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Reciprocal Hypnosis: A New Standard for the Admission of Post-hypnotic Testimony

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Reciprocal Hypnosis: A New Standard for the Admission of Posthypnotic Testimony

Dr. Jack Fox & Julian Fox*

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INTRODUCTION

Hypnosis.¹ Once the subject of derision, hypnosis is now a tool of formidable utility.² Hypnosis is utilized in areas as diverse as sports,

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1. Although practiced for centuries, it is unclear what hypnosis is. See Comment, *Excluding Hypnotically Induced Testimony on the "Hearsay Rationale,"* 20 VAL. U.L. REV. 619, 625 (1986) [hereinafter Comment, *Hearsay*]. Webster's Dictionary defines hypnosis as

education, dentistry, research, and the law.³ The technique's memory-enhancing capabilities, however, raise a variety of difficult legal questions.⁴ This Article will explore these capabilities and the problems associated with them and will propose a new method for alleviating those problems.

Like any other tool of substantial benefit, hypnosis entails potential dangers. False recollections or "pseudomemories" may be induced in witnesses whose recollections have been "enhanced."⁵ Courts strike various balances when determining whether to admit posthypnotic testimony. No consensus has emerged, however, as to the reliability of posthypnotic testimony, or as to its proper treatment in the judicial system.

Courts can achieve uniformity by adopting the new standard of hypnotic reciprocity. Both the prosecution and the defense should hypnotize the same witness. A bilateral system of hypnosis would

"[a] state that resembles sleep but is induced by a hypnotizer whose suggestions are readily accepted by the subject." Diamond, *Inherent Problems in the Use of Pretrial Hypnosis on a Prospective Witness*, 68 CALIF. L. REV. 313, 316 (1980) (quoting WEBSTER'S NEW COLLEGIATE DICTIONARY 563 (1976)). The following characteristics were described by Professor Hilgard:

- 1) subsidence of the planning function (the subject loses initiative);
- 2) redistribution of attention;
- 3) availability of visual memories from the past and heightened ability for fantasy production;
- 4) reduction in reality testing and a tolerance for persistent reality distortion;
- 5) increased suggestibility;
- 6) adoption of role behavior (subject will adopt a suggested role and carry on complex activities in accordance with that role);
- 7) amnesia for what transpired within the hypnotic state (this is not an essential aspect of hypnosis).

Diamond, *supra* at 316 (quoting E. HILGARD, *THE EXPERIENCE OF HYPNOSIS* 6-10 (1963)).

2. See Diamond, *supra* note 1, at 318. Modern interest and research in hypnosis traces back to the era of Franz Anton Mesmer, a Viennese physician who moved to Paris in 1778 and established a clinic for the practice of "animal magnetism." *Id.* From the time of Mesmer to the present, controversy has surrounded the practice of hypnosis. *Id.* Periods of intense interest were followed by condemnation as quackery. *Id.* With the advent of World War II came a resurgence of interest in hypnosis, particularly as a tool for the treatment of "war neurosis." W. MENNINGER, *PSYCHIATRY IN A TROUBLED WORLD* 309-11 (1948). Since World War II, hypnosis has continued to be effective as a tool for treating mental and emotional conditions. See Diamond, *supra* note 1, at 320. Escaping the old charges of fakery, hypnosis is now a legitimate subject of research among academic psychologists and clinicians. *Id.*

3. See W. KROGER, *CLINICAL AND EXPERIMENTAL HYPNOSIS* 115-117, (2nd ed. 1977); R. UDOLF, *FORENSIC HYPNOSIS* 4 (1983).

4. See generally Orne, *Hypnotically Refreshed Testimony: Enhanced Memory or Tampering with Evidence?*, 51 NAT'L INST. OF JUST., ISSUES AND PRACTICES, 1 (1985); Comment, *Hypnotically Refreshed Testimony and the Balancing Pendulum*, 1985 U. ILL. L. REV. 921 [hereinafter Comment, *Hypnotically Refreshed*]; Note, *Evidence—Admitting Hypnotically Refreshed Testimony—State v. Haislip*, 35 KAN. L. REV. 219, (1986) [hereinafter Note, *Haislip*]; Comment, *Hearsay*, *supra* note 1, at 61.

5. Orne, *supra* note 4, at 11. Dr. Orne defines a pseudomemory as a false recollection that may be brought about by confabulation, suggestion, and organic factors.

enhance the reliability of the subject's testimony and promote accurate assessment of the subject's memory status. Traditional approaches should therefore be re-evaluated in light of this proposal.

This Article consists of five sections. Part I begins with a brief overview of the benefits and dangers associated with forensic hypnosis. Part II then reviews the current judicial postures towards the admissibility of posthypnotic testimony. Part III briefly discusses the constitutionality of posthypnotic testimony. Part IV then presents the concept of hypnotic reciprocity and demonstrates that forensic hypnosis is more reliable in a bilateral context. Finally, Part V argues that posthypnotic testimony should be generally admissible on a bilateral basis.

I. THE BENEFITS AND DANGERS OF HYPNOSIS

During the 1970s, hypnosis was routinely used in criminal investigations.⁶ Police hypnotists employed hypnosis to restore a witness's memory of a crime.⁷ Hypnosis grew rapidly as a useful investigatory technique, but doubts concerning the reliability of the technique grew as well.⁸ Legal questions arose as to the admissibility of hypnotically influenced testimony.⁹ Today, the law is in a state of flux.¹⁰ Modern courts consider both the benefits and the dangers of enhanced memory when determining admissibility standards.¹¹

Hypnosis can serve as a powerful enhancer of memory.¹² Police authorities use this tool to obtain new and otherwise unobtainable

6. See generally Monrose, *Justice with Glazed Eyes: The Growing Use of Hypnosis in Law Enforcement*, JURIS DR., Oct.-Nov. 1978, at 54. Hypnosis often triggers recollection of the suspect's face. See *Clay v. Vose*, 771 F.2d 1 (1st Cir. 1985).

7. See *Clay*, 771 F.2d at 1. Often, the witness hypnotized is the victim of the crime. See, e.g. *United States v. Narciso*, 446 F. Supp. 252 (E.D. Mich. 1977); *People v. Shirley*, 31 Cal. 3d 18, 641 P.2d 775, 181 Cal. Rptr. 243 (1982), cert. denied, 459 U.S. 860 (1982); *Harding v. State*, 5 Md. App. 230, 246 A.2d 302 (1968), cert. denied, 395 U.S. 949 (1969); *State v. Hurd*, 86 N.J. 525, 432 A.2d 86 (1981). Usually, the trauma of the incident induces amnesia in the victim, rendering her unable to recall the critical facts. See Milos, *Hypnotic Exploration of Amnesia After Cerebral Injuries*, 23 INT'L J. CLINICAL & EXPERIMENTAL HYPNOSIS 103, 103 (1975). Dr. Martin Orne believes that hypnosis may be useful for restoring memory following an accident or crime. Orne, *The Use and Misuse of Hypnosis in Court*, 27 INT. J. CLINICAL & EXPERIMENTAL HYPNOSIS 311, 317-318 (1979).

8. See Orne, *supra* note 4, at 12.

9. See *id.*

10. See *id.*

11. See *id.*

12. See *Harker v. State of Maryland*, 800 F.2d 437, 440 (4th Cir. 1986). Various studies have documented the effectiveness of hypnosis in criminal cases. See Orne, *supra* note 4, at 13. These studies consistently found that hypnosis provided valuable new information 60 to 90 percent of the time. *Id.*

evidence.¹³ For example, in Chowchilla, California, twenty-six children were kidnapped from a school bus, and the bus driver was able to recall, under hypnosis, a license plate number which was instrumental in the capture of the kidnappers.¹⁴ Many similar leads have been uncovered in other hypnotic investigations.¹⁵

Unfortunately, the very process which enhances the witness's memory may induce "pseudomemories" as well.¹⁶ Critical judgment is suspended during hypnosis.¹⁷ Subjects experience a heightened state of suggestibility.¹⁸ In order to comply with the hypnotist's perceived expectations, subjects may produce inaccurate recollections.¹⁹ The

13. During the 1970s, police formed specially trained teams of hypnotists. Comment, *Hearsay*, *supra* note 1 at 619. These teams were employed to enhance the memory of crime victims. *Id.* Such cases generally involve a witness who viewed her assailant, but is subsequently unable to recall the face either because the events happened too quickly or because the trauma induced amnesia. *Id.*

14. See Comment, *Hearsay*, *supra* note 1, at 619 n.6; *State v. Beachum*, 97 N.M. 682, 686, 643 P.2d 246, 250 (N.M. Ct. App. 1981) (reporting the facts of the Chowchilla kidnapping). In July of 1975, Franklin Edward Ray (a bus driver) and the twenty-six children in his bus were kidnapped outside of Chowchilla California. Later hypnotized, Ray was able to recall five of the six digits on the license plate of the kidnapper's van. This proved to be a critical breakthrough in the investigation. See Comment, *Hearsay*, *supra* note 1, at 619 n.6.

15. The use of hypno-investigators has reportedly led to hundreds of breakthroughs. Comment, *Hearsay*, *supra* note 1 at 619 n. 6 (quoting Serril, *Breaking the Spell of Hypnosis*, *TIME*, Sept. 17, 1984, at 62). The use of hypno-investigators became so popular that even the Federal Bureau of Investigation instructed some of its agents in hypnosis. *Id.* at 619 n. 1.

16. See *supra* note 6.

17. See Orne, *supra* note 4, at 6. During hypnosis a subject is highly susceptible to suggestions. *Id.* Typically, these suggestions involve a subject's ability to experience alterations in perception, memory, or mood. *Id.* Because the hypnotist defines what is to be experienced, the hypnotic subject forgoes evaluation of both the nature of the suggestion and his reaction to it. *Id.* Consequently, a person's private experience can be altered in a manner that is uncritically accepted by the person. *Id.* at 7. This uncritical acceptance is further enhanced by the subject's expectation of heightened memory, her desire to please the hypnotist, and by the nature of the suggestions received. *Id.* Thus, a subject may give credence to memories so vague and fragmentary that she would not have relied on them before being hypnotized. See Diamond, *supra* note 1, at 337-38.

18. See *United States v. Valdez*, 722 F.2d 1196, 1201 (1984). A subject reacts even to slight nuances in the hypnotist's words or manner while under hypnosis. *Id.* Following the hypnotic induction, the subject's attention focuses intensely on the hypnotist, and there is an increased tendency to please the hypnotist and to comply with both explicit and implicit demands. Orne, *supra* note 4, at 8. Compliance is largely determined by both the subject's expectations regarding the effects of hypnosis and the hypnotist's behavior. *Id.* at 8-9. A subject's preconceptions can greatly enhance the impact of hypnosis on her willingness to produce the desired and expected effects. Moreover, the hypnotist's expectations and desires often result in implicit suggestions and unwitting cues which direct the subject's responses during and after the hypnosis. See *Harker v. State of Maryland*, 800 F.2d 437, 440 (4th Cir. 1986). The hypnotist's tone of voice and body language may communicate these cues. *Id.* The subject subconsciously picks up these cues and says what she thinks the hypnotist wants to hear. See *People v. Shirley*, 31 Cal. 3d 18, 44, 641 P.2d 775, 801, 181 Cal. Rptr. 243, 269 (1982). The end result may be that the subject's description of the event departs from reality to conform to the questioner's expectations. See *Harker*, 800 F.2d at 440.

19. See *Little v. Armontrout*, 835 F.2d 1240, 1246 (8th Cir. 1987); *Harker*, 800 F.2d at 440; *Valdez*, 722 F.2d at 1201.

subject may also confabulate or fill in gaps in her memory to make her recall more coherent.²⁰ These suggestions and confabulations are then hardened in the memory and asserted as absolute fact.²¹ Subsequent to the hypnosis, the subject remains utterly convinced that her assertions are true.²² Thus, it is difficult to distinguish between memory enhancement and memory inducement.

Because memory enhancement and memory inducement are sometimes confused, the admissibility of posthypnotic testimony poses dangers. Courts are unable to agree, however, whether these dangers are offset by the benefits.²³ Consequently, several judicial positions have emerged. These positions are discussed in Part II.

II. THE ADMISSIBILITY OF POSTHYPNOTIC TESTIMONY

Courts agree that witnesses should not be allowed to testify while under hypnosis.²⁴ They also ban the use of out-of-court statements made by a witness while under hypnosis as evidence of the truth of the matters asserted.²⁵ Courts disagree, however, on whether testi-

20. See *Armontrout*, 835 F.2d at 1246; *Harker*, 800 F.2d at 44; *Valdez*, 722 F.2d at 1201; see also *Orne*, *supra* note 4, at 10. Confabulation occurs when the subject fabricates missing details by fantasy or by using parts of other real memories unrelated to the events in question. See *Harker*, 800 F.2d at 440. These fabrications or distortions are not conscious lies—the subject honestly reports them as real. *Orne*, *supra* note 4, at 10. The explicit or implicit demands of the hypnotic situation often suggest to the subject that she accept the fabrications as accurate. *Id.* at 11. Thus, the subject comes to view pseudomemories as genuine memories.

21. See *Armontrout*, 835 F.2d at 1246; *Harker*, 800 F.2d at 440; *Valdez*, 722 F.2d at 1201. See also *Diamond*, *supra* note 1, at 334; *Orne*, *supra* note 4, at 25. After the hypnotic session has ended, the subject may not remember being hypnotized. *Diamond*, *supra* note 1, at 334. Moreover, she may be unable to distinguish between memories held prior to hypnosis and those resulting from the hypnotic session. Comment, *Hypnotically Refreshed*, *supra* note 4, at 928. In addition, hypnosis can greatly strengthen the confidence of a subject without regard to whether the memory was genuine or invented. *Orne*, *supra* note 4, at 25. Thus, a witness may have an unshakable subjective conviction that lends him an aura of credibility. See *Harker*, 800 F.2d at 440. The witness's ability to recall detail may further enhance credibility, regardless of whether the witness is correct on substantive matters. *Orne*, *supra* note 5, at 25. In the worst case, an eyewitness might inaccurately reconstruct the memory of the crime, either by suggestion or confabulation, and then become convinced of its absolute accuracy through memory hardening. *Harker*, 800 F.2d at 440.

22. See *Armontrout*, 835 F.2d at 1246; *Harker*, 800 F.2d at 440; *Valdez*, 722 F.2d at 1201; see also *Diamond*, *supra* note 1, at 334; *Orne*, *supra* note 4 at 25.

23. See *infra* notes 27-61 and accompanying text.

24. See, e.g., *Greenfield v. Commonwealth*, 214 Va. 710, 204 S.E. 2d 414 (1974); see also Comment, *Evidence: Placing Limits on the Admissibility of Hypnotically Refreshed Testimony*, 23 WASHBURN L.J. 697, 697-98 (1984); Note, *Haislip*, *supra* note 4, at 220.

25. See, e.g., *Jones v. State*, 542 P.2d 1316 (Okla. 1975). See also Ruffra, *Hypnotically Induced Testimony: Should it Be Admitted?*, 19 CRM. L. BULL. 293, 304-05 (1983).

mony influenced by a previous hypnosis is admissible.²⁶ This section identifies five prominent admissibility standards.

A. Free Admissibility

In 1968, a Maryland case, *Harding v. State*,²⁷ established the majority rule of the state courts in the 1970s: hypnotically induced testimony is admissible, with hypnosis as an element discounting credibility.²⁸ This rule remains the law in numerous states and several federal circuits today.²⁹ Perhaps its strongest appeal is that it complies with the general trend toward opening the courtroom doors to all relevant evidence for the jury's assessment.³⁰ From a practical point of view, such evidence is often the crux of the prosecution's case.³¹ However, critics find several flaws with this position.

First, the jury may not be capable of assessing the impact of a pre-trial hypnosis on a witness's credibility.³² Technical testimony by experts may be too abstract for a jury to understand or believe.³³ Moreover, the scientific aura of hypnosis may lead jurors to attach undue weight to hypnotically influenced testimony.³⁴

26. See *infra* notes 27-61 and accompanying text.

27. 5 Md. App. 230, 246 A.2d 302 (1968), *cert. denied*, 395 U.S. 949 (1969).

28. See Note, *Haislip*, *supra* note 4, at 224.

29. See, e.g., *Beck v. Norris*, 801 F.2d 242, 244-45 (6th Cir. 1986); *United States v. Awkard*, 597 F.2d, 667, 669 (9th Cir. 1979), *cert. denied*, 444 U.S. 885 (1979); *State v. Wren*, 425 So. 2d 756 (La. 1983); *State v. Brown*, 337 N.W. 2d 138, 151 (N.D. 1983); *State v. Glebock*, 616 S.W. 2d 897, 903-904 (Tenn. Crim. App. 1981); *Chapman v. State*, 638 P.2d 1280, 1282 (Wyo. 1982).

30. See Ruffra, *supra* note 25, at 311; see also Note, *Haislip*, *supra* note 4, at 224.

31. See Note, *Haislip*, *supra* note 4, at 224; see also Ruffra, *supra* note 25 at 311; Dilhoff, *The Admissibility of Hypnotically Influenced Testimony*, 4 OHIO N.U. L. REV. 1, 21-22 (1977).

32. See Comment, *Hypnotically Refreshed*, *supra* note 4, at 940; see also Note, "*Chapman v. State*": *Hypnotically Refreshed Testimony - An Issue of Admissibility or Credibility*, 1983 UTAH L. REV. 381, 386.

33. See generally Comment, *Hypnotically Refreshed*, *supra* note 4, at 939-40.

34. See Comment, *Hypnotically Refreshed*, *supra* note 4, at 929. Hypnotically enhanced testimony, like other scientific processes, may "assume a posture of mystic infallibility in the eyes of a jury of laymen." *United States v. Addison*, 498 F.2d 741, 744 (D.C. Cir. 1974). Further complicating matters, many jurors believe that all perceptions are perfectly recorded in the memory and that hypnosis can simply retrieve an accurate recording. See Comment, *Hypnotically Refreshed*, *supra* note 4, at 929. Recent scientific experiments, however, suggest a reconstructive theory of memory. See R. UDOLF, *supra* note 3, at 29-31; see also Putnam, *Hypnosis & Distortions in Eyewitness Memory*, 27 INT'L J. CLINICAL & EXPERIMENTAL HYPNOSIS 437 (1979). Under this theory, memory is a *constructive* process by which information received after an event is integrated by the mind into the memory representation of that event. *United States v. Valdez*, 722 F.2d 1196, 1200 (5th Cir. 1984). Thus, an individual's hypnotically induced memory may be a product of both original recall and memory reconstruction. See Note, *The Admissibility of Testimony Influenced by Hypnosis*, 67 VA. L. REV. 1203, 1216-18 (1981).

Second, critics feel this position leaves too little discretion for the court to exclude testimony when the prejudice of the evidence outweighs the potential benefits.³⁵ Thus, testimony contaminated through impermissible hypnotic suggestions might become admissible. Admission of such testimony could prejudice the jury. Therefore, the free admissibility approach offers the potential for the abuse of forensic hypnosis.

B. *Qualified Admissibility*

A number of courts have admitted posthypnotic testimony only on a *qualified* basis. Testimony qualifies for admission only if the probative value of the evidence outweighs its prejudicial effect.³⁶ Testimony is thus evaluated on a case-by-case basis rather than being automatically admitted or excluded.

This approach has several advantages. Testimony produced from a highly suggestive hypnotic encounter is excluded. Testimony for which an independent basis of reliability is established, however, is admissible. Thus, the jury participates in the fact-finding process only when there is some reliable basis for determining the facts.

C. *Conditional Admissibility*

Some courts have required compliance with specific procedural safeguards as a condition precedent to admissibility.³⁷ The Supreme Court of New Jersey pioneered this approach in the landmark decision of *State v. Hurd*.³⁸ *Hurd* adopts a two-part test for admissibi-

35. See Comment, *Hypnotically Refreshed*, *supra* note 4, at 940.

36. Under this standard, the probative value of the testimony would have to outweigh its prejudicial effects in order to qualify for admission. See, e.g., *McQueen v. Garrison*, 814 F.2d 951, 958 (4th Cir. 1987) (reliability evaluation); *Wicker v. McCotter*, 738 F.2d 487, 492-93 (5th Cir. 1986) (probative value of the testimony weighed against its prejudicial effect) *cert. denied*, 106 S. Ct. 3310 (1986); *Brown v. State*, 426 So. 2d 76, 90 (Fla. Dist. Ct. App. 1983) (admissibility determination); *State v. Iwakiri*, 106 Idaho 618, 625, 682 P.2d 571, 578 (1984) (weigh "totality of circumstances"); *State v. Beachum*, 97 N.M. 682, 690, 643 P.2d 246, 254 (N.M. Ct. App. 1981) (reliability determination).

37. The leading case in this line is probably *State v. Hurd*, 86 N.J. 525, 432 A.2d 86 (1981). See also *Spryncznatyk v. General Motors Corp.*, 771 F.2d 1112, 1122-23 (8th Cir. 1985), *cert. denied*, 475 U.S. 1046 (1986); *House v. State*, 445 So. 2d 815, 826-27 (Miss. 1984); *State v. Weston*, 16 Ohio App. 3d 279, 287, 475 N.E. 2d 805, 813 (1984); *State v. Martin*, 33 Wash. App. 486, 656 P.2d 526 (1983), *rev'd*, 101 Wash. 2d 713, 684 P.2d 651 (1984). The state of Oregon has codified the procedural safeguard approach. Or. Rev. Stat. § 136.675 (1985).

38. *Hurd*, 86 N.J. 525, 432 A.2d 86.

lity.³⁹ First, the court determines whether hypnosis was an appropriate method for refreshing the witness's recall.⁴⁰ Second, the court assesses whether the hypnotic procedures were reasonably reliable.⁴¹ This assessment includes mandatory compliance with six procedural safeguards recommended by Dr. Martin T. Orne.⁴²

First, a qualified psychiatrist or psychologist must perform the hypnosis. Such interrogation increases the accuracy of hypnotic recall.⁴³ Second, the hypnotist must be independent of the litigation. This alleviates risks that the interest and beliefs of the hypnotist will contaminate the witness's recollection.⁴⁴

Third, law enforcement personnel can only supply the hypnotist information in a recorded memorandum.⁴⁵ This facilitates a later assessment of suggestiveness, as the court would know the extent of information which the hypnotist could have given the subject.⁴⁶ The hypnotist is also required to record a statement of the subject's prehypnotic memories.⁴⁷ This fourth requirement provides a basis for determining the extent of a subject's pre-hypnotic knowledge.⁴⁸

Fifth, hypnotic sessions must be recorded so that the reliability of the hypnotic encounter can be accurately assessed.⁴⁹ The court did not, however, mandate a videotape as does Dr. Orne.⁵⁰ Most commentators agree with Dr. Orne, noting that any other method of recording would inadequately disclose subtle cuing.⁵¹ Finally, the court provided that only the hypnotist and the subject could be present during any phase of the hypnotic session, including prehypnotic testing and the posthypnotic interview.⁵² This requirement minimizes the risk of suggestive communication.⁵³

The procedural safeguard approach attempts to maximize the reliability of hypnosis. However, some courts doubt the wisdom of the conditional approach. First, these procedural safeguards are hard to

39. *Id.* at 554-55, 432 A.2d at 95-96.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Hurd* at 545, 432 A.2d at 96.

44. *Id.*

45. *Id.* at 546, 432 A.2d at 96.

46. *Id.*

47. *Id.*

48. *Id.*

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

50. *Id.*

51. Comment, *Hypnotically Refreshed*, *supra* note 4, at 942.

52. *Hurd*, 86 N.J. at 546, 432 A.2d at 97.

53. *Id.*

administer.⁵⁴ An otherwise easy procedure becomes a rigorous enterprise. Second, special hearings and appeals could escalate so that "the game is not worth the candle."⁵⁵ Finally, even with the administration of these safeguards, the risk of hypnotic unreliability cannot be totally eliminated.⁵⁶ Thus, many courts have rejected the conditional approach as either too cumbersome or too lenient.

D. Restricted Admissibility

Some courts allow previously hypnotized witnesses to testify, but *restrict* their testimony to those matters remembered (and documented) prior to hypnosis.⁵⁷ These courts view hypnotically induced testimony as data gathered in a scientific experiment.⁵⁸ As such, the testimony must meet the general admission standard applicable to scientific procedures or techniques required by the *Frye* test.⁵⁹ Under *Frye v. United States*,⁶⁰ evidence produced by a scientific technique is admissible only when that technique is deemed reliable by the relevant scientific community.⁶¹ Because hypnotic proceedings are not considered generally reliable, posthypnotic testimony fails the *Frye* test.⁶²

Obviously, this approach goes a long way toward preventing the admission of unreliable evidence. Some courts, however, are skeptical of such generalized exclusions.⁶³ Restriction of post hypnotic testimony could seriously damage a prosecution case, especially if the main witness (usually the victim) has little prehypnotic memory of the events.⁶⁴ Such testimony is not necessarily unreliable, especially if it is confirmed by independent evidence. Thus, in their zeal to promote reliability, courts might exclude valuable and relevant evidence.

54. Note, *Haislip*, *supra* note 4, at 226.

55. *People v. Shirley*, 31 Cal. 3d 18, 39, 641 Cal. Rptr. 243, 787, *cert. denied*. 459 U.S. 860 (1982).

56. See Orne, *The Use and Misuse of Hypnosis in Court*, 27 INT'L J. CLINICAL & EXPERIMENTAL HYPNOSIS 311, 317-18 (1979).

57. See, e.g. *State v. Mena*, 128 Ariz. 226, 624 P.2d 1274 (1981); *People v. Quintanar*, 659 P.2d 710 (Colo. Ct. App. 1982); *State v. Peoples*, 311 N.C. 515, 319 S.E.2d 177 (1984); *People v. Hughs*, 59 N.Y.2d 523, 453 N.E.2d 484, 466 N.Y.S.2d 255 (1983).

58. See Comment, *Hypnotically Refreshed*, *supra* note 4, at 944.

59. See *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

60. 293 F. 1013 (D.C. Cir. 1923).

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

62. See Comment, *Hypnotically Refreshed*, *supra* note 4, at 945-46.

63. See *supra* notes 27-44 and accompanying text.

64. See Note, *Haislip*, *supra* note 4, at 229.

E. Inadmissibility

Some jurisdictions that adopt the *Frye* test ban previously hypnotized witnesses from testifying altogether.⁶⁵ The question is seen as a problem of competence, not credibility.⁶⁶ The suggestive effects of hypnosis are regarded as so pronounced that the witness is *contaminated*.⁶⁷ Even posthypnotic testimony corroborated by documented prehypnotic statements is unacceptable.⁶⁸ Courts focus on the memory hardening effects of hypnosis.⁶⁹ The entire testimony is clothed in an artificial but impenetrable aura of certainty.⁷⁰ Opportunity for proper cross-examination is impaired.⁷¹ In short, these courts view hypnosis as too dangerous for the courtroom.

Many courts find this position unacceptable.⁷² Not only is evidence which can be independently corroborated excluded, but testimony tracing back to prehypnotic testimony is excluded as well.⁷³ There is little doubt that reliable evidence is sacrificed for the simplicity of this bright-line rule.

III. CONSTITUTIONAL ISSUES REGARDING POSTHYPNOTIC TESTIMONY

The Supreme Court addressed the constitutionality of excluding posthypnotic testimony in *Rock v. Arkansas*.⁷⁴ In *Rock*, the defendant, accused of killing her husband, underwent hypnosis to refresh her memory.⁷⁵ Subsequent to the hypnosis, she remembered details indicating that her gun was defective and had misfired when her husband hit her arm during a struggle.⁷⁶ An expert examined the gun

65. See, e.g., *People v. Shirley*, 31 Cal. 3d 18, 641 P.2d 775, 181 Cal. Rptr. 243, cert. denied, 459 U.S. 860 (1982); *Collins v. State*, 52 Md. App. 186, 447 A.2d 1272 (1982), *aff'd*, 296 Md. 670, 464 A.2d 1028 (1983); *People v. Gonzales*, 415 Mich. 615, 329 N.W.2d 743 (1982); *State v. Mack*, 292 N.W. 2d 764 (Minn. 1980).

66. See Note, *Haislip*, *supra* note 4, at 228.

67. *Id.* at 228-29.

68. See *id.*

69. See *Shirley*, 31 Cal. 3d at 68, 641 P.2d at 806, 181 Cal. Rptr. at 274, cert. denied, 459 U.S. 860 (1982).

70. *Id.*

71. See Comment, *Hypnotically Refreshed*, *supra* note 4, at 928.

72. See *supra* notes 27-54 and accompanying text.

73. See *supra* text accompanying note 68.

74. 107 S. Ct. 2704 (1987).

75. *Id.* at 2706.

76. *Id.* at 2707.

and corroborated that it had a tendency to misfire when dropped or hit.⁷⁷ Rock was not allowed to testify, however, because Arkansas restricted posthypnotic testimony to events remembered and documented prior to hypnosis.⁷⁸ The Supreme Court overruled the state decision and held that per se exclusion violated Rock's fifth, sixth, and fourteenth amendment right to testify on her own behalf.⁷⁹

The decision in *Rock* was narrowly confined to the issue of whether a criminal defendant's testimony could be arbitrarily excluded on a per se basis.⁸⁰ The Court did not address whether a witness's testimony could be arbitrarily excluded.⁸¹ The decision does, however, cast doubt upon the validity of per se exclusions. Such exclusions were described as arbitrary, since corroborating evidence and other means of assessing accuracy might render testimony reliable in an individual case.⁸²

While the Court has never addressed the admissibility of a witness's posthypnotic testimony, several federal circuits have addressed this issue.⁸³ These courts held that admission of posthypnotic testimony did not violate a defendant's sixth amendment right to confrontation when: 1) the witness was cooperative; 2) experts were allowed to testify as to the possible effects of hypnosis on a witness's memory; and 3) the witness could be sufficiently cross-examined.⁸⁴ Posthyp-

77. *Id.*

78. *Id.* The Arkansas Court banned admission of any testimony which could not be traced to a documented prehypnotic memory. *Id.* The Arkansas Court relied on a California case, *People v. Shirley*, 31 Cal. 3d 18, 723 P.2d 1354, 181 Cal. Rptr. 243, cert. denied, 459 U.S. 860 (1982), for much of its reasoning as to the unreliability of hypnosis. But while the California court adopted a stricter general rule—barring posthypnotic testimony entirely—it explicitly exempted a defendant's testimony on her own behalf. *Shirley*, 31 Cal. 3d at 67, 723 P.2d at 1384, 181 Cal. Rptr. at 273.

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

80. *Id.* at 2712. The Court explicitly states, "This case does not involve the admissibility of testimony of previously hypnotized witnesses other than criminal defendants and we express no opinion on that issue." *Id.* at 2712 n.15.

81. *See id.*

82. *See id.* at 2714.

83. *See, e.g., Bundy v. Dugger*, 850 F.2d 1402 (11th Cir. 1988); *Harker v. Maryland*, 800 F.2d 437 (4th Cir. 1986); *Wicker v. McCotter*, 783 F.2d 487 (5th Cir. 1986); *Beck v. Norris*, 801 F.2d 242 (6th Cir. 1986); *Clay v. Vose*, 771 F.2d 1 (1st Cir. 1985).

84. *See Bundy*, 850 F.2d at 1415-16; *Harker*, 800 F.2d at 440; *Wicker*, 783 F.2d at 492; *Beck*, 801 F.2d at 245; *Clay*, 771 F.2d at 4. *See also McQueen v. Garrison*, 814 F.2d 951, 961-62 (4th Cir. 1987) (sixth amendment not violated where testimony resulting from a faulty hypnosis is supported by considerable corroboration); *Robinson v. Maynard*, 829 F.2d 1501, 1508 (10th Cir. 1987) (admission of posthypnotic testimony is not constitutional error where a reviewing court determines that adequate safeguards have been employed to insure reliability of the testimony). In addition, the Eight Circuit has held that assistance of a hypnotic expert in evaluating the credibility of posthypnotic testimony is a constitutional right, and such expertise must be provided to indigent defendants. *Little v. Armontrout*, 835 F.2d 1240, 1244-

notic testimony is therefore constitutionally permissible whenever credibility may be adequately litigated.

IV. RECIPROCAL HYPNOSIS: AN OVERLOOKED FACTOR IN THE RELIABILITY DEBATE

No general consensus concerning the admissibility of posthypnotic testimony has emerged in the American legal system. States strike various balances when weighing the benefits against the potential for prejudice. Courts have uniformly misaddressed the problem, however, by considering hypnosis in a unilateral context.

The current system of unilateral hypnosis is unfair because it tilts the judicial system in favor of one side. Both sides bring in expert witnesses to discuss the reliability of a hypnotic procedure performed by one side.⁸⁵ Tapes are presented of a hypnotic procedure performed by one side.⁸⁶ A witness's testimony is selectively enhanced by one side.⁸⁷ Reliability and fairness dictate that this system be changed. Both sides should have the opportunity to enhance the witness's memory. Both sides should have the opportunity to introduce videotapes. Both experts should be able to testify based on a firsthand examination of the witness. Only when these measures are implemented will the jury have an adequate fact-finding basis.

In focusing exclusively on reliability, courts have overlooked the issue of reciprocity. Reliability is in doubt, however, partly *because* reciprocity is lacking. Unilateral hypnosis provides an imbalanced perspective. A balanced perspective can be restored, however, by viewing the subject's memory through a second hypnotic lens. Specifically, this Article proposes a five-stage technique of hypnotic examination.⁸⁸

45 (8th Cir. 1987). *But see* U.S. v. Bercier, 848 F.2d 917, 919 (8th Cir. 1988) (a defendant suffering memory loss is not automatically entitled to expert hypnotic assistance in order to improve his recall).

85. Courts which admit posthypnotic testimony generally permit expert testimony regarding the reliability of hypnosis. *See, e.g., Harker*, 800 F.2d at 440; *Clay*, 771 F.2d at 4. The Eighth Circuit held that provision of an hypnotic expert to an indigent defendant is constitutionally required where the victim's posthypnotic identification was the primary inculpatory evidence. *See Armontrout*, 835 F.2d at 1245.

86. *See, e.g., Harker*, 800 F.2d at 440; *Clay*, 771 F.2d at 4. Audio or video tapes of the hypnotic procedure are admissible only for the purpose of evaluating the witness's credibility, not as evidence of the truth of the matters asserted in the tapes. *See Clay*, 771 F.2d at 3.

87. Selective enhancement need not be deliberate. It is simply endemic to the hypnotic procedure that the subject desires to please the hypnotist and will divulge or withhold information in accordance with that desire. *See supra* note 18 and accompanying text.

88. For a detailed description of the reciprocal hypnotic procedure, *see* Appendix. Briefly,

The first four stages involve generating data. A subject is asked to describe in general terms what she believes happened. Then she is asked to provide details of what she actually perceived.⁸⁹ A regression through the events is followed by questions calling for more detail.⁹⁰ After all the data is generated, it is evaluated in stage five. Information produced within the hypnotic session enables the expert to analyze both the content of the subject's memory and the origin of those memories.⁹¹ Contradictions produced may be used to apprise the jury of hypnotic dangers.⁹²

This reciprocal hypnotic technique will promote memory enhancement, diagnostic assessment, and jury appraisal. These functions are discussed below, focusing on how they affect the reliability of hypnosis as a forensic tool.

the procedure is outlined as follows:

In stage one of the hypnosis, the subject will be asked to describe what she *believes* happened concerning the events in question. In stage two, the subject will be asked to record only those events which she actually *perceived*; namely, what she actually saw, heard, felt, etc. If the answers to stage one and two are inconsistent with each other, this indicates that the previous hypnosis induced fabrication of a belief system within the subject.

Stage three involves a *regression* to the time of the events in question. The subject is asked to relive the events in question and describe them aloud. Because the perceived expectations and desires of the hypnotist are likely to be different than under the prior hypnosis, the subject may produce a different set of recollections. Those memories which remained constant between the two hypnotic sessions are likely the product of original recall. Those which vary are likely confabulations.

Stage four will involve an *amplification* of detail. The subject will be asked to remember the events in greater and greater detail. If the subject begins to contradict herself or the known facts, this would cast doubts upon the reliability of the subject's present memory and would suggest that this memory was likely a product of suggestion and confabulation. Furthermore, faced with the demand for detail, the subject might become less certain of her original identification. This would serve as a diagnostic indication that the subject's unshakable certainty developed as an artifact of the original hypnosis.

Stages one through four serve as the basis for stage five—the evaluation. Information received regarding the *content* of the subject's memory is now used to evaluate the *status* of the subject's memory. If the subject's answers remained consistent within the hypnosis and did not contradict answers given in the previous hypnosis, this would indicate that the subject was in fact reciting original recall and that her memory was not altered by the first hypnosis. If, however, the subject contradicts herself within the hypnosis and between the two hypnotic procedures, her present recollection is probably based on confabulation rather than original recall.

Id.

89. See *id.* and Appendix.

90. See *id.*

91. See *id.*

92. A video showing a subject wildly confabulating would apprise a jury of hypnotic dangers much more concretely than theoretical explanation.

Hypnosis involves a diagnostic examination of the content of a subject's memory.⁹³ That content might include memories suppressed under the original hypnosis but elicited under a reciprocal hypnosis.⁹⁴ Thus, a reciprocal hypnotic examination may be of great value as a memory enhancer.

As a tool of memory enhancement, reciprocal hypnosis will balance an otherwise "loaded" recollection.⁹⁵ For example, a memory enhancement procedure conducted by the prosecution might elicit—quite unintentionally—only those recollections favorable to the prosecution.⁹⁶ Details favorable to the defense could remain suppressed.⁹⁷ A defense hypnosis of the same witness will balance the testimony by providing an opportunity to elicit those details. This would increase the reliability of the witness's testimony.

An examination of the content of the subject's memory is a preliminary step in evaluating memory status.⁹⁸ A primary purpose of reciprocal hypnosis is to indicate diagnostically whether the status of the subject's memory content is that of original recall or confabulation and memory hardening. Original sensory memory impressions are not erased;⁹⁹ they may, however, be recalled in a modified fashion.¹⁰⁰ Contradictions produced within the hypnotic session could lead to the conclusion that the subject's recall is unreliable.¹⁰¹ The absence of such contradictions would lead to a contrary conclusion.¹⁰² Thus, reciprocal hypnosis would serve as a powerful tool for assessing the impact of the original hypnosis on the subject's memory.

93. See *supra* note 88 and Appendix.

94. *Id.*

95. Details favorable to the prosecution are more likely to be forthcoming in a prosecution hypnosis; likewise, details favorable to the defense are more likely to be elicited in a defense hypnosis. Subjects are generally more willing to provide information if that information is consistent with the perceived expectations of the hypnotist. Memory enhancement is thus a selective process which can "load" a memory in the absence of reciprocity.

96. See *supra* note 95.

97. *Id.*

98. See *supra* note 88 and Appendix.

99. Memory is generally thought to involve a *reconstructive process*; hypnotically induced recall is therefore thought to contain elements of both original memory and memory reconstruction. See *supra* note 34.

100. The distinction between storage and recall is well recognized in the psychological literature. See J. HOUSTON, *FUNDAMENTAL OF LEARNING AND MEMORY* 331 (1981). Many memories which are stored are difficult to retrieve. M. ROSENZWEIG & A. LEIMAN, *PSYCHOLOGICAL PSYCHOLOGY* 628 (1982). Experiments have shown that stimuli such as electroshock will interfere with recall but not storage. J. KALAAT, *BIOLOGICAL PSYCHOLOGY* 385 (1981). Memories seemingly erased can often be retrieved under the influence of drugs, delay, or reminder stimuli. *Id.*

101. See *supra* note 88 and Appendix.

102. *Id.*

Finally, tapes of the reciprocal hypnotic proceeding will apprise the jury in a concrete manner as to the practical limits and dangers of hypnosis. Jurors sometimes exhibit an undue reverence for scientific procedures.¹⁰³ Upon exposure to tapes of the reciprocal examination, however, the jury may have direct visual or audio information to the contrary.¹⁰⁴ Contradictions produced within the hypnotic proceeding would eliminate any belief that hypnosis can produce perfect recall of a subject's perceptions or experiences. Distorting aspects of hypnotic proceedings would be viewed in a concrete context. The myth of the "mystic infallibility"¹⁰⁵ of hypnosis would be crushed under the weight of evidence. Thus, admission of reciprocal hypnotic tapes would alleviate the danger of jury misconception.

While reciprocity would alleviate the problems associated with selective memory enhancement and jury misconception, it is not without dangers. The reciprocal procedure may itself alter the subject's memory. The following responses are made to this criticism.

First, reliability is a function of replication. Replication is science's system of checks and balances for controlling and exposing experimenter and experimental artifacts.¹⁰⁶ Consider, for example, the "experimenter expectancy effect."¹⁰⁷ In the behavioral sciences, the experimenter's hypothesis may unintentionally influence her behavior towards the subject.¹⁰⁸ The subject responds to this behavior by

103. See *supra* note 34.

104. Tapes of the reciprocal hypnosis offer a concrete method of demonstrating the fallibility of hypnosis to the jury. If the jury sees the subject contradicting herself or engaging in wild confabulation, they will be skeptical of the hypnotic procedure. But if the jury only sees tapes of the original hypnosis, abstract expert testimony regarding hypnotic dangers might be disregarded. Jurors tend to be skeptical of psychological testimony in general and are more likely to believe what they see with their own eyes than what they hear from an expert.

105. As one court noted, scientific processes may "assume a posture of mystic infallibility in the eyes of a jury of laymen." *United States v. Addison*, 498 F.2d 741, 744 (D.C. Cir. 1974).

106. R. ROSENTHAL & R. ROSNOW, *ESSENTIALS OF BEHAVIORAL RESEARCH* 111 (1984).

107. Robert Rosenthal has repeatedly demonstrated this effect. See generally, R. ROSENTHAL, *EXPERIMENTER EFFECTS IN BEHAVIOR RESEARCH* (1976). In one study, a dozen experimenters were each to teach five rats to run a maze. Rosenthal, *The Effect of Experimenter Bias on the Performance of the Albino Rat*, 8 *BEHAVIORAL SCIENCE*, 183 (1963). Half of the experimenters were told that their rats had been bred to be "maze-bright." The remaining experimenters were told that their rats were bred "maze-dull." There was no actual difference between the rats. Rats trained by experimenters expecting brighter behavior demonstrated significantly superior learning compared to rats trained by experimenters expecting dull behavior. *Id.*

108. R. ROSENTHAL & R. ROSNOW, *ESSENTIALS OF BEHAVIORAL RESEARCH* 110 (1984). Perhaps the classic example of self-fulfilling prophecy is the case of clever Hans. Hans, a horse, was able to "verbalize" difficult mathematical calculations by tapping his hoof. He spelled, read,

reacting in a manner tending to confirm the experimenter's hypnosis.¹⁰⁹ Replication with different experimenters is a common way of controlling such artifacts.¹¹⁰

Second, memory alterations occurring during the reciprocal hypnosis indicate that alterations probably occurred during the first hypnosis.¹¹¹ A prosecution witness demonstrating a tendency to confabulate under a defense hypnosis is certainly likely to confabulate under a prosecution hypnosis.¹¹² Thus, a reciprocal hypnotic examination is required to adequately inform the jury of the critical facts.

Third, if hypnosis is useful to the prosecution as a memory-enhancing technique, it is useful to the defense as well.¹¹³ To allow hypnosis on one side and not the other is blatantly discriminatory.

And finally, why should the adverse side bear all the risk? If the prosecution introduces hypnotically influenced testimony, the prosecution should bear the risk that the subject's memory will be subsequently altered upon reciprocal examination. It is procedurally unfair to withhold from the defense the only technical means of evaluating the reliability of the previous hypnosis.¹¹⁴ Inherent risk exists in the admission of posthypnotic testimony—and neither the defense nor the prosecution should bear the entire burden alone.

At this point, critics will probably demur. Even if reciprocity promotes reliability, they will argue that the time and expense of litigation outweighs possible benefits. This is not a persuasive argument. Hypnotically influenced testimony is often used to prosecute defendants accused of serious violent crimes.¹¹⁵ Criminal penalties are substantial. If the testimony is important, the defense must have the opportunity to accurately litigate the credibility issue. And if the

and solved problems of musical harmony. A distinguished panel of scientists ruled that no fraud was involved. Pfungst, in a series of experiments, demonstrated that Hans could only answer the questions when the questioner or experimenter himself knew the answer and was within the horse's view. *Id.* at 110-111. An unconscious forward movement of the experimenter's head signaled Hans to start tapping. *Id.* at 111. A tiny upward movement of the questioner's head or a raising of his eyebrows signaled Hans to stop. *Id.*

109. See *supra* note 108.

110. R. ROSENTHAL, *supra* note 106, at 111.

111. Certain subjects may be particularly responsive to suggestion. Excessive confabulation during reciprocal hypnosis is evidence of a heightened susceptibility to suggestion. Possession of this trait casts serious doubts upon the reliability of the original hypnosis.

112. Witnesses generally want to see crime solved and justice done. Orne, *supra* note 4, at 10. They tend to identify with the police or prosecution and will often volunteer under hypnosis more than their meager memory warrants. *Id.*

113. See text accompanying notes 94-98.

114. The same argument applies to the hypnosis of a defense witness. It is procedurally unfair to allow such a hypnosis unless the prosecution can perform a reciprocal hypnosis.

115. Orne, *supra* note 4, at 15.

testimony is unimportant, it should be excluded on legal relevance grounds.

V. RECIPROCAL ADMISSIBILITY: A NEW STANDARD

The previous section demonstrated forensic hypnosis to be markedly more reliable in a bilateral context. Because reliability is the central issue in most admissibility cases, the concept of reciprocity should fundamentally revolutionize admissibility standards. Per se rules of admissibility or inadmissibility would be rendered obsolete. This Article recommends a new uniform standard of *reciprocal admissibility*, in which reciprocal hypnosis would be a condition precedent to admissibility.¹¹⁶

Evidentiary rules involving per se restriction or exclusion of post-hypnotic testimony are over-encompassing. First, independent evidence may exist which corroborates the witness's story.¹¹⁷ Exclusion of the testimony renders this other evidence less meaningful.¹¹⁸ Second, the hypnosis may have no appreciable effect on the witness's memory.¹¹⁹ And finally, the reciprocal hypnotic procedure provides a reasonable basis for assessing the witness's reliability.¹²⁰ The arbitrary exclusion of potentially reliable evidence cannot be justified.

Likewise, rules of general admissibility are insufficient to promote justice. Admission of posthypnotic testimony on a unilateral basis is procedurally unfair. Both sides should have the opportunity to use the same sorts of interviewing techniques. Failure to present such an opportunity might violate defendant's sixth amendment right to confrontation.¹²¹ Thus, these courts will have to recognize the right of reciprocal hypnosis as a prerequisite to admissibility.

116. While the *right* to conduct a reciprocal hypnosis would be absolute, that *right* could be waived by the party possessing the right. Also, no witness should ever be forced to undergo involuntary hypnosis. Failure to cooperate in a reciprocal hypnosis should merely result in exclusion of the witness's testimony.

117. See text accompanying note 82.

118. The Court in *Rock*, for example, suggested that the "expert's description of the gun's tendency to misfire would have taken on greater significance if the jury had heard [Rock] testify that she did not have her finger on the trigger and that the gun went off when her husband hit her arm." *Rock v. Arkansas*, 107 S. Ct. 2704, 2712 (1987).

119. It is possible to undergo memory enhancement without having one's memory enhanced or altered by the procedure.

120. See *supra* note 88 and Appendix.

121. See text accompanying note 84. Should a witness refuse to participate in a reciprocal hypnosis, then one can argue that she is uncooperative. Experts can claim inadequate opportunity to expose the effects of hypnosis. Finally, cross-examination is insufficient since the prosecution had access to a pre-trial interview technique unavailable to the defense. See *id.*

Reciprocal admissibility is superior to either a standard of inadmissibility or unilateral admissibility. Three questions, however, still need to be addressed. First, should any procedural safeguards be required in a bilateral system of hypnosis? Second, how much discretion should a judge have to exclude posthypnotic testimony? And third, is reciprocity consistent with modern developments in constitutional law?

Addressing the first question, complex and elaborate procedural safeguards should not be compulsory. Compliance with elaborate safeguards may be difficult, and proof of such compliance is even more difficult. Errors in trial court rulings jeopardize otherwise unimpeachable convictions. Procedural issues overshadow reliability issues and generate a panoply of issues for appeal.

Two important safeguards are easily implemented, however, and should be mandated. First, a videotape of each hypnotic session should be required.¹²² Second, only licensed psychiatrists or psychologists should administer the hypnosis.¹²³ These safeguards will maximize reliability while minimally affecting determinations of proof.

Regarding the second question, judges must have some discretion to exclude testimony. Litigation over reliability may be too costly or burdensome for a particular case. Subjects may not cooperate during the reciprocal hypnosis.¹²⁴ Testimony might be overly-prejudicial. Under ordinary rules of evidence, the judge may exclude logically relevant evidence when probative value is offset by other countervailing factors. No special exception need be made to exclude posthypnotic testimony on grounds of legal irrelevance. The judge's discretion should not be all-encompassing, however. The adversarial system of reciprocity is best suited for determining questions of fact in the absence of unusual circumstances.

Finally, a national system of hypnotic reciprocity is fully consistent with recently developing constitutional law. The Supreme Court

122. Although the *Hurd* court required only audio tapes, a video tape is required for accurate assessment of the hypnotic session. Orne, *supra* note 4, at 44. The influence of subtle nonverbal cues can be profound and are not identifiable from an audio tape. *Id.* at 21.

123. Lay hypnotists do not have the requisite training in the relevant psychological issues. Consequently, they are much more likely to conduct a suggestive hypnosis than a trained psychologist or psychiatrist. Additionally, the strong interest of a police hypnotist in solving a case is easily communicated to a subject and consequently is likely to alter her memory.

124. A more difficult problem arises when the subject cooperates but is unable to enter a hypnotic trance. Failure to induce hypnosis could be the result of either poor hypnotic technique or an unconscious reluctance to be hypnotized. The judge should have the discretion to either exclude the testimony or admit it with a special cautionary instruction that it be viewed skeptically.

decision of *Rock v. Arkansas*¹²⁵ casts doubt upon the validity of wholesale exclusion of testimony. A defendant's testimony may be excluded only if the reliability of the witness's testimony cannot be fairly and accurately litigated.¹²⁶ Likewise, the circuit courts require fair and accurate opportunity to litigate as an admission requirement.¹²⁷ Thus, the Constitution protects posthypnotic testimony only when full litigation regarding the effects of hypnosis is possible. This requires hypnotic reciprocity. Accurate litigation is possible only if the witness cooperates with the hypnotic expert of the other side.¹²⁸ That expert must have the opportunity to conduct a full and complete examination. Without that opportunity, sufficient cross-examination is impossible, adequate expert testimony is impossible, and reliability assessment is severely impaired.

CONCLUSION

Scientists recognize dangers in using hypnosis to enhance memory.¹²⁹ Courts strike various balances in weighing these dangers against potential benefits.¹³⁰ Five dominant admissibility standards have emerged.¹³¹ These five positions consider hypnotic reliability in a unilateral context. The reliability of the fact-finding process would be elevated, however, if hypnosis were administered bilaterally.¹³² Traditional admissibility standards must therefore be re-evaluated. Courts should promote reliability and uniformity by adopting a single standard of hypnotic reciprocity.

125. 107 S. Ct. 2704 (1987).

126. See text accompanying note 82.

127. See text accompanying notes 81-84.

128. Adequate expert examination requires the witness's cooperation in a reciprocal hypnosis.

129. See *supra* notes 6-13 and accompanying text.

130. See *supra* notes 24-73 and accompanying text.

131. See *supra* notes 24-73 and accompanying text.

132. See *supra* notes 85-115 and accompanying text.

Appendix

A BRIEF OUTLINE OF THE APPLICATION OF RECIPROCAL HYPNOSIS IN ADVERSARIAL COURT PROCEEDINGS

The purpose of the examination under hypnosis is to establish some basis on which one may separate confirmed observations from uncertain recollections and these from fabrications which may have been induced by the subject's own bias or by the expectations of the person conducting the hypnosis. The last may be elicited nearly directly, through the asking of leading questions (i.e., "did he wear a coat?"), or very indirectly, through the tone of the question, or from other behavioral indicators. Typically, most hypnotic subjects exhibit a verbally unexpressed—and unconscious—need to please the examiner and produce some phenomena which they believe will please the hypnotist. They also tend to be more sensitive to subtle cues coming from the hypnotic examiner—of which the examiner himself may not even be aware—and respond to these cues. It is, therefore, extremely important that *all* contacts between subject and examiner be very carefully recorded, including all contacts before and after the hypnotic examination itself. Preferably, such recording should be done, whenever possible, on videotape. Ideally, there ought to be two cameras, one focused on the subject, the other on the examiner. Because of the cost involved, this ideal approach might be feasible only in major criminal cases or in civil cases in which substantial assets or compensations are at stake.

The hypnotic examination must be carefully prepared and be based on an analysis of what is known, including a thorough analysis of previous hypnotic examinations.

Preceding the hypnotic examination itself, the examiner will, during an interview with the subject, reinforce hypnotic susceptibility and tentatively determine what kind of hypnotic induction procedure to use initially.

The hypnotic examination itself should include two different procedures: a memory procedure and a regression procedure. Each procedure, in turn, is conceived as consisting of two phases, moving from the more general in the first phase to the more specific in the second phase.

The purpose of the memory procedure of the examination is the determination of the extent and scope of the subject's recall about the

events under question. The procedure is aimed, primarily, at cognitive-intellective functions.

During the first phase of this procedure, the approach to the subject will be in the most general terms possible, contingent upon the nature of the events about which information is sought, and with the least number of interventions by the examiner, aside from those which are necessary to assure the more or less continuous flow of recollections. In broad terms, the subject would be asked to provide a detailed account of the incidents and events in question and, at the end of the account, would be asked, whenever appropriate, to tell the examiner what the subject thinks has happened. This latter question is designed to make manifest the subject's belief system about the events, and the responses may help later, in the analysis, to separate personal biases from hypnotically induced conceptual spectacles.

After completion of the first phase, it may be necessary for the hypnotic session to be interrupted, in order to provide the examiner with an opportunity to organize and analyze the material produced, collate it with the material prepared earlier, and plan the systematic examination of the patient's production during the second phase of the examination. The focus of this phase is not on a general account, which was the objective of the first phase, but an emphasis on perceptual recollections of greater and greater detail. The subject will be asked to provide *details* of what she saw, heard, or felt (tactually and kinesthetically). Since a number of the questions asked by the examiner will be different in form as well as content from the questions asked during the previous hypnotic examination, a new set will be established which is different from the set which was formed during the first hypnotic examination and, consequently, may tend to counteract the artificial degree of certainty which could have been established during the first examination. Thus, the first phase sets the stage for the second phase, which ought to provide a great deal of discreet and specific information—the nuts and bolts to be classified and ordered later during the analysis and evaluation.

The purpose of the regression procedure is to place the subject in a relatively safe situation where the subject can re-live and re-experience the incidents and events under consideration. While the first procedure focused primarily on cognitive-intellective processes, this procedure concentrates on a more global experience, including affective and emotional reactions to the events. In general, this procedure tends to be more stressful to the subject, and, therefore, it is not accidental that it *follows* the memory procedure—it should not, under ordinary

circumstances, precede the latter. Since it is more stressful to the subject, and the stress may have to be dealt with during the course of the examination in a way helpful to the subject, hypnotic explorations should not be undertaken by anyone not qualified and licensed to provide psychological treatment.

In the regression procedure, the examiner functions primarily as one who manipulates the subject's time frame. Initially, during the first phase, the examiner will return the subject to a time of personal enjoyment or gratification, such as a birthday celebration—selected during the pre-hypnotic interview—prior to a return to the critical incidents. This pleasant re-experience will provide the subject with an opportunity to become acquainted with and understand what takes place during a regression procedure. It also gives the examiner the opportunity to assess the effectiveness of the induced state. After passing quickly through this pleasant event, the time frame will be moved forward to the time of the very beginning of the critical incidents and events. The stage is set so that the subject describes her experiences in the present tense, just as if she were there. Again, during this first phase, the subject will be asked in the most general terms to provide a running description of the setting, of what takes place, of her observations, and of her reactions to the incidents and events which are happening. By and large, the examiner should restrict her interventions to those which keep the subject's running comments going and keep the subject moving through the time frame to the end of the critical events relevant to this particular subject. Once more, the hypnotic session may be interrupted at this time to give the examiner the opportunity to review and organize the productions during this phase and to prepare in detail the approach during the next phase.

In the second phase of the regression procedure, the examiner should return the subject to specific occurrences, at each of which the subject will be asked to provide more detailed descriptions of the occurrence, her observations, and her reactions. Thus, the focus is on re-living the occurrence more intensely and a more detailed running description of the subject's observations and reactions. It is almost needless to say that the occurrences must be carefully selected and be limited to those which appear to have substantial promise and significance. To use an unplanned random approach will merely overburden the subject and result in a mass of undigestible data.

The two procedures may not be applicable to all subjects. They require different depths of hypnosis. In general, the regression proce-

cedure requires a greater depth of hypnotic trance than the memory procedure. Consequently, fewer people will be suitable for the regression technique than for the memory procedure.

After the last hypnotic session is over, one begins with the collation, classification, analysis, and evaluation of data from all sources, including all information from the two hypnotic procedures, the previous hypnosis, and data gleaned from other sources. What will emerge are some major categories. The largest one will consist of observations which are consistent from procedure to procedure and from one hypnosis to the other. This consistency suggests strongly the reliability of the subject's recollections. Then there will be a category of observations that were reported in the second hypnosis and not in the first, or were not present in the memory procedure but were made in the regression procedure. All these will be elaborations of observations made before. One should be able to classify these into at least three sub-types. (1) Elaborations that enhance the first report and are consistent (occur in second phase of both procedures, for example). We may be able to accept these as reliable. (2) Elaborations that introduce some new elements which have heuristic value. These point to elements known to others (e.g., the police) but not known to the subject; or they seem to point in the direction of new discoveries of data or other evidence. (3) Elaborations that may be consistent with the subject's biases or the examiner's expectations. These must be viewed with caution and suspicion but could turn out to be valuable and valid.

Then there may be a category of observations that fill large gaps in what is known and have a quality of tenuousness, thinness, tangentiality, wildness, or unexpectedness about them. These may very well be the subject's confabulations (artificial, invented fill-ins) created to satisfy the supposed need of the examiner for a continuous account or story. They must be viewed with a great deal of suspicion and reservation.

Then there will be a category of contradictions. Here we must separate minor from major contradictions. The more detailed observations are produced and available, the more minor discrepancies are to be anticipated. Human memorial functions are not like tape recordings, and hypnosis does not induce a replay of tapes. These minor discrepancies must be accepted for what they are: minor discrepancies. More striking substantial contradictions, on the other hand, must be taken seriously. They strongly suggest the presence of confabulatory elements in one or the other, or in all the accounts of these particular

sub-events. These examples of categories do not, of course, exhaust the number of categories possible. They are merely meant as examples and illustrations.

One more comment on the affective and emotional components elicited during the regression procedure: They will play an important role in the evaluation of the results. Emotions which are appropriate in intensity and kind to the described situations would tend to strengthen the belief in the veridicality of the observations. Strong affects of anxiety, fear, or shock may suggest that apparent gaps in memory are not accidental but may have strong psychological motivations. They indicate that these gaps are taboo for the examiner. To pursue them willy-nilly might be quite harmful to the mental and emotional well-being of the subject, and their unravelling is better left to a sustained psychotherapeutic endeavor.

It is possible that some subjects have strong sympathies with one side and not with the other. If this is so, the subject may not be amenable, or may not be as amenable, to the induction and use of hypnosis by an examiner who represents the other side, that is, the side for which the subject does not feel sympathy or toward which she may even feel antipathy. If this seems to be the case, then one must consider that the subject is "resistant" to the hypnotic inquiry and her testimony must be viewed with some healthy skepticism. On the other hand, one must not arrive at such a conclusion too readily. The fact is that hypnotic examiners, like other professional experts, differ in their skills and what one observes may not be "resistance" per se, but a response to inadequate skills. Furthermore, subjects react to other differences between examiners, such as sex, age, attitude, induction technique, and to other more subtle factors, which one may not be able to delineate very readily. The point is that one must not rush hastily to the conclusion that the subject is "resisting." Such a conclusion must be arrived at in a very deliberate and careful fashion.