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POSTHYPNOTIC TESTIMONY—WITNESS COMPETENCY AND THE FULCRUM OF PROCEDURAL SAFEGUARDS

ROBERT B. FALK*

To strike the essential balance between the necessity for presenting all relevant evidence and the demand that such evidence be reliable, criminal jurisprudence is discreet in accepting new evidentiary sources. Accordingly, scientific methods of crime detection have gained access to the courtroom only after the utmost circumspection.1 This notion is manifest in the standard for admissibility articulated by the District of Columbia Circuit, in Frye v. United States,2 which requires that a scientific method "be sufficiently established to have gained general acceptance in [its] particular field."


2 293 F. 1013 (D.C. Cir. 1923).

3 Id. at 1014. In Frye, the court was asked to admit into evidence the results of a lie detector test. Id. at 1013. The court rejected the testimony, stating:

Just when a scientific principle or discovery crosses the line between the experimen
tal 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 sci
tific 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.

Despite continued controversy as to its validity, see Moenssens, Polygraph Test Results Meet Standards for Admissibility as Evidence, in LEGAL ADMISSIBILITY OF THE POLYGRAPH 14-21 (N. Ansley ed. 1975), the Frye test has been applied to various types of scientific approaches to crime detection, see, e.g., United States v. Kilgus, 571 F.2d 508, 510 (9th Cir. 1978) (forward-looking infrared system); United States v. Brown, 557 F.2d 541, 556-58 (6th Cir. 1977) (ion microprobing analysis of human hair); People v. Cox, 85 Mich. App. 314, 317, 271 N.W.2d 216, 217-18 (Ct. App. 1978) (brevital-sodium test); People v. Smith, 110 Misc. 2d 118, 124-26, 443 N.Y.S.2d 551, 556-57 (Dutchess County Ct. 1981) (odontological identification of bite marks); State v. Canaday, 90 Wash. 2d 808, 813, 585 P.2d 1185, 1188 (1978) (breathalyzer); Herman, The Use of Hypno-Induced Statements in Criminal Cases, 25 Ohio St. L.J. 1, 23-25 (1964) (truth serums). For further discussion of the Frye standard, see infra note 52.
The subject of hypnosis presents no exception to this history of judicial prudence. By virtue of the increased application of hypnosis in the field of medicine, and the concomitant increase in society's awareness of the subject, there has been growing interest in the use of hypnosis as a criminal investigatory tool. Perhaps the most pervasive aspect of hypnosis is its pretrial use for the purpose of witness recollection. As a result, the competency of a previously hypnotized witness has evoked widespread as well as heated controversy.

4 See Comment, supra note 1, at 127; infra text accompanying notes 22-31.
5 Spiegel, Hypnosis and Evidence: Help or Hindrance?, 347 ANNALS N.Y. ACAD. SCI. 73, 73 (1979); see infra notes 16-21 and accompanying text.
8 See Harding v. State, 5 Md. App. 230, 236, 246 A.2d 302, 306 (Ct. Spec. App. 1968), cert. denied, 395 U.S. 949 (1969); Jones v. State, 542 P.2d 1316, 1326-27 (Okla. Crim. App. 1975); supra note 7. One characteristic of a hypnotic trance is the subject's capacity to recall events that he is unable to remember in the ordinary conscious state. E. Block, supra note 1, at 17. One recent example of the use of hypnosis as an aid for recall was in the much publicized murder of a cellist in the Metropolitan Opera House. In that case, a ballerina who had seen a man with the victim was hypnotized for purposes of inducing an adequate description. Brody, supra note 7, at C1, col. 1.
9 State ex rel. Collins v. Superior Court, 644 P.2d 1279, 1279 (Ariz. 1982) (en banc) (supplemental opinion); Brody, supra note 7, at 1, C2, col. 6. Since a hypnotic subject is prone to suggestion, see, e.g., Putnam, Hypnosis and Distortions in Eyewitness Memory, 27 INT'L J. CLINICAL & EXPERIMENTAL HYPNOTIC 437, 444 (1979), much of the criticism of hypnosis' law enforcement use focuses on the potential "contamination" of the subject's memory, Brody, supra note 7, at C2, col. 6; see Diamond, supra note 7, at 333-39. Dr. Martin Orne, professor of psychiatry at the University of Pennsylvania, has said that "[d]uring a trance, people are more likely to say what they think their questioners want to hear, whether it is true or not." Brody, supra note 7, at C2, col. 6. Thus, it is not unusual for a witness to "recall" a story that supports the theory of those investigating a case. As Dr. Herbert Spiegel describes it, the subject becomes an "honest liar." Spiegel, supra note 5, at 78; see United States v. Narciso, 446 F. Supp. 252, 281-82 (E.D. Mich. 1977); Putnam, supra, at 444.

A second focal point of the criticism surrounding hypnosis is that investigators, rather than experienced and expert hypnotists, most often perform the hypnosis in criminal investigations. See Brody, supra note 7, at C2, col. 5.
This Article addresses whether the testimony of a witness who has undergone hypnosis to refresh his recollection should be admissible in a criminal trial. Initially, the Article traces the scientific and jurisprudential history of hypnosis. It then examines the manner in which the various jurisdictions presently treat the issue. Finally, the Article concludes that the testimony of a previously hypnotized witness should be admissible, provided there is compliance with certain procedural safeguards.

HYPNOSIS' SCIENTIFIC AND JURISPRUDENTIAL HISTORY

Despite the abundance of attempts at defining hypnosis, it is not a concept susceptible of ready definition. According to Dr. Herbert Spiegel of Columbia University, the hypnotist-patient relationship is "characterized by the patient's nonrational submission and relative abandonment of executive control to a more or less regressed, disassociated state." In the clinical situation, this regression is actively instigated and knowingly enhanced by the hypnotist. This "structured form of aroused concentration . . .

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10 See H. Arons, Hypnosis in Criminal Investigation 11 (1967). Although hypnosis has never been defined adequately, there have been a number of attempts at describing its nature. See Note, The Admissibility of Testimony Influenced by Hypnosis, 67 Va. L. Rev. 1203, 1206 (1981). In 1923, Pavlow wrote that hypnosis is a partial sleep state. See Pavlow, The Identity of Inhibition with Sleep and Hypnosis, 17 Sci. Monthly 603, 607 (1923). Professor Ernest Hilgard identified seven observable characteristics of the hypnotic trance, including increased suggestibility, amnesia as to what transpires during the hypnotic state, tolerance for reality distortion, and heightened selective attention and inattention. See E. Hilgard, The Experience of Hypnosis 6-10 (1968). In 1977, Dr. Martin Orne wrote that hypnosis was the "state . . . in which subjects are able to respond to appropriate suggestions with distortions of perception of memory." See Orne, The Construct of Hypnosis: Implications of the Definition for Research and Practice, 296 Annals N.Y. Acad. Sci. 14, 19 (1977).

Currently, three theories of hypnosis prevail. Note, supra, at 1207-08. The "state view" describes hypnosis "as a distinct state of consciousness, similar to sleep in that it involves a partial inhibition of brain activity . . . [with] specific neural and physiological changes." Id. at 1207. Dr. Orne criticizes this view, however, on the basis that there is no proof that the physiological changes are uniquely associated with hypnosis. Orne, supra, at 19. The second theory explains hypnosis in terms of behavior and stimuli. See Barber & Calverley, The Relative Effectiveness of Task-Motivating Instructions and Trance-Induction Procedure in the Production of "Hypnotic-Like" Behaviors, 137 J. Nervous & Mental Disease 107, 107 (1963). The third theory uses Freudian concepts to explain hypnosis. Note, supra, at 1208.

11 Spiegel, Hypnosis: An Adjunct to Psychotherapy, in 2 Comprehensive Textbook of Psychiatry § 30.4, at 1844 (2d ed. 1975) [hereinafter cited as Textbook].

12 See Spiegel, supra note 5, at 73. The hypnotist does not project the hypnotic spell onto the subject, but, rather, instigates the natural trance capacity inherent in the subject. Id. Trance capacity differs among individuals and can be measured. Id. Hypnotic trances can occur spontaneously as well as be self-induced. See H. Spiegel & D. Spiegel, supra note
can be disciplined and directed toward specific therapeutic goals.”¹³ The patient’s disassociated attention is constantly sensitive and responsive to cues from the hypnotist, thus permitting the patient to concentrate intensely on areas or conditions, the clarification of which can lead toward the designated goals.¹⁴ Succinctly stated, hypnosis is a subjective state of mind in which a person is more prone to accept “acceptable” suggestion.¹⁵

The first reference to hypnosis as being anything more than pure quackery was in the 18th century. During that time, Franz Anton Mesmer and his disciple, the Marquis de Puységur, practiced the art of “animal magnetism.”¹⁶ In the centuries that followed, hypnosis was the subject of much greater scientific scrutiny. Among those who studied hypnosis in the 19th century were Braid, Liebolt, Beheim, Janet and Freud.¹⁷ It was not until after World War II, however, that American interest in hypnosis truly came to fruition. Viewed as a quick and effective means to deal with World War II combat neuroses, hypnotic techniques were used on a large scale.¹⁸ Shortly thereafter, the medical professions began to accept hypnosis as a therapeutic technique. During the 1950’s, for instance, the British and American Medical Associations formally approved the use of hypnosis.¹⁹ In 1960, hypnosis became a recognized branch of psychology in America.²⁰ Presently, even those who oppose the admissibility of posthypnotic testimony concede the current recognition of hypnosis by the scientific and therapeutic communities.²¹

The jurisprudential background of hypnosis has proceeded along similar lines. The earliest American case dealing with hypnotically induced evidence is the 1897 case of People v. Ebanks,²² in which the California Supreme Court refused to admit the testi-

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¹³ See generally F.J. Monahan, Hypnosis in Criminal Investigation 3 (1980).
¹⁴ Formal hypnosis differs from spontaneous trances in that the subject of formal hypnosis maintains “a sensitive, attentive responsiveness to an operator during the trance state.” H. Spiegel & D. Spiegel, supra note 6, at 34.
¹⁵ Textbook, supra note 11, at 1844.
¹⁶ Spiegel, supra note 5, at 75.
¹⁷ E. Block, supra note 1, at 11.
¹⁸ Diamond, supra note 7, at 318.
¹⁹ E. Block, supra note 1, at 9-21.
²⁰ Diamond, supra note 7, at 320.
²¹ Note, supra note 10, at 1206 n.22.
²² Id. See generally Diamond, supra note 7, at 320-21.
²³ See Diamond, supra note 7, at 321.
²⁴ 117 Cal. 652, 49 P. 1049 (1897).
mony of an alleged expert who had hypnotized the defendant, interro-
tegated him, and adjudged him not guilty of murder. The Ebanks
court quite accurately stated that "[t]he law of the United States
does not recognize hypnotism." In the years that followed, there
was a definite paucity of cases dealing with hypnotism. Indeed,
between 1915 and 1950, there is only one reported case concern-
ing hypnosis' medico-legal aspects. In that case, an Alabama
appellate court held that evidence of the defendant procuring
property by hypnotizing his victim was insufficient to prove the
requisite elements of robbery. The 1950's, however, marked the
advent of continual judicial consideration of the subject. During
that decade, the Supreme Court of North Dakota held that excul-
atory statements made by a defendant while under hypnosis
were not admissible into evidence. In addition, the California
Supreme Court decided Cornell v. Superior Court, the first case
to rule favorably with respect to hypnotizing prospective
witnesses. In Cornell, an attorney petitioned the California
Supreme Court to compel the superior court to allow his client
to employ a skilled lay hypnotist in order to prepare an adequate
defense against a murder charge. While declining to pass judgment

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23 Id. at 665, 49 P. at 1053. In Ebanks, the defendant, at his murder trial, attempted to
introduce the testimony of an expert hypnotist who had hypnotized him, and had adjudged
him not guilty based upon exculpatory hypnotic statements. Id. The trial court sustained an
objection to this testimony. Id.

24 Id.


26 Id. at 121, 130 So. at 905.

27 State v. Pusch, 77 N.D. 860, 46 N.W.2d 508 (1950). In Pusch, the defendant and his
lover allegedly caused the death of the defendant's wife by administering a lethal dose of
strychnine. Id. at 886-67, 46 N.W.2d at 510-11. At trial, the defendant offered to prove that
Dr. Burgess, allegedly an expert hypnotist, placed the defendant in a hypnotic trance on
four occasions and questioned him extensively on all phases of the incident. Id. at 886-87, 46
N.W.2d at 521. The defendant offered the court the opportunity to question the expert and
offered to produce tape recordings of Dr. Burgess' examination of him. Id. at 887, 46
N.W.2d at 521. The defendant further offered to show that the hypnotic tests proved his
innocence. Id. at 887, 46 N.W.2d at 522. The lower court sustained objections to the offer of
proof and rejected the testimony. Id. at 887-88, 46 N.W.2d at 522. On appeal, the North
Dakota Supreme Court upheld the lower court's determination, stating that "[n]o case has
been cited . . . relating to the admissibility of the evidence proffered and no case has been
found." Id. at 888, 46 N.W.2d at 522.


29 Id. at 100, 338 P.2d at 448. The defendant, Conrey, charged with murder, could not
remember his whereabouts and activities at the time of the murder due to "'intoxication,
shock, or otherwise.'" Id. at 101, 338 P.2d at 448. The defendant's attorney, Cornell, was
able to ascertain "only that Conrey was wandering from bar to bar in an intoxicated
condition during the time the alleged crime was committed . . . ." Id. Cornell sought to have
on the admissibility of evidence secured through hypnosis, the
court declared that a defendant's right to counsel includes the
right to be hypnotized for the purpose of calling forth facts which
the defendant is unable to recall because of retrograde amnesia.

Recent decades have seen a marked increase in the use of the
hypnotic device by law enforcement personnel. Its popularity as
an investigatory tool has burgeoned since the 1976 Chowchilla kid-
napping. There, the driver of a busload of children recalled a li-
cense plate number while under hypnosis, which, with the excep-
tion of one digit, matched the license plate number of the van
driven by the kidnappers. The upshot of this expanded employ-
ment of hypnosis is a spate of cases dealing with the admissibility
of posthypnotic testimony.

THE ADMISSIBILITY OF POSTHYPNOTIC TESTIMONY: A MATTER OF
COMPETENCY OR CREDIBILITY?

An examination of the cases concerning whether hypnotically
induced or enhanced testimony is admissible reveals that American
jurisdictions have resolved the issue in three different ways. The
first category of cases excludes all testimony hypnotically in-
duced. The second approach is to admit posthypnotic testimony

Conrey recall the night in question through the use of hypnosis. Id. The sheriff refused to
allow this and the trial court denied Cornell's motion for an order directing the sheriff to
grant the request. Id. The respondent argued that since a hypnotic examination
is not admissible at trial, such an examination would be of no assistance to the petitioner.
Id. at 101-02, 338 P.2d at 448. The respondent cited a number of cases including People v.
Ebanks, 117 Cal. 652, 49 P. 1049 (1897), see supra notes 22-24 and accompanying text, to
support the proposition that such an examination would not be admissible into evidence.
62 Cal. 2d at 102, 338 P.2d at 449. The California Supreme Court dismissed the respondent's
contentions because the cited cases addressed admissibility and not whether Conrey had a
right to be hypnotized in order to assist in the preparation of his defense. Id.

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right to be hypnotized in order to assist in the preparation of his defense. Id.

Id. at 103, 338 P.2d at 449-50. The Cornell court stated that the constitutional right
to representation by counsel mandates that counsel be afforded reasonable opportunity to
prepare for trial. Id. at 103, 338 P.2d at 449. The court noted that hypnotism is recognized
as a means to help those with retrograde amnesia. Id. Accordingly, the court concluded that
Conrey had a constitutional right to be hypnotized since such hypnotism may result in
memories that, if corroborated, could prove his innocence. Id.

See supra note 7.

See P.J. MONAGHAN, supra note 12, at 9 (1980). The Chowchilla kidnapping occurred
in California in July 1976. Id. at 8. In that case, a busload of children had been kidnapped
by three masked men carrying pistols. Id. The victims were forced into a trailer buried 6
feet underground. Id.

E.g., State v. Mack, 292 N.W.2d 764, 772 (Minn. 1980); see infra notes 38-73 and
for all purposes on the premise that hypnosis affects the credibility of a witness rather than his competence to testify.36 Finally, some jurisdictions allow posthypnotic testimony provided that specific procedural safeguards are followed.37

Per Se Exclusion and the Frye Standard of Admissibility

Among the jurisdictions that apply a per se rule excluding posthypnotic testimony are Minnesota,38 Arizona,39 California,40 Maryland41 and Michigan.42 These jurisdictions ground their denial of admissibility on hypnosis' failure to meet the Frye standard of "general acceptance" in the scientific community.43

The case of State v. Mack44 is indicative of this approach. In that case, hypnosis was used to refresh the complainant’s memory of events that took place when she suffered a serious injury while heavily intoxicated.46 Once under hypnosis, the complainant remembered the circumstances surrounding an assault that caused her the injury.46 After recalling these events, the complainant was given a posthypnotic suggestion that she would remember all of the details.47 Following the hypnotic session, the complainant gave a statement to the police describing the events that she had "remembered" while under hypnosis, asserting that the statement represented her present memory of the assault.48

accompanying text.

36 E.g., State v. McQueen, 295 N.C. 96, 119, 244 S.E.2d 414, 427 (1978); see infra notes 75-77 and accompanying text.
37 E.g., State v. Hurd, 86 N.J. 525, 545-46, 432 A.2d 86, 90-91 (1981); see infra notes 88-119 and accompanying text.
38 See State v. Mack, 292 N.W.2d 764, 765 (Minn. 1980).
43 E.g., State v. Mack, 292 N.W.2d 764, 768 (Minn. 1980); see supra notes 2-3 and accompanying text.
44 292 N.W.2d 764 (Minn. 1980).
45 Id. at 766-67.
46 Id. at 767.
47 Id. The hypnotist gave the complainant a posthypnotic suggestion, stating, "[Y]ou . . . will be able to remember very clearly everything that has happened on the 13th and 14th. Now that memory is very clear in your mind." Id.
48 Id.
Before conducting a probable cause hearing, the trial court certified to the Minnesota Supreme Court the question of whether a previously hypnotized witness may testify at a criminal proceeding concerning events recalled during a pretrial hypnotic session.\textsuperscript{49} The Mack court viewed the admissibility issue as concerning the reliability of hypnosis in reviving an accurate memory.\textsuperscript{50} Thus, the court questioned the competency of the witness, as distinguished from the credibility of the testimony.\textsuperscript{51} The standard applied was the Frye requirement that a consensus within the scientific community concerning the reliability of a scientific device must be present before the device or its results will be admissible.\textsuperscript{52}

\textsuperscript{49} Id. at 768. The Mack court recognized that a person under hypnosis "is highly susceptible to suggestion, even that which is subtle and unintended." Id. Given this susceptibility, the Mack court believed that the possibility of suggestion creates too great a threat of fabrication to admit into evidence the testimony of a person who previously has been hypnotized. Id. This suggestion, the court noted, may be made prior to or during the hypnotic session. Id. Prior to the hypnotic session, persons interested in the investigation may have expressed to the subject their views on what happened during the incident. Id. The subject, "influenced by a need to 'fill gaps,'" may incorporate this speculation into his or her memory of the events. Id. This "gap-filling" is analogous to a situation where a witness in an investigation repeatedly tells his story. Frequently, the detail of witness description increases the more a witness discusses an incident. See Note, Did Your Eyes Deceive You? Expert Psychological Testimony on the Unreliability of Eyewitness Identification, 29 Stan. L. Rev. 969, 983-84 (1977). These incorporations may cause permanent memory distortion, making it impossible to determine later the veracity of the subject's statements. Note, supra note 10, at 1221. The subject may be influenced further by his or her "desire to please either the hypnotist or others . . . who have urged that it is important that he or she remember certain events." 292 N.W.2d at 768.

The Mack court also noted the threat that facts, of which the subject previously was unsure, will become "hardened" in his memory following the hypnotic session. Id. at 769. Once hypnotized, observed the court, the subject will be so convinced of the veracity of his story that he could pass a lie detector test uttering statements that are in fact false. Id. This self-confidence in the truthfulness of the story could lead to the unintentional deception of a jury. Id.

Finally, recognizing potential difficulties in cross-examining such a witness, the Mack court concluded that it would be impossible to determine "which parts [of the memory] . . . are historically accurate, which are entirely fanciful, and which are lies." Id. This is significant since a popular misconception, likely to be subscribed to by a jury, is that a person under hypnosis always tells the truth. See id. at 769; Note, supra note 10, at 1209.

\textsuperscript{50} 292 N.W.2d at 769-70.

\textsuperscript{51} Id. at 768. Since it was impossible scientifically to verify truth from fiction through the use of hypnosis, such testimony did not meet the Frye standard. Id. Indeed, the court illustrated the potential for fabrication by indicating the fallacies in the complainant's post-hypnotic testimony. Id. at 772. Following the hypnotic session, the complainant asserted that she had been stabbed repeatedly, that the defendant's motorcycle was a black Yamaha, and that on the day of the alleged assault she had pizza with her father at a particular restaurant. Id. Hospital records indicated, however, that the complainant was stabbed once.
Similarly, in State v. Mena, the Arizona Supreme Court promulgated a blanket rule against the admission of testimony that had been refreshed by hypnosis. In Mena, the victim of an attack was taken by a police officer to see two doctors who hypnotized him in order to improve his recall of the surrounding details. The doctors suggested that he would remember his responses after he came out of hypnosis. At trial, the victim was permitted to testify, notwithstanding the defendant’s objection that the hypnotist did not testify that the victim’s memory was refreshed independently of any suggestion by the hypnotist. The issue on appeal was whether testimony that was possibly tainted by hypnosis should have been excluded upon timely objection. The Mena court held that if the prosecution attempts to enhance the witness’ memory by having him questioned while under hypnosis, it will lose the opportunity to use the witness’ testimony at trial. A review of the literature in the area convinced the court that hypnosis was not yet accepted in the scientific community as

Id. Furthermore, the defendant’s motorcycle was not a black Yamaha, but a maroon Triumph. Id. Finally, the restaurant named by the complainant did not serve pizza. Id. These circumstances, in conjunction with the inherent uncertainties involved with the use of hypnosis to refresh memory, convinced the Mack court of the unreliability of posthypnotic testimony and the need to declare all such testimony inadmissible under the Frye rule. See id. at 769-72.

The Mack decision represents an expansion of the Frye decision’s application to scientific devices. Prior to Mack, the Frye rule had been used to determine the admissibility of evidence derived from mechanical scientific devices, such as polygraphs, voiceprints, gunshot residue tests, neutron activation analysis, sodium pentothal, bitemark comparisons, and scanning electron microscopic analysis. Giannelli, The Admissibility of Novel Scientific Evidence: Frye v. United States, a Half-Century Later, 80 COLUM. L. REV. 1197, 1205-06 (1980). The Mack court extended Frye’s application to a nonmechanical device that involves the restoring of memory for the purpose of witness testimony. See Case Note, Hypnotically-Induced Testimony Held Inadmissible in Criminal Proceeding, 7 WM. MITCHELL L. REV. 264, 277 (1981).

Id. at 232, 624 P.2d at 1280.
Id. at 228, 624 P.2d at 1276.
Id.
Id.
Id.
Id. at 231-32, 624 P.2d at 1279-80. The Mena court stated that “[t]he 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.” Id. at 231, 624 P.2d at 1279. The Mena court justified its decision by referring to the exclusionary rule enunciated in United States v. Wade, 388 U.S. 218 (1967), which proscribes the admission of testimony at trial which is the product of “an illegal pre-trial identification procedure.” 128 Ariz. at 232, 624 P.2d at 1280; see 388 U.S. at 241.
a reliable means of refreshing memory.\textsuperscript{60} The dangers cited by the \textit{Mena} court included the suggestibility of a person in a hypnotic trance, and his subsequent inability to distinguish between his own memories and pseudomemories implanted during hypnosis.\textsuperscript{61}

In accord with the foregoing are \textit{People v. Shirley}\textsuperscript{62} and \textit{People v. Tait}.\textsuperscript{63} Applying the \textit{Frye} test, courts in California and Michigan determined that hypnosis has not gained general acceptance in the field to which it belongs, at least as a means of obtaining accurate recall of prior events.\textsuperscript{64} In addition, the Pennsylvania Supreme Court entertained serious doubts as to the reliability of hypnotically refreshed testimony, and concluded that these doubts justified the exclusion of such evidence.\textsuperscript{65} The court emphasized, however, that its holding did not establish a per se


\textsuperscript{61} 128 Ariz. at 223-30, 624 P.2d at 1277-78. The \textit{Mena} court indicated that a person under hypnosis is open to any suggestions "deliberately or unwittingly communicated by the hypnotist." \textit{Id.} at 229, 624 P.2d at 1277 (quoting Diamond, supra note 7, at 314). The court cautioned further that a subject under hypnosis, motivated by a desire to please the hypnotist, may fabricate events and later believe that these "memories" are the product of personal experience. 128 Ariz. at 228-29, 624 P.2d at 1276-77. See generally Dilloff, \textit{The Admissibility of Hypnotically Influenced Testimony}, 4 \textit{Ohio N.U.L. Rev.} 1, 4-9 (1977).


\textsuperscript{63} 99 Mich. App. 19, 297 N.W.2d 853 (Ct. App. 1980). In \textit{Tait}, the defendant allegedly threatened a deputy sheriff with a gun. \textit{Id.} at 21, 297 N.W.2d at 854. Prior to trial, the sheriff was hypnotized by the prosecuting attorney, an amateur hypnotist, in order to refresh the sheriff's memory. \textit{Id.} at 25, 297 N.W.2d at 855. The defendant was given no notice of this until the sheriff testified at trial. \textit{Id.} The trial judge denied the defendant's motion for a mistrial, and did not allow the fact of the hypnotic session to be disclosed to the jury. \textit{Id.} at 25, 297 N.W.2d at 855-56. On appeal, the \textit{Tait} court reversed, holding that hypnosis had not yet been scientifically accepted, and, therefore, testimony obtained through hypnosis was inadmissible. \textit{Id.} at 28, 297 N.W.2d at 857. Irrespective of the reliability issue, the court held that the deputy's testimony was inadmissible as a result of the prosecution's failure to give the defendant notice of the pretrial hypnosis. \textit{Id.} at 29, 297 N.W.2d at 857 (by implication).

\textsuperscript{64} See \textit{Commonwealth v. Nazarovitch}, 436 A.2d 170, 174-78 (Pa. 1981). The court cited various experts and examined the problems involved with hypnotized subjects' "hypersuggestibility and hypercompliance." \textit{Id.} at 174. The court determined that since the subject is often anxious to please the hypnotist, he "will unconsciously create answers to the questions which the hypnotist asks if he cannot recount the details being sought." \textit{Id.} Following hypnosis, the court observed, the subject possesses a firm "confidence and conviction" as to the truth of his statements, \textit{id.}, and thus it would be impossible to determine with certitude the veracity of the testimony, \textit{id.} at 174-75. The court, therefore, declined to sanction the admission of the testimony. \textit{Id.} at 176-78.
rule against the admissibility of such testimony. Hypnotically refreshed memory may be admitted, the court stated, when it is presented with more conclusive proof that the procedures for obtaining it meet the Frye standard.

Closely linked to the Frye analysis are the scientific arguments in favor of a blanket exclusionary rule. These objections were presented by Dr. Bernard Diamond, who argued that hypnosis irreversibly alters a witness' memory, thus rendering hypnotically influenced testimony unreliable. Dr. Diamond claims that a previously hypnotized witness is incompetent to testify because: (1) he will fantasize, or confabulate while hypnotized; (2) he will confuse his hypnotic memory of events with his pre- and posthypnotic waking memories, and, after hypnosis, not be able to separate his fabrications from true recall; and (3) he will, after hypnosis, subjectively be certain of the accuracy and truth of his hypnotic memory, whereas before hypnosis he was willing to express some uncertainty.

Although a number of jurisdictions have adopted the blanket

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66 Id. at 178. The witness in Nazarovitch was under the influence of a hallucinogen at the time of the crime. This, in the court's view, presented a poor set of facts upon which to premise a blanket exclusionary rule. See id. at 177-78.

67 Id. at 178.

68 Diamond, supra note 7, 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").

69 Id. at 333-41. Dr. Diamond believes that human beings have great difficulty in separating thoughts which are "the product of their own volition" from those that possibly were suggested by other sources, whether those suggestions were intentional or not. Id. at 333-34. Often, memories recited by a witness after hypnosis will be real memories, but they may be recollections of events distinct from the incident in question. Id. at 335. Indeed, Dr. Diamond suggests that "[a] subject who has lost the memory of the source of his learned information will assume that the memory is spontaneous to his own experience." Id. at 336.

70 Id. at 335-36. Dr. Diamond comments that, by virtue of a hypnotized subject's tendency to "fill in gaps" with fantasy or confabulation, hypnotically refreshed memory may consist of: "(1) appropriate actual events, (2) entirely irrelevant actual events, (3) pure fantasy, and (4) fantasized details supplied to make a logical whole." Id. at 335. Pretrial hypnosis therefore materially influences a witness' testimony "in ways that are outside the consciousness of the witness and difficult, if not impossible, to detect." Id. at 336. Moreover, these confabulations frequently are well detailed, coherent and consistent with corroborating evidence. Id. at 337-38.

71 Id. at 339-42. In contrast to prehypnotic hesitancy, a witness who has been hypnotized may be "significantly" more confident in the veracity of his recollections. Id. at 339. "Thus, a witness who quite honestly reveals that he is unsure of the identification of a defendant from a photograph or a line-up, may, after hypnosis, become quite certain and confident that he has picked the right man." Id. at 339-40.
exclusion position put forth by Dr. Diamond, it has been rejected in civil decisions of the federal courts, and, more recently, in criminal cases in several states where such evidence has either been admitted for all purposes or only when certain procedural safeguards have been met.

Admissible for All Purposes—A Question of Credibility

Courts embracing the second approach have admitted hypnotically influenced evidence on the theory that the prior hypnosis of a witness is merely one of the factors that a jury must weigh in assessing the credibility of a witness. One of the earliest reported decisions permitting the use of hypnotically induced evidence for

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72 E.g., People v. Shirley, 31 Cal. 3d 18, 66-67, 641 P.2d 775, 804, 181 Cal. Rptr. 243, 272-73, cert. denied, 51 U.S.L.W. 3220, (U.S. Oct. 5, 1982) (No. 82-78). The California Supreme Court, in Shirley, discussed the problems inherent in hypnosis, including the possible suggestibility of the subject, the subject's tendency to confabulate or create pseudomemories, the inability of the subject and the examiner to recognize such confabulation, and the subject's imperviousness to cross-examination. Id. at 63-66, 641 P.2d at 802-04, 181 Cal. Rptr. at 270-72. In addition, the Shirley court touched upon a topic not treated extensively in previous cases: the model of human memory espoused by the proponents of hypnotically refreshed recall. See id. at 57-62, 641 P.2d at 798-801, 181 Cal. Rptr. at 266-70. This model, the court noted, analogizes human memory to a videotape machine, “faithfully record[ing], as if on film, every perception experienced by the witness, . . . permanently stor[ing] such recorded perceptions in the brain at a subconscious level, and . . . accurately ‘replay[ing]’ them in their original form when the witness is placed under hypnosis and asked to remember them.” Id. at 56, 641 P.2d at 798, 181 Cal. Rptr. at 266. The Shirley court further observed, however, that the established view among medical professionals is that rather than functioning like a videotape recorder, human memory undergoes continuous alteration due to various influences. Id. Hence, the court concluded that the scientific community perceives memory as productive rather than reproductive, and, thus, when memories are retrieved, the accuracy of these recollections may be compromised by external influences. Id. at 57-63, 641 P.2d at 798-801, 181 Cal. Rptr. at 266-70. See generally D. Hintzman, The Psychology of Learning and Memory 297-311 (1978) (critique of experiments tending to prove the videotape memory model).

73 See e.g., Kline v. Ford Motor Co., 523 F.2d 1067, 1069-70 (9th Cir. 1975) (per curiam); Wyller v. Fairchild Hiller Corp., 503 F.2d 506, 509 (9th Cir. 1974). In Kline, the plaintiff sued an automobile manufacturer in strict liability. 523 F.2d at 1068. The trial court's exclusion of the plaintiff's testimony on the grounds that her memory had been refreshed by pretrial hypnosis was held to be reversible error. Id. at 1069. The fact that the plaintiff was hypnotized did not affect admissibility, but rather “credibility and the weight to be given such testimony [which] were [issues] for the jury to determine.” Id. at 1070. (quoting Wyller v. Fairchild Hiller Corp., 503 F.2d 506, 509 (9th Cir. 1974)).

In Wyller, a helicopter passenger who survived a crash sued the manufacturer of the aircraft. 503 F.2d at 507-08. Prior to trial, the survivor was hypnotized to refresh his memory of the events preceding the crash. Id. at 509. The court of appeals held that the hypnosis merely affected the credibility of the witness. Id.

74 See infra notes 75-119 and accompanying text.

75 See infra notes 85-87.
all purposes is *Harding v. State.*\(^7^6\) In *Harding*, a rape victim remembered the details of an assault following hypnosis.\(^7^7\) Two police officers were present at the audiotaped hypnotic session, though they did not participate.\(^7^8\) In allowing the victim’s testimony, the court emphasized the hypnotist’s professional expertise\(^7^9\) and the solid foundation that was laid for the testimony.\(^8^0\)

\(^7^6\) 5 Md. App. 230, 246 A.2d 302 (Ct. Spec. App. 1968), cert. denied, 395 U.S. 949 (1969). In *Harding*, the victim, Mildred Coley, met the defendant, James Milton Harding, in a bar in Baltimore City. *Id.* at 232, 246 A.2d at 304. They joined another couple, Barbara Miles and Robert Lee Sanders. *Id.* The two couples drank and drove around the city in Sander’s car until Harding, angered that Mildred would not sit with him in the back seat and engage in sexual relations with him, shot Mildred. *Id.* Harding then ordered Sanders to drive to a back road in an isolated area of Howard County. *Id.* After dropping off the body, and after meeting Harding’s brother at another bar, Sanders drove Harding home. *Id.* As the defendant was leaving Harding’s home, he saw Harding get into his brother’s station wagon. *Id.* The following day Mildred was found lying 4 or 5 feet off a road in Howard County that was 2 or 3 miles from the location at which she was originally placed. *Id.* at 232, 246 A.2d at 304. An examination disclosed traces of sperm in her vagina. *Id.*

\(^7^7\) *Id.* When the victim initially was questioned in a hospital emergency room as to the events of the night she was shot, she said that she had been abducted from Baltimore City at knifepoint by three males. *Id.* at 233, 246 A.2d at 304. Upon being questioned for the second and third times, she recanted her story, and recalled everything up until the point when she was removed from the car. *Id.* at 233-34, 246 A.2d at 304-05. In addition, she positively identified a photograph of Sanders. *Id.* at 233, 246 A.2d at 305. The victim later was put under hypnosis by a trained psychologist, *id.*, after which she identified Harding as the person who shot her, *id.* at 235, 246 A.2d at 306. She also remembered the following events: a truck or station wagon approached her as she was lying on the side of the road; Harding placed her in the vehicle; the car arrived at another location; Harding threw her on the ground, and unzipped her dress; and, after regaining consciousness, she noticed that her undergarments had been removed. *Id.*

The posthypnotic improvement of a witness’ memory is not a unique phenomenon. “Clinical reports from several practitioners who have assisted the police in criminal investigations have described dramatic improvements in the memories of witnesses and victims of crime who are placed under hypnosis.” *Note,* *supra* note 10, at 1210-11 (citation omitted).

\(^7^8\) 5 Md. App. at 242-43, 246 A.2d at 309.

\(^7^9\) *Id.* at 235, 246 A.2d at 306. The hypnotist possessed a master’s degree in psychology and had pursued work on his doctorate. *Id.* At the time of the hypnosis, he was Chief Clinical Psychologist at Clifton J. Perkins State Hospital, and formerly was employed as a staff psychologist at Crownsville State Hospital. *Id.* at 236, 246 A.2d at 306. He was qualified to testify as an expert in psychology in Baltimore City and several counties in Maryland. *Id.* Prior to hypnotizing the victim, he had practiced the technique of hypnosis for 4 years. *Id.*

\(^8^0\) See *id.* at 247, 246 A.2d at 312. It has been suggested that the party introducing the posthypnotic testimony has the burden of proving that the hypnosis session was conducted properly. *Note,* *supra* note 10, at 1228. Additionally, some commentators recommend that the hypnotist testify prior to the previously hypnotized witness in order to lay a foundation for the witness’ testimony. Spector & Foster, *Admissibility of Hypnotic Statements: Is the Law of Evidence Susceptible?,* 38 Ohio State L.J. 567, 593 (1977). It is felt that such testimony on the part of the hypnotist will ensure that hypnotic procedures will be conducted without suggestion or implantation. Putnam, *supra* note 9, at 444-46. *But see* Diamond,
The Harding court stated that "modern medical science has now recognized the possibility that memory of painful events can sometimes be restored by hypnosis, although some authorities warn that fancy can be mingled with fact in some cases." The court also pointed out that the testimony was corroborated substantially by other evidence. Additionally, the trial judge recognized the need for a precautionary instruction concerning the weight to be given the evidence.

Although Maryland later seemed to repudiate this view in State v. Polk, subsequent cases dealing with hypnotically in-

supra note 7, at 333.

5 Md. App. at 246, 246 A.2d at 311-12; see People v. Smrekar, 68 Ill. App. 3d 379, 385-86, 385 N.E.2d 848, 853 (App. Ct. 1979) (hypnosis is a valuable tool that can be used to restore memory). Some commentators have posited that "[a] witness whose memory has been refreshed through hypnosis may be able to recount an observed event more fully and accurately than any other witness." Spector & Foster, supra note 80, at 590. But see Note, Hypnotism, Suggestibility and the Law, 31 Neb. L. Rev. 575, 583 (1952).

5 Md. App. at 247, 246 A.2d at 312. The witness' testimony was corroborated by evidence that sperm was found in the victim's vagina, that the accused and Sanders were the only two males who knew the victim's location when the crime was committed, and that Harding was seen in a station wagon immediately before the crime was committed. Id. Additionally, the court, observing that the witness considered her testimony as deriving from her own recollection, stated: "The fact that she had told different stories or had achieved her present knowledge after being hypnotized concerns the question of the weight of the evidence which the trier of facts must decide." Id. at 236, 246 A.2d at 306.

Id. at 244, 246 A.2d at 310. The trial judge instructed the jury:
You have heard, during this trial, that a portion of the testimony of the prosecuting witness . . . was recalled by her as a result of her being placed under hypnosis. The phenomenon commonly known as hypnosis has been explained to you during this trial. I advise you to weigh this testimony carefully. Do not place any greater weight on this portion of [the] testimony than on any other testimony that you have heard during this trial. Remember, you are the judges of the weight and the believability of all of the evidence in this case.

Id. For a discussion of cases that have used similar precautionary instructions, see infra note 85.

48 Md. App. 382, 391, 427 A.2d 1041, 1046-47 (Ct. Spec. App. 1981). The defendant in Polk was convicted of committing various sexual offenses against an 8-year-old boy. Id. at 383-84, 427 A.2d at 1043. The boy, unable to recall the incident, was hypnotized by a state trooper 5 months after the incident. Id. at 385, 427 A.2d at 1043. The trooper's hypnotic training consisted of a 2-day seminar and the reading of three books on the subject. Id. The defendant objected to the use of the boy's testimony, asserting that hypnosis was not a proven science, that the hypnotist was unqualified, that his questions were suggestive, and that the gap between the date of the incident and that of the hypnotic session was impermissibly long. Id. at 387, 427 A.2d at 1044-45. The defendant's objections were overruled, and he appealed to the court of special appeals. Id. at 387-88, 427 A.2d at 1045.

The court of special appeals observed that subsequent to the Harding decision, the Frye rule was adopted in Maryland in Reed v. State, 283 Md. 374, 391 A.2d 364 (1978), and remanded the case for a determination of the scientific acceptance of hypnosis. 48 Md. App. at 394, 427 A.2d at 1048. A mere finding that hypnosis is scientifically acceptable, the court
duced testimony have applied the Harding rule that pretrial hypnosis raises questions not of competency, but of credibility and weight.86 Generally, these cases have reasoned that the use of hypnosis to revive a witness' memory should be treated like any other present recollection refreshed.86 Additionally, these courts assume that skillful cross-examination will enable a jury to evaluate the effect of hypnosis on the credibility of the testimony.87

indicated, is not dispositive of the admissibility question. Id. at 395, 427 A.2d at 1049. Certain questions concerning the hypnotist's qualifications, his objectivity and technique (as they bear on the possibility of suggestion), and whether any posthypnotic suggestions were given must first be answered. Id. As an additional safeguard, the court suggested that when hypnotically refreshed testimony is offered in court, the fact that the witness was hypnotized must be revealed to the factfinder. Id. at 396, 427 A.2d at 1049.


In Narciso, the United States District Court for the Eastern District of Michigan recognized that hypnosis may have no impact upon the witness' testimony; that it may enable the witness to delve into his memory and remember things either forgotten or repressed; and that it may affect the witness' mind to such an extent that he would fabricate a "memory composed partly of real memories and partly of fantasy." 446 F. Supp. at 281. The court chose to submit these alternatives to the jury, stating that "[o]n these facts where the probabilities are closely in equipoise, the Court will not remove from the jury the function of finding the facts." Id. at 281-82.

The McQueen case is somewhat unique in its resolution of the credibility issue. In McQueen, the Supreme Court of North Carolina analogized a hypnotized witness to one who has undergone some psychiatric or other medical treatment which has improved his or her memory. 295 N.C. at 122, 244 S.E.2d at 428. The court reasoned that since the credibility of all medically induced testimony is a matter for the jury's consideration, the same principle should obtain when a witness has been hypnotized. Id. In facts similar to those in McQueen, the memory of the witness in Jorgensen was restored through psychiatric and drug treatment as well as hypnosis. 8 Or. App. at 9, 492 P.2d at 315. The court admitted the testimony simply by stating that the credibility of the witness was for the jury to decide. Id.

88 E.g., Creamer v. State, 232 Ga. 138, 205 S.E.2d 240, 242 (1974); State v. Jorgensen, 8 Or. App. 1, 9, 492 P.2d 312, 315 (Ct. App. 1971). See generally Diamond, supra note 7, at 321. The Creamer court justified the admission of posthypnotic testimony by emphasizing, among other things, that both the hypnotist and the witness were cross-examined "extensively and thoroughly" by an experienced advocate. 232 Ga. at 138, 205 S.E.2d at 242. Similarly, in Jorgensen, the court justified admitting the testimony of two hypnotized witnesses by emphasizing that both had been "subjected to prolonged and rigorous cross-examination by defendant's counsel. . . . " 8 Or. App. at 8, 492 P.2d at 315.

The opportunity for sufficient and thorough cross-examination as a prerequisite to ad-
Admissibility in Light of Procedural Safeguards

Several courts have selected a middle road and have enumerated procedures aimed at reducing the potential unreliability of the statements produced. Recently, in *State v. Hurd*, the New Jersey Supreme Court held that the testimony of a witness who had undergone hypnosis to restore her memory was inadmissible in a criminal trial unless strict procedural safeguards were observed at the hypnotic session. In *Hurd*, the victim of a stabbing showed an unwillingness or inability to describe her attacker. The victim was hypnotized in an attempt to enhance her recollection of the incident. During the hypnotic session, which was performed by a psychiatrist, the victim identified her former spouse as the assailant. At trial, the accused ex-husband challenged the admissibility

mitting hypnotically induced testimony enables the trier of fact to better evaluate the weight and credibility to be accorded a witness' testimony. See Diamond, *supra* note 7, at 321. But see Spector & Foster, *supra* note 80, at 593 (subject's conviction of the truth of his testimony renders cross-examination "virtually ineffective").

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98 See, e.g., United States v. Adams, 581 F.2d 193, 198-99, 199 n.12 (9th Cir. 1978) (care must be taken to ensure that the subject's testimony is not tainted by suggestions received during the hypnotic session); People v. Smrekar, 68 Ill. App. 3d 379, 388, 385 N.E.2d 848, 855 (App. Ct. 1979) (testimony admissible where hypnotist is competent, independent evidence corroborates the subject's statements, and there is no evidence of suggestiveness); Polk v. State, 48 Md. App. 382, 395, 427 A.2d 1041, 1049 (Ct. Spec. App. 1981) (hypnotist must be qualified and disinterested and must avoid leading questions or other suggestible techniques); see also Case Note, *supra* note 52, at 271 & n.30. But see State ex rel. Collins v. Superior Court, 132 Ariz. 180, 187, 644 P.2d 1266, 1272 (1982) (en banc) (supplemental opinion) (safeguards cannot improve reliability of testimony).


100 Id. at 545-49, 432 A.2d at 96-98; see infra notes 100-08 and accompanying text.

101 86 N.J. at 529-30, 432 A.2d at 88. The prosecutor's office and the police department identified two suspects, the victim's current husband, David Sell, who was in the apartment when the attack occurred, and the victim's former husband, Paul Hurd. *Id.* at 530, 432 A.2d at 88. Mrs. Sell informed the police that they should "check out" her ex-husband. *Id.*

102 *Id.* at 530-31, 432 A.2d at 88-99. The entire hypnotic interview was tape-recorded. *Id.* at 531, 432 A.2d at 88. Prior to the hypnosis, Mrs. Sell was questioned by the hypnotist about the events surrounding the attack. *Id.* She indicated that she knew one of the suspects' names, but she did not mention which one. *Id.* Additionally, she described a person standing near the dresser in her bedroom and a person leaning in the window. *Id.*

103 *Id.* at 530, 432 A.2d at 88. In addition to the hypnotist, two officers from the prosecutor's office and a medical student were present at the session. *Id.* The victim was instructed to answer questions from the officers as well as from the hypnotist. *Id.* at 531, 432 A.2d at 88.

104 *Id.*, 432 A.2d at 89. Under hypnosis, Mrs. Sell described the facial features of her attacker in response to questions by the hypnotist. *Id.* The victim's ex-husband was identified as the assailant in response to the detective's direct question, "Is it Paul?" *Id.* The victim expressed doubt about her response when she was brought out of the hypnotic trance. *Id.* The officers encouraged Mrs. Sell to accept her identification of her former hus-
of the hypnotically refreshed testimony.\textsuperscript{85}

The \textit{Hurd} court stated that “hypnosis, unless carefully controlled, is not generally accepted as a reliable means of obtaining accurate recall,” and further noted that a person under hypnosis is vulnerable to suggestion.\textsuperscript{86} Such a person may be willing to speculate and often loses the ability to distinguish memories evoked by hypnosis from prior recollections.\textsuperscript{87} The court found, however, that a “rule of per se inadmissibility is unnecessarily broad . . . .”\textsuperscript{88} The court held, therefore, that such hypnotically enhanced testimony should be admissible if a trial court finds that the use of hypnosis was reasonably likely to elicit recollections comparable to those that would result from normal memory.\textsuperscript{89}

The \textit{Hurd} court adopted an extensive set of procedural safeguards as a condition precedent to admitting hypnotically induced recollections.\textsuperscript{100} First, the hypnotist should be a licensed psychiat-

\begin{itemize}
  \item \textsuperscript{85} \textit{Id.} They explained to her that by not identifying Paul Hurd she was in effect implicating her present husband and was leaving herself and her children in possible danger. \textit{Id.} Six days later, Mrs. Sell formally identified Paul Hurd as her assailant. \textit{Id.} at 532, 432 A.2d at 89.
  \item \textsuperscript{86} \textit{Id.} The defendant argued that since hypnosis fails to satisfy the \textit{Frye} standard for the admissibility of scientific evidence, any testimony based on a prior hypnotic session should be per se inadmissible. \textit{Id.} Alternatively, the defendant argued that even if hypnotically induced testimony is not per se inadmissible, the procedure utilized in this case was improper due to the coercive and suggestive nature of the questioning. \textit{Id.}
  \item \textsuperscript{87} \textit{Id.} at 539, 432 A.2d at 93.
  \item \textsuperscript{88} \textit{Id.} at 539-40, 432 A.2d at 93-94.
  \item \textsuperscript{89} \textit{Id.} at 541, 432 A.2d at 94.
  \item \textsuperscript{90} \textit{Id.} at 543, 432 A.2d at 95. The court discussed the shortcomings of any eyewitness account of an event. \textit{Id.} at 541, 432 A.2d at 94. Psychological studies have indicated that the normal human memory is an active process, and often the subject unconsciously fills in the gaps in memory so that the total picture will make sense. \textit{Id.}; see, e.g., Levine & Tapp, \textit{The Psychology of Criminal Identification: The Gap from Wade to Kirby}, 121 U. Pa. L. Rev. 1079, 1082 (1973). Additionally, the most accurate method of recall, unprompted narrative, ordinarily results in an incomplete picture. 86 N.J. at 541-42, 432 A.2d at 94. The system of interrogating witnesses evolved from the needs created by the imperfect workings of the normal memory, see \textit{id.} at 542, 432 A.2d at 95, but interrogation often serves to distort the witness' recollection because the pressure to answer in spite of gaps leads to less accurate responses, \textit{id.}, 432 A.2d at 94. This phenomenon is increased when the subject is hypnotized. \textit{See People v. Shirley}, 31 Cal. 3d 18, 63-64, 641 P.2d 775, 802-03, 181 Cal. Rptr. 243, 270-71 (1982) (en banc); \textit{infra} note 141.

  The solution proposed by the \textit{Hurd} court is to require that in each case, the recollection enhanced by hypnosis be approximately as reliable as normal human memory. 86 N.J. at 543, 432 A.2d at 95. Once a finding is made that the recollections under hypnosis are comparably reliable to those resulting from normal memory processes, admissibility of evidence tending to show the general unreliability of hypnosis would not be allowed. \textit{Id.} The procedures employed in a particular case, however, may be subject to challenge. \textit{Id.}
  \item \textsuperscript{91} \textit{See} 86 N.J. at 545-46, 432 A.2d at 96-97; \textit{infra} notes 101-06 and accompanying text.
\end{itemize}
trist or psychologist trained in the use of hypnosis. Second, the court emphasized the importance of the hypnotist’s independence from the parties involved in the case. Third, all information given to the hypnotist in advance of the hypnotic session must be in writing. Fourth, prior to the hypnotic session, the hypnotist should obtain a detailed list of the remembered facts from the witness. Fifth, the court mandated that the session be recorded, and strongly recommended the use of videotape for this purpose.

In addition to the enumerated procedural safeguards, the Hurd court held that the party seeking to introduce the hypnotically refreshed testimony must notify his opponent of this intent and provide him with a recording of the session. At the admissibility hearing, the court first must determine the type of memory loss experienced by the witness. This is necessary because, for example, the reliability of hypnotically restored recall is greater when there is a pathological reason for the memory loss than when the hypnosis is used simply to help a witness recall details. Moreover, the court should determine whether a witness has a discernible motivation for “remembering” a particular version of the events in question. If after considering these factors the court concludes that the hypnotic recall is comparable to that which would have been recalled under normal conditions, it must evaluate the procedures followed. In this connection, the court noted the manner of questioning as being particularly important. For example, simple narrative is the least prodding, and, therefore, would weigh in favor of admitting the testimony. The Hurd court also emphasized that the purpose behind reviewing the procedures “is not to determine whether the proffered testimony is accurate, but instead whether the use of hypnosis and the procedure followed in the particular case was a reasonably reliable means of restoring the witness’ memory.”

The professional who conducts the hypnotic session should qualify as an expert. Thus, the court will be able to elicit the professional’s aid in discovering the pathological reason for the memory loss and the “hypnotizability” of the witness. Additionally, an expert should be able to obtain the most accurate results. The expert should not be employed regularly by the prosecution, police or defense. This will preclude the possibility of bias on the part of the hypnotist, both intentional and unintentional. The court believed that requiring a written enumeration of all information given to the hypnotist prior to the session would enable the factfinder later to determine what, if any, information was communicated to the subject during hypnosis.

Prior to hypnosis, the witness should describe the facts as he remembers them without structured questions. This will enable the court to determine whether a discrepancy exists, and, if so, whether the difference is due to suggestion occurring during the hypnotic session. See United States v. Adams, 581 F.2d 193, 199 n.12 (9th Cir. 1978).

In order to detect any cues that the hypnotist inadvertently may have given, and to ensure the availability and accuracy of any information gleaned, a recording of every session is mandatory. Since videotaping the sessions would be the most useful procedure and the only way of detecting visual cues, its use is strongly
Sixth, no one other than the hypnotist and the subject should be present during any phase of the hypnotic process. The Hurd court determined that under the facts at hand, the procedural requirements were not met and that the suggestive procedures used "raise[d] grave doubts about the reliability of the hypnotically refreshed testimony obtained, which render[ed] that testimony inadmissible."

A number of courts have employed a similar analysis. In People v. Lucas, the defendant moved to suppress the testimony of a witness who had undergone hypnosis prior to trial. The court held that the witness’ testimony was admissible despite the fact that many of the required procedures were not adhered to rigidly. The witness’ pre- and posthypnotic statements were substantially similar, however, and the defendant’s own expert witness testified that the witness either had feigned hypnosis, or was not in a suggestible state.

Although the state of the law in New York currently is unset-
a lower New York court specified nine procedural safeguards. In addition to the six measures enunciated in *Hurd*, the *Lewis* court suggested that a mental health professional examine the subject to ensure "that [he] possesses sufficient judgment, intelligence, and reason"; that the hypnotist avoid adding to the subject's description; and that other evidence be considered, whether corroborative or tending to challenge the subject's description. These safeguards have been applied by other courts that have emphasized the importance of corroboration, by independent evidence, of hypnotically influenced statements, and that have held that the "totality of circumstances" must be considered when determining the reliability of the hypnotic procedures.


117 *People v. Lewis*, 103 Misc. 2d 881, 427 N.Y.S.2d 177 (Sup. Ct. N.Y. County 1980). In *Lewis*, safeguards were enumerated in order to determine whether the clinical psychologist who had hypnotized the defendant could testify at the defendant's trial. See id. at 882-83, 427 N.Y.S.2d at 179. The psychologist's testimony indicated that the defendant had been susceptible to pressure from the police when he made inculpatory statements. Id. at 882, 427 N.Y.S.2d at 178. The court held that the psychologist could not testify as to the voluntariness of the confession because he had based his evaluation on two interviews, one of which was a hypnotic session where the enumerated procedures were not followed. See id. at 884-85, 427 N.Y.S.2d at 180. The court believed that since the subject could fabricate under hypnosis as easily as if he were not hypnotized, the absence of safeguards, especially a recording of the session, rendered the testimony inadmissible. Id. at 883-84, 427 N.Y.S.2d at 179.

118 *Id.* The additional safeguards articulated by the *Lewis* court read, in full, as follows:

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

(8) The specially trained person should strive to avoid adding any new elements to the subject's description of her/his experience, including any implicit or explicit cues during the presession contact, the actual hypnosis and the postsession contact.

(9) Consideration should be given to any other evidence tending to corroborate or challenge the information garnered during the trance or as a result of posthypnotic suggestion.

*Id.*


PROCEDURAL SAFEGUARDS: ADDRESSING THE OBJECTIONS TO ADMISSIBILITY

In addition to the argument that hypnosis does not meet the Frye standard of admissibility, a close examination of the authorities reveals two constitutional objections to admitting posthypnotic testimony. First, it is argued that pretrial hypnosis results in a denial of the sixth amendment right to confrontation; and second, that hypnosis, in a pretrial identification context amounts to a denial of due process because of the susceptibility to suggestion. This section of the Article addresses these constitutional objections, as well as the contention that the Frye standard of admissibility presents an obstacle to admitting hypnotically induced or enhanced testimony. It will be shown that strict adherence to the procedural safeguards outlined in the previous section can overcome the doubts concerning such testimony.

The Frye Standard

Courts applying the Frye analysis have noted that there is a continuing controversy in the legal and scientific community concerning the reliability of hypnotically enhanced testimony. While it is recognized that such testimony can never be completely free from doubt, it is suggested that the Frye test of general scientific acceptance is misplaced in the context of hypnosis. Hyp-
nosis, unlike polygraphs, voiceprints and other technological testing devices, does not purport to establish any type of scientific fact or data. An expert does not render an opinion as to the credibility of any fact based upon the results of a test. Hypnosis simply is a method of prompting the recall of information buried within the mind of the witness. As such, its reliability should be left for determination by a jury, rather than its admissibility determined by a Frye analysis.

Properly conducted, hypnosis can elicit an accurate account of a person's recollection of his or her perceptions, although the original perception may not always be an accurate account of what occurred. Hypnotically evoked recollection thus seems to suffer from an imperfection no greater than that of recollection achieved through other methods, and, therefore, appears no more objectionable. Indeed, as a method of obtaining historically accurate information, human recall can be notoriously unreliable. Rather than requiring historical accuracy before admitting eyewitness testimony, however, the adversary system is relied upon to inform the jury of the inherent weakness of the evidence. Thus, hypnotically enhanced evidence should be admissible in criminal cases if the trial court finds that the use of hypnosis in a particular situation is "reasonably likely" to achieve recall "comparable in accuracy to normal human memory." The trier of fact then can decide how much weight to accord the hypnotically refreshed testimony.

would be excluded under a Frye analysis, from the hypnotically induced testimony itself, which it held admissible. Id.

126 See, e.g., Diamond, supra note 7, at 340; Orne, supra note 100, at 317-18; Spector & Foster, supra note 80, at 613; Spiegel, supra note 5, at 79.

127 See, e.g., Orne, supra note 100, at 317-18, 320; Spector & Foster, supra note 80, at 587-91; Spiegel, supra note 5, at 79.

128 See State v. Hurd, 86 N.J. at 541-43, 432 A.2d at 94-95; Spector & Foster, supra note 80, at 590-91.


131 See State v. Hurd, 86 N.J. at 543, 432 A.2d at 95.

Furthermore, a careful application of the procedural safeguards should quell any reservations created by the scientific objections themselves. While there is substantial controversy in the legal and scientific communities concerning the propriety of admitting posthypnotic testimony, there is considerable agreement as to the nature of its inadequacies. Since these inadequacies are clearly delineated, it would appear that strict procedures can be applied to remedy them. For example, the risk of suggestiveness is reduced when a licensed psychiatrist or clinical psychologist administers the hypnosis with no one else present. Additionally, the requirement that the hypnotist not be involved in the investigation ensures that even if the witness confabulates his responses, they will be the product of his own mind, rather than the result of the hypnotist's prompting or unintentional divulgence of prejudicial information. The human memory is an active process and even the normal workings of the mind can result in inaccurate gap-filling. Application of the safeguards should result in hypnotically refreshed memory whose reliability is comparable to that associated with normal recall, the credence of which is determined by the jury.

Right to Confrontation

The sixth amendment of the Constitution guarantees a defendant the right to confront his accusers. Basic to this right is the opportunity to cross-examine opposing witnesses. There are few subjects upon which courts have been in closer agreement than in their belief that the rights of confrontation and cross-examination are fundamental requirements for a fair trial. Indeed, the Su-

132 See supra note 122 and accompanying text.
133 See supra notes 68-71 and accompanying text.
136 U.S. CONST. amend. VI.
138 See, e.g., California v. Green, 399 U.S. 149, 158 (1970) (describing cross-examination as "the 'greatest legal engine ever invented for the discovery of truth'") (quoting 5 J. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 1367 (3d ed. 1940)).
The Supreme Court has affirmed prior holdings that sought to preserve the defendant's sixth amendment rights against undue pretrial manipulation of witnesses.139 One drawback of the hypnotic process is the subject's firm conviction that what he has recalled under hypnosis is accurate.140 Because of the high level of suggestibility, any hypnotic suggestion, intentional or otherwise, could become part of the subject's memory, regardless of the validity of the particular fact suggested.141 Thus, when a subject has no independent memory, he may reconstruct or recreate his memory to fit that which previously had been suggested to him.142 Even when the questioning is free from suggestion, hypnotic subjects tend to fabricate missing details from a mixture of actual, though unrelated, experiences and fantasy.143 When the distorted memory is implanted, the subject usually develops a firm belief in its validity, and the tenacity with which he relates this belief as a witness is correspondingly enhanced.144 This false confidence may interfere with the jury's proper function in

139 See Moore v. Illinois, 434 U.S. 220, 224-25 (1977). The Moore Court stressed the danger that a witness who has made an identification will be "predisposed to adhere to this identification in subsequent testimony at trial." Id. at 225 (citing United States v. Wade, 388 U.S. 218, 229, 235-36 (1967)).

140 See 9 ENCYCLOPAEDIA BRITANNICA Macropaedia 139 (1981). "When recalled in hypnosis, such false memories are accompanied by strong subjective conviction and outward signs of conviction that are most compelling to almost any observer." Id.

141 See Orne, supra note 100, at 327; Putnam, supra note 9, at 444. Putnam questioned experimental subjects about a videotape they had seen. Id. at 440-41. Those subjects under hypnosis made significantly more errors in response to leading questions than did the control group. Id. at 444. Putnam found no difference in accuracy, however, between the two groups' responses to nonleading questions. Id. at 445.

142 See, e.g., E. Hilgard, supra note 10, at 8-9 ("[r]eality distortions of all kinds, including acceptance of falsified memories . . . can be accepted without criticism within the hypnotic state"); see also Diamond, supra note 7, at 314.

143 See, supra note 7, at 335; Stalnaker & Riddle, The Effect of Hypnosis on Long Delayed Recall, 6 J. Gen. Psych. 429 (1932). In a study conducted more than 50 years ago, students attempted to recall poems learned 12 months earlier. Under hypnosis, they recalled more of the original material, but, significantly, they made more mistakes, in some instances fabricating significant segments of the poem. Id. at 436-37. Clearly, this phenomenon stems not from dishonesty, but from the hypnotized subject's desire to satisfy the hypnotist. See Diamond, supra note 7, at 335. This desire can prod the subject into producing the detailed, seemingly realistic account that he senses the hypnotist wants. Id. at 337.

The most dramatic illustrations of the hypnotized subject's willingness to "recall" events that have not occurred are seen in age/progression studies. There, subjects are able to describe events 10 years in the future with the same confidence and in the detail that they described past events. Rubenstein & Newman, The Living Out of "Future" Experiences Under Hypnosis, 119 SCIENCE 472, 473 (1954).

144 See Spiegel, supra note 5, at 78-79.
evaluating the demeanor of a witness. Arguably, a defendant faced with such a witness is denied his sixth amendment right to confront his accusers because the witness’ original memory is lost forever. The defendant now must face a “new” witness whose natural recollection may have been altered by suggestion or confabulation, but who nonetheless has a firm conviction as to its truth. Thus, the prosecutor has created, and later will present to a jury, a sincere, and, hence, more credible witness.

While hypnotically obtained testimony presents some risks to an accused’s sixth amendment rights, the validity of this evidence, when it is obtained under strictly regulated conditions, is comparable to that resulting from recognized and permissible techniques for refreshing a witness’ recollection. The major concern when using any form of present memory refreshment is that the witness’ recollection actually may not be revived, but rather, that he merely will agree with counsel’s leading questions or with data contained in a memorandum. Nonetheless, courts usually will permit a wit-

145 It is well established that a primary objective of the confrontation clause is to allow the jury to judge the witness’ demeanor on the stand and the manner of his delivery. See, e.g., Mattox v. United States, 156 U.S. 237, 242-43 (1895). Following hypnosis, however, the witness’ demeanor may not reflect the honest uncertainties he may have felt as to his natural recollection, but instead will reflect an artificial confidence. See Diamond, supra note 7, at 339-40. Professor Diamond asserts that not even a trained expert can determine whether a hypnotically induced recollection is distorted, as long as the recollection logically is plausible. See id. at 337, 340. Thus, the jury’s ability to interpret the witness’ demeanor on the stand is diminished, if not eliminated.

146 See Diamond, supra note 7, at 336. Professor Diamond proffers:

[|time, rather than weakening the effects of the hypnotic distortion, tends if any-
thing to fix it into a permanent pattern. Therefore, the pretrial hypnosis of a wit-
ness appreciably influences all of his subsequent testimony in ways that are
outside the consciousness of the witness and difficult, if not impossible, to detect.

147 Id. at 335-37. Professor Diamond describes the problem of “posthypnotic source amn-
esia,” whereby the subject remembers what he learned in a hypnotic state, but forgets that he learned it under hypnosis. Id. at 336; see also Spiegel, supra note 5, at 78 (description of the “honest liar” syndrome).

148 Comment, supra note 1, at 130. “Refreshing recollection” refers to a witness reviewing-
data in order to help him recall the facts of a particular event. C. McCormick, HANDBOOK OF THE LAW OF EVIDENCE § 9, at 14-15 (E. Cleary 2d ed. 1972). “Past recollection recorded” refers to the swearing by a witness that a memorandum was prepared by him and that he believed it to be accurate at that time. Id.

149 See 3 J. Wom, supra note 138, §§ 776-777, at 169. Leading questions may be asked to aid a witness’ memory subject to the court’s discretion. Id. It is accepted that the human memory often can be refreshed when an image or statement associated with the memory is brought to a witness’ attention. C. McCormick, supra note 148, § 9, at 14. It is at times questionable, however, whether the witness actually recalls the events or merely believes them to be true because of the written statement. See id. at 16.
ness’ memory to be refreshed or revived, but will retain the authority to determine whether the witness is actually relying on his refreshed memory. Additionally, the court may deny counsel permission to proceed if the method’s probative value is outweighed by the possibility of undue prejudice caused by suggestion. Furthermore, the adverse party has the right to examine any aid employed to enhance recollection, as well as attack the validity of the aid and the corresponding testimony on cross-examination.

It appears that a skillful and vigorous examination of both the witness and hypnotist should bring any deficiencies in the hypnotic technique to the attention of the jury. For example, discrepancies between the witness’ pre- and posthypnotic statements provide fertile ground for investigation and confrontation. Moreover, the additional confidence in a witness’ testimony induced by hypnosis need not violate a defendant’s sixth amendment rights any more than confidence induced through more conventional and accepted techniques, such as an attorney’s extensive drilling of a witness before trial.

Several courts properly have permitted the testimony of a witness whose amnesia has been overcome through hypnosis, reasoning that the technique of memory enhancement is a factor to be considered by the jury, provided that the facts are related from the witness’ present memory, the hypnotist details the technique employed, and the opponent has the opportunity to challenge the reliability of the present memory and the procedures employed to enhance the recall. When memory refreshment techniques are employed, access by opposing counsel at trial to the materials used, and cross-examination based on those materials, is deemed sufficient to protect the defendant’s constitutional rights. Thus,

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180 C. McCormick, supra note 148, § 9, at 16-17; see United States v. Conley, 503 F.2d 520, 522 (8th Cir. 1974) (it is within the discretion of the trial court to permit or disallow the use of an aid to memory).
181 C.McCormick, supra note 148, § 9, at 17.
182 Spivey v. Zant, 683 F.2d 881, 885 n.5 (5th Cir. 1982); see Fed. R. Evid. 612 & advisory committee note.
184 See Comment, supra note 1, at 132.
185 See Fed. R. Evid. 612. Under the federal rules, a defendant’s access to a witness’ memory refreshment aid is mandated only when the witness uses the aid on the stand. Id. advisory committee note. If the aid is used only to refresh his memory before testifying,
when hypnosis is used to enhance recall, access before trial to the mandatory recording of the hypnotic session\textsuperscript{156} and divulgence of all information received by the hypnotist prior to the session\textsuperscript{157} will provide greater protection to the defendant since criminal defendants normally are not permitted access to a state witness' pretrial statements until that witness has testified on direct examination.\textsuperscript{158} Access to the records will enable opposing counsel to bring any procedural irregularities to the attention of the court, and will furnish him with the necessary raw material with which to impeach the credibility of the witness' recall.

\textbf{Due Process}

It can be argued that the pretrial hypnosis of a witness violates an accused's right to due process of law because of the subject's susceptibility to suggestion, and the tendency of a witness to adhere to an initial statement in later proceedings. It is submitted that through the implementation of the enumerated procedures, this danger may be ameliorated to an extent that will ensure the defendant of his constitutional rights.

The due process analysis as applied to identification procedures provides a useful analogy,\textsuperscript{159} since those procedures present the same dangers of suggestibility\textsuperscript{160} and proclivity to adhere to...
earlier statements. In a due process analysis of an identification procedure, courts balance the suggestiveness of the procedure against the reliability of the identification to determine whether there is a "very substantial likelihood" that the identification was inaccurate. This standard does not require the elimination of all appearances of doubt. Identification procedures will be upheld "so long as the identification possesses sufficient aspects of reliability." Similarly, when testimony is hypnotically induced, courts should make a threshold determination of admissibility based upon whether the hypnotic testimony was unduly influenced by suggestion, and thus violative of due process. Adherence to the

cated that overly suggestive procedures indeed violate the defendant's constitutional rights. Note, supra note 50, at 992-93. In United States v. Wade, the Court stated, "A major factor contributing to the high incidence of miscarriage of justice from mistaken identification has been the degree of suggestion inherent in the manner in which the prosecution presents the suspects to witnesses for pretrial identification." 388 U.S. at 228.

See Simmons v. United States, 390 U.S. 377, 383-84 (1968) (when a witness makes an identification from a photograph, he is likely to retain the image of the photograph rather than of the criminal); United States v. Wade, 388 U.S. 218, 229 (1967) (a witness is not likely to change his mind once he has made an identification).

See Coleman v. Alabama, 399 U.S. 1, 5 (1970); Simmons v. United States, 390 U.S. 377, 384 (1968). Factors indicative of a reliable identification include "the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation and the length of time between the crime and the confrontation." Neil v. Biggers, 409 U.S. 188, 199-200 (1972). Indicia of suggestiveness include the composition of a lineup and the behavior of the police at the confrontation. See Note, supra note 50, at 986-88. An additional consideration is the necessity of the procedure used. See, e.g., Stovall v. Denno, 388 U.S. 293, 302 (1967).

Manson v. Braithwaite, 432 U.S. 98, 106 (1977) (footnote omitted); see United States v. Field, 625 F.2d 862, 866 (9th Cir. 1980).

Cf. Manson v. Braithwaite, 432 U.S. 98, 116 (1977) (with respect to identification procedures generally, if there is anything "short of a very substantial likelihood of irreparable misidentification," the testimony is "for the jury to weigh"); Sales v. Harris, 675 F.2d 532, 539 (2d Cir. 1982) (if a "minimum threshold level of reliability" has been met, identification testimony is admissible). In the context of a pretrial identification made during a hypnotic session, the trial judge at the suppression hearing should consider the inherent suggestiveness of hypnosis, as well as the degree of suggestiveness in the particular instance in light of the Hurd procedures. Whether the minimum level of reliability has been reached should be determined through use of the Manson test of "very substantial likelihood of irreparable misidentification." See Manson, 432 U.S. at 116; supra note 161. In addition, it should be borne in mind that reliability is not synonymous with accuracy. Rather, it is the probability that the response would be the same under any circumstance. Note, supra note 50, at 992 n.103. Indeed, the Manson factors serve to determine the quantity and quality of information the witness has in his memory, and, therefore, could be used to test the probability of confabulation by the subject. For example, the span of time between the crime and the hypnosis will determine the extent of memory decay, and whether the holes in memory will likely be filled while the subject is under hypnosis.
procedural safeguards should serve to minimize the likelihood of prejudice in this context. For instance, the requirement that the hypnotist be independent of the investigation and uninformed about its progress will reduce the incidence of leading questions. Additionally, requiring that the hypnotist be alone with the subject will eliminate the possibility of influence from third parties. In this manner, the procedural safeguards enhance the reliability of the testimony, and thereby ensure that due process has not been violated.

Adherence to due process requirements, it is suggested, can be secured further through performance of two additional functions. First, in applying the due process balance, the court should weigh the necessity of the hypnotic procedure. If the hypnosis was not necessary to the procurement of evidence, the subject should not be permitted to testify regarding the substance of the hypnotic

165 When the hypnotist has a preconceived idea of the expected responses, his interrogation can be tainted and the likelihood of suggestion increased. State v. Hurd, 86 N.J. 525, 538-39, 432 A.2d 86, 92-93 (1981). Subtleties in the hypnotist’s manner or voice that would hardly be noticed in an ordinary courtroom setting, much less considered leading, could indicate to the witness what responses are expected of him. See id. Consequently, the fewer preconceptions of the hypnotist, the less risk there is of suggestion. Additionally, an independent hypnotist will be less inclined to press the hypnotized subject for an answer he does not know, thereby reducing the risk of the subject confabulating simply to satisfy the hypnotist. Id. at 543, 432 A.2d at 96.


167 There is some controversy as to whether a witness whose testimony was excluded because of hypnosis can testify regarding the substance of what he recalled prior to hypnosis. State ex rel. Collins v. Superior Court, 644 P.2d 1279, 1279 (Ariz. 1982) (en banc) (supplemental opinion). In Collins, the Arizona Supreme Court reiterated its rule of per se inadmissibility for hypnotically induced recall testimony, but held that a previously hypnotized witness could testify about “those matters which he or she was able to recall and relate prior to hypnosis.” Id. at 1295 (emphasis in original) Although the court acknowledged the dangers to the defendant’s sixth amendment rights, it reasoned that the benefit of such testimony outweighed the risk and that an adequate record of the prehypnotic statements would enable the court to confine the testimony to prehypnotic recall. Id. at 1296; see also People v. Wallach, 110 Mich. App. 37, 72-73, 312 N.W.2d 387, 404-05 (Ct. App. 1981); State v. Palmer, 210 Neb. 206, 218, 313 N.W.2d 648, 655 (1981).

In Palmer, the Nebraska Supreme Court held that a witness may not testify as to the “subject matter” of the hypnotic session, but his testimony as to “other subjects” may be admissible. 210 Neb. at 218, 313 N.W.2d at 655. Clearly, this approach presents problems for courts in delineating the various “subjects.” The concurrence in Palmer adopted the view that testimony concerning recollections made prior to hypnosis should be admissible.
session. This would have the conjunctive effect of discouraging prosecutorial abuse of the hypnosis technique. Second, a greater level of corroboration should be required in hypnosis cases to counteract the increased level of suggestibility.

As with motions to suppress other types of pretrial procedures claimed to be unduly suggestive, a court ruling on a motion to suppress the testimony of a previously hypnotized witness should decide the issue on the basis of the overall quality of the procedures employed. Since the safeguards require that the defendant be given a complete record of the hypnotic session, as well as any other witness contacts with the hypnotist, any due process objection to the procedures can be expeditiously presented to the court.

CONCLUSION

While hypnosis as a device to enhance witness recall remains problematic, understanding of hypnosis on the part of the scientific and therapeutic communities is increasing. Moreover, such employment of hypnosis may expose valuable, albeit potentially unreliable, evidence that otherwise would remain undisclosed. The potential unreliability of this evidence, however, seems no more perilous than that resulting from other methods of inducing witness recall. Hence, in the essential balance between the necessity for all relevant evidence and such evidence's reliability, post-hypnotic testimony appears deserving of a place in criminal jurisprudence. Indeed, although hypnosis bears a degree of imperfec-

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168 Id. at 219, 313 N.W.2d at 655 (Clinton, J., concurring); see State v. Koehler, 312 N.W.2d 108, 110 (Minn. 1981) (permitting testimony as to matters "unequivocally disclosed" before hypnosis).

169 See State v. Long, 32 Wash. App. 732, 737, 649 P.2d 845, 847 (Ct. App. 1982). The recommendation to consider the necessity of the hypnosis is aimed at preventing prosecutors from using hypnosis to strengthen a witness or to change his story rather than to refresh his memory. One factor to be considered in deciding whether the hypnosis was necessary is the stage in the investigatory process at which the hypnosis was performed. See id., 649 P.2d at 847. If the hypnosis was performed close to the time of the trial, after the investigation was completed, the court may infer that its purpose was not the development of facts, but instead the manipulation of the witness. See id.

tion, any obstacle to its admissibility appears scaleable with the aid of procedural safeguards.