hypnosis does not render witness incompetent); *Collins*, 132 Ariz. at 209, 664 P.2d at 1295 (supplemental opinion) (restricted majority opinion on rehearing, concluding that hypnosis does not render witness incompetent to testify to facts demonstrably recalled prior to hypnosis); State v. Long, 32 Wash. App. 732, 735, 649 P.2d 845, 846 (1982) (witness deemed competent to testify since no evidence indicated that witness' mind was unsound because of hypnosis).

80. Diamond, *supra* note 12, at 332. Diamond further states:

> I believe that once a potential witness has been hypnotized for the purpose of enhancing memory his recollections have been so contaminated that he is rendered effectively incompetent to testify. . . . After hypnosis the subject cannot differentiate between a true recollection and a fantasy or a suggested detail. Neither can any expert or the trier of fact. This risk is so great, in my view, that the use of hypnosis by police on a potential witness is tantamount to the destruction . . . of evidence.

Id. at 314.

81. FED. R. EVID. 601. For state adaptation of Federal Rule of Evidence 601, see 3 J.

cantly changed the common law on the issue of witness competency,[82] eliminating judicial discretion to determine admissibility. Rule 601 explicitly provides that every person is competent to be a witness, absent constraints imposed by the rules.[83] The enactment of this succinct rule of evidence was a broad ground-clearing measure, abolishing previous common law rules of incompetency, such as religious belief, conviction of a crime, interest in the litigation or spousal relationship to an interested party. The federal rule that all witnesses are competent is preferable because "rules which disqualify witnesses who have knowledge of relevant facts and mental capacity to convey that knowledge are serious obstructions to the ascertainment of truth."[84]

Courts' exclusion of testimony of previously hypnotized witnesses based on competency clearly cannot be reconciled with the rules of evidence. With the possible exception of the witness' personal knowledge of the events in question,[85] nothing about the nature of a previously hypno-

WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE § 601[06], at 601-39 to -50 (1985 & Supp. 1987).

82. *See also* CAL. EVID. CODE § 700 (West Supp. 1987). The California Evidence Code, which was the precursor to the Federal Rules of Evidence, enacted a broad rule with respect to competency of witnesses. The California Evidence Code provides that "every person, irrespective of age, is qualified to be a witness and no person is disqualified to testify to any matter." *Id.* Section 700 is limited by an additional section, which provides that a witness may be disqualified only if he or she is "[i]ncapable of expressing himself or herself concerning the matter so as to be understood" or if the witness is "[i]ncapable of understanding the duty of a witness to tell the truth." *Id.* § 701 (a) (1) & (2) (West Supp. 1987). Thus, read together, these two sections provide that every witness is competent, leaving to the determination of the court only the issue of the witness' ability to communicate and appreciation of the duty to tell the truth on the stand.

Other sections of the California Evidence Code also govern witness' competency. *See id.* § 701 (West Supp. 1987) (mental or physical capacity to be witness); *id.* § 702 (West 1966) (requirement of personal knowledge); *id.* § 703 (West 1966) (judge as witness); *id.* § 704 (West 1966) (juror as witness); *id.* §§ 900-1070 (West 1966) (privileges); *id.* § 1150 (West 1966) (limiting use of evidence concerning jury misconduct). Prior to the enactment of the Evidence Code, the law in California provided that the competency of a witness was a question to be determined by the court, depending upon the witness' capacity to understand the oath and to perceive, recollect and communicate that which he or she is offered to relate. *Id.* § 701 Law Revision Commission comment (West 1966). Under § 701, the question of competency remains to be determined by the court. *See also id.* § 405 (West 1966) (judge to determine existence or nonexistence of certain disputed preliminary facts). Thus, the California Evidence Code did little to change the common law; it simply codified the practice in this state.

83. FED. R. EVID. 601. Under the federal rules, only judges and jurors are incompetent to be witnesses in trials in which they are serving. *See id.* 605, 606. Other rules of evidence that affect a witness' qualifications to testify are the requirements that the witness have personal knowledge of the matter, *id.* 602, and that the witness declare that he or she will testify truthfully, *id.* 603.

84. MCCORMICK, *supra* note 31, at 168.

85. "A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter." FED. R. EVID. 602. For a

tized witness renders that person incompetent to be a witness under any provision of the Federal Rules of Evidence. To exclude testimony of a witness simply because hypnosis was used to refresh his or her memory may keep from the trier of fact evidence relevant to the determination of guilt. That is not to say, however, that hypnotically refreshed testimony should be admitted in all cases. Rather, the occurrence of a hypnotic session should not in itself act as a barrier to the introduction of evidence. While courts are correct in questioning the reliability of hypnotically induced recall, a per se rule declaring all previously hypnotized witnesses incompetent is unfounded and will result in the exclusion of relevant evidence.[86]

b. the Frye *test*

Courts have excluded hypnotically refreshed testimony based on the lack of consensus in the scientific community regarding the reliability of posthypnotic testimony as a matter of scientific fact. The admissibility of testimony based upon scientific experimental procedures is governed by the rule in *Frye v. United States.*[87] In *Frye,* the District of Columbia Court of Appeals held that a scientific theory or procedure is admissible if it has gained general acceptance in the scientific community.[88] The proponent of the experimental evidence in question bears the burden of introducing expert testimony on the scientific community's acceptance of the technique as reliable.

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discussion of personal knowledge and the previously hypnotized witness, see *infra* notes 126-42 and accompanying text.

86. Barring the testimony of a criminal defendant who has been previously hypnotized also interferes with the constitutional right to testify in one's own defense. *See Rock,* 107 S. Ct. at 2710-11. For a discussion of *Rock* and the constitutional implications of restricting a defendant's right to testify, see *infra* text accompanying notes 243-87.

87. 293 F. 1013 (D.C. Cir. 1923). The court in *Frye* held inadmissible expert testimony regarding the results of a systolic blood pressure deception test taken by the defendant. *Id.* at 1014.

88. In *Frye,* the court stated:

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

Id. at 1014. The *Frye* test has been used to determine the admissiblity of evidence based on polygraph examinations, truth serum, voice stress analysis, infrared sensing of aircraft, psychological profiles of battered women and experimental systems of blood typing, among other procedures. For citations to cases relying on the *Frye* test, see MCCORMICK, *supra* note 31, at 606 & nn.6-15.

The *Frye* test has been applied to cases involving the hypnosis of a witness prior to trial for purposes of refreshing his or her recollection of the event in question. Under *Frye*, hypnosis is regarded as an experimental scientific procedure, thereby requiring an evaluation of the consensus in the community to ensure the reliability of the method and its ability to aid the jury in reaching an accurate verdict. Most courts relying on *Frye* have found posthypnotic testimony to be inadmissible, concluding that hypnosis is not "generally accepted" in the scientific community as a reliable means of refreshing the recollection of its subject.[89]

The *Frye* test has been subject to varying interpretations and substantial criticism in recent years.[90] This test may no longer be applicable in light of the Federal Rules of Evidence. Certainly, state courts may adopt the *Frye* test as the applicable standard for evaluating novel scientific procedures. Federal courts and those state courts that have adopted the federal rules,[91] however, must recognize the possibility that *Frye* has been superceded.

The *Frye* standard of acceptance of an experimental procedure in the scientific community conflicts with the requirements for an expert opinion under the Federal Rules of Evidence.[92] *Frye* requires "general

89. *See, e.g.*, *Collins*, 132 Ariz. at 186, 644 P.2d at 1272 ("until hypnosis is recognized and generally accepted in the scientific community as a reliable tool to enhance memory accurately it is inadmissible in a criminal trial"); *Shirley*, 31 Cal. 3d at 54, 723 P.2d at 1375-76, 181 Cal. Rptr. at 264 (testimony of previously hypnotized witness is inadmissible because proponent did not prove compliance with *Frye* standard of admissibility); People v. Gonzales, 415 Mich. 615, 626, 329 N.W.2d 743, 748 (1982) ("Hypnosis has not received sufficient general acceptance in the scientific community to give reasonable assurance that the results produced under even the best of circumstances will be sufficiently reliable to outweigh the risks of abuse or prejudice."); *Mack*, 292 N.W.2d at 768 (under *Frye*, use of hypnosis to refresh recollection is not scientifically reliable as accurate); Alsbach v. Bader, 700 S.W.2d 823, 830 (Mo. 1985) (hypnosis does not currently meet *Frye* standard of reliability and accuracy); State v. Martin, 101 Wash. 2d 713, 719-20, 684 P.2d 651, 654 (1984) ("[a]bsent general scientific acceptance of hypnosis as a reliable means of refreshing recollection, the dangers and possibilities of prejudice should preclude admission of evidence based upon it"). *But see* United States v. Harrington, 18 M.J. 797, 802 (A.C.M.R. 1984) ("hypnotically-refreshed testimony satisfies the *Frye* standard and is admissible in a criminal trial if the use of hypnosis in that case was reasonably likely to result in recall comparable in accuracy to normal human memory"); *Hurd*, 86 N.J. at 538, 432 A.2d at 92 (use of hypnosis to refresh recollection satisfies *Frye* test as reasonably reliable method when procedure is conducted with certain safeguards).

90. *See* McCORMICK, *supra* note 31, at 606-09. *See generally* Giannelli, *supra* note 55.

91. A majority of states have adopted Federal Rule 702, governing the testimony by experts, either verbatim or with slight modification. *See* 3 J. WEINSTEIN & M. BERGER, *supra* note 81 § 702[06], at 702-31 to -39. For state adaptation of Rule 701, see *id.* § 702[06], at 702-31 to -39 (1985 & Supp. 1987). "Rule 402 [which permits the admissibility of all relevant evidence] has been adopted by the states without substantive change." *Id.* § 402[06], at 402-17. For state adaption of Rule 402, see *id.* § 402[06], at 402-17 to -28 (1985 & Supp. 1987).

92. FED. R. EVID. 703. In light of this conflict, it remains unclear whether *Frye* should be controlling in determining the admissibility of novel scientific procedures. McCORMICK, *supra*

acceptance" within the scientific community before expert testimony on experimental procedures may be deemed admissible. The federal rules, on the other hand, permit experts to rely on otherwise inadmissible evidence if that evidence is "reasonably relied upon by experts in the particular field . . . ."[93] These standards are not synonymous.[94] As its forensic use becomes more widespread, the scientific community continues to debate whether hypnosis is a reliable method of tapping a subject's memory. Because the scientific community has not yet "generally accepted" the use of hypnosis for purposes of enhancing memory, the *Frye* test mandates that its use be disallowed and any resultant testimony excluded.

The *Frye* test, however, excludes evidence that is otherwise relevant to the trier of fact's determination of issues based on the scientific evidence. Professor McCormick, a chief opponent of the *Frye* standard of admissibility, noted:

> General scientific acceptance is a proper condition for taking judicial notice of scientific facts, but it is not a suitable criterion for the admissibility of scientific evidence. Any relevant conclusions supported by a qualified expert witness should be received unless there are distinct reasons for exclusion. These reasons are the familiar ones of prejudicing or misleading the jury or consuming undue amounts of time.[95]

Thus, McCormick views the validity of a scientific technique as an aspect of relevancy. The Federal Rules of Evidence concerning expert testimony[96] permit the introduction of any expert opinion that "will assist the trier of fact to understand the evidence or to determine a fact in issue . . . ."[97] The absence of the general acceptance standard of *Frye*, even in the advisory committee's notes, "should be regarded as tantamount to an abandonment of the general acceptance standard,"[98] thereby leaving the admissibility of any scientific procedure to the relevancy standards of the federal rules.

Simply because substantial disagreement exists regarding the relia-

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note 31, at 607 n.24; C. WRIGHT & K. GRAHAM, FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 5168, at 91 (1978).

93. FED. R. EVID. 703.

94. MCCORMICK, *supra* note 31, at 607. *But cf. Hurd*, 86 N.J. at 538, 432 A.2d at 92 (court found that *Frye* test was satisfied because "hypnosis is generally accepted as a reasonably reliable method of restoring a person's memory").

95. MCCORMICK, *supra* note 31, at 608 (footnotes omitted).

96. *See* FED. R. EVID. 702, 703.

97. FED. R. EVID. 702.

98. 3 J. WEINSTEIN & M. BERGER, *supra* note 81, § 702[03], at 702-16 (footnote omitted).

bility of hypnosis does not suggest that hypnotically induced evidence is irrelevant and therefore should be excluded. The general scientific acceptance requirement of the *Frye* test could deprive the trier of fact of the opportunity to hear testimony that is relevant to the determination of guilt. The Federal Rules of Evidence, on the other hand, provide for the admissibility of relevant evidence,[99] which is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[100] Therefore, as applied to expert testimony on a scientific procedure, hypnotic testimony should be admitted if it will assist the trier of fact in reaching its verdict, regardless of whether the technique has been generally accepted by the scientific community.

This relevancy standard does not warrant admitting hypnotically induced evidence every case. Based on the Federal Rules, the admissibility of a novel scientific technique depends on the consideration of three factors: (1) the probative value of the evidence; (2) the dangers associated with the technique; and (3) the probative value weighed against the dangers.[101] Thus, if "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury,"[102] Rule 403 provides for exclusion of the evidence, even if relevant. Consequently, the Federal Rules mandate the admissibility of expert testimony regarding the reliability of hypnosis as a method of refreshing recollection, as well as testimony from a previously hypnotized witness, unless it is proven that the prejudicial impact of such evidence outweighs its probative value.[103]

In the event that hypnosis testimony is admissible as being relevant, the opposition can attempt to diminish its credibility by presenting expert testimony regarding the potential dangers that arise out of any hypnotic session. If this testimony proves that the dangers of a hypnotic session are so conclusive as to render the evidence irrelevant, then all evidence regarding the hypnosis should be excluded, including the subsequent testimony of the previously hypnotized witness. If the dangers do not out-

99. FED. R. EVID. 402. See *supra* note 50 for evidentiary provisions which call for the exclusion of relevant evidence.

100. FED. R. EVID. 401.

101. Giannelli, *supra* note 55, at 1235.

102. FED. R. EVID. 403; *see also* CAL. EVID. CODE § 352 (West 1966). Both the federal and California rules codified the common-law rule which permitted the exclusion of relevant evidence at the discretion of the trial judge. *See* MCCORMICK, *supra* note 31, at 545; *see also* Gold, *Federal Rule of Evidence 403: Observations on the Nature of Unfairly Prejudicial Evidence*, 58 WASH. L. REV. 497 (1983).

103. See *infra* notes 143-52 and accompanying text for further discussion of Rule 403.

weigh the benefits of presenting hypnosis testimony to the trier of fact, then the evidentiary rules favor its admissibility. The *Frye* requirement of general acceptance within the scientific community is no longer a workable method of determining the admissibility of hypnotically refreshed testimony. Instead, the inquiry should focus on the relevance of the testimony of both the previously hypnotized witness and experts in the field, thereby achieving a resolution which is in accord with the Federal Rules of Evidence.

4. Ad hoc balancing approach

The recent trend in hypnosis cases is to determine the admissibility of hypnotically refreshed testimony on an ad hoc basis.[104] Recognizing that the potential dangers of hypnosis do not affect the memory of the witness in every case, the ad hoc method avoids the harsh results of a per se rule of admissibility or inadmissibility. The trier of fact is free to consider the reliability of the testimony of the previously hypnotized witness in each case, resolving the issue in a manner dictated by the evidence, rather than according to an inflexible standard.

Since the ad hoc method of determining admissibility does not adhere to rigid conclusions, courts following this approach have allowed for both the admissibility and inadmissibility of hypnotically enhanced testimony. The Seventh Circuit Court of Appeals in *United States v. Kimberlin*[105] adopted this theory as its primary approach to evaluating the admissibility of hypnotically refreshed testimony, concluding in that case that the hypnotically refreshed testimony was properly admitted. In *Kimberlin*, the prosecution produced six witnesses who had undergone hypnosis for purposes of refreshing their recollection of events surrounding a series of explosions that the defendant was suspected of committing. The lower court admitted the testimony of these witnesses but cautioned the jury that the use of hypnosis on the witnesses did not warrant giving greater weight to their testimony. Further, the jury was free to evaluate the impact of hypnosis on the witness' memory and ability to remember correctly.[106] The defendant was convicted of twenty-two counts of a thirty-four count indictment.[107]

On appeal, the Seventh Circuit evaluated the potential dangers involved in the use of hypnosis and surveyed judicial responses to these

104. *See supra* note 46.
105. 805 F.2d 210 (7th Cir. 1986), *cert. denied*, 107 S. Ct. 3270 (1987).
106. *Id.* at 216-17.
107. *Id.* at 215.

dangers, but found them unpersuasive.[108] Although the court recognized that witnesses "may be led to testify beyond their genuine memory," it was unlikely that the dangers of suggestion or confabulation affected the jury's verdict.[109] Concluding that the admission of the testimony of the hypnotized witnesses did not affect a substantial right of the defendant, the court found support in various factors: the strength of evidence against the defendant apart from the testimony of the previously hypnotized witnesses, the lack of any effect of hypnosis on the key witness, the lack of any enhanced recall as a result of hypnosis, the consistency between the testimony and prehypnosis statements and the likelihood that the jury's verdict would have remained the same even if the testimony was restricted to prehypnosis recall.[110] The Seventh Circuit affirmed the defendant's conviction.[111]

Recently, the Eighth Circuit used a similar method of balancing the factors favoring and disfavoring the admissibility of testimony of a previously hypnotized witness, concluding that the evidence should not be permitted. *Little v. Armontrout*[112] involved the admissibility of eyewitness testimony of a rape victim. The victim saw her assailant only briefly, viewing a partial right profile of his face for anywhere from two to sixty seconds.[113] When the victim was able to provide only a general description of her assailant's build, she agreed to undergo hypnosis in order to enhance her recall of his identity.[114] Within three months after the hypnosis, the victim viewed three photographic displays but only once did she pick someone who resembled her assailant.[115] Later, the victim underwent hypnosis for a second time, this time to aid in her sleeping. Shortly thereafter, four months after her attack, the victim picked the defendant out of a photographic display and again in a lineup. The defendant was convicted and the state supreme court affirmed.[116]

Relying on the standards for determining the reliability of eyewitness identification established by the United States Supreme Court,[117] the Eighth Circuit concluded that the victim's identification of the defendant

108. *Id.* at 217-19.

109. *Id.* at 219.

110. *Id.* at 223 (citing FED. R. EVID. 103(a)).

111. *Id.* at 254.

112. 819 F.2d 1425 (8th Cir. 1987).

113. *Id.* at 1426.

114. *Id.* at 1427. The hypnosis session was conducted by Officer B.J. Lincecum of the Cape Giradeau Police Department.

115. *Id.* The defendant's photo was not included in these displays.

116. *Id.*

117. *Id.* at 1433 (citing Manson v. Brathwaite, 432 U.S. 98, 114 (1977); Neil v. Biggers, 409 U.S. 188, 199 (1972); Simmons v. United States, 390 U.S. 377, 384 (1968); Stoval v. Denno,

was constitutionally unreliable.[118] The court in *Little* recognized that the victim did in fact see her assailant, sufficient lighting was available for her to view him and she made an unequivocal identification of the defendant on several occasions. Other factors, however, tainted her identification: the victim admitted that she avoided staring at her assailant for fear of being physically harmed and her initial description did not describe the defendant, differing substantially as to his age, weight and height.[119] Additionally, the court noted that the victim's testimony was uncorroborated, she was able to identify the defendant only after hypnosis and the fingerprints found at the scene did not match the defendant's.[120] Weighing all of these factors, the court concluded that the use of her testimony at trial violated the defendant's right to due process of law.[121]

The fact that these two courts reached different results after considering the factors in each case brings to light the flexibility of an ad hoc balancing approach. While the negative influences of hypnosis may taint the memory of a witness to such an extent that his or her testimony is rendered unreliable, so may the exclusion of such testimony interfere with the administration of justice. The adoption of a balancing approach to the admissibility of hypnotically refreshed testimony will enable courts to evaluate the influence of the use of hypnosis on that particular case and avoid the harsh results of a per se rule of admissibility or inadmissibility. The use of such a case by case analysis should not consume any

388 U.S. 293, 302 (1967)). For a discussion of eyewitness identification and the use of hypnosis, see *infra* notes 204-26 and accompanying text.

118. 819 F.2d at 1433.

119. *Id.*

120. *Id.* at 1435.

121. *Id.* at 1434-35. While *Little* was a criminal case of first impression in that circuit, the court cited to an earlier civil case which addressed the admissibility of hypnotically enhanced testimony on an ad hoc basis. In Sprynczynatyk v. General Motors Corp., 771 F.2d 1112 (8th Cir. 1985), the court considered the following factors in determining the admissibility of hypnotically refreshed testimony: whether and to what degree procedural safeguards were followed, the appropriateness of using hypnosis in light of the memory loss involved and whether corroborating evidence exists. *Id.* at 1123. The court must consider all of the circumstances involved, whether the testimony is reliable and whether the probative value outweighs the prejudicial impact before determining the admissibility of the testimony. *Id.* The court noted: "It is our hope that this case-by-case method of determining the admissibility of hypnotically enhanced testimony will guard against the problems of hypnosis, especially undue suggestiveness and confabulation, but also allow for the inclusion of reliable refreshed memory which hypnosis can at times under certain circumstances produce." *Id.*

In light of the differing burden of proof and the constitutional issues which arise in criminal cases, the court in *Little* did not adopt the *Sprynczynatyk* test. The court did, however, find this ad hoc method to be useful in establishing guidelines for determining the reliability of such evidence when presented in a criminal trial. 819 F.2d at 1432 n.20.

greater amount of time than the more established theories of admissibility since the introduction of expert testimony regarding the influences of hypnosis will probably remain the same.[122] This method of determining admissibility of testimony of a previously hypnotized witness frees the courts from unnecessary constraints and provides for an equitable resolution of the issue.

B. Evidentiary Objections to the Use of Hypnosis

The common-law methods of excluding and admitting testimony of a previously hypnotized witness are not consistent with the Federal Rules of Evidence,[123] which ensure that only reliable and relevant evidence is considered by the trier of fact. Although the reliability of hypnosis is not explicitly addressed in the Federal Rules of Evidence,[124] other evidentiary objections may be applied to the introduction of hypnosis testimony. Objections based on personal knowledge and Rule 403, as well as hearsay,[125] can serve to exclude evidence that is rendered unreliable due to the influence of the hypnotic session. Absent legislation governing the admissibility of testimony from a previously hypnotized witness, these evidentiary objections provide equally effective means for excluding potentially unreliable, hypnotically induced testimony. Until the scientific community offers a conclusive statement that hypnosis is an accurate means of refreshing recollection, the use of these objections can ensure that the criminal defendant will be convicted on nothing less than reliable evidence.

1. Personal knowledge

Perhaps the most logical evidentiary objection to hypnotically refreshed testimony is that the witness may not be testifying from firsthand knowledge. As a result of the dangers of suggestibility and confabulation, the previously hypnotized subject may not have actually perceived

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122. *But see Rock*, 107 S. Ct. at 2716 (Rehnquist, J., dissenting) ("requiring the matter to be considered *res nova* by every single trial judge in every single case might seem to some to pose serious administrative difficulties").

123. See *supra* notes 79-86 & 87-103 and accompanying text for a criticism of incompetency and the *Frye* test, respectively, as bases for excluding hypnosis testimony and notes 52-58 and accompanying text for a discussion of credibility of the previously hypnotized witness.

124. State courts, however, are free to develop their own evidentiary rules governing the admissibility of such testimony. California and Oregon have enacted such rules. CAL. EVID. CODE § 795 (West Supp. 1987); OR. REV. STAT. §§ 136.675, 136.685, 136.695 (1985). See *supra* note 61 for a discussion of these sections.

125. See *supra* text accompanying notes 177-202 for a discussion of hearsay and the use of hypnosis.

those matters he or she now claims to remember.[126] Thus, the trier of fact may be misled by inaccurate evidence submitted by a previously hypnotized witness.

The Federal Rules of Evidence require that a witness have personal knowledge of a subject as a prerequisite to the admissibility of his or her testimony.[127] The rationale behind this rule presupposes that observations through one's own senses are reliable;[128] the witness may be presumed to know what was experienced through the senses. But the witness' observations through the senses and a strict interpretation of the term "knowledge" are not necessarily the same.[129] As noted by Dean Wigmore:

> [A] witness cannot be assumed beforehand, by the law, to know things; the most it can assume is that he thinks he knows . . . . Accordingly, the rules upon the subject in hand are all concerned, not strictly with the witness' knowledge, but with his *opportunities of observing* and his *actual observation*.[130]

Thus, to ensure that a witness observed the event in question through the senses, an adequate foundation should be laid before accepting a witness' purported knowledge of the subject matter. The proponent must establish that the witness had an adequate opportunity to observe, that he or she was able to obtain correct impressions of the event and that the witness is able to apply both experience and observation to correctly characterize the event in question.[131] Wigmore defines three

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126. See *supra* notes 13-30 and accompanying text for a discussion of suggestibility and confabulation.

127. Federal Rules of Evidence, Rule 602 provides that "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter." FED. R. EVID. 602. This provision is subject to the rules regarding opinion testimony by an expert witness. *See* FED. R. EVID. 703.

A majority of states have adopted the federal rule on personal knowledge, either verbatim or without substantial modification. For states' adaptation of Rule 602, see 3 J. WEINSTEIN & M. BERGER, *supra* note 81, § 602[04], at 602-10 to -12 (1985 & Supp. 1987).

128. MCCORMICK, *supra* note 31, at 23.

129. "Even if the most trustworthy of men assures me that he *knows* things are thus and so, this by itself cannot satisfy me that he does know. Only that he believes he knows. . . . The difficulty is to realize the groundlessness of our believing." L. WITTGENSTEIN, ON CERTAINTY 20e, 24e (1969) (emphasis in original).

130. 2 WIGMORE, EVIDENCE § 650 (Chadbourn rev. ed. 1979) (emphasis in original).

131. Wigmore draws a distinction between experience and observation:

> By Observation is meant that direction of attention which is the source of impressions, and thus of knowledge. The distinction between Experience and Obervation is that the former concerns the mental *power* or capacity to acquire knowledge on the subject of testimony, while the latter concerns the *actual exercise* of intelligence upon the subject of testimony. Admission as a witness is inconceivable without the presence of both these elements.

WIGMORE, *supra* note 130, at § 651 (emphasis in original).

corollaries to the general principle of knowledge: (1) that the witness characterize the impressions based on observations from his or her own senses;[132] (2) that the witness need not state his or her observations with absolute certainty;[133] and (3) that the observations must have adequate data as the basis for the inference.[134] The satisfaction of the preliminary fact of a witness' firsthand knowledge necessarily involves a proper showing of these corollaries before a witness may testify.

When a witness has undergone hypnosis for purposes of refreshing recollection in anticipation of providing testimony at a criminal trial, the witness' personal knowledge of the event becomes suspect. Even if the previously hypnotized witness testifies that he or she had an opportunity to observe, such statements do not ensure that the testimony is based on the witness' actual observations.[135] The potential dangers of hypnosis may supplement the witness' memory. If the witness proceeds to testify to those details in his or her posthypnotic memory, a danger exists that the witness does not in fact have personal knowledge of those matters. Therefore, the previously hypnotized witness may not meet Wigmore's corollaries for establishing firsthand knowledge and the admissibility of the witness' testimony should be questioned.

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132. *Id.* at § 657. If the witness reports the observations of others, the testimony may be excluded on the grounds of hearsay. *Id.* For a further discussion of hearsay and hypnosis, see *supra* text accompanying notes 177-202.

133. *Id.* at § 658. The witness is permitted to testify to a "belief" or "impression" if it is in reference to the degree of positiveness of the original observation or signifies the degree of positiveness of the witness' recollection. If the "belief" or "impression" suggests that the witness lacks actual personal observation or simply states an opinion, then the testimony may be excluded as not adequately based on personal knowledge. *Id.*

134. *Id.* at § 659. "[T]he law may reject testimony which appears to be founded on data so scanty that the witness' alleged inferences from them may at once be pronounced absurd or extreme." *Id.*

135. The rules of evidence permit the witness to establish personal knowledge through his or her own testimony. FED. R. EVID. 602. "[P]ersonal knowledge is not an absolute but may consist of what the witness thinks he knows from personal perception." FED. R. EVID. 602 advisory committee's notes (citing 2 WIGMORE, EVIDENCE § 650). "In laying this foundation of knowledge, it is allowable for the examiner to elicit from the witness the particular circumstances which led him to notice or observe or remember the fact." MCCORMICK, *supra* note 31, at 24 (footnote omitted). The drafters of the rules did not contemplate the use of hypnosis and its effects on a witness' memory when codifying the requirements for personal knowledge; the ability of the previously hypnotized witness to satisfy the requirements for personal knowledge is deceiving. In hypnosis cases, limitations must be placed on a witness' ability to establish firsthand knowledge by his or her testimony. The nature of hypnosis—and the very reason for questioning the personal knowledge of a previously hypnotized witness—is such that the witness may not have actually perceived that to which he or she now testifies. The proponent of the evidence should be required to establish that the facts to which the witness testifies are within his or her personal knowledge, but proof of that knowledge should be provided by evidence other than the witness' own testimony.

For example, the prosecution presents a witness who was allegedly an eyewitness to a robbery. This witness may have had incomplete recollection of the event and was hypnotized by the police prior to her identification of the defendant. When the witness testifies, she is able to characterize her observation based upon her senses, the first corollary; she may have seen the culprit as he ran from the store, or heard him speak during the course of the criminal act. The witness, however, may be unsure of the accuracy of her initial observations or her memory of the event in general. Simply because she expresses some uncertainty would not be enough to preclude testimony based upon the witness' knowledge of the event.[136] Absent an indication that the uncertainty reflects a lack of actual personal perception, Wigmore's second corollary would permit the introduction of the witness' testimony.

Fulfillment of the third corollary, which requires that the witness base her inference on adequate data, becomes questionable when the witness has been hypnotized. The dangers of suggestibility and confabulation are such that the witness may not have actually perceived the event in question. She may never have had the opportunity to clearly see the robber that night, due to the distance between the robber and the witness, the witness' poor eyesight or the fact that the robber never in fact faced the witness at all. The witness may be drawing on her imagination for details rather than on data acquired from actual sensory observations, or, in an effort to cooperate, she may have been responding to the subtle questioning of a partial questioner. Thus, the witness may not have based her testimony on her personal knowledge of the event as it actually occurred.

This possibility becomes most apparent when the witness' memory greatly improves as a result of the hypnosis. Previously, the witness may have been unable to provide a detailed description, but after hypnosis is able to recall a great deal. In this situation, the possibility that the witness is testifying from less than personal knowledge is greatly increased, particularly when the witness is unable to factually credit his or her post-hypnosis memory. If the witness' story cannot be sufficiently corroborated or supplemented by satisfactory proof of the witness' personal knowledge, the court should entertain an objection based on the witness' lack of firsthand knowledge and the testimony should be excluded.

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136. While the law does demand personal knowledge, testimony will not be excluded simply because the witness' knowledge may be imprecise. "Accordingly, . . . th[ere] will be no ground of objection if it appears that he merely speaks from an inattentive observation, or an unsure memory, though it will if the expressions are found to mean that he speaks from conjecture or from hearsay." MCCORMICK, *supra* note 31, at 25 (footnotes omitted).

While an objection to hypnotically refreshed testimony based on lack of personal knowledge may be the most accurate, the practicality of sustaining such an objection is problematic. Although a danger exists that the witness may be testifying to matters that are not within his or her personal knowledge but are in fact fruits of the hypnotic session, this situation may not always exist. The hypnotic session may not affect the substance or accuracy of the subject's memory at all, or may do so to a negligible extent. If the use of hypnosis enhances the witness' memory, the possibility exists that the procedure has resulted in accurate recollection.[137] Additionally, the exclusion of a witness' testimony on the mere possibility that his or her memory is tainted is contrary to the admissibility standards established by the federal rules, which require the most minimal burden to establish personal knowledge.[138]

One solution to these problems is to adapt the burden of proof required to establish personal knowledge to meet the unique dangers posed by the use of hypnosis. The Federal Rules of Evidence permit the testimony of a witness whenever the proponent introduces evidence "sufficient to support a finding" that he or she does indeed have personal knowledge.[139] Since the dangers of hypnosis are such that knowledge of the witness is in question, this minimal standard should be raised to a more stringent burden of proof. The proponent should be required to establish personal knowledge by a preponderence of the evidence in cases involving testimony of a previously hypnotized witness. By raising the burden of proof in hypnosis cases, unreliable evidence is excluded[140] while adequately proven evidence reflecting the witness' personal knowl-

137. However, as noted above, separating the true facts from those improperly supplanted by hypnosis may be impossible. *See* text accompanying note 17.

138. *See* Fed. R. Evid. 602.

139. *Id.*

140. The role of the judge is not to exclude evidence based on lack of personal knowledge if it is merely improbable that the witness actually has knowledge of the disputed event; rather, "near impossibility" or "so improbably that no reasonable person could believe" should be the test. 3 J. WEINSTEIN & M. BERGER, *supra* note 81, § 602[02], at 602-5; *cf.* 3 J. WEINSTEIN & M. BERGER, *supra* note 81, § 602[02], at 602-4 to -5 (" 'It is only when no reasonable trier of fact could believe that the witness perceived what he claims to have perceived that the court may reject the testimony. Not improbability but impossibility is the test.' ") (quoting E. MORGAN, BASIC PROBLEMS OF EVIDENCE 59-60 (1962)). In hypnosis cases, the opponent of the testimony may introduce evidence which establishes, for instance, that the witness never had the opportunity to observe the event. Under Weinstein's test of near impossibility, the evidence could be excluded. If, however, the witness did have an opportunity to perceive and only some doubt exists as to the witness' ability to observe in such detail or with such certainty, then the courts clearly favor admitting the testimony, leaving to the trier of fact the issue of credibility. See *supra* notes 52-58 and accompanying text for a discussion of credibility and the previously hypnotized witness.

edge is admitted.[141] Any lesser standard of proof would invite the introduction of unreliable evidence, the very danger to be eliminated.

The proponent of the evidence may establish personal knowledge by proving that the substance of the witness' testimony clearly falls within the knowledge of that witness. The proponent must show not only that the witness had an opportunity to perceive the event in question, but that he or she did in fact perceive it as such and is presently characterizing these observations accurately. This may be demonstrated through the introduction of corroborating evidence to support the witness' testimony. Further, any inconsistencies in the witness' pre- and posthypnotic versions of the event must be addressed and resolved,[142] firmly establishing that the testimony is based on the witness' personal knowledge.

When the witness experiences a change in memory as a result of the hypnosis, a danger exists that the witness is testifying to matters not based on personal knowledge. So long as the use of hypnosis as a means of refreshing recollection is questioned, an objection based on the lack of personal knowledge should be considered, requiring a greater burden on the proponent before the evidence is admitted. If the proponent is unable to meet this modified burden of proof, then the court should sustain the objection, keeping such unreliable evidence from the trier of fact.

2. Balancing prejudicial impact against probative value

As discussed above, the admissibility of hypnotically refreshed testimony should not be subject to the nebulous "general admissibility" standard of the *Frye* test, but is more properly a question of relevancy.[143] However, even if hypnotically enhanced testimony is legally relevant under the Federal Rules of Evidence, this does not permit the admissibility of such evidence in every case. Rather, its probative value must be

141. "The judge must admit the testimony even though the witness is not positive about what he perceived provided the witness had an opportunity to observe and obtained some impressions from his observations." 3 J. WEINSTEIN & M. BERGER, *supra* note 81, § 602[02], at 602-6.

142. Thus, some means of measuring the change in memory after hypnosis must be established. It is essential that the witness' version of the event in question be accurately recorded and memorialized in a writing or other recordation prior to the hypnotic session. The witness should be required to sign and swear to the accuracy of this version of their prehypnosis memory before being subjected to hypnosis to establish a complete record against which the witness' testimony at trial may be compared. This precaution is also recognized as one of the safeguards designed to curb the contaminating effects of hypnosis. See *supra* notes 59-70 and accompanying text for a discussion of the use of safeguards in determining the admissibility of posthypnotic testimony.

143. See *supra* notes 87-103 and accompanying text for a discussion of the viability of the *Frye* test in light of the rules of evidence and its relation to the use of hypnosis in criminal trials.

weighed against any potential prejudicial impact that may result from allowing the jury to hear such evidence. A number of hypnosis cases have relied on this balancing of interests contained in Rule 403 of the Federal Rules of Evidence.[144] Weighing the costs and benefits requires careful consideration of the potential dangers involved in hypnotizing a witness for purposes of refreshing his or her memory and the impact of such evidence on the sensibilities of the jury.

The potential probative value of a previously hypnotized witness' testimony is obvious; the witness is on the stand because he or she is able to recall (although possibly as a result of the hypnosis) relevant information that may play a role in the trier of fact's determination of guilt. Given the potential influence of suggestibility, confabulation and overconfidence, however, the prejudicial impact of hypnotically refreshed testimony could be great. In general, when dealing with scientific procedures there exists "an aura of scientific infallibility [that] may shroud the evidence and thus lead the jury to accept it without critical scrutiny."[145] Thus, whether the jury is realistically able to see through the scientific procedure and consider the substance of the testimony given is a crucial issue.

Rule 403 deems evidence inadmissible whenever the prejudicial impact "substantially outweigh[s]" any benefits derived from admitting the evidence.[146] The key question when considering the admissibility of hypnotically refreshed testimony under Rule 403 is whether the dangers inherent in the technique "substantially outweigh" the value of the testimony. The influence of an overly confident witness who possesses

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144. *See, e.g.*, United States v. Charles, 561 F. Supp. 694, 697 (S.D. Tex. 1983) ("while [the] evidence is relevant, its probative value is substantially outweighed by the danger of unfair prejudice to the Defendants and should therefore be excluded"); Contreras v. State, 718 P.2d 129, 136 (Alaska 1986) (if *Frye* test were not applied, hypnotically adduced testimony would be excluded under Evidence Rule 403 for being more prejudicial than probative); State v. Beachum, 97 N.M. 682, 691, 643 P.2d 246, 255 (N.M. Ct. App. 1981) (under 403 analysis, hypnosis found to be reasonably reliable method of refreshing witness' recollection); *see also* United States v. Valdez, 722 F.2d 1196, 1202 (5th Cir. 1984) ("The jury's assumptions concerning the nature of memory and the accuracy of hypnosis may make the testimony so prejudicial that its weight is impossible to overcome"); State *ex rel.* Collins v. Superior Court, 132 Ariz. 180, 199, 644 P.2d 1266, 1285 (1982) (supplemental opinion), *overruled on other grounds by* State v. Nunez, 135 Ariz. 257, 660 P.2d 858 (1983) (case by case analysis of whether danger of prejudice outweighs probative value found to be unworkable because of possibility of conflicting decisions and consumption of trial resources; *Frye* held to be appropriate threshhold test).

A majority of states have adopted Federal Rule of Evidence 403, either verbatim or without substantial modification. For state's adaptation of Rule 403, see 1 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE § 403[07], at 403-102 to -137 (1985 & Supp. 1987).

145. *See* Giannelli, *supra* note 55, at 1237.

146. FED. R. EVID. 403.

the mysterious ability to recall all that transpired on the occasion in question presents a significant problem. Although the jury may be instructed on the dangers inherent in the use of hypnosis on a witness, the witness' confidence and ability to recall details of the event may be so overly impressive that the warning may fall on deaf ears.[147] This holds true even if the content of the witness' testimony fails to bear any relation to the events as they truly happened.

But does the potentially misleading demeanor of an overconfident witness "substantially outweigh" the relevance of the testimony? McCormick notes several factors to consider when weighing the admissibility of relevant evidence under Rule 403. First, one must consider the danger of prejudice—not merely damage to the case or an appeal to the emotions, but whether "[a] juror influenced in this fashion may be satisfied with a slightly less compelling demonstration of guilt than he should be."[148] Second, the evidence may produce an emotional reaction of such magnitude that it may confuse or mislead the jury. Third, the impact of the evidence may detract the jury from the main issues. Fourth, the introduction of the evidence may consume too much time.[149]

An analysis of these factors indicates that the prejudice caused by admitting testimony of a previously hypnotized witness may substantially outweigh the benefits of admitting the evidence, particularly when the witness has experienced a change in memory after hypnosis. With respect to the first factor, the danger of possibly prejudicing the jury is great in a criminal case where the liberty of the accused is in the hands of the trier of fact. Second, the jury may accept at face value the overconfident, detailed testimony of a previously hypnotized witness. This could lead a jury to return a guilty verdict, concluding that the prosecution's burden has been met, when, in reality, the case against the accused severely lacks substantiation. Although the defense can attempt to diminish the credibility of the hypnotic testimony by arguing that it consists of confabulated fantasy rather than fact, this would be a truly difficult task. The third factor may also be implicated because hypnotic testimony can distract the jury from the true reliability of the evidence presented and, therefore, may improperly influence the jury as to the guilt of the defendant. As to the fourth factor, the expert testimony required to inform the

147. *See* Bruton v. United States, 391 U.S. 123, 135 (1968) ("there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored").

148. McCORMICK, *supra* note 31, at 545 (footnote omitted).

149. *Id.* at 545-46.

jury about the potential dangers of hypnosis unduly burdens the judicial system in that it results in the consumption of the courts' resources while often shedding relatively little light on the truth.[150]

Certainly, the use of hypnosis will not always adversely affect the witness' demeanor or the content of his or her memory. The goal of the hypnotic session may, in fact, be successful in restoring the true memory of the subject. In such a case, the relevancy of the evidence is clearly paramount and warrants its admission. In evaluating hypnosis cases, however, it is difficult to recognize *when* the testimony has been negatively impacted, thereby calling for its exclusion. An objection based on Rule 403 is much more flexible than strict theories of admissibility or inadmissibility in that it focuses on the costs and benefits of the hypnotically enhanced testimony in each case before ruling on its admissibility. The proponent may rebut claims of unfair prejudice by presenting evidence corroborating the witness' story, comparing the witness' pre- and posthypnosis memory or introducing reliable independent evidence against the accused. When presented with a challenge based on Rule 403, the court may consider the possibility of the ill effects of hypnosis in that case and rule accordingly.[151]

In a criminal trial, the admission of untrustworthy evidence has serious consequences for the accused. "The introduction of unreliable evidence that has a significant potential to influence a jury greatly increases the likelihood of an erroneous verdict."[152] Still, relevant evidence should not be excluded based only upon a possibility that the witness' testimony was negatively impacted. Through the use of an objection based on Rule 403, the trier of fact can weigh the benefits and burdens of introducing the testimony of a previously hypnotized witness, thereby retaining a flexible standard for ruling on its admissibility which is in accord with the Federal Rules of Evidence.

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150. One commentator noted:

> One of the main reasons for prohibiting the use of post-hypnotic facts is that educating juries as to the effects of hypnosis has proven insufficient to compensate for the defendant's loss of cross-examination. Such attempts to educate the jurors frequently degenerate into swearing contests between rival experts and are ineffective in dispelling popular misconceptions of hypnotic recall. Moreover, no amount of jury education can protect a defendant when the prosecutor uses hypnosis to "create" a confident and seemingly reliable witness out of a previously unbelievable character.

Mickenberg, *supra* note 53, at 972.

151. Rule 403 has been criticized for allowing too much discretion in excluding prejudicial evidence, undermining the goals of predictability and uniformity of evidence law. *See generally* Gold, *Limiting Judicial Discretion to Exclude Prejudicial Evidence*, 18 U.C. DAVIS L. REV. 59 (1984).

152. Giannelli, *supra* note 55, at 1246.

C. *The Rules of Evidence and the Admissibility of Hypnosis Testimony in Criminal Trials*

Until the scientific community resolves the issue of reliability, courts will continue to grapple with the admissibility of hypnotically refreshed testimony. At present, the reliability of hypnosis as a method of enhancing recall is rightfully questioned. Yet, the total exclusion of such evidence may unnecessarily hamper the efficient administration of the criminal justice system. Rather than simply relying on each state's resolution of the issue, courts should seek a more consistent method of determining admissibility consistent with the Federal Rules of Evidence. The present theories of admissibility should be reevaluated in terms of the evidentiary rules. Through the use of objections provided by the federal rules, courts may find alternative methods of determining the admissibility of hypnotically induced testimony. This may pave the way to a more uniform method of judging the reliability of hypnosis testimony until the area is more clearly defined.

IV. THE CONSTITUTIONALITY OF THE USE OF HYPNOSIS IN CRIMINAL TRIALS

Whenever hypnotically enhanced testimony is offered in a criminal trial, the trier of fact must consider the probative value of the evidence as well as the potentially contaminating influences of hypnosis, whether the evidence is introduced by the prosecution or the defense. The Bill of Rights, however, guarantees criminal defendants certain protections which are not extended to the government. While preservation of the truth-determining process is of utmost priority, special consideration of the criminal defendant's constitutional rights may warrant the extension of unique privileges. When the prosecution seeks to introduce testimony of a previously hypnotized witness, certain due process and confrontation issues must enter into the equation and may weigh in favor of excluding the evidence. On the other hand, when the testimony of a previously hypnotized witness is offered by the defendant, the rights guaranteed the accused by the due process and confrontation clauses may justify the admission of the witness' testimony. Thus, when hypnosis is used in a criminal trial, its constitutionality must be considered in light of whether the prosecution or the defense is offering the evidence, keeping in mind the unique privileges reserved for the criminally accused.

A. *Use of Hypnosis by the Prosecution*

When the prosecution seeks to introduce testimony of a previously hypnotized witness, the interests served by admitting the evidence must be weighed against the constitutional rights of the criminal defendant. First, care must be taken that the testimony does not violate the criminal defendant's right to confront the witnesses against him, particularly when encountering "the overconfident witness" or when the witness has had his or her memory substantially changed as a result of hypnosis. Second, the court must evaluate the prosecution's use of hypnosis as a method of refreshing the memory of a witness in light of the criminal defendant's due process rights. Here, the use of hypnosis as an identification procedure and its good faith use as a forensic tool require careful consideration. If the use of hypnosis in the prosecution's case violates the defendant's constitutional rights to confrontation of witnesses or due process of law, the case against the accused has been irreparably tainted and warrants reversal.[153]

1. The constitutional right to confrontation of witnesses

The sixth amendment to the United States Constitution guarantees

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153. *See, e.g.*, State v. Mena, 128 Ariz. 226, 232, 624 P.2d 1274, 1280 (1981) (defendant's conviction of aggravated assault reversed; court persuaded that reasonable probability existed that jury would have reached different verdict if previously hypnotized victim's testimony had been properly excluded); People v. Guerra, 37 Cal. 3d 385, 429, 690 P.2d 635, 665, 208 Cal. Rptr. 162, 191 (1984) (prejudicial error for trial court to admit testimony of rape victim who was able to recall act of penetration only after hypnosis and whose testimony was virtually sole incriminating evidence against criminal defendants); People v. Shirley, 31 Cal. 3d 18, 71-72, 723 P.2d 1354, 1387, 181 Cal. Rptr. 243, 274-75, *cert. denied*, 458 U.S. 1125, *cert. denied*, 459 U.S. 860 (1982) (judgment reversed; witness' testimony regarding events that were subject of hypnosis should be excluded); People v. Rex, 689 P.2d 669, 671 (Colo. App. 1984), *later proceeding*, Rex v. Teeples, 753 F.2d 840 (10th Cir. 1985), *cert. denied*, 474 U.S. 967 (1985) (reversible error for trial court to admit testimony of kidnapping victim who identified defendant at trial even though she was unable to identify him at two prior trials); Peterson v. State, 448 N.E.2d 673, 679 (Ind. 1983) (trial court reversibly erred by admitting testimony of previously hypnotized witness who was able to identify defendant only after being hypnotized); People v. Hughes, 59 N.Y.2d 523, 545, 453 N.E.2d 484, 495, 466 N.Y.S.2d 255, 266 (1983) (defendant entitled to new trial because lower court incorrectly permitted witness to testify to matters revealed after hypnosis); State v. Peoples, 311 N.C. 515, 535, 319 S.E.2d 177, 189 (1984) (reversible error since reasonable possibility existed that jury would have reached different verdict had testimony of previously hypnotized witness/accomplice not been erroneously admitted); State v. Martin, 101 Wash. 2d 713, 723, 684 P.2d 651, 656 (1984) (defendant's conviction reversed because witness was unable to remember anything prior to hypnosis; without this witness' testimony, evidence against defendant was circumstantial, at best); *see also* State v. Long, 32 Wash. App. 732, 737-38, 649 P.2d 845, 847 (1982) (case against defendant was dismissed when prosecution hypnotized defense witness on eve of trial to obtain inculpatory evidence against defendant, precluding defendant from questioning his witness without taint of hypnosis).

every criminal defendant the right to confront the witnesses against him.[154] "[T]he mission of the Confrontation Clause is to advance a practical concern for the accuracy of the truth-determining process in criminal trials by assuring that 'the trier of fact [has] a satisfactory basis for evaluating the truth of the prior statement.'"[155] Thus, the right of confrontation generally guarantees the opportunity for meaningful and effective cross-examination of those witnesses testifying against the accused.[156] The United States Supreme Court summarized this fundamental right as follows:

> Confrontation: (1) insures that the witness will give his statements under oath—thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of penalty for perjury; (2) forces the witness to submit to cross-examination, the "greatest legal engine ever invented for the discovery of truth"; (3) permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility.[157]

This right of confrontation and cross-examination of witnesses is an element of due process[158] and is guaranteed to every criminal defendant.

When a criminal defendant confronts a witness who has experienced some alteration in memory due to the use of hypnosis, questioning by the accused may be ineffective in discrediting the witness. The potential for constitutional violation arises in two circumstances: (1) when hypnosis alters the demeanor of a witness, creating overconfidence in the witness'

154. U.S. CONST. amend. VI. The right to confront one's accusers applies only to criminal proceedings and may be raised only by the criminally accused. MCCORMICK, *supra* note 31, at 749. The federal confrontation clause provision has been made obligatory upon the states. Pointer v. Texas, 380 U.S. 400 (1965).

155. Dutton v. Evans, 400 U.S. 74, 89 (1970) (quoting California v. Green, 399 U.S. 149, 161 (1970)); *see also* State v. Armstrong, 110 Wis. 2d 555, 569, 329 N.W.2d 386, 394, *cert. denied*, 461 U.S. 946 (1983).

156. *See generally* Davis v. Alaska, 415 U.S. 308 (1974); Chambers v. Mississippi, 410 U.S. 284 (1973); California v. Green, 399 U.S. 149 (1970); Barber v. Page, 390 U.S. 719 (1968); Smith v. Illinois, 390 U.S. 129 (1968); Douglas v. Alabama, 380 U.S. 415 (1965); Pointer v. Texas, 380 U.S. 400 (1965); *see also* MCCORMICK, *supra* note 31, at 47-48.

157. California v. Green, 399 U.S. 149, 158 (1970) (quoting 5 WIGMORE, EVIDENCE § 1367 (Chadbourn rev. ed. 1974)); *see also* Barber v. Page, 390 U.S. 719, 724 (1968) ("The right to confrontation is basically a trial right. It includes both the opportunity to cross-examine and the occasion for the jury to weigh the demeanor of the witness.").

158. *See* Smith v. Illinois, 390 U.S. 129 (1968); *In re* Oliver, 333 U.S. 257 (1948); Snyder v. Massachusetts, 291 U.S. 97 (1934); Alford v. United States, 282 U.S. 687 (1931). For a discussion of the origins of the confrontation clause and the infamous 17th century trial of Sir Walter Raleigh, see Graham, *The Right of Confrontation and the Hearsay Rule: Sir Walter Raleigh Loses Another One*, 8 CRIM. L. BULL. 99, 100 (1972).

testimony and (2) when a witness' version of an event substantially changes as a result of hypnosis. In these two situations, the constitutional rights of the defendant must be carefully weighed against the relevancy of the evidence.

a. confrontation and the overconfident witness

As discussed above,[159] one possible effect of hypnosis is that the subject may experience increased confidence in his or her "memory" of an event, even if that "memory" is not founded on personal knowledge.[160] This false confidence may alter the witness' demeanor, potentially blocking the defendant's attempts to ascertain the truth through cross-examination.[161]

Courts disagree whether alteration in the witness' demeanor as a result of hypnosis violates a criminal defendant's constitutional right to confront the witnesses against him. Those courts finding a constitutional violation[162] note that the potential dangers inherent in the use of hypnosis can undermine the defendant's ability to cross-examine.

> [T]he hypnotic subject, upon awakening, is often imbued with a confidence and conviction as to his memory which was not present before. Pre-hypnosis uncertainty becomes molded, in light of additional recall experienced under hypnosis, into certi-

159. See *supra* notes 31-37 and accompanying text for a discussion of overconfidence.

160. See *supra* notes 126-42 and accompanying text for a discussion of personal knowledge.

161. "Some authorities have considered this 'tampering' with the witness's demeanor to effectively render the witness permanently unavailable for cross-examination, and conclude that [the witness'] testimony at trial is the equivalent of hearsay and constitutes a violation of the defendant's right to confront the witnesses against him." State v. Contreras, 674 P.2d 792, 796 (Alaska Ct. App. 1983), *rev'd*, 718 P.2d 129 (Alaska 1986). See also *Rock v. Arkansas*, 107 S. Ct. 2704, 2713 (1987), where the United States Supreme Court acknowledged that cross-examination of an overconfident witness is "more difficult" as a result of hypnosis.

162. *See, e.g.*, Contreras v. State, 718 P.2d 129, 139 (Alaska 1986) (alteration in demeanor of previously hypnotized witness denies defendants constitutional right of confrontation); State *ex rel.* Collins v. Superior Court, 132 Ariz. 180, 189, 644 P.2d 1266, 1275 (1982), *overruled on other grounds by* State v. Nunez, 135 Ariz. 257, 660 P.2d 858 (1983) ("Because of the unreliability of posthypnotic testimony and the denial of the defendant's fundamental right to effective cross-examination, posthypnotic testimony is inadmissible in a criminal trial"); State v. Joblin, 107 Idaho 351, 355, 689 P.2d 767, 771 (1984) (cross-examination of witness who is overly confident due to hypnotic session is meaningless); Peterson v. State, 448 N.E.2d 673, 678 (Ind. 1983) (key witness identified defendant only after hypnosis and was unable to provide any factual basis for identification; introduction of his testimony denied defendant his right to confrontation and cross-examination); State v. Peoples, 311 N.C. 515, 526, 319 S.E.2d 177, 184 (1984) ("Since a previously hypnotized witness has no recollection of the procedure itself, the defendant is unable to question him about the hypnotic process and his right of confrontation on this point is completely frustrated. Effective cross-examination is, furthermore, nearly impossible when a witness's confidence in his recall has been artificially enhanced by hypnosis.").

> tude, with the subject unaware of any suggestions that he acted upon or any confabulation in which he engaged. The subject's firm belief in the veracity of his enhanced recollection is honestly held, and cannot be undermined through cross-examination.[163]

Counsel's best efforts at cross-examination may not shake the witness' version of the events described; the witness is testifying to what he or she truly believes to be the truth, even though that description may be based on the hypnotic session rather than firsthand knowledge.[164]

After hypnosis, a witness is often able to report considerable detail about the event in question and will most likely appear to be an extremely credible witness. In reality, hypnosis operates to obfuscate the trier of fact, since "there may be no way to test his or her subjective belief to ascertain the objective truth."[165] Upon "awakening" from a hypnotic trance, the subject can recall everything that was "remembered" during

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163. *Collins*, 132 Ariz. at 189, 644 P.2d at 1274 (citing Commonwealth v. Nazarovitch, 496 Pa. 97, 105, 436 A.2d 170, 174 (1981)). The subject's belief in the accuracy of his or her recall provides the basis for the witness' increased confidence and unshakeable demeanor.

> [T]he witness' conviction of the absolute truth of his hypnotically induced recollection grows stronger each time he is asked to repeat the story; by the time of trial, the resulting 'memory' may be so fixed in his mind that traditional legal techniques such as cross-examination may be largely ineffective to expose its unreliability.

People v. Shirley, 31 Cal. 3d 18, 65, 723 P.2d 1354, 1383, 181 Cal. Rptr. 243, 272, *cert. denied*, 458 U.S. 1125, *cert. denied*, 459 U.S. 860 (1982); *see also* State v. Mena, 128 Ariz. 226, 230, 624 P.2d 1274, 1278 (1981) (witness is likely to have greater confidence in hypnotically induced memories than actual observations); Commonwealth v. Kanter, 388 Mass. 519, 528, 447 N.E.2d 1190, 1197 (1983) ("Subjects show increased confidence in the veracity of recollections reported under hypnosis, regardless of their accuracy. . . . It is this . . . tendency toward immunization from meaningful cross-examination, that leads the defendant to argue that a person, once hypnotized, should be forever barred as a witness to events discussed during hypnosis."); State v. Mack, 292 N.W.2d 764, 769 (Minn. 1980) (impossible to meaningfully cross-examine witness who is convinced of truth of those facts remembered only under hypnosis, thus possibly misleading jury); Commonwealth v. Nazarovitch, 496 Pa. 97, 105, 436 A.2d 170, 174 (1981) ("The subject's firm belief in the veracity of his enhanced recollection is honestly held, and cannot be undermined through cross-examination."); Diamond, *supra* note 12, at 339 (hypnosis permits subject to resolve all doubts and uncertainties, giving witness confidence in his or her recall and keeping from jury any indication of possible lack of certainty on which they rely in determining weight of evidence in question).

164. Two commentators on the subject recognized this problem and noted:

> [T]he oath or affirmation loses its meaning, for whilst the witness may be prepared to tell the whole truth and nothing but the truth as he or she sees it, what the witness honestly believes to be the truth could be a purely fictitious piece of information planted in the mind of the witness during hypnosis.

Haward & Ashworth, *supra* note 36, at 476; *see also* THE FORENSIC USE OF HYPNOSIS, *supra* note 4, at 2 (possible for well-intentioned witness to become "honest liar").

165. *Collins*, 132 Ariz. at 189, 644 P.2d at 1274; *see also* State v. Hurd, 86 N.J. 525, 540, 432 A.2d 86, 93-94 (1981); People v. Gonzales, 108 Mich. App. 145, 160, 310 N.W.2d 306, 313-14 (1981), *aff'd*, 415 Mich. 615, 329 N.W.2d 743 (1982).

the hypnotic session.[166] However, the subject may be unable to provide an explanation as to *how* he or she was able to recall, but experiences a "dawning awareness of the forgotten event."[167] This enhanced recollection frustrates effective cross-examination on the basis of the witness' recollection, since the subject is unable to recall anything about the influence of the hypnotic procedure itself.[168]

A number of courts have concluded that simply because a witness' confidence is strengthened by hypnosis does not itself result in a denial of confrontation.[169] These courts have held that hypnosis does not render a

166. 9 ENCYCLOPAEDIA BRITANNICA *Hypnosis* 133, 137 (1974).

167. *Id.*

168. Peterson v. State, 448 N.E.2d 673 (Ind. 1983), provides an example of such a change in memory. In *Peterson*, three men robbed a pharmacy during which one of the pharmacy employees was murdered. The defendant allegedly shot the pharmacist, put on a mask and left the store with the stockboy, Gary Szeszycki. Szeszycki was released when the perpetrators reached their car. *Id.* at 674. When the police were conducting their investigation, Szeszycki was able to recount the details of the crime but could not identify the perpetrators. *Id.* Three men, including the defendant, were later arrested, but Szeszycki was unable to pick the defendant out of a photographic line-up. Three months after the crime, Szeszycki agreed to undergo hypnosis. *Id.* After one session, Szeszycki was able to identify the defendant as the gunman, as well as one other participant. *Id.* The defendant was found guilty of murder. *Id.* at 673. The Supreme Court of Indiana reversed, noting that "Szeszycki was unable to give any factual basis or explanation for his ability to identify Peterson after hypnosis when he was not able to identify Peterson before hypnosis." *Id.* at 678. The court concluded that the identification testimony was "inherently tainted," thereby denying the defendant's constitutional right to confront and cross-examine. *Id.*

169. *See, e.g.*, Chaussard v. Fulcomer, 816 F.2d 925, 930 (3d Cir. 1987) (court found no denial of right to confrontation and cross-examination; counsel was able to cross-examine previously hypnotized witness as well as hypnotist); McQueen v. Garrison, 814 F.2d 951, 961-62 (4th Cir. 1987) (no denial of confrontation because witness testified independent of possible dangers of hypnosis); Beck v. Norris, 801 F.2d 242, 245 (6th Cir. 1986) (use of hypnotic procedure insufficient to constitute denial of defendant's right to fair trial; opportunity for cross-examination provided adequate confrontation); Harker v. Maryland, 800 F.2d 437, 441-42 (4th Cir. 1986) (testimony of previously hypnotized witness did not violate defendant's right to confrontation in any conventional sense; court noted that witness and prosecution's expert were cross-examined, jury was aware that witness had been hypnotized and defense introduced testimony of expert witness); Clay v. Vose, 771 F.2d 1, 4 (1st Cir. 1985), *cert. denied*, 106 S. Ct. 1212 (1986) (defendant was able to fully and extensively cross-examine witness and introduced expert testimony to educate jury on possible effects of hypnosis); State v. Seager, 341 N.W.2d 420, 432 (Iowa 1983) (court considered admissibility of testimony in light of totality of truth finding process, concluding that defendant must take his witnesses as he finds them for purposes of cross-examination); People v. Nixon, 421 Mich. 79, 91-92, 364 N.W.2d 593, 599-600 (1984) (defendant was not denied fair trial because jury was aware that witness had been hypnotized; defense counsel was able to attack credibility of previously hypnotized witness); Hopkins v. Commonwealth, 230 Va. 280, 292-93, 337 S.E.2d 264, 272 (1985), *cert. denied*, 106 S. Ct. 1498 (1986) (cross-examination of previously hypnotized witness and introduction of expert testimony sufficient to ensure criminal defendant right to confrontation); State v. Armstrong, 110 Wis. 2d 555, 569, 329 N.W.2d 386, 393-94, *cert. denied*, 461 U.S. 946 (1983) (no denial of confrontation because defendant was able to present evidence regarding witness' prehypnosis recollection and expert testimony on effect of hypnosis on memory; court noted

witness incapable of being effectively cross-examined. The Constitution does not guarantee "perfect" cross-examination:

> It may be true that a jury would be in a better position to evaluate the truth of the prior statement if it could somehow be whisked magically back in time to witness a gruelling cross-examination of the declarant as he first gives his statement. But the question as we see it must be not whether one can somehow imagine the jury in "a better position," but whether subsequent cross-examination at the defendant's trial will still afford the trier of fact a satisfactory basis for evaluating the truth of the prior statement.[170]

A defendant may still question the witness fully, test the witness' version for inconsistencies and bring out the possibility that the witness' demeanor is the product of hypnosis.[171] In addition, the defense may offer the testimony of experts on the dangers of hypnosis.[172] The trier of fact is then left to determine the credibility of the previously hypnotized witness.[173]

Courts holding that hypnosis does not render a witness incapable of being cross-examined question whether the use of hypnosis operates to tamper with the demeanor of a witness any more than other methods of refreshing recollection[174] or preparing a witness for testimony at trial. Any witness who has been "coached" by the prosecution prior to trial or has had his or her memory refreshed by looking at a document can potentially be subject to some alteration of demeanor. These methods, not unlike simple reminders when one's memory has faded, are common[175] and do not result in the exclusion of evidence based on a denial of confrontation.[176]

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that other forms of refreshed recollection can increase witness' confidence); *see also* People v. Hughes, 59 N.Y.2d 523, 546, 453 N.E.2d 484, 496, 466 N.Y.S.2d 255, 266-67 (1983) (court recognized that increased confidence can effect defendant's right of cross-examination, although degree of confidence gained may vary from individual to individual; trial court to resolve this question at pretrial hearing since it may have little effect on defendant's power to cross-examine).

170. *Green*, 399 U.S. at 160-61.

171. *Clay*, 771 F.2d at 4.

172. *Rock*, 107 S. Ct. at 2714.

173. See *supra* notes 52-58 and accompanying text for a discussion of credibility of the previously hypnotized witness.

174. *See* FED. R. EVID. 612, 803 (5); CAL. EVID. CODE § 771, 1237 (West 1966).

175. MCCORMICK, *supra* note 31, at 17 ("The effect of a reminder, encountered in reading a newspaper or in the conversation of a friend, which gives us the sensation of recognizing as familiar some happening which we had forgotten, and prompts our memory to bring back associated experiences, is a frequently encountered process.").

176. *Cf.* People v. Williams, 132 Cal. App. 3d 920, 928, 183 Cal. Rptr. 498, 502 (1982)

While the degree to which a previously hypnotized witness experiences a greater confidence in his or her memory may vary, the possibility that hypnosis may affect the witness in that respect calls for careful consideration of a criminal defendant's constitutional challenge. Not every previously hypnotized witness will experience an increased level of confidence as a result of hypnosis—perhaps no more so than other methods of refreshing recollection. However, the fact that hypnosis has been used warrants a closer look; the use of hypnosis to refresh recollection brings to issue the possible detrimental effects of suggestibility, confabulation and overconfidence which do not arise with other court-approved procedures for enhancing recall. Thus, while the use of hypnosis does not in itself suggest a violation of the defendant's constitutional rights, the unique dangers inherent in any hypnotic session call for careful evaluation of the influence of hypnosis in each particular case to ensure the criminal defendant the right to confront his or her accusers.

b. substantial change in testimony as a result of hypnosis—hypnosis and hearsay

These potential confrontation problems are compounded when the witness not only exhibits an unshakable demeanor, but also has had the content of his or her recollections substantially changed by hypnosis. A typical situation may involve a witness who remembered little or nothing of the event in question prior to being hypnotized, but is suddenly able to report substantial detail after hypnosis. In effect, two distinct witnesses exist: one can remember very little about the event in question prior to hypnosis and the other is able to remember a great deal after hypnosis. The defendant is provided with an opportunity to cross-examine only the witness now on the stand—the witness who is able to "remember."

Assume, for example, that the witness on the stand confidently testifies in a manner inculpatory to the defendant. Prior to hypnosis, the witness' memory may have suggested a neutral or exculpatory view of the defendant's involvement. The witness who remembers inculpatory evidence after hypnosis is a different witness than prior to hypnosis.[177] The confrontation clause guarantees a criminal defendant the right to confront the witnesses against him. In hypnosis cases, however, the de-

(Gardner, J., concurring) ("[T]he idea that an eyeball witness . . . be denied the opportunity to tell a jury his recollections of what he saw is disturbing to me whether that recollection has been refreshed by hypnosis, truth serum, drugs, intimidation, coercion, brainwashing or impaired by the plain old passage of time.").

177. Comment, *Hypnosis: A Survey of Its Legal Impact*, 11 SW. U.L. REV. 1421, 1445 (1979).

fendant is unable to confront that witness at the time when he or she became the witness against him, that is, under hypnosis. The defendant is able to confront only the witness who is now on the stand. The defendant arguably cannot effectively cross-examine on the basis of the witness' recollection of the inculpatory evidence.[178] Thus, there may be no way to ascertain the accuracy of the witness' beliefs because he or she may be unable to provide a basis for the substantial change in memory.

One method to counter the testimony of a witness who has experienced increased memory due to hypnosis is to interpose an objection on the grounds of hearsay. Although the declarant is on the stand at trial, the statements made out-of-court while under hypnosis, submitted to prove the truth of the matter asserted at trial, fall within the definition of hearsay.[179] Additionally, several layers of hearsay may exist. If the witness remembers inculpatory evidence only after the hypnosis and is unable to account for the increased memory, that witness is merely repeating the out-of-court statements uttered while under hypnosis—the first level of hearsay. Only at that time, while under hypnosis, did the witness become the witness against the accused. Further, due to the potential influence of suggestion inherent in the hypnotic session, the hypnotized subject may be repeating "accusations" which are, in reality, the implanted suggestions of the hypnotist—the second level of hearsay. Thus, the inculpatory statements against the accused may not be the perceptions of the witness, but rather the hearsay statements of the agency conducting the hypnotic session.[180]

In *State v. Contreras*,[181] the Alaska Court of Appeals analogized the use of hypnotically enhanced testimony to the introduction of hearsay.[182]

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178. See *supra* notes 154-76 and accompanying text for a discussion of confrontation of the previously hypnotized witness.

179. See FED. R. EVID. 801(c), which defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." *Id.*

180. This danger of hearsay may not be cured if the witness' testimony is restricted to prehypnotic memory. When the witness' memory of the event has changed after hypnosis, those "new" recollections are accepted by the witness as the true perceptions of the event in question. If the testimony is limited to prehypnotic recollections, the witness is not actually testifying to his or her present memory of the event in question. Rather, the witness is merely repeating those statements made prior to hypnosis that allegedly reflect prehypnotic memory—the very essence of an out-of-court statement being admitted against an accused. Thus, the danger exists that even this theory of inadmissibility allows the introduction of hearsay against an accused.

181. 674 P.2d 792, 819 (Alaska Ct. App. 1983), *rev'd*, 718 P.2d 129 (Alaska 1986).

182. *See also* McQueen v. Garrison, 617 F. Supp. 633, 637 (D.N.C. 1985), *rev'd*, 814 F.2d 951 (4th Cir. 1987) (hypnosis analysis parallels that which the United States Supreme Court has applied to hearsay); *Shirley*, 31 Cal. 3d at 33, 723 P.2d at 1362, 181 Cal. Rptr. at 251

In *Contreras*, two witnesses were able to identify their assailants only after undergoing hypnosis.[183] In deciding whether the hypnotically induced testimony was admissible, the *Contreras* court used the test established by the United States Supreme Court in *Ohio v. Roberts*[184] regarding the admission of hearsay against a criminal defendant without violating the confrontation clause. The *Roberts* Court held that before hearsay may be admitted the proponent must show: (1) that the declarant is unavailable and (2) that the hearsay possesses adequate indicia of reliability. If the hearsay does not fall within a "firmly rooted" hearsay exception, it must be excluded unless a showing of "particularized guarantees of trustworthiness is made."[185]

The *Contreras* court concluded that the previously hypnotized witnesses were effectively "unavailable on the issue of identification only to the extent that their demeanor might have been affected by the hypnotic sessions."[186] With respect to the second tier of the *Roberts* test, the court found that the witnesses' in-court identification—the "conceptual equivalent of hearsay"—bore sufficient indicia of reliability to be admitted in light of other inculpatory evidence against the defendants.[187]

The Alaska Supreme Court reversed, holding that the admission of the witnesses' hypnotically enhanced identification testimony denied the defendants' their constitutional right to confront witnesses.[188] The supreme court took the court of appeals' analogy one step further by adopting an interpretation of *Roberts* to apply to hypnosis cases. *Roberts* requires that the prosecution demonstrate a good faith effort to procure the witness at trial before the witness is considered unavailable.[189] Applying this standard, the *Contreras* court found the witnesses to be "unavailable" since "[t]he police . . . arguably failed to make duly diligent, good faith efforts to exhaust other investigative leads before resorting to hypnosis."[190] Further, the opinion disapproved of the court of appeals' finding that the "hearsay" statements bore adequate indicia of reliability because of the weight of other evidence against the defendants. The supreme court noted that "[f]ocusing on corroboration leads to boot-

("statements made under hypnosis may not be introduced to prove the truth of the matter asserted because the reliability of such statements is questionable") (emphasis omitted).

183. *Id.* at 794, 797-99.

184. *Roberts*, 448 U.S. 56, 65-66 (1980).

185. *Id.* at 66.

186. *Contreras*, 674 P.2d at 819.

187. *Id.*

188. *Contreras*, 718 P.2d 129, 139 (Alaska 1986).

189. *Roberts*, 448 U.S. at 74 (citing Barber v. Page, 390 U.S. 719, 724-25 (1968)).

190. *Contreras*, 718 P.2d at 139.

strapping unreliable testimony. The notion that witnesses can be made 'unavailable' through hypnosis and then have their statements made reliable through corroboration is troublesome."[191] Given the potential dangers of hypnosis, particularly the possible tampering with a witness' demeanor, the court concluded that the admission of the hypnotically refreshed testimony deprives defendants of their constitutional right of confrontation of witnesses.[192]

For hypnosis to meet the two-prong test of *Ohio v. Roberts*,[193] a creative interpretation of the requirement of unavailability is required. A witness who has been hypnotized does not fit into any traditional definition of unavailability simply by virtue of the hypnosis.[194] The Alaska Court of Appeals and the Alaska Supreme Court offered their interpretations of the unavailability requirement so that hypnosis could be compared to hearsay.[195] Since *Roberts*, however, the United States Supreme Court has stated that the unavailability prong must be met only when seeking to introduce former testimony.[196] Thus, when applied to hypnosis testimony, all that remains of the *Roberts* test is that the "hearsay" bear adequate indicia of reliability for its admission to comply with the confrontation clause.

Under this hearsay/hypnosis analogy, the standard set by the United States Supreme Court for analyzing the trustworthiness of out-of-court statements must be considered to determine whether hypnosis is sufficiently reliable to comply with the confrontation clause. In *Dutton v. Evans*,[197] the Court provided four factors to be evaluated when determining whether hearsay possesses sufficient "particularized guarantees of trustworthiness." Hearsay has a greater likelihood of being trustworthy when: (1) the out-of-court statement does not contain an express assertion about a past fact; (2) the possibility that the out-of-court statement is founded on faulty recollection is extremely remote; (3) the circumstances under which the statement was made indicate that the declarant is not misrepresenting the facts; and (4) the declarant had personal knowledge of the matters asserted in the statement.[198]

Comparing "hearsay" statements uttered by a subject while under

191. *Id.*; *see also id.* at 138 ("We are not convinced that corroboration is a panacea, even if strict procedural safeguards are observed concerning the hypnotic session.").

192. *Id.* at 139.

193. *Roberts*, 448 U.S. at 66.

194. See FED. R. EVID. 804(a) for the definition of unavailability.

195. *Contreras*, 674 P.2d at 819; *Contreras*, 718 P.2d at 139.

196. United States v. Inadi, 106 S. Ct. 1121, 1125-26 (1986).

197. 400 U.S. 74 (1970).

198. *Id.* at 88-89.

hypnosis with the four *Dutton* factors, the declarations arguably fail to assure sufficient trustworthiness to be admissible against an accused. In terms of the first *Dutton* factor, the statements clearly contain a narration about a past fact; the witness is hypnotized so that he or she may recall a prior event. The second *Dutton* factor—that the possibility of faulty recollection is extremely remote—is troublesome when considered in the context of hypnosis. The witness was initially hypnotized because of an inability to fully remember what happened. Simply because a witness was hypnotized does not assure that the defects in the witness' recollection are cured, since hypnosis is not yet proven as an accurate method of refreshing recollection.[199] The dangers of suggestibility and confabulation are such that a possibility exists that the "facts" the witness is able to "remember" under hypnosis are not a true reflection of the events as they took place.[200] With respect to the third *Dutton* factor—the possible misrepresentation of facts—the dangers of suggestibility and confabulation again come into play. Hypnosis does not assure that the witness is relaying only accurate data, or that the witness is not intentionally lying. Finally, the possibility that the hypnotized witness is not speaking from personal knowledge eliminates the fourth *Dutton* factor. When the witness is able to "recall" only after undergoing hypnosis, particularly when he or she cannot provide a factual basis for the statements, a danger surfaces that the witness lacks firsthand knowledge.[201]

While hypnosis does not negatively influence the recollection of the hypnotized subject in every case, the severity of the consequences is substantial enough for courts to entertain an objection based on hearsay. The admission of such out-of-court statements may preclude the defendant from confronting his or her accuser if that witness is only able to repeat what was remembered under hypnosis. Although the witness may swear that the testimony is based upon personal knowledge, it may unknowingly be based upon inadmissible out-of-court statements.[202] The party raising the objection should bear the burden of establishing that the testimony is actually hearsay. If the statements do not meet the four factors articulated in *Dutton*, then the court should conclude that the statements are not sufficiently trustworthy to permit their admission against an accused and exclude them on the basis of inadmissible hearsay. The proponent of the evidence may overcome the objection by dem-

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199. *See supra* note 5.

200. See *supra* notes 13-30 and accompanying text for a discussion of the dangers of suggestibility and confabulation.

201. See *supra* notes 126-42 and accompanying text for a discussion of personal knowledge.

202. *See supra* note 164.

onstrating that the "hearsay" is sufficiently reliable under the *Dutton* factors, possibly through corroborating the witness' testimony or through the introduction of independent evidence against the accused. An objection based on hearsay may provide the accused with an alternative method of challenging the prosecution's case, thereby preserving the defendant's constitutional right to confrontation of witnesses.

2. A criminal defendant's right to due process of law

In addition to the problems of confrontation and cross-examination, the use of hypnosis may potentially deny the criminal defendant the right to due process of law. The use of hypnosis by the prosecution must be kept in careful check, lest its use as an investigative technique impede the defendant's right to a fair trial. Due process violations may occur in two situations: (1) when the prosecution invents previously non-existent inculpatory evidence, such as when the use of hypnosis taints an eyewitness' identification of the accused or (2) when the prosecution destroys previously existing exculpatory evidence, such as when the prosecution abuses the use of hypnosis as a forensic tool. Although not always explicitly decided on due process grounds, these cases in effect stand for the proposition that the abuse and misuse of hypnosis can present a barrier to the defendant's constitutional right to a fair trial.[203]

a. eyewitness identification and hypnosis

Contrary to popular notions, eyewitness identifications are often an unreliable method of building the prosecution's case against an accused.[204] Relying on a witness' identification of another person is often questionable,[205] particularly when the witness was involved in or viewed an intense experience such as the commission of a crime. "[E]xcitement exaggerates, sometimes grossly, distortion in perception and memory es-

203. U.S. CONST. amend. VI.

204. *See generally* Note, *Did Your Eyes Deceive You? Expert Psychological Testimony on the Unreliability of Eyewitness Identification*, 29 STAN. L. REV. 969 (1977).

205. Stewart, *Perception, Memory, and Hearsay: A Criticism of Present Law and The Proposed Federal Rules of Evidence*, 1970 UTAH L. REV. 1, 15 (1970) ("Perception of height, weight, age, and personal identification are especially vulnerable to inaccuracy."). As one commentator noted:

> It is a Kafka*esque* world in which people testify to what they could neither see nor hear accurately, nor recall nor communicate fully, in which victory becomes an end in itself, and in which men and women compromise to reach a decision that they base upon partially understood testimony, partisan arguments, and abstract judicial charges. Life and liberty, property and reputation, are staked on bets or guesses as to what really happened.

Marshall, *Evidence, Psychology, and the Trial: Some Challenges to Law*, 63 Colum. L. Rev. 197, 231 (1963).

pecially when the observer is a witness to a nonroutine episodic event . . . . The likelihood of inaccurate perception, the drawing of inferences to fill in memory gaps, and the reporting of nonfacts is high."[206] When the witness makes an identification which will be used as the basis for a criminal prosecution, the danger of inaccuracies translates into the potential violation of the constitutional right to due process of law.

"[R]eliability is the linchpin in determining the admissibility of identification testimony . . . ."[207] In *Neil v. Biggers*[208] and *Manson v. Brathwaite*,[209] the United States Supreme Court considered the issue of the reliability of in-court testimony when the basis of that testimony is the witness' prior out-of-court identification of the defendant. In an effort to guard against suggestive identification procedures, the Court held that a defendant's due process rights are violated if a substantial likelihood of misidentification exists based on the suggestive identification procedure through which the witness was able to identify the defendant.[210] The Court further noted that even if the identification procedure was suggestive, the "totality of the circumstances" are to be evaluated to determine whether the identification was nevertheless reliable.[211] The suggestive confrontation must be weighed against five factors: (1) the opportunity of the witness to view the criminal; (2) the witness' degree of attention at that time; (3) the accuracy of the witness' prior description; (4) the witness' level of certainty at the time of the out-of-court identification; and (5) the length of time between the event in question and the identification procedure.[212] If the confrontation is found to be unduly suggestive and the surrounding circumstances reveal that the witness would not have been able to make an identification without that suggestiveness, then the witness' identification must be excluded.

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206. Stewart, *supra* note 205, at 28. Professor Stewart commented:

> Memory of a poorly defined perceptual matter is especially susceptible to substantial alteration by attitudes which shape the image of the event and conform it to preconceptions construed from the associated affect. Such memories are very unfaithful to their originals. Recall of faces is particularly subject to the distortive influence of affective attitudes since people often initially respond to others in an emotional way. Long after the visual image decays, the affect endures. A description of a face may be constructed in part from a stereotype associated with the observer's emotional response to the face or from a conventional personality type associated with the face in question.

Id. at 17.

207. Manson v. Brathwaite, 432 U.S. 98, 114 (1977); *see also* Neil v. Biggers, 409 U.S. 188, 198 (1972); Stovall v. Denno, 388 U.S. 293, 302 (1967).

208. *Neil*, 409 U.S. 188 (1972).

209. *Manson*, 432 U.S. 98 (1976).

210. *Neil*, 409 U.S. at 198; Simmons v. United States, 390 U.S. 377, 384 (1968).

211. 409 U.S. at 199.

212. *Id.*; *see also Manson*, 432 U.S. at 114-15.

These problems of eyewitness identifications may be exacerbated when hypnosis plays a role in the witness' ability to identify the criminal.[213] In the urgency of the investigation to find a suspect or careless use of overly suggestive tactics, law enforcement officials may influence the witness' description through the hypnotic procedure to such an extent that the reliability of the witness' subsequent in-court testimony may be irreparably tainted. Studies reveal that the use of hypnosis for purposes of refreshing the recollection of an eyewitness does not lead to accurate identifications, and in fact increases the likelihood of incorrect identifications being credited as positive memories.[214] Hypnotized subjects are more easily influenced by leading questions than their nonhypnotized counterparts and express a higher degree of confidence in the accuracy of their responses, even though erroneous.[215] An eyewitness or victim who has a substantial interest in providing law enforcement officials with a description of the criminal may be even more susceptible to the dangers inherent in being questioned while under hypnosis. The influence of suggestibility and confabulation compounding otherwise suggestive procedures may render the witness' identification so unreliable as to potentially violate the defendant's right to due process of law.[216]

A totality of the circumstances approach, as used in *Neil*[217] and *Manson*,[218] may not accurately reflect the untrustworthiness of the identification made under hypnosis. The witness' opportunity to view the criminal and the degree of attention at the time generally increase the likelihood of an accurate identification. The probative value of these factors, however, is decreased when the witness had to be hypnotized before being able to provide a sufficiently detailed description. The witness' level of certainty in his or her description is misleading when that description is made under hypnosis. As mentioned above, hypnotized subjects credit even erroneous "memories" as accurate. Further complications are presented by the danger of overconfidence inherent in any

213. See *supra* notes 15 & 168 for a discussion of State v. Joblin, 107 Idaho 351, 689 P.2d 767 (1984) and Peterson v. State, 448 N.E.2d 673 (Ind. 1983) and the influence of hypnosis on eyewitness identification.

214. Wagstaff, *Hypnosis and Recognition of a Face*, 55 PERCEPTUAL & MOTOR SKILLS 816, 817-18 (1982); *see also* Putnam, *supra* note 14, at 444 ("There is every reason to believe that the tendency to distort recall would be even greater in a real criminal investigation, where the witness may have a vested interest in recalling the information.").

215. Putnam, *supra* note 14, at 444.

216. *Cf. Harker*, 800 F.2d at 442 ("Suggestibility and memory hardening are not unique to hypnosis; they are potential problems whenever an eyewitness makes an identification.").

217. *Neil*, 409 U.S. at 199-200.

218. *Manson*, 432 U.S. at 114-16.

hypnotic session.[219] A relatively short lapse of time lapse between the crime and the identification is not an absolute safeguard against the dangers of distortions in memory that may occur to the hypnotized subject. Thus, when an eyewitness is able to provide a description only after hypnosis, the dangers of the hypnotic session are so influential that a substantial likelihood of misidentification exists.

The potential for tainting an identification through the misuse of hypnosis is illustrated in *State v. Hurd*.[220] In *Hurd*, the victim was repeatedly stabbed as she lay asleep in the bedroom of her apartment which she shared with her husband and children.[221] Although unable to describe her assailant, the victim asked the police to "check out" her former husband, the defendant. Shortly thereafter, two officers from the prosecutor's office arranged for the victim to undergo hypnosis to enhance her recollection of the incident. While under hypnosis, the victim was told to respond to questions from both the hypnotist and the officers who were present,[222] who asked such leading questions as "Is it Paul?", referring to the defendant. Further, when the victim expressed mistrust about her identification of the defendant made under hypnosis, the hypnotist and officers encouraged her to accept the identification, even though no evidence corroborating the identification existed.[223] They suggested that if she did not accept her identification, she would be indirectly implicating her present husband, who remained a suspect, and that the defendant was free to attack her again.[224] Based on these facts, the court found that the hypnotic session was highly suggestive and excluded the victim's identification.[225]

Since the prosecution did not meet its burden of establishing the reliability of hypnosis, the court did not explicitly reach the defendant's due process argument.[226] However, the facts of *Hurd* illustrate how hyp-

219. See *supra* notes 31-37 & 159-76 and accompanying text for a discussion of overconfidence in hypnotized individuals and its impact on the defendant's right to confrontation of witnesses.

220. 86 N.J. 525, 432 A.2d 86 (1981).

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

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

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

224. *Id.*

225. *Id.* at 549, 432 A.2d at 98.

226. *Id.* See text accompanying *supra* notes 112-21 for a discussion of Little v. Armontrout, 819 F.2d 1425 (8th Cir. 1987), where the court found the witness' identification constitutionally unreliable, thereby violating the defendant's right to due process of law. For other cases considering the reliability of a previously hypnotized witness' identification testimony, see *Harker*, 800 F.2d at 443; United States v. Valdez, 722 F.2d 1196, 1203 (5th Cir. 1984); People v. Cohoon, 104 Ill. 2d 295, 300-01, 472 N.E.2d 403, 406 (1984); Harmon v. State, 700 P.2d 212, 217-18 (Okla. Crim. App. 1985) (Bussey, J., dissenting); Vester v. State, 713 S.W.2d 920,

nosis can taint an identification, with respect to both the ability of the witness to make an identification under hypnosis and the overly suggestive tactics used during the hypnotic session itself. Identifications made while the witness is under hypnosis must be viewed with suspicion, particularly when the law enforcement agency is an active participant in questioning the witness. The use of hypnosis for purposes of eyewitness identification may result in misidentification and thus deny the defendant the right to due process of law.

b. the good faith use of hypnosis as a forensic tool

A criminal defendant may raise a due process argument based on the abuse of hypnosis when the prosecution does not use the technique in good faith, resulting in the destruction of exclupatory evidence. Hypnosis is not yet universally accepted as a reliable means of refreshing recollection. Yet, it can be viewed as an attractive procedure to the prosecution and law enforcement officials if it has the possibility of building a case against a criminal defendant. Although hypnosis is arguably acceptable when the investigation is lacking any direct evidence,[227] its use is less justified when sufficient evidence is already available and the technique is used merely as a means of confirming the suspicions of the police.[228]

In *State v. Long*,[229] the abuse of hypnosis by the prosecution resulted in the dismissal of the case against the defendant. The defendant in *Long* was charged with first degree assault. In support of the defense, two eyewitnesses submitted written statements to the effect that Long had acted in self-defense.[230] On the eve of trial, two months after the investigation had been completed, the prosecution arranged for the hypnosis of one of the defense witnesses.[231] In the hypnotic session, this witness was able to recall that the victim did not have a weapon and had not attacked the defendant. This crippled Long's defense because the other eyewitness was looking elsewhere at the crucial moment of the incident.[232] The defendant was convicted.[233]

On appeal, the case against the defendant was dismissed. The court

923-24 (Tex. Crim. App. 1986); State v. Armstrong, 110 Wis. 2d 555, 571-80, 329 N.W.2d 386, 394-98, *cert. denied*, 461 U.S. 946 (1983).

227. *See supra* note 7.

228. People v. Hughes, 59 N.Y.2d 523, 544-45, 453 N.E.2d 484, 495, 466 N.Y.S.2d 255, 266 (1983).

229. 32 Wash. App. 732, 649 P.2d 845 (1982).

230. *Id.* at 733, 649 P.2d at 845.

231. *Id.*

232. *Id.* at 734, 649 P.2d at 845.

233. *Id.* at 733, 649 P.2d at 845.

held that the prosecution's hypnosis of the defense witness, and the resultant change in memory, prevented the defendant from having an opportunity to interview his material witness without the taint of hypnosis, rendering that witness incapable of being rehabilitated.[234] In so holding, the majority in *Long* noted:

> That hypnosis is a valuable and important investigative procedure in police work has been established. Properly handled it can do much good without the harm of contaminating the mind of the person interviewed. But there must be care taken in the employment of the technique and there must be good cause. In this case there was neither. . . . The purpose could only have been to change the story of the key witness[ ] from what she had said in a statement written shortly after the event.[235]

Prosecutors and law enforcement officials must be deterred from using hypnosis on potential witnesses in less than good faith. Otherwise, the misuse of this forensic tool may result in the denial of a defendant's right to a fair trial.[236]

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234. *Id.* at 738, 649 P.2d at 847 (citing State v. Dailey, 93 Wash. 2d 454, 610 P.2d 357 (1980)).

235. 32 Wash. App. at 737, 649 P.2d at 847.

236. Such conduct may also be violative of the defendant's right to due process of law on the grounds that it "shocks the conscience" of the court. In Rochin v. California, 342 U.S. 165 (1952), the United States Supreme Court held that a conviction will not be permitted to stand if the methods employed offended "a sense of justice." *Id.* at 173. In *Rochin*, three officers illegally entered the home of the defendant, who was suspected of selling narcotics. Upon the officers' entry into his bedroom, the defendant swallowed two capsules of morphine. *Id.* at 166. The defendant was taken to the hospital where, at the request of one of the officers, he was given an emetic solution, causing the defendant to vomit. *Id.* The two capsules were found to contain morphine and the defendant was convicted on that basis. *Id.* The court of appeal affirmed Rochin's conviction and the California Supreme Court denied review. *Id.* at 166-67. In reversing the conviction, *id.* at 174, the United States Supreme Court concluded that the "proceedings by which this conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism about combatting crime too energetically. This is conduct that shocks the conscience." *Id.* at 172.

The *Rochin* standard is most often applied when the conduct in question rises to the level of a constitutional violation of the defendant's rights. The standard may also, however, be used when the methods employed do not violate constitutional rights. "In such cases, *Rochin* may well mean that evidence must be excluded if it was obtained in a manner that offends important values that are not embodied in specific constitutional doctrines, at least if the affront to those values was an extreme or outrageous one." McCORMICK, *supra* note 31, at 498.

Conceivably, hypnosis could be abused to such an extent that it may "shock the conscience" under the *Rochin* standard. Law enforcement officials may abuse the technique of hypnosis, resulting in conduct which is offensive or lacks good faith. *See, e.g.*, *Long*, 32 Wash. App. 732, 649 P.2d 845, discussed *supra* text accompanying notes 229-35. The courts should not tolerate offensive conduct in hypnosis cases since it effectively denies the defendant the right to a fair trial. All evidence obtained in such a manner must be excluded and the constitutional rights of criminal defendants preserved.

Since the dangers of hypnosis are particularly significant when the subject is hypnotized in anticipation of testifying at a criminal proceeding, the technique must be used sparingly and in good faith. Law enforcement agencies should resort to the use of hypnosis only when all other methods of obtaining evidence are exhausted. The use of hypnosis is justified only when the evidence clearly indicates that the witness to be hypnotized had an opportunity to observe the incident, but is merely experiencing a lapse of memory. Further, the limitations of hypnosis must be recognized; while hypnosis may be effective in assisting a witness' recall, the witness should not provide more information than he or she was capable of perceiving or remembering. The realities of the hypnotic session warrant careful evaluation of the reliability of the witness' "memory," particularly when admitted against an accused in a criminal trial.[237]

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237. Although potentially unreliable evidence is at times admitted against an accused, not every case will demand a retrial. "If it is sufficiently clear that another trial conducted without committing a particular error would lead to the same result, using judicial resources to conduct that retrial is obviously inefficient." MCCORMICK, *supra* note 31, at 533. This rule is embodied in the harmless error standard established by the United States Supreme Court in Chapman v. California, 386 U.S. 18, *reh'g denied,* 386 U.S. 987 (1967). In *Chapman,* the Court held that federal constitutional error is harmless if the beneficiary of the error is able to prove to the court beyond a reasonable doubt that the error did not contribute to the jury verdict or conviction. *Id.* at 24.

The harmless error rule is most often applied in cases involving a violation of the exclusionary rule, but the standard has also been applied to hypnosis cases in which testimony of a previously hypnotized witness has been admitted and the defendant convicted. Depending on the facts of the case, a number of courts have found the introduction of hypnotically refreshed testimony to be harmless error. *See, e.g.,* King v. State, 460 N.E.2d 947, 950 (Ind. 1984) (admission of previously hypnotized witness' testimony held to be harmless error because of cumulative nature of testimony); State v. Blanchard, 315 N.W.2d 427, 431 (Minn. 1982) (not reversible error to admit witness' hypnotically induced recollection; although witness was able to provide more details under hypnosis, prehypnosis memory contained damaging evidence against accused which remained unchanged after hypnosis); State v. Payne, 312 N.C. 647, 659, 325 S.E.2d 205, 213 (1985) (no reasonable possibility that jury would have reached different verdict had testimony of previously hypnotized witness been excluded). Other courts have found that the error involved was indeed harmful, requiring reversal of the defendant's conviction. *See, e.g., Little,* 819 F.2d at 1435 (court found error was not harmless; victim's tainted identification testimony was only positive testimony placing defendant at scene, testimony was largely uncorroborated, fingerprints from scene did not match defendant's and victim's initial description of her assailant did not fit defendant); People v. Guerra, 37 Cal. 3d 385, 429, 690 P.2d 635, 665, 208 Cal. Rptr. 162, 191 (1984) (prejudicial error for trial court to admit testimony of rape victim who recalled act of penetration only after hypnosis and whose testimony was virtually sole incriminating evidence against defendants).

Reliance on an appellate court's decision that the introduction of hypnotically enhanced testimony was harmful to the defendant is no substitute for a uniform rule of inadmissibility. On the other hand, the use of hypnosis in a criminal proceeding does not always affect a substantial right of the defendant and judicial resources should not be consumed on those cases in which the harm was negligible. Not all evidence introduced through a previously hypno-

B. The Use of Hypnosis by the Criminal Defendant

Just as the prosecution has resorted to the use of hypnosis in gathering evidence against the accused, so have criminal defendants sought the use of hypnosis in preparing their defense. When the criminal defendant seeks to introduce hypnotically refreshed testimony in his or her case, new issues enter the equation. Certainly, if a criminal defendant were to misuse hypnosis as a forensic tool, the evidence or testimony obtained thereby should be excluded. However, when the defense properly uses hypnosis, certain rights uniquely available to criminal defendants must be recognized and weighed in determining the admissibility of hypnotically refreshed testimony.

The United States Constitution reserves certain rights to criminal defendants to provide them with an adequate opportunity to defend the case against them.[238] The United States Supreme Court has stated that every criminal defendant must have "a reasonable opportunity to meet [the charges against him] by way of defense or explanation, have the right to be represented by counsel, and have a chance to testify and call other witnesses in his behalf, either by way of defense or explanation."[239] These constitutional guarantees apply both when the defendant presents witnesses on his or her behalf[240] and when the defendant chooses to testify.[241] No preexisting state rule of evidence or per se exclusion of ques-

tized witness is crucial to the trier of fact's determination of guilt. Until the constitutionality of the use of hypnosis testimony is decided, the harmless error rule will serve to at least correct those wrongs committed at the trial level and perhaps help to establish guidelines for the constitutional admissibility of hypnotically refreshed testimony in the future.

238. *See* U.S. CONST. amend. IV (right against unreasonable searches and seizures); U.S. CONST. amend. V (right to grand jury indictment for capital cases, right against double jeopardy, right against self-incrimination, right to due process of law); U.S. CONST. amend. VI (right to speedy trial, right to public trial, right to fair and impartial trial, right to jury trial, right to information regarding the charges against accused, right to confrontation of witnesses, right to compulsory process, right to assistance of counsel).

239. *In re* Oliver, 333 U.S. 257, 275 (1948).

240. The sixth amendment guarantees criminal defendants the right to obtain witnesses in their favor. U.S. CONST. amend. VI. This right of compulsory process is the companion to the constitutional right to confrontation of witnesses. Westen, *The Compulsory Process Clause*, 73 MICH. L. REV. 71, 73 (1974) [hereinafter Westen I]. For a discussion of this constitutional provision which provides the defendant with affirmative aid in presenting his or her defense, see generally, Westen I, *supra*; Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases*, 91 HARV. L. REV. 567 (1978); Westen, *Compulsory Process II*, 74 MICH. L. REV. 191 (1975).

241. The state cannot completely restrict a criminal defendant's due process right to testify in his or her own defense. Nix v. Whiteside, 106 S. Ct. 988, 993, 1004-05 n.5 (1986). This right does not, however, permit the defendant to testify in whatever manner he or she pleases. *See id.* at 998; Harris v. New York, 401 U.S. 222, 225 (1971). "Indeed, the due process decisions relied on by the Court all envision that an individual's right to present evidence on his behalf is not absolute and must often times give way to countervailing considerations." Rock

tionable evidence may prevent the accused from responding to the state's case. The exclusion of defense evidence is tantamount to a violation of the defendant's constitutional right to due process of law.[242]

These constitutional guarantees may outweigh the potentially contaminating influence of hypnosis. As seen above, the taint of hypnosis has often justified the exclusion of testimony presented by the prosecution. Given the constitutional implications, however, the admissibility of posthypnosis testimony from a prosecution witness differs substantially from the defense use of hypnosis. The questionable reliability of hypnosis is no longer the sole issue. In addition, the court must consider the defendant's fundamental rights, rooted in the Constitution.

1. The impact of *Rock v. Arkansas*[243]

To date, state and federal courts have developed their own theories concerning the admissibility of hypnotically enhanced testimony without the imposition of any constitutional restrictions. The United States Supreme Court in *Rock v. Arkansas*[244] recently broke its silence on the issue of hypnosis and recognized the unique considerations involved in the use of hypnosis by a criminal defendant. Reserving for a later time the resolution of the issue of hypnosis as an investigative tool, a closely divided Court found the constitutional rights of the accused paramount in spite of the potential unreliability of hypnotically refreshed testimony.[245]

a. the facts

At issue in *Rock* was the constitutionality of a state's per se exclusion of hypnotically refreshed testimony of a criminal defendant who, due to a previous lapse in memory, was able to establish her defense only under hypnosis.[246] The defendant was charged with manslaughter for the shooting death of her husband.[247] The defendant and her husband had an argument over their living arrangement and Mr. Rock's insistence that the defendant not leave their home to get something to eat.[248]

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v. Arkansas, 107 S. Ct. 2704, 2716 (1987) (Rehnquist, J., dissenting) (citing Morrissey v. Brewer, 408 U.S. 471, 481-82 (1972); Goldberg v. Kelly, 397 U.S. 254, 263 (1970); *In re* Oliver, 333 U.S. 257, 273, 275 (1948)).

242. *See* Chambers v. Mississippi, 410 U.S. 284 (1973).

243. 107 S. Ct. 2704.

244. *Id.*

245. *Id.* at 2714-15.

246. *Id.* at 2706-07.

247. *Id.* at 2706.

248. *Id.*

This dispute ended in Mr. Rock's death by a gunshot wound.[249] The defendant recalled that she was physically abused by her husband when she attempted to leave that evening and that she had a gun in her hand, but was unable to remember important details of the shooting.[250]

Mrs. Rock's attorney hired a licensed neuropsychologist for purposes of enhancing the defendant's recollection through hypnosis.[251] She submitted to two hypnotic sessions which did not reveal any new information. Afterwards, however, the defendant was able to recall that she did not have her finger on the trigger of the gun and that the gun had discharged accidentally when her husband struggled with her.[252] As a result of this information, defense counsel ordered an examination of the weapon, which revealed the gun to be defective and prone to firing without the trigger being pulled.[253] The trial court ruled that the defendant's hypnotically refreshed statements were inadmissible due to the unreliability of hypnosis, but permitted her to testify to subjects remembered prior to undergoing hypnosis.[254] The Supreme Court of Arkansas affirmed.[255]

b. the majority opinion

In a five to four vote, the United States Supreme Court vacated the judgment of the Arkansas Supreme Court, holding that the state's exclusion of the defendant's testimony "infringes impermissibly on the right of a defendant to testify on his or her own behalf."[256] The majority opinion by Justice Blackmun found the defendant's claim to be "bottomed on her constitutional right to testify in her own defense."[257] The Court noted that the right to testify is embedded in the criminal defendant's right to

249. *Id.*

250. *Id.* The defendant was distraught when the police arrived on the scene and was ultimately removed from the investigation area due to her attempts to telephone the victim's parents.

251. The hypnotist was trained in the use of hypnosis. *Id.* The defense attorney failed to inform the court or the prosecutor that the defendant was to undergo hypnosis. Rock v. State, 288 Ark. 566, 568, 708 S.W.2d 78, 79 (1986), *vacated*, 107 S. Ct. 2704 (1987).

252. 107 S. Ct. at 2707. Both hypnotic sessions were recorded on tape and the hypnotist had handwritten notes of the substance of the defendant's statements. *Id.* at 2706-07 & n.2.

253. *Id.* at 2707.

254. *Id.*

255. *Id.* at 2707-08.

256. *Id.* at 2714-15.

257. *Id.* at 2708. The common law rule rendering a defendant incompetent to testify has long since given way to a rule of competency. *See generally* Ferguson v. Georgia, 365 U.S. 570 (1961) (tracing history of competency of criminal defendant to testify). See also *supra* notes 79-86 and accompanying text for a discussion of the competency of the previously hypnotized witness.

due process of law,[258] the sixth amendment right to call witnesses in his or her favor,[259] as well as the fifth amendment guarantee against self-incrimination.[260] The Court found the right of the accused to testify fundamental to a personal defense, noting that "[a] defendant's opportunity to conduct his own defense by calling witnesses is incomplete if he may not present himself as a witness."[261] The Court further noted:

> [T]he most important witness for the defense in many criminal cases is the defendant himself. There is no justification today for a rule that denies an accused the opportunity to offer his own testimony. Like the truthfulness of other witnesses, the defendant's veracity, which was the concern behind the original common-law rule, can be tested adequately by cross-examination.[262]

Regarding Arkansas' per se exclusion of posthypnotic testimony, the Court held that such a rule arbitrarily excluded the defendant's testimony, and that the interests of the state did not warrant limiting the constitutional rights of the accused.[263] The Court relied upon their earlier decisions in *Washington v. Texas*[264] and *Chambers v. Mississippi*[265] to

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258. 107 S. Ct. at 2709 (citing Faretta v. California, 422 U.S. 806 (1975)). *Faretta* emphasized the right of self-representation as essential to the defense of the criminally accused. 422 U.S. at 819.

259. 107 S. Ct. at 2709 (citing Washington v. Texas, 388 U.S. 14 (1967)).

260. *Id.* at 2710 (citing Harris v. New York, 401 U.S. 222, 230 (1971)). "Every criminal defendant is privileged to testify in his own defense, or to refuse to do so." *Harris*, 401 U.S. at 230.

261. 107 S. Ct. at 2710.

262. *Id.* at 2709. *See generally* Westen I, *supra* note 240, at 119-20.

263. 107 S. Ct. at 2711-12.

264. 388 U.S. 14 (1967). The defendant in *Washington* was convicted of murder and sentenced to 50 years in prison. As part of his defense, the defendant sought to introduce the exculpatory testimony of a coparticipant in the crime, who had in fact been convicted and sentenced for the same murder for which the defendant was held. *Id.* at 16. The prosecution successfully barred the introduction of the testimony, relying on two Texas statutes which prevented coparticipants in the same crime from testifying for one another, although no such rule prevented the prosecution from using such testimony. *Id.* at 16-17. The Court held that the defendant's sixth amendment right to compulsory process for obtaining witnesses in his or her favor was a "fundamental element of due process of law." *Id.* at 19. Thus, the Court found the state had "arbitrarily denied him the right to put on the stand a witness who was physically and mentally capable of testifying to events that he had personally observed, and whose testimony would have been relevant and material to the defense." *Id.* at 23.

265. 410 U.S. 284 (1973). In *Chambers*, the defendant was charged with killing a police officer, but asserted that the crime was committed by one Gable McDonald. *Id.* at 289. The defense called McDonald as its own witness and submitted his sworn written confession into evidence. *Id.* at 291. On cross-examination, McDonald repudiated his confession, noting his earlier claims of innocence. *Id.* On redirect, the defense attempted to submit unsworn self-incriminatory statements allegedly made by McDonald to three witnesses. The trial court blocked the introduction of the evidence on the basis that the statements were hearsay and

prohibit the state from interfering with the defendant's right to testify.[266] Favoring the admissibility of relevant testimony, the United States Supreme Court has held that a state may not arbitrarily preclude a defense witness from presenting relevant testimony.[267] Similarly, the Court has recognized the fundamental right of an accused to present witnesses in his or her own defense.[268] Recognizing that criminal defendants' rights must at times " 'bow to accommodate other legitimate interests in the criminal trial process,' "[269] the *Rock* majority held that state rules "may not be arbitrary or disproportionate to the purposes they are designed to serve. In applying its evidentiary rules a State must evaluate whether the interests served by a rule justify the limitation imposed on the defendant's constitutional right to testify."[270] In this case, the defendant's right to testify outweighed Arkansas' interest in excluding potentially unreliable evidence obtained through hypnosis.

Although the Court upheld the defendant's right to testify in this case, the decision is not a ruling on the reliability of hypnosis. Justice Blackmun's opinion acknowledged that "scientific understanding of the phenomenon and of the means to control the effects of hypnosis is still in its infancy."[271] The Court recognized the dangers of suggestibility, confabulation and "memory hardening" inherent in the use of hypnosis.[272] However, despite these dangers, the Court held that Arkansas was not justified in excluding the hypnotically refreshed testimony of the defendant:

> Wholesale inadmissibility of a defendant's testimony is an arbitrary restriction on the right to testify in the absence of clear evidence by the State repudiating the validity of all post-hypnosis recollections. . . . [I]t has not shown that hypnotically enhanced testimony is always so untrustworthy and so immune to the traditional means of evaluating credibility that it should disable a defendant from presenting her version of the events for which she is on trial.[273]

In particular, the Court commented on the existence of corroborating

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Mississippi law did not permit the impeachment of one's own witnesses. *Id.* at 292-93. The United States Supreme Court reversed the trial court's ruling, *id.* at 303, holding that the state rules of evidence denied the defendant his right to due process of law. *Id.* at 295.

266. 107 S. Ct. at 2710-11.

267. *Id.* at 2711; *see Washington*, 388 U.S. at 23.

268. 107 S. Ct. at 2711; *see also Chambers*, 410 U.S. at 302; *Washington*, 388 U.S. at 19.

269. 107 S. Ct. at 2711 (quoting Chambers v. Mississippi, 410 U.S. 284, 295 (1973)).

270. 107 S. Ct. at 2711.

271. *Id.* at 2714.

272. *Id.* at 2713.

273. *Id.* at 2714.

evidence to support the defendant's posthypnosis memory.[274] Arkansas' per se exclusion "operate[d] to the detriment of any defendant who undergoes hypnosis, without regard to the reasons for it, the circumstances under which it took place, or any independent verification of the information it produced."[275] While the Court did not endorse the general use of hypnosis as an investigative tool,[276] it found the criminal defendant's constitutional right to testify to be superior.

c. the dissent

The dissent by then Justice Rehnquist favored the right of states to establish their own evidentiary rules, allowing such rules to take precedence over the constitutional right to testify. The dissent found that "[t]he Supreme Court of Arkansas' decision was an entirely permissible response to a novel and difficult question."[277] Justice Rehnquist supported the state supreme court's exclusion of the defendant's testimony, noting that the "advancement of the truth-seeking function of Rock's trial was the sole motivation behind limiting her testimony."[278] The constitutional right to testify is subject to reasonable restrictions, justifying the state court ruling.

> The Constitution does not in any way relieve a defendant from compliance with 'rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.' Surely a rule designed to exclude testimony whose trustworthiness is inherently suspect cannot be said to fall outside this description.[279]

The dissent accepted the Arkansas court's resolution of the issue, concluding that "until there is a much more general consensus on the use of hypnosis than there is now, the Constitution does not warrant this Court's mandating its own view of how to deal with the issue."[280]

d. the future use of hypnosis by a criminal defendant

While *Rock* did little to resolve the issue of the reliability of hypno-

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274. *Id.*
275. *Id.* at 2712.
276. *Id.* at 2714.
277. *Id.* at 2716 (Rehnquist, J., dissenting).
278. *Id.* at 2715 (Rehnquist, J., dissenting).
279. *Id.* at 2716 (Rehnquist, J., dissenting) (quoting Chambers v. Mississippi, 410 U.S. 284, 302 (1973)).
280. *Id.* (Rehnquist, J., dissenting).

sis as an investigative tool,[281] the Court found that a state's per se exclusion of hypnotically refreshed testimony must not interfere with the defendant's constitutional rights. As the Court in *Chambers* warned, the rules of hearsay should not be "applied mechanistically to defeat the ends of justice."[282] So too must the potential unreliability of hypnosis be balanced against the criminal defendant's right to present a defense. Thus, lower courts must decide the admissibility of a criminal defendant's hypnotically refreshed testimony on an ad hoc basis, at times demanding admissibility even though the reliability of the evidence is in question.

Rock does not, however, permit the testimony of a previously hypnotized defendant in every case. The majority opinion rested on constitutional grounds which favored the admissibility of the defendant's testimony in this case and not the advocacy of hypnosis as a means of refreshing memory. The potential violation of a criminal defendant's constitutional rights may not always permit the compromise of the state's legitimate interests.[283] To the contrary, the defendant's due process rights are not absolute[284] and must be weighed against the interests

281. See *infra* text accompanying notes 288-96 for a general discussion of the influence of *Rock* on the use of hypnosis in criminal trials.

282. *Chambers*, 410 U.S. at 302.

283. *Id.* at 295.

284. This notion has been recognized in the context of a previously hypnotized criminal defendant seeking to offer exculpatory statements made while under hypnosis. *See* Greenfield v. Robinson, 413 F. Supp. 1113 (W.D. Va. 1976). In *Greenfield*, the defendant testified at trial that he had become unconscious during the crucial moment when the murder was allegedly committed. *Id.* at 1116. Shortly after his arrest, however, the defendant had confessed to the police, indicating that he injected heroin and took hallucinogenic drugs on the night in question. *Id.* at 1117. Prior to trial, the defendant was hypnotized by a psychiatrist for purposes of enhancing his memory of the night of the murder. *Id.* Defense counsel requested that the psychiatrist be allowed to question the defendant on the stand while in a hypnotic trance. The lower court did not permit this procedure and refused to allow the psychiatrist to testify to the defendant's statements made while under hypnosis. *Id.* The defendant was convicted and sentenced to twenty years imprisonment. *Id.* at 1118. In denying the defendant's writ of habeas corpus, the court noted that no evidence existed to support the reliability of the statements made by the defendant while under hypnosis. *Id.* at 1120. Further, no additional eyewitnesses to the crime were presented and only "minute evidence" exculpated the defendant. *Id.* In upholding the trial court's refusal to permit the testimony of either the defendant or the psychiatrist, the court noted:

> This court knows of no rule that requires a judge to accept evidence of uncertain value to go to a defense that is otherwise completely uncorroborated. The mere fact that a crime has no eyewitnesses or direct evidence does not warrant a court to accept evidence that may be able to tell the trier of fact something about the crime, but may also be of dubious quality. As a constitutional principle then, this court simply finds that petitioner's due process guarantees were not abrogated by the trial court's refusal to permit the defendant to relate his story under hypnosis or an expert witness to recount what the defendant told him while under hypnosis.

Id. at 1120-21; *see also* State v. Atwood, 39 Conn. Supp. 273, 284, 479 A.2d 258, 264-65 (1984)

of the state to ensure the " 'integrity of the fact-finding process.' "[285]

The reliability of the evidence presented by the defense must be carefully considered, just as is the evidence offered by the prosecution.[286] However, courts should favor a more liberal standard of admissibility when the exclusion of evidence would impede a criminal defendant's constitutional right to present his or her defense. *Rock* confirms this unique position held by criminal defendants and assures the future protection of a defendant's constitutional rights even in light of the use of hypnosis.[287]

C. *The Influence of* Rock v. Arkansas *on the Use of Hypnosis in Criminal Trials*

Rock v. Arkansas[288] should not be construed as dispositive on the issue of hypnosis[289] because the case involved the unusual situation in

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(defendant's due process right to testify in own behalf was not affected by inadmissibility of testimony elicited by hypnosis or narcoanalysis).

285. *Chambers*, 410 U.S. at 295 (quoting Berger v. California, 393 U.S. 314, 315 (1969)).

286. The United States Supreme Court has indicated that the reliability of evidence must be weighed against the constitutional rights of criminal defendants. *See, e.g.*, United States v. Inadi, 106 S. Ct. 1121, 1126-27 (1986) (declarant's unavailability is not requirement for admission of hearsay statements of co-conspirator); *Chambers*, 410 U.S. at 299-300 (reliability of excluded hearsay weighed in favor of defendant's right to present evidence); Mancusi v. Stubbs, 408 U.S. 204, 213-14 (1972) (hearsay statements of unavailable witness must bear sufficient indicia of reliability to be admissible); Dutton v. Evans, 400 U.S. 74, 88-89 (1970) (hearsay statements of unavailable witness must bear sufficient indicia of reliability to be admissible).

287. Under the Court's reasoning in *Rock*, the protection of the constitutional rights of the criminal defendant should allow for the introduction of testimony of previously hypnotized defense witnesses as well. This result is commanded by the compulsory process clause of the sixth amendment which gives the criminal defendant the right to obtain witnesses in his or her favor. *See supra* note 240. Yet, just as the Court indicated that Rock's constitutional right to testify was subject to reasonable restrictions, so too would the hypnotically refreshed testimony of defense witnesses be subject to scrutiny. In fact, the introduction of testimony of a previously hypnotized defense witness may meet greater resistance than the situation in which the defendant him or herself testifies posthypnotically. *See infra* note 295.

288. 107 S. Ct. 2704 (1987).

289. While *Rock* is the first United States Supreme Court case to consider its reliability, the issue of hypnosis was previously raised before the Court in Leyra v. Denno, 347 U.S. 556 (1954). Although *Leyra* involved the unusual situation in which the defendant allegedly confessed while under hypnosis, this case provides an excellent illustration of the power of hypnotic suggestion and its potential for abuse.

The defendant in *Leyra* was a 50-year-old man charged with the hammer murders of his parents. *Id.* at 556-57. The defendant was subjected to constant questioning, beginning on the evening his parents' bodies were discovered and continuing shortly after the defendant attended their funeral, allowing the defendant only a few hours of sleep. *Id.* at 558-59. During the interrogation, the defendant was suffering from an acute sinus attack, and was promised that a doctor would tend to him. A "Dr. Helfand" was sent to see the defendant. However, Dr. Helfand was not a medical doctor, but was a psychiatrist with extensive knowledge in hypnosis. *Id.* at 559. Rather than render medical assistance, the doctor spent an hour and a

which the *defendant*, rather than a victim or prosecution witness, voluntarily submitted to hypnosis. The Court in *Rock* rendered a very narrow interpretation of the use of hypnosis, providing for the utmost protection of the constitutional right to testify in spite of the use of hypnosis in an accused's defense.[290] Both the majority and the dissent acknowledged the dangers associated with the use of hypnosis.[291] The difference in the two opinions lies in the value accorded the constitutional rights of the accused. Thus, aside from the unusual case in which the procedure is utilized by a criminal defendant, the use of hypnosis as a method of refreshing recollection remains unresolved. How will the Court consider the use of hypnosis by the prosecution?

The five justices in the majority in *Rock* found that "[t]he use of hypnosis in criminal investigations . . . is controversial, and the current medical and legal view of its appropriate role is unsettled."[292] Since the ruling of the majority rested on constitutional grounds rather than on the reliability of hypnosis, these five votes would not be bound to permit the introduction of hypnotically enhanced testimony in all cases. If the Court was presented with the more typical case of the prosecution introducing such testimony, these five justices may vote to exclude the evidence without being inconsistent with *Rock* since the constitutional issues involved in the prosecution's use would differ from that of the

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half persistently asking suggestive questions "to break [the defendant's] will in order to get him to say he had murdered his parents." *Id.* The defendant was physically and emotionally exhausted and repeatedly complained of his fatigue. *Id.* at 560. Eventually, the defendant accepted the suggestion of the doctor and eventually agreed that he must have committed the crime using the hammer. *Id.* at 562-84 (appendix to the opinion of the Court). The defendant then confessed to the police captain and to two assistant state prosecutors. *Id.* at 560-61. At his subsequent trial, the defendant argued that he had been hypnotized by the psychiatrist. The jury found that he had not been hypnotized and sentenced the defendant to death on the basis of his confessions. The appellate court reversed, finding defendant's confession to have been coerced in violation of the due process clause of the fourteenth amendment. People v. Leyra, 302 N.Y. 353, 365, 98 N.E.2d 553, 560 (1951). On remand, defendant was again convicted. 347 U.S. at 561.

The Supreme Court reversed Leyra's conviction, concluding that his confession was coerced in violation of the fourteenth amendment. *Id.* at 561-62. "We hold that use of confessions extracted in such a manner from a lone defendant unprotected by counsel is not consistent with due process of law as required by our Constitution." *Id.* at 561.

For a general discussion of the use of hypnosis on criminal defendants, see Comment, *Hypnosis of the Accused: Defendant's Choice*, 75 J. CRIM. L. & CRIMINOLOGY 995 (1984).

290. Note also that the dissenting opinion by Justice Rehnquist similarly avoids the resolution of the use of hypnosis in criminal trials. The dissent instead focuses on the right of the state to determine the admissibility of questionable evidence, which takes precedence over constitutional considerations. 107 S. Ct. at 2715 (Rehnquist, J., dissenting).

291. *Id.* at 2713-14, 2715-16 (Rehnquist, J., dissenting).

292. *Id.* at 2713.

criminal defendant. Thus, on constitutional grounds, the *Rock* decision is not binding on the prosection's use of hypnosis.

In the majority opinion, Justice Blackmun touched upon the possibility of reducing the dangers of contamination through the use of safeguards, as well as through such traditional methods of evaluating testimony as corroborating evidence, cross-examination, expert testimony and cautionary instructions.[293] Although the majority opinion did not advocate the use of this procedure as a forensic tool, the recognition of these prophylactics suggests that a per se exclusion of posthypnosis testimony is unwarranted. Rather, the Court seems to lean toward a case by case evaluation of hypnosis—including those cases involving the use of hypnosis by the prosecution—until the area is more clearly defined.

Rock's four dissenters concluded that the Constitution does not mandate an ad hoc approach to determining the admissibility of hypnotically refreshed testimony. Rather, according to the dissenters, lower courts should be given great deference in determining their own standards of admissibility.[294] Since the dissent found that no constitutional issue existed, the reasoning by these four justices may presumably apply to the use of hypnosis by the prosecution or the defense. The conservative members of the dissent suggest that their opinion was not influenced by the fact that *Rock* involved a criminal defendant attempting to introduce hypnotically refreshed testimony on her behalf.[295] Rather, the dissent relied on the right of lower courts to resolve the issue within the parameters of the constitution. Should the Court be faced with the use of hypnosis by the prosecution, the dissenters are bound by their opinion in *Rock* to favor the state's resolution of the issue, whether a state follows a rule of admission or exclusion.

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293. *Id.* at 2713-14.

294. *Id.* at 2716 (Rehnquist, J., dissenting).

295. A further issue may exist when a defense witness, not the defendant, submits to hypnosis prior to trial. The Court in *Rock* recognized the California Supreme Court's decision in People v. Shirley, 31 Cal. 3d 18, 723 P.2d 1354, 181 Cal. Rptr. 243, *cert. denied*, 458 U.S. 860, *cert. denied*, 459 U.S. 860 (1982). The *Shirley* court excluded all testimony of a previously hypnotized prosecution witness, noting the constitutional implications of the use of hypnosis by a criminal defendant:

> [W]hen it is the defendant himself—not merely a defense witness—who submits to pretrial hypnosis, the experience will not render his testimony inadmissible if he elects to take the stand. In that case, the rule we adopt herein is subject to a necessary exception to avoid impairing the fundamental right of an accused to testify in his own behalf.

Id. at 2712 n.15 (quoting People v. Shirley, 31 Cal. 3d 18, 67, 723 P.2d 1354, 1384, 181 Cal. Rptr. 243, 273, *cert. denied*, 458 U.S. 860, *cert. denied*, 459 U.S. 860 (1982) (citing People v. Robles, 2 Cal. 3d 205, 214-15, 466 P.2d 710, 716, 85 Cal. Rptr. 166, 172 (1970))). The United States Supreme Court's opinion in *Rock* did not address the issue of admissibility of posthypncsis testimony of witnesses other than criminal defendants. 107 S. Ct. at 2712 n.15.

The possiblility exists, however, that the potential unreliability of hypnosis as a means to refresh recollection influenced the four dissenters even more strongly than the absense of a constitutional right to testify. If so, a future case involving the use of hypnosis by the prosecution may meet opposition from some members of the dissent based on the unreliable nature of the evidence. Without a more clear indication regarding the basis for the dissenters' votes, a possibility remains that the use of hypnotically refreshed testimony by the prosecution may be excluded as being too unreliable.

As noted above,[296] the use of hypnosis by the prosecution does not raise the same constitutional issues that were at issue in *Rock*. Clearly, the admission of testimony of a previously hypnotized witness is not constitutionally mandated, particularly in light of its questionable reliability. Without the demands of constitutional guarantees to warrant the admissibility of hypnotically refreshed testimony, the Court is not likely to commit to any per se rule of admission or exclusion. Whether the persuasion of the *Rock* majority or dissent is controlling in a case in which the prosecution introduces hypnosis as part of its case, the use of hypnosis by the prosecution must continue to be questioned.

V. CONCLUSION

What happens when the black letter of the law confronts the black art of hypnosis? At this point, the question remains unresolved. While hypnosis seemingly represents a method for the discovery of truth, its potential unreliability signals that it may nonetheless provide an inappropriate basis for a verdict against a criminal defendant. Until there is conclusive evidence establishing the accuracy of hypnosis as a method of refreshing recollection, the use of hypnosis in a criminal trial must be cautiously approached and seriously questioned.

Both the admission and exclusion of hypnotically refreshed testimony is subject to criticism. Traditionally followed methods of determining the admissibility of this testimony must be reevaluated, taking a critical look at the potential impact of hypnosis on a witness' testimony as well as the influence of the Federal Rules of Evidence. Through the use of evidentiary objections for excluding unreliable evidence, courts are provided with additional ammunition for keeping misleading testimony of a previously hypnotized witness from the trier of fact. Absent specific legislation governing the admissibility of hypnotically refreshed testi-

296. *See supra* notes 153-237 and accompanying text.

mony in a criminal proceeding, the rules of evidence will at least pave the way to more proper methods of excluding such testimony.

Additional problems of a constitutional dimension cast doubt on the admissibility of hypnotically enhanced testimony. The dangers inherent in the hypnotic session present the possibility that the admission of hypnotically obtained testimony may deny a criminal defendant the constitutional rights to confrontation of witnesses and due process of law. On the other hand, excluding such testimony could potentially cripple law enforcement, which has found hypnosis to be an invaluable investigative tool. If the police were prevented from using hypnosis upon the slightest possibility that the witness will be called upon to provide testimony in a subsequent criminal prosecution, crucial evidence could be lost. The reliability of such testimony must be carefully considered in each case, recognizing both the special protections reserved for criminal defendants as well as the interests of the state in seeking a just verdict.

The use of hypnosis has the potential to forever influence the memory of the subject, as well as alter the course of the criminal trial in which it is used. While the truth determining process may be best served by liberal standards of admissibility, the criminal justice system must recognize the unique dangers presented by the use of hypnosis, particularly when hypnotically refreshed testimony forms the basis for a verdict against a criminal defendant. Until the trustworthiness of forensic hypnosis is established, the law must exercise caution, lest the system of justice also falls prey to the mesmerizing powers of the unconscious mind.

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