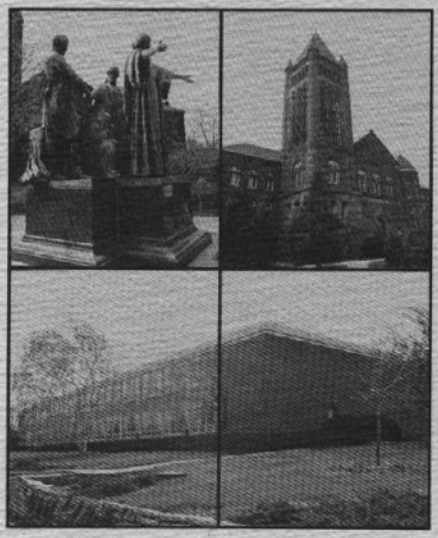
ISSN 0276-9948

UNIVERSITY OF ILLINOIS



LAW REVIEW

VOLUME 1985 NUMBER 4

HYPNOTICALLY REFRESHED TESTIMONY AND THE BALANCING PENDULUM

I. INTRODUCTION

Today hypnosis remains undefined, as no consensus about a single definition exists.[1] Nevertheless, scientists recognize that hypnosis explains a natural, psychological phenomenon.[2] The impact of hypnosis is widespread, affecting such diverse areas as sports,[3] education,[4] dentistry, research, advertising,[5] and the law.[6] No one questions the benefits of hypnosis as a medical treatment. Such benefits include calming nerves,[7] reducing pain,[8] curing multiple personalities,[9] interpreting dreams,[10] treating mental illness, and dealing with combat neuroses.[11] This note focuses on another benefit of hypnosis: its ability to enhance memory recall and to overcome amnesia.[12]

Despite its benefits, hypnosis remains controversial. This controversy has traditionally caused courts to view hypnotically enhanced evidence with distrust. Such distrust particularly applies to the specific form of hypnotically induced evidence which this note addresses: present in-court testimony of a lay witness when a previous hypnotic session refreshed that testimony. Courts recognize, however, that the process of hypnosis can provide useful testimony. In attempting to balance these competing concerns, courts have been unable to agree on a compromise.

Courts which address the issue of whether the hypnotically refreshed testimony of a witness is admissible at trial generally follow one of three established approaches.[13] First, numerous courts view hypnosis as merely affecting the *credibility* of the witness rather than the admissibility of the evidence and always admit posthypnotic testimony.[14] Two dangers inherent

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[1] Council on Scientific Affairs of the American Medical Association, *Scientific Status of Refreshing Recollection by the Use of Hypnosis,* 253 J. A.M.A. 1918 (1985).

[2] The American Medical Association recognized and accepted hypnosis in 1958. Council on Mental Health of the American Medical Association, *Medical Use of Hypnosis,* 168 J. A.M.A. 186 (1958). In 1960, the American Psychological Association recognized hypnosis as a branch of psychology. E. HILGARD, HYPNOTIC SUSCEPTIBILITY 4 (1965).

[3] Unestal, *Hypnotic Preparation of Athletes,* 1979 HYPNOSIS 301.

[4] Cory, *Hypnolearning? Hip, but No Learning,* PSYCHOLOGY TODAY, Mar. 1980, at 22.

[5] R. UDOLF, FORENSIC HYPNOSIS 4 (1983).

[6] W. KROGER, CLINICAL AND EXPERIMENTAL HYPNOSIS 115-17 (2d ed. 1977).

[7] E. HILGARD, DIVIDED CONSCIOUSNESS: MULTIPLE CONTROL IN HUMAN THOUGHT AND ACTION 163 (1977).

[8] *Id.* at 171.

[9] *Id.* at 17.

[10] *Id.* at 87.

[11] E. HILGARD, *supra* note 2, at 4.

[12] H. ARONS, HYPNOSIS IN CRIMINAL INVESTIGATION 34-39 (1967).

[13] United States v. Valdez, 722 F.2d 1196, 1198-1200 (5th Cir. 1984); Ruffra, *Hypnotically Induced Testimony: Should it be Admitted?,* 19 CRIM. L. BULL. 293, 297 (1983); Note, *Evidence The Admissibility of Hypnotically Refreshed Testimony in New Mexico: "State v. Beachum",* 13 N.M.L. REV. 541, 545-47 (1983) [hereinafter cited as Note, *Evidence];* Note, *Hypnotically-Refreshed* Testimony Held Inadmissible Absent More Conclusive Proof of Reliability of Hypnotically-Restored Memory, 55 TEMP. L.Q. 756, 761 (1982) [hereinafter cited as Note, Conclusive Proof]; Note, The Admissibility of Testimony Influenced by Hypnosis, 67 VA. L. REV. 1203, 1216-18 (1981) [hereinafter cited as Note, Testimony Influenced].

[14] For a list of state cases which have held that posthypnotic testimony only affects the credibility of the

in this approach, however, are the jury's potential inability to accurately assess the credibility of hypnotically aided testimony and the jury's potential misconceptions about the reliability of hypnosis.

Several courts responded to these dangers and developed a second approach. Under the *procedural safeguards* approach, the trial judge makes an initial ruling on admissibility and excludes testimony unless the hypnotic session satisfies rigorous procedural safeguards.[15] Thus, these courts must perform a case-by-case analysis.

While recognizing the importance of a judicial ruling on admissibility, other courts find testimony enhanced by prior hypnosis inadmissible regardless of the procedures employed.[16] This third approach requires a court to determine whether the scientific community of the particular jurisdiction generally accepts hypnosis as reliable. Most jurisdictions determine the reliability of a new scientific technique under this test of *general acceptance*.[17] Because the scientific community does not generally accept hypnotically aided testimony as reliable, courts applying this test to hypnosis usually exclude all such testimony.[18]

Three courts recently declined to follow any of the entrenched positions[19] and instead applied the rules of evidence defining relevancy and its limits to the issue of hypnotically refreshed evidence. The *relevancy* position balances the probative value of evidence against the prejudicial risks characteristic of that evidence in determining the admissibility of hypnotically refreshed testimony.

This note suggests that each position can contribute to a single legal approach which properly addresses the questions surrounding a witness's testimony refreshed by hypnosis. In developing a viable legal position, this note first discusses the scientific and legal controversy surrounding hypnosis. Hypnosis encourages such controversy because it creates problems for both the scientific and the legal disciplines. This note investigates these problems and then presents two judicial reactions to the problems. First, courts often refuse to admit hypnotic testimony as substantive proof and instead only allow the use of hypnosis as a memory refresher. Alternatively, courts question the extent, if any, to which hypnosis creates or aggravates problems found with ordinary, non-hypnotized witnesses.

Beneficial factors counter the problems inherent in the hypnotic process. This note identifies three areas where hypnosis proves useful to the legal system: as a recollection device,

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witness and is therefore admissible, see Appendix A. Two United States courts of appeals have agreed. *Clay v. Vose*, 771 F.2d 1 (1st Cir. 1985); *United States v. Awkard*, 597 F.2d 667 (9th Cir.), cert. denied, 444 U.S. 885 (1979).

[15] For a list of state cases which require procedural safeguards as a condition for admissibility of posthypnotic testimony, *see* Appendix A. One United States Court of Appeals case has agreed. *United States v. Adams*, 581 F.2d 193 (9th Cir.), cert. denied, 439 U.S. 1006 (1978).

[16] For a list of state cases which hold that hypnotically enhanced testimony is inadmissible, see Appendix A under "Majority Position." No federal courts follow this approach.

[17] *Frye* v. United States, 293 F. 1013 (D.C. Cir. 1923), first stated the test of general acceptance. In *Frye*, the court refused to admit the results of a lie detector test (polygraph examination) into evidence. This refusal resulted because the scientific test was not "sufficiently established to have gained general scientific acceptance in the particular field to which it belongs." *Id*. at 1014. In support of the view that most jurisdictions accept the *Frye* standard, see Strong, *Questions Affecting the Admissibility of Scientific Evidence*, 1970 U. ILL. L.F. 1, 11; Note, Evolving Methods of Scientific Proof, 13 N.Y.L.F. 677, 682 n.15 (1967). Almost all the jurisdictions that bar. hypnotically enhanced testimony do so under the *Frye* rule. Brown v. State, 426 So. 2d 76, 86 n.14 (Fla. App. 1983)

[18] For a list of state cases which hold that the general acceptance test applies to posthypnotic testimony, see Appendix A. No federal court applies this test.

[19] United States v. Valdez, 722 F.2d 1196 (5th Cir. 1984); United States v. Charles, 561 F. Supp. 694 (S.D. Tex. 1983); State v. Contreras, 674 P.2d 792 (Alaska App. 1983).

as an investigatory tool, and as a basis for expert opinion. This note then balances the problems and benefits of hypnosis to analyze and critique each of the four legal positions addressing hypnotically refreshed testimony. Finally, this note recommends a flexible, three-tiered balancing approach which adopts the best reasoning of each existing position.

II. HISTORICAL BACKGROUND: CONTROVERSY SURROUNDING HYPNOSIS

Until recently, scientists considered hypnosis more of a parlor trick or black magic than a legitimate psychological phenomenon.[20] Controversy over hypnosis arises from two sources. First, myths and legends retain vitality. The ancient origins of hypnosis,[21] at a time when scientific knowledge was primitive, caused lay persons to associate hypnosis with mystery and evil.[22] These misconceptions remain today because scientists are unable to explain fully how hypnosis works. This lack of agreement among scientists concerning the nature of hypnosis is the second source of controversy.

The numerous definitions of hypnosis reflect the diverse theoretical explanations for the phenomenon. Most definitions state that hypnosis is a state of mind in which a person becomes likely to accept suggestion.[23] Some hypnotists form a negative definition, stating what hypnosis is not: a state of sleep, an unconscious state, a psychological condition, or a "control" condition.[24] Other hypnotists frame the definition in terms of observable characteristics of the hypnotic trance.[25] The lack of a consensus definition provides evidence of a scientific inability to explain hypnosis and illustrates the controversy surrounding hypnosis.

The controversy in the scientific field traditionally caused courts to view testimony uncovered or affected by hypnosis with skepticism. In 1897, the first reported American case which addressed such testimony stated that "[t]he law of the United States does not recognize hypnotism."[26] This skeptical view remained prevalent until 1968 when a court specifically allowed hypnosis as a tool for evidentiary purposes.[27] Since that time, the increasing use of hypnosis and society's developing interest in hypnosis as a phenomenon of human conduct are forcing courts to abandon their initial reluctance to recognize hypnosis. The recent proliferation of cases discussing hypnosis illustrates the impact of hypnosis on all phases of the legal

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[20] J. MCCONNELL, UNDERSTANDING HUMAN BEHAVIOR 393 (1977).

[21] Primitive medicine men, voodoo practitioners, the Egyptians, and the Bible all identified the powers of suggestion. Comment, The Admissibility of Hypnotically Induced Recollection, 70 KY. L.J. 187, 189 (1981-82). Professor Udolf asserts that ancient peoples observed hypnotic phenomena since the beginning of recorded history. R. UDOLF, *supra* note 5, at 1. Thus, hypnosis existed long before Dr. Franz Anton Mesmer's modern "discovery" in the eighteenth century. Note, *Refreshing the Memory of a Witness Through Hypnosis*, 5 U.C.L.A. [UCLA]-ALASKA L. REV. 266 (1976).

[22] Comment, Hypnosis-Should the Courts Snap Out of It?--A Closer Look at the Critical Issues, 44 OHIO ST. L.J. 1053, 1055 (1983).

[23] H. ARONS, *supra* note 12, at 15. For similar definitions, see Spector & Foster, *Admissibility of Hypnotic Statements: Is the Law of Evidence Susceptible?*, 38 OHIO ST. L. J. 567, 570 (1977); H. ARONS, supra note 12, at 17 (quoting Dr. S. J. VanPelt, editor of the *British Journal of Medical Hypnotism)*.

[24] H. ARONS, *supra* note 12, at 11-13.

[25] Such characteristics include loss of initiative, selective attention, use of visual images, reality distortions, increased suggestibility, role behavior, and amnesia for what transpired during the hypnotic state. E. HILGARD, THE EXPERIENCE OF HYPNOSIS 6-10 (1968).

[26] People v. Ebanks, 117 Cal. 652, 665, 49 P. 1049, 1053 (1897).

[27] Harding v. State, 5 Md. App. 230, 246 A.2d 302 (1968), *cert. denied*, 252 Md. 731, *cert. denied*, 395 U.S. 949 (1969).

process.[28] Most courts recognize that witnesses can remember forgotten information both during and after hypnosis.[29] This recognition caused a widespread increase in the use of hypnosis during the preliminary investigative stage of litigation during the 1970's.[30] Such use remains largely unfettered by judicial restrictions.[31] Under the rules of evidence, however, courts scrutinize the use of hypnotically obtained evidence at trial. Finally, courts permit largely unfettered use of hypnosis during the sentencing stage.[32]Courts thus may receive hypnotically induced evidence in various phases of the legal process.

Courts also may receive such evidence in various forms. One form involves testimony by a lay witness hypnotized on the stand. A second form involves statements made by a witness during pretrial hypnosis.[33] This note primarily addresses a third form of hypnotically induced evidence: hypnotically refreshed testimony. Although the issues surrounding the use of hypnotically refreshed testimony are not novel,[34] many courts' recent decisions concerning this form are cases of first impression.[35] Other courts have yet to address the issues,[36] and those courts which do address the issues exhibit a pronounced lack of uniformity.

Inadequate knowledge has caused the scientific controversy surrounding hypnosis and the resulting lack of legal uniformity surrounding hypnotically refreshed testimony. Because scientific development advancing the study of hypnosis is lacking,[37] the essential nature of the hypnotic phenomenon remains inadequately explained despite numerous theoretical views on the subject.[38] Lack of explanation, however, does not preclude widespread use of hypnosis; scientists know both the capabilities of hypnosis and how to induce the hypnotic state.[39]

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[28] See Appendix A for a list of recent state cases discussing hypnosis. The federal courts have only recently begun to address the issue. Appendix A also lists federal court decisions on the subject of hypnosis.

[29] Note, *Pretrial Hypnosis and its Effect on Witness Competency in Criminal Trials,* 62 NEB. L. REV. 336, 336 (1983).

[30] Diamond, *Inherent Problems in the Use of Pretrial Hypnosis on a Prospective Witness, 68* CALIF. L. REV. 313, 313 (1980).

[31] Warner, *The Use of Hypnosis in the Defense of Criminal Cases,* 27 INT'L J. CLINICAL & EXPERIMENTAL HYPNOSIS 417, 418 (1979). Pretrial practices include using hypnosis to enhance the memories of witnesses to and victims of crimes, to enhance the memories of witnesses and parties in civil actions, and to seek the truth in a manner analogous to a lie detector test or truth serum. R. UDOLF, *supra* note 5, at 5. Courts screen such testimony for possible abuses. Warner, *supra,* at 418.

[32] One commentator doubts that a court would prohibit any mitigating information obtained in a scientifically recognized form at this stage. *Id.* at 433.

[33] For a discussion of both forms of hypnotically induced evidence, see Note, *Testimony Influenced*, *supra* note 13, at 1223-28; Comment, *supra* note 21, at 188.

[34] The first American case to address these issues was State v. Exum, 138 N.C. 599, 50 S.E. 283 (1905).

[35] *See, e.g.,* State v. Beachum, 97 N.M. 682, 643 P.2d 246 (1981) (the legal issues involving the use of hypnosis remain undecided in this state); State v. Long, 32 Wash. App. 732, 649 P.2d 845 (1982) (the question of the hypnotized witness is new in this state).

[36] One commentator estimated that, as of 1982, the issues were novel in 40% of the states. R. UDOLF, *supra* note 5, at 63. Although Appendix A indicates that 35 states now have addressed the issues, research has uncovered only four federal circuits which have directly considered the issues.

[37] Fromm and Shor suggest one reason for this lack of development: hypnosis lacks the quantification by units of measure which characterizes other sciences, thereby inducing the ridicule of more conventional scientists. Fromm & Shor, *Underlying Theoretical Issues: An Introduction,* in HYPNOSIS RESEARCH DEVELOPMENTS AND PERSPECTIVES 3-4 (E. Fromm & R. Shor eds. 1972). Wolberg suggests that gaps in scientific understanding of brain mechanisms and psychoanalysis-the tools necessary to understand hypnosis--cause modern scientists' inability to explain hypnosis. L. WOLBERG, HYPNOSIS: IS IT FOR YOU? 50-60 (1972).

[38] Kline and Wolberg identify six theories or models for hypnosis: hereditary, physiological, environmental, learning, cultural social, and developmental motivational. M. KLINE & L. WOLBERG, THE NATURE OF HYPNOSIS: CONTEMPORARY THEORETICAL APPROACHES 6 (1962). For a discussion of the various

III. BALANCING FACTORS: HYPNOTIC PROBLEMS AND BENEFITS

A. Problems with Hypnosis

The process of hypnosis is not a perfected procedure. Difficulties inherent in the process create corresponding problems which the courts must address. These problems may include questionable reliability, ineffective cross-examination, witness-credibility concerns, an undue scientific aura, and misleading juror misconceptions.

1. Reliability

Because the hypnotized person is ultrasuggestible and tries to please the hypnotist by complying with the perceived demand for a correct memory, the reliability of statements made under hypnosis is questionable.[40] These suggestibility problems raise due process issues for courts. Some experts acknowledge the ability of persons under hypnosis to manufacture or invent false statements and therefore consider hypnotic evidence unreliable.[41] Hypnotized persons obtain an increased subjective certainty in their statements following hypnosis. Such certainty may thwart an ability to cross-examine a witness after hypnosis, thereby raising sixth amendment issues for a court. Finally, lay misconceptions concerning the nature of hypnosis may cause a jury to attach undue significance to the testimony of previously hypnotized witnesses.

By definition hypnotism is a state of increased suggestibility.[42] This *hypersuggestiveness,* or extreme state of suggestibility, may cause subjects to incorporate cues from the hypnotist into their own memories. In responding to suggestions, the subject tries to please the hypnotist by adopting these suggestions.[43] The subject may *confabulate,* or fill in missing details with fantasized or extraneous material, in this effort to please the hypnotist.[44] Confabulation may result from suggestions or from the subject's own memory. The subject's posthypnotic memory, therefore, may not be true recall but instead may integrate actual events

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theoretical explanations of hypnosis, see W. KROGER, supra note 6, at 26-32 and M. TEITELBAUM, HYPNOSIS INDUCTION TECHNICS 3 (1963).

[39] Appendix B describes the process of hypnosis by which the hypnotist induces the hypnotic state.

[40] MCCORMICK's HANDBOOK OF THE LAW OF EVIDENCE § 208, at 520 (E. Cleary 2d ed. 1972) [hereinafter cited as MCCORMICK].

[41] *See, e.g., J.* WIGMORE, EVIDENCE § 998, at 943 (Chadbourn rev. 1970); Orne, *The Use and Misuse of Hypnosis in Court,* 27 INT'L J. CLINICAL & EXPERIMENTAL HYPNOSIS 311, 313 (1979), *reprinted in* 3 CRIME & JUSTICE 61, 64 (1981); Ruffra, *supra* note 13, at 296.

[42] The hypnotic process requires that a subject be open to suggestion. Experts universally acknowledge susceptibility to suggestion as a characteristic of hypnosis. See, e.g., H. ARONS, *supra* note 12, at 14-15; E. HILGARD, *supra* note 25, at 9-10; Diamond, supra note 30, at 333; Spector & Foster, *supra* note 23, at 570.

[43] J. MCCONNELL, *supra* note 20, at 398. A subject may produce approximations of memory in an effort to cooperate with the hypnotist. Orne, supra note 41, at 319, *reprinted at* 69. *See also* Diamond, *supra* note 30, at 333.

A hypnotist cannot avoid conveying suggestions to the subject; these suggestions can be extremely subtle, perhaps even unconscious or inadvertent on the hypnotist's part. Doctor Diamond suggests that attitude, demeanor, expectations of the hypnotist, tone of voice, and body language may all communicate suggestions. Diamond, supra note 30, at 333. Orne labeled the cues that a subject might receive in the hypnotic session as "demand characteristics." These "demand characteristics" include socio-economic factors, expectancies, prior information, and other aspects of the total context. Orne, *The Nature of Hypnosis- Artifact & Essence*, 58 J. ABNORMAL & Soc. PSYCHOLOGY 277-99 (1959) [hereinafter cited as Orne, *Nature of Hypnosis*].

[44] For a more detailed explanation of confabulation, see Diamond, *supra* note 30, at 335; Ruffra, *supra* note 13, at 296; Note, *supra* note 29, at 342; Comment, *supra* note 22, at 1066-67.

with fantasized details which either the hypnotist suggests or the subject creates.[45] Suggestibility may go so far as to "create an eyewitness where there was none.[46]

In addition to the unreliability of hypnotically refreshed testimony, suggestibility may create a constitutional problem. The use of a hypnotized witness's pretrial identification as evidence may constitute a denial of due process.[47] Because the United States Supreme Court has ruled that identification procedures which are "unnecessarily suggestive" violate due process of law,[48] identifications made after hypnosis when the witness is hypersuggestible may violate this standard.[49]

Expert testimony assessing the subject's proneness to subtle suggestion is one potential guard against hypersuggestiveness.[50] The factfinder could discount the testimony of subjects overly susceptible to suggestion. Another protection is inherent in the hypnotic process: the hypnotist cannot manipulate the subject's will.[51] The hypnotist, therefore, cannot abuse the situation by implanting false suggestions against the will of the subject. Despite such protection, however, one commentator views suggestibility as the most dangerous characteristic of hypnotically aided recall.[52]

Although the hypnotist might not abuse the hypnotic session, the subject might deliberately deceive during hypnosis. Even a deep state of hypnosis cannot prevent a witness from lying.[53] Moreover, the subject might even fake a hypnotic trance.[54] Potential protections exist, however, for both types of fabrications. One commentator suggests that "autonomic lie detection," whereby upon suggestion by the hypnotist the subject will unconsciously display a physical reaction when consciously lying, would uncover deception.[55] In addition, hypnotists could use the correlation between depths of hypnosis and physical characteristics to detect faking of hypnosis.[56] Most commentators agree, however, that hypnotists cannot infallibly determine whether the subject is lying or even whether the subject is hypnotized.[57] The fact that hypnotists

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[45] Note, *supra* note 29, at 342, 349. A study by William H. Putnam illustrates the correlation between suggestibility and memory distortion under hypnosis. The study indicated that leading questions elicited more incorrect responses from subjects under hypnosis than from those not under hypnosis. Putnam, *Hypnosis & Distortions in Eyewitness Memory*, 27 INT'L J. CLINICAL & EXPERIMENTAL HYPNOSIS 437 (1979).

[46] Orne, Affidavit for Amicus Curiae Brief in Opposition to Petition for Rehearing Before California Supreme Court at 20, People v. Shirley, 31 Cal. 3d 18, 641 P.2d 775, 181 Cal. Rptr. 243, *cert. denied,* 459 U.S. 860 (1982) [hereinafter cited as Orne, Affidavit].

[47] The due process clause of the fifth amendment to the United States Constitution applies to federal litigation. The fourteenth amendment contains a due process clause applicable to the states. See *also* Worthington, *The Use in Court of Hypnotically Enhanced Testimony, 27* INT'L J. CLINICAL & EXPERIMENTAL HYPNOSIS 402, 414 (1979); Note, *Testimony Influenced, supra* note 13, at 1221.

[48] Stovall v. Denno, 388 U.S. 293, 301-02 (1967).

[49] *See, e.g.,* Note, *supra* note 29, at 350. Suggestibility is just one factor that a court must consider in assessing the constitutional validity of an identification. The Supreme Court in Neil v. Biggers, 409 U.S. 188, 199-200 (1972), presented additional factors.

[50] For a description of several tests that hypnotists commonly use to assess susceptibility to suggestion, see Spector & Foster, *supra* note 23, at 575-76; Kroger & Doucé, *Hypnosis in Criminal Investigation,* 27 INT'L J. CLINICAL & EXPERIMENTAL HYPNOSIS 358, 365-66 (1979).

[51] Spector & Foster, *supra* note 23, at 576.

[52] Orne, Affidavit, *supra* note 46, at 10.

[53] R. UDOLF, *supra* note 5, at 2; Ruffra, *supra* note 13, at 296. One commentator points out, however, that subjects tend to offer the truth in a hypnotic state. Note, *supra* note 21, at 278.

[54] Orne, Affidavit, *supra* note 46, at 24.

[55] M. TEITELBAUM, supra note 38, at 155.

[56] Note, supra note 21, at 278.

[57] R. UDOLF, *supra* note 5, at 2; Orne, *supra* note 41, at 313, *reprinted at 64;* Spector & Foster, *The Utility of*

are unable to distinguish accurate hypnotically refreshed memory from either confabulation, suggestion, or lies accentuates the reliability problem facing the courts.[58]

2. The Legal Process: Cross-Examination, Credibility, Scientific Aura, Jury Misconceptions

The hypnotist is not the only party unable to distinguish confabulation and suggestion from actual memory: subjects themselves also cannot tell the difference. Once subjects incorporate confabulation or suggestions into memory, the subjects create a new pseudomemory.[59] Subjects are unable to distinguish between old memory before, and new memory after, hypnosis. Subjects remember only the content of their new memories, not the source of those memories. As a result, hypnotized subjects acquire a subsequent increased subjective certainty in the truth of the pseudomemory.[60] Memories tend to harden under hypnosis.[61]

When this "hardening" in the mind of a witness occurs, cross-examination at trial may no longer adequately test reliability. Although some commentators state that effective cross-examination after hypnosis is impossible,[62] others find that hypnosis merely renders cross-examination more difficult, but not necessarily ineffective."[63] Even the latter, less restrictive view arguably creates a violation of the sixth amendment in criminal cases. The sixth amendment ensures an accused the right to confront a witness, and the ability to effectively cross-examine a witness is crucial to that right.[64] Creating a pseudomemory under hypnosis may frustrate the ability to cross-examine a witness and therefore might infringe upon an accused's sixth amendment rights.[65] Some commentators also analogize hypnotism to other forms of destroyed evidence, as hypnotism may destroy the material fact of uncertainty.[66]

An additional problem which may result from a subject's increased subjective certainty in memory following hypnosis involves the subject's credibility as a witness. Increased certainty

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Hypno-Induced Statements in the Trial Process: Reflections on "People v. Smrekar", 10 LOY. U. CHI. L.J. 691, 697 (1978-79) [hereinafter cited as Spector & Foster, *Reflections*]*;* Spector & Foster, *supra* note 23, at 594.

[58] Most authorities agree that even experienced hypnotists cannot detect confabulation. Orne, *supra* note 41, at 318, *reprinted at* 72; Kroger & Doucé, supra note 50, at 366; Diamond, *supra* note 30, at 335; Worthington, *supra* note 47, at 414. The same is true of memories which are the product of suggestion. Diamond, *supra* note 30, at 334.

[59] Comment, *supra* note 22, at 1067.

[60] Ruffra, *supra* note 13, at 297; Comment, *supra* note 22, at 1067. Hypnosis resolves doubts in the subject's mind and adds confidence to recall. Diamond, *supra* note 30, at 339. Thus, a person once uncertain about observations may swear to the truth of those observations based on undue confidence in a posthypnotic memory. Orne, *supra* note 41, at 327-28, *reprinted at* 85-86.

[61] Note, *supra* note 29, at 343. Putnam's study showed that hypnotized subjects were as confident in their memories as were non-hypnotized subjects, despite the fact that recollections of the former were incorrect with much greater frequency. Putnam, supra note 45. Another study showed hypnotized subjects more likely to be certain in the accuracy of their answers. Shehan & Tilden, *Effects of Suggestibility and Hypnosis on Accurate and Distorted Retrieval from Memory*, 9 J. EXPERIMENTAL PSYCHOLOGY 283 (1983).

[62] Worthington, *supra* note 47, at 414 ("Given the reality of memory alteration under hypnosis, no defense counsel could possibly cross-examine the witness . . . .").

[63] Professor Udolf believes that effort and skill can overcome the effects of hypnosis. Thus a skillful cross-examination conducted by an attorney who is knowledgeable in hypnosis could overcome the undue confidence of a witness in a hypnotically refreshed or created memory. R. UDOLF, *supra* note 5, at 85.

[64] For a closer look at the confrontation clause in general, see Ohio v. Roberts, 448 U.S. 56 (1980); California v. Green, 399 U.S. 149 (1970); Pointer v. Texas, 380 U.S. 400 (1965).

[65] Worthington, *supra* note 47, at 414; Note, *supra note* 29, at 350.

[66] Diamond, *supra* note 30, at 314; Worthington, *supra* note 47, at 414.

will bolster the credibility of a witness[67] and may mislead the jury in judging the demeanor of a previously hypnotized witness.[68] The problem of judging credibility, however, is only one jury-related concern that courts have noted when considering hypnotically induced testimony.

The possibility that hypnotically induced evidence will unduly impress a jury is another concern.[69] Scientific processes tend to impress juries, especially when lay persons cannot understand such processes.[70] Two popular misconceptions confuse most lay persons and therefore affect a jury's evaluation of hypnotically refreshed testimony. First, some authors state that all sensory perceptions are perfectly recorded in the memory and that hypnosis can simply retrieve an accurate recording.[71] Although scientists discount this theory of memory,[72] many jurors are likely to believe the theory. Second, the jury may assume that hypnosis prevents lying and assures truth.[73] As noted above, scientists similarly discount this assumption.[74] These misconceptions may induce a jury to give hypnotically refreshed testimony undue weight.

While recognizing the dangers that hypnosis presents for a jury, some authors discount such dangers. These writers accord the jury more credit in evaluating hypnotically refreshed testimony than judicial fears of jury prejudice would allow.[75] For example, in one unreported case the jury viewed a film of defendant's hypnotic session, during which defendant's re-enactment showed a lack of premeditation, yet the jury convicted defendant of first degree murder.[76] Other writers suggest that forceful jury instructions would adequately safeguard against jury prejudice.[77] Although whether hypnotically refreshed testimony actually prejudices a jury is in doubt, commentators agree that the potential for such prejudice exists.

These various problems which hypnosis generates should, and do, affect the position that the legal system takes concerning hypnotically enhanced memory. In adopting a position, courts

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[67] Orne, *supra* note 41, at 332-34, *reprinted at* 93-95. Witnesses who are uncertain in their memory communicate that uncertainty by hesitancy, expressions of doubt, and body language. Juries rely heavily on such indicators to determine credibility of the witness and hence to accord the witness's evidence appropriate weight. Hypnosis may improve the credibility of a witness, because the process resolves doubts and uncertainties, without adding substance to the witness's recollection. Diamond, *supra* note 30, at 339.

[68] Comment, *supra* note 22, at 1068. Because subjects often recall events in great detail, the chance that a witness's increased certainty will mislead a jury in evaluating the witness's credibility increases. Diamond, *supra* note 30, at 337.

[69] R. UDOLF, *supra* note 5, at 161; Spector & Foster, *Reflections, supra* note 57, at 697; Note, *Testimony Influenced, supra* note 13, at 1222.

[70] United States v. Addison, 498 F.2d 741, 744 (D.C. Cir. 1974) (scientific evidence may "assume a posture of mystic infallibility in the eyes of a jury of laymen . . .").

[71] Note, *Testimony Influenced, supra* note 13, at 1209.

[72] *See, e.g.,* E. LOFTUS EYEWITNESS TESTIMONY 115 (1979). For a discussion of the conflicting theories on methods of recall, *see infra* note 106. See also Putnam, *supra* note 45, at 439-40. Scientists note at least one problem with the recordation theory: a witness may not perceive an event accurately. *See infra* notes 92-95 and accompanying text.

[73] R. UDOLF, *supra* note 5, at 161; Note, *Testimony Influenced, supra* note 13, at 1209.

[74] *See supra* notes 53-58 and accompanying text.

[75] Warner, *supra* note 31, at 421; Note, *Testimony Influenced, supra* note 13, at 1222 n.119.

[76] People v. Thomas, Crim. No. 3274 (Cal. Ct. App., 4th App. Dist., Jan. 9, 1969) (see Comment, *Hypnosis as a Defense Tactic,* 1969 U. TOL. L. REV. 691, 695, for a discussion of the case). *See also* State v. Turner, 81 N.M. 450, 468 P.2d 421 (Ct. App.), *cert. denied,* 81 N.M. 506, 469 P.2d 151 (1970) (involved a similar situation where the jury convicted a defendant despite exculpatory statements made by the defendant under hypnosis).

[77] Spector & Foster, *supra* note 23, at 595. Spector and Foster provide an example of a potential jury instruction. *Id*. at 595 n. 141. Other authorities argue that jury instructions cannot protect against jury prejudice. *See, e.g.*, Loftus, *Reconstructing Memory: The Incredible Eyewitness*, PSYCHOLOGY TODAY, Dec. 1974, at 117-18 (discredited testimony of an eyewitness did not prevent great influence by that testimony on the jury).

also must realize that the scientific community has yet to adequately investigate the psychological dangers of forensic hypnosis.[78] These dangers prompted Doctor Bernard L. Diamond to take the extreme view that once a witness undergoes hypnosis, that witness is "contaminated" and therefore incompetent to testify.[79] Noting the benefits of hypnosis, courts reject this extreme reaction to the problems inherent in hypnotically refreshed testimony. The courts do not, however, ignore these problems.

B. The Effect of Hypnotic Problems on the Courts

1. Inadmissibility of Hypnotic Testimony as Substantive Proof

Courts directly address the problems characteristic of hypnosis when evaluating two types of hypnotically enhanced evidence involving refreshed testimony. First, courts consistently refuse to permit a witness to testify while under hypnosis in court.[80] In addition, most courts find out-of-court statements made under hypnosis inadmissible to prove the substantive truth of the matters asserted.[81] In these two situations all of the problems characteristic of hypnosis are present. Therefore, the judicial bar to admissibility is nearly absolute.[82]

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[78] R. UDOLF, *supra* note 5, at 160.

[79] Diamond, *supra* note 30, at 314. Doctor Bernard L. Diamond is Clinical Professor of Psychiatry at the University of California, San Francisco, and Professor of Law at the University of California, Berkeley.

[80] R. UDOLF, *supra* note 5, at 63, 162; Diamond, *supra* note 30, at 321; Warner, *supra* note 31, at 431; Note, *Testimony Influenced*, *supra* note 13, at 1205; Comment, *supra* note 21, at 188. Prior to 1962, no reported case attempted to introduce hypnotic testimony itself into evidence. Note, *supra* note 21, at 275. Only two cases since 1962 permitted a witness to testify under hypnosis. *See infra* notes 86-88 and accompanying text.

[81] R. UDOLF, *supra* note 5, at 162; Diamond, *supra* note 30, at 321; Ruffra, *supra* note 13, at 304-05; Spector & Foster, *Reflections, supra* note 57, at 704; Note, *Testimony Influenced, supra* note 13, at 1205.

[82] Out-of-court statements made under pretrial hypnosis are susceptible to an additional objection under the hearsay rules. R. UDOLF, *supra* note 5, at 162; Ruffra, *supra* note 13, at 305; Spector & Foster, *supra* note 23, at 603; Spector & Foster, *Reflections, supra* note 57, at 707. FED. R. EVID. 801(c) states: " 'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Such evidence is inadmissible under FED. R. EVID. 802, which provides: "Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress." States often have similar evidentiary provisions.

Such statements, however, might fall under an exception to the hearsay rules. One exception involves statements representing past recollection recorded under FED. R. EVID. 803(5). One commentator notes that courts consistently refuse to apply this provision to statements made under hypnosis. Ruffra, *supra* note 13, at 305. If the statement is an admission, FED. R. EVID. 801(d)(2) would provide an exception. Commentators and cases suggest additional, imaginative exceptions which might enable out-of-court hypnotic testimony to avoid a hearsay bar.

FED. R. EVID. 803(4) creates a hearsay exception for out-of-court statements made for the purposes of medical diagnosis or treatment. The purpose of the statement must be medical, however, and witnesses who are hypnotized to enhance recall probably do not meet this test. Note, Testimony Influenced, supra note 13, at 1226 n.137. Two defendants argued that statements made under hypnosis were admissible because the statements "bore persuasive assurances of trustworthiness" under the United States Supreme Court's constitutional test as stated in Chambers v. Mississippi, 410 U.S. 284, 302 (1973). However, the court in both cases, Greenfield v. Robinson, 413 F. Supp. 1113, 1119-21 (W.D. Va. 1976), and People v. Blair, 25 Cal. 3d 640, 665-66, 602 P.2d 738, 753-54, 159 Cal. Rptr. 818, 833-34 (1979), refused to apply Chambers because no assurances of reliability existed. See Ruffra, *supra* note 13, at 305; Spector & Foster, *supra* note 23, at 610-13.

Finally, many jurisdictions retain their own common law rules. Some of these jurisdictions give trial judges discretion to admit hearsay. Ruffra, *supra* note 13, at 305 n.68; Spector & Foster, supra note 23, at 606. Judges are not likely to exercise this discretion in favor of admitting hypnotically recalled evidence, however, as most judges

The most common reason given by courts in rejecting these two types of evidence is the unreliability of hypnosis.[83] The problems of suggestibility and untruthfulness inherent in the hypnotic process contribute to this lack of reliability.[84] In rejecting both types of evidence, courts further rely upon the perceived inability of counsel to effectively cross-examine the witness and of the jury to evaluate the witness's testimony.[85] One commentator suggests that courts should preclude witnesses from testifying under hypnosis as a matter of law because these dangers clearly outweigh the probative value of the testimony.[86] Courts uniformly agreed with this proposal until 1962.[87] Today, the rule remains nearly intact, with one American case creating an exception.[88]

2. Does Hypnosis Create Unique Problems?

Courts note the problems inherent in the process of hypnosis and treat hypnotically induced statements offered as proof with caution. Some authorities argue, however, that these problems are no more difficult than imperfections which characterize ordinary witnesses.[89]. Because ordinary witnesses are "historically inaccurate,"[90] some commentators believe that problems with human perception, suggestibility, and confabulation are the primary source for erroneous verdicts.[91]

The problems inherent in human perception are well documented.[92] Information previously in the mind-such as attitudes, preferences, biases, and expectations-influences

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believe such evidence to be unreliable. See Ruffra, supra note 13, at 305; supra text accompanying notes 40-52.

[83] R. UDOLF, *supra* note 5, at 162; Note, *supra* note 21, at 277-78.

[84] *See supra* notes 40-52 and accompanying text.

[85] R. UDOLF, supra note 5, at 66.

[86] Note, *Testimony Influenced, supra* note 13, at 1223-24.

[87] Note, *supra* note 21, at 275.

[88] In State v. Nebb, No. 39540 (Ohio C.P., Franklyn County, May 28, 1962), the court permitted hypnosis of the defendant in court before the trial judge with the jury absent. A stipulation between the prosecution and the defense preceded the court's permission. The jury's absence was important, as the evidence was not admitted in the trial. The impression made by the subsequent testimony on the prosecutor was evident, however, because he reduced the indictment from first degree murder to manslaughter. *Nebb* remains the only American case allowing testimony of a witness while under hypnosis. Even this exception is limited: no American cases permit a witness to testify while hypnotized in the presence of a jury.

An additional reported case of hypnosis in the courtroom occurred in the Supreme Court of British Columbia, Canada. Regina v. Pitt, 68 D.L.R.2d 513, 66 W.W.R. 400 (Canada B.C. Sup. Ct. 1967). For a discussion of this case, see Hanley, *Hypnosis in the Court Room,* 14 CAN. PSYCHIATRIC ASS'N J. 351 (1969). In *Pitt*, an amnesic defendant was accused of attempted murder. The court allowed hypnosis of the defendant in the courtroom and in the jury's presence.

[89] Professor Udolf, noting the dissent by Justice Kaus in People v. Shirley, 31 Cal. 3d 18, 641 P.2d 775, 181 Cal. Rptr. 243, *cert. denied*, 459 U.S. 860 (1982), states that most ordinary witnesses would be unable to testify under the standards applied to hypnotically refreshed testimony. R. UDOLF, *supra* note 5, at 85. Spector and Foster agree that hypnotically refreshed testimony "presents no more potential for inaccuracy due to disabilities of perception, memory, and articulation than that of any witness." Spector & Foster, *supra* note 23, at 591. The court in State v. Hurd, 86 N.J. 525, 543, 432 A.2d 86, 92 (1981), found hypnotically induced recall at least as reliable as ordinary memory when sufficient safeguards existed.

[90] State v. Hurd, 86 N.J. 525, 541, 432 A.2d 86, 92 (1981).

[91] Spector & Foster, *supra* note 23, at 587. See Comment, *supra* note 22, at 1069-71, for a discussion of the infamous case of Sacco and Vanzetti, which illustrates the effect that perception, suggestibility, and confabulation problems may have on ordinary witnesses.

[92] Spector & Foster, *Reflections, supra* note 57, at 695 n.20. *See also* Spector & Foster, *supra* note 23, at 587-91. The possibility of faulty perception of the declarant is one of the four "hearsay dangers" traditionally invoked to

perception.[93] Because memory follows perception, these cues are "suggestibility" elements which affect memory in much the same way that hypnotized subjects are susceptible to cues.[94] Even Doctor Diamond, who advocates complete inadmissibility of all testimony from a hypnotized witness, concedes that unhypnotized subjects are subject to distortions of suggestion.[95]

The ordinary witness also has a desire to please or conform with the expectations of the interrogator.[96] In addition, witnesses tend to fill in memory gaps by unconsciously confabulating. This "logical completion mechanism" causes the witness to alter details and forces the memory to comport with expectation.[97] Both the desire to please and confabulation, therefore, are not problems unique to the hypnotized subject. Further, these distortions combine with suggestibility to cause a hardening of the distortion in the witness's subsequent memory.[98]

This hardening of memory combines with increased confidence over time and retelling of the story to create problems similar to those a jury encounters with previously hypnotized witnesses.[99] Two potential jury problems, however, characterize only hypnotically refreshed testimony. First, the prejudicial effect which scientific processes might have on impressionistic jurors is absent when an ordinary witness testifies. Second, juror misconceptions about the hypnotic process itself can have no effect when an ordinary witness testifies. Nevertheless, the memory distortion of ordinary witnesses can create problems for the jury.

Finally, the argument that hypnosis creates an undesireably difficult task for attorneys on cross-examination fails to recognize the problems that attorneys have with ordinary witnesses. At least one court dismissed this argument by noting that many factors other than hypnosis may render witnesses less amenable to cross-examination.[100] For example, counsel usually will prepare a witness before that witness testifies in court.[101] Even the distortions which ordinary

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justify excluding hearsay evidence. Tribe, *Triangulating Hearsay*, 87 HARV. L. REV. 957, 959 (1974). People commonly fail to observe occurring events and often observe non-occurring events. Diamond, *supra* note 30, at 342.

[93] A. TRANKEL, RELIABILITY OF EVIDENCE 19-20 (1972).

[94] This common problem of suggestibility is evident during any interrogation. Questioners may unwittingly and unknowingly alter the witness's memory when the nature and form of the inquiry is "leading." A leading question is a question which suggests an answer. One author has shown that even eyewitnesses who are not hypnotized make errors when asked leading questions. Loftus, *Leading Questions and the Eyewitness Report*, 7 COGNITIVE PSYCHOLOGY 560-72 (1975). One study found that leading questions caused hypnotized subjects to be more likely to respond incorrectly. Sanders & Simmons, *Use of Hypnosis to Enhance Eyewitness Accuracy: Does it Work?*, 68 J. APPLIED PSYCHOLOGY 70 (1983). When the questioner merely alters one word in a question, witnesses may respond from memory differently. In one study, changing the question "Did you see a broken headlight?" to "Did you see the broken headlight?" increased the number of affirmative responses. Loftus, *supra* note 77, at 116.

[95] Diamond, *supra* note 30, at 342.

[96] Spector & Foster, *Reflections, supra* note 57, at 698; Comment, *supra note* 22, at 1069.

[97] Spector & Foster, *supra* note 23, at 588-90; Comment, *supra* note 22, at 1068-69.

[98] Diamond, *supra* note 30, at 342; Comment, *supra* note 22, at 1069, 1071.

[99] Comment, *supra* note 22, at 1070-71. *See supra* text accompanying notes 67-76. The witness's false conviction, for example, may cause a jury to accord the witness excessive creditibility.

[100] People v. Smrekar, 68 Ill. App. 3d 379, 388, 385 N.E.2d 848, 855, 24111. Dec. 707, 714 (4th Dist. 1979).

[101] Under the heading "Instructions to Witnesses Before Trial," one author counsels the trial attorney to rehearse the testimony that a witness will give at trial with that witness. The attorney should conduct a mock direct examination, and should ascertain that the witness's memory is "not vague or in error as to dates, distances, descriptions, etc." S. SCHWEITZER, TRIAL GUIDE 1157 (1945). Professor Richard L. Marcus of the University of Illinois College of Law views hypnotism as a special type of witness preparation. In Marcus's experience, attorneys prepare almost all witnesses before these witnesses testify. Such preparation may be long and intense, may include mock direct examination and cross-examination, and may involve a variety of efforts by the lawyer to

witnesses possess in memory are difficult to uncover through cross-examination.[102] Although commentators concede that hypnosis may aggravate the problems inherent in the cross-examination of ordinary witnesses, some commentators nevertheless maintain that the aggravation is marginal.[103]

C. The Benefits of Hypnosis

1. Hypnosis as a Recollection Device

Given that hypnosis aggravates, at least marginally, the problems inherent in witness testimony, one might question why so many attorneys and commentators advocate the use of hypnosis. One reason propounded is that hypnosis enhances the ability of an individual to remember past events now forgotten.[104] The problem of a witness who forgets crucial details-whether over time or through shock, trauma, or intoxication-recurs in litigation.[105]

Once presented with additional information, the legal system next asks whether that information is accurate. Unfortunately, scientists are unable to provide an unqualified answer to this question.[106] Despite the controversy over whether hypnosis provides accurate information,

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stimulate the witness's recall of important items. Marcus then wonders why hypnosis differs from ordinary witness preparation. Comments from Professor Richard L. Marcus to Kevin R. Casey (Aug. 13, 1985) (discussing this note).

[102] Comment, *supra* note 22, at 1070-71.

[103] *See, e.g.*, R. UDOLF, *supra* note 5, at 84-85; Comment, *supra* note 22, at 1071.

[104] Some early studies demonstrate that for certain types of information hypnosis fails to enhance recall. Note, *Testimony Influenced, supra* note 13, at 1209. But scientists discount these studies because laboratory settings have little relevance to legal settings, and because the studies are in conflict with several more recent studies and reports which do show increased recall. Id. at 1210. One commentator, while deeming the question whether hypnosis improves memory recall "open," recognizes that a large amount of anecdotal evidence supports the idea that hypnosis improves recall in at least some situations. Putnam, *supra* note 45, at 438.

This confusion appears resolved today: the use of hypnosis as a tool for retrieving unrecollected information seems scientifically established. Spector & *Foster, Reflections, supra* note 57, at 695; Note, *Testimony Influenced, supra* note 13, at 1211. One introductory psychology text indicates that hypnotized subjects are often able to recall past events, which the subjects would otherwise have forgotten, with extraordinary detail and clarity. J. MCCONNELL, *supra* note 20, at 395-96. Kroger and Doucé reported that in 23 cases involving 53 witnesses and victims, the hypnotist discovered new information in 60% of the cases. Kroger & Doucé, *supra* note 50. Another report indicated a significant increase in recall in 24 out of 40 cases as a result of hypnosis. Kleinhauz, Horowitz & Tobin, *The Use of Hypnosis in Police Investigations: A Preliminary Communication*, 17 J. FORENSIC SCIENCE SOC'Y 77-80 (1977). Professor Orne acknowledges that "[t]he reason hypnosis is used as a forensic tool is that it is effective in eliciting more details." Orne, *supra* note 41, at 326, *reprinted at* 83.

[105] Spector & Foster, *supra* note 23, at 585. An attorney can resolve this problem in a limited number of ways. First, the attorney may discard the testimony, but then critical evidence may be lost. Second, traditional methods are available for stimulating recollection, including association, leading questions, and offering the witness various memoranda. In theory, anything that actually refreshes a witness's memory is admissible. Most courts are liberal in allowing witnesses to use various items to refresh memory. *See, e.g.*, Jewett v. United States, 15 F.2d 955, 956 (9th Cir. 1926). For a discussion of the variety of items used, see Note, *supra* note 21, at 267. Finally, the attorney might attempt to refresh the witness's memory through the process of hypnosis.

[106] One reason for this uncertainty is the existence of two competing theories of how the memory works: the *recorded* theory versus the reconstructive theory. The former theory suggests the popular view held by lay hypnotists and the public that memory permanently and accurately records sensory experiences by functioning as a tape recorder. *See, e.g.*, Orne, *supra* note 41, at 321, *reprinted* at 76; Putnam, *supra* note 45, at 439 (calling the recorded theory of memory an "implicit theory" because many individuals hold the theory implicitly). Under this theory, forgetting is simply an inability to retrieve the recorded information. Hypnosis eliminates this difficulty by providing access to the record. The recorded theory would therefore assure the legal system that, at least to the extent that perception allowed the senses to record accurately, hypnotically induced recall provides accurate

hypnosis is a viable recollection device from which the legal system may gain valuable evidence. The process of hypnosis is therefore useful to the law. The uncertainty associated with the accuracy of the process, however, should restrict the uses of hypnosis in the legal process.

2. Hypnosis as an Investigatory Tool

One of the most productive uses of hypnosis in the legal process applies hypnosis as an investigative or discovery device. Police authorities have used hypnosis in this manner for some time.[107] Hypnosis helps these authorities develop leads to new and independent evidence.[108] Because the success of hypnosis as an investigatory tool is well-documented, hypnosis is a useful discovery device.[109]

The question remains, however, whether the uncertainties associated with the process of hypnosis should restrict the law's use of hypnosis as an investigatory tool. Most authorities agree that using forensic hypnosis for investigative purposes is appropriate.[110] When discovery is the only issue, evidentiary problems of admissibility do not arise. Furthermore, the judicial problems associated with hypnosis are absent in preliminary hypnotic investigations if investigators follow two cautions. First, investigators should corroborate hypnotically related evidence through independent research. This is true, however, of most preliminary data which police officials collect. Second, the subject of the hypnotic investigation should not be a future witness.[111] When investigators follow these two cautions, the law generally allows them to use hypnosis as an investigatory tool despite the process's uncertainties.[112]

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information.

Recent scientific developments, however, indicate that the reconstructive theory of memory may be more accurate than the recorded theory. Scientific experiments now support a reconstructive theory, whereby memory continuously changes. I. HOROWITZ & T. WILLGING, THE PSYCHOLOGY OF LAW 152 (1984); R. UDOLF, *supra* note 5, at 29-31; Orne, *supra* note 41, at 321, *reprinted at* 76; Putnam, *supra* note 45, at 440; Note, *Testimony Influenced, supra* note 13, at 1213. Under the reconstructive theory, the memory process involves reconstructing events using both information known before and information acquired after the experience. Such information alters the original memory so that memories and actual events need not correspond, thereby causing possible inaccuracy in ordinary memories. Whether hypnosis aggravates this inaccuracy is unclear. See supra text accompanying notes 89-103.

[107] Prior to the turn of the century, a Dutch statute permitted police authorities to hypnotize criminals to obtain information. Note, *Hypnotism, Suggestibility and the Law*, 31 NEB. L. REV. 575, 590 (1952). Today various law enforcement departments around the world use hypnosis in investigations and provide personnel with special training for this purpose. Some examples are: (1) police departments in Los Angeles, New York City, Portland, Seattle, Denver, Houston, San Antonio, and Washington, D.C.; (2) the Los Angeles County Sheriff's Office; (3) the F.B.I.; (4) the Treasury Department; (5) the United States Air Force; and (6) the Israeli National Police. R. UDOLF, *supra* note 5, at 10.

[108] For example, investigators can recover details of crime scenes, detailed physical descriptions of witnesses and suspects, descriptions of weapons, details of conversations, and descriptions of cars and license plates. R. UDOLF, *supra* note 5, at 13.

[109] For a collection of statistics reported by police authorities which indicate impressive results, see R. UDOLF, *supra* note 5, at 11-12. Hypnosis offers an additional benefit: hypnosis can save people-hours and expense. Kroger & Doucé, *supra* note 50, at 371.

[110] R. UDOLF, *supra* note 5, at 157 (Professor Udolf called the use of hypnosis as a discovery device the "least controversial . . . use of hypnosis." *Id.* at 9.); Warner, *supra* note 31, at 418; Spector & Foster, *supra* note 23, at 580.

[111] Courts vary, but some jurisdictions hold that pretrial hypnosis contaminates future testimony and exclude such testimony. *See infra* text accompanying notes 173-77. Regardless of the jurisdiction, however, courts scrutinize the misuse of investigative hypnosis. *See, e.g.*, United States v. Adams, 581 F.2d 193, 198-99 (9th Cir.) ("We are concerned, however, that [the] investigatory use of hypnosis on persons who may later be called upon to

3. Hypnotic Evidence as a Basis of Expert Opinion

Another area in which the law balances the usefulness of hypnosis against the uncertainties in the process involves expert testimony based on statements made during hypnosis. The function of an expert witness is to help the jury decide technical questions involving specialized information outside the lay juror's knowledge.[113] The issue facing the legal system is whether, and in what form, the basis for the expert hypnotist's opinion should be admissible.

The Federal Rules of Evidence allow an expert witness to form an opinion based on any material upon which an expert would reasonably rely.[114] Because hypnotic experts reasonably

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testify in court carries a dangerous potential for abuse."), *cert. denied*, 439 U.S. 1006 (1978).

In criminal cases, the fifth and fourteenth amendments to the United States Constitution prohibit examining defendants against their wishes. These provisions would preclude introducing hypnotically induced statements made by the defendant. Spector & Foster, *supra* note 23, at 581; Warner, *supra* note 31, at 418.

[112] The related issue of whether courts will *compel* the use of hypnosis as a discovery tool is unclear. One attorney sought a writ of mandamus to compel the court to permit a hypnotist to examine the attorney's incarcerated client. Cornell v. Superior Court, 52 Cal. 2d 99, 338 P.2d 447 (1959). The defendant-client could not recall his whereabouts on the night of a murder. The court granted the writ, holding that there was no legal difference between the right of counsel to use a hypnotist to attempt to probe a client's subconscious and the right to use a psychiatrist to determine a client's sanity. *Id*. at 103, 338 P.2d at 449. The judge refused to consider cases relating to the admissibility of evidence given under hypnosis, as the issue was discovery rather than evidence.

In a second case involving a request for a hypnotic examination of a prisoner, the court also permitted the hypnosis. *In re* Ketchel, 68 Cal. 2d 397, 438 P.2d 625 (1968). A third case refused a writ of mandamus to permit hypnotic examination of a defendant. State *ex rel.* Sheppard v. Koblentz, 174 Ohio St. 120, 187 N.E.2d 40 (1962), cert. denied, 373 U.S. 911 (1963). Commentators distinguish this third case from those compelling examination because this case involved discretionary, post-conviction procedures rather than a pretrial request as in Cornell or an automatic appeal as in *Ketchel*. *See, e.g.*, R. UDO1.F, *supra* note 5, at 57; Spector & Foster, *supra* note 23, at 580 n.72; Warner, *supra* note 31, at 418.

[113] Then a witness qualifies as an expert, and when the opinion the witness will offer can help the jury in its deliberations, a court may allow the witness to testify as an expert. FED. R. EVID. 702 states: "If . . . specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert . . . may testify . . . ."

Whether a hypnotist qualifies as an expert is a preliminary issue of fact which the court must decide. In deciding this issue, a court should consider a myriad of factors: formal education and degrees, special training, professional experience, authorship, teaching experience, licenses and certifications, professional-society memberships, and reputation. R. UDOLF, *supra* note 5, at 118. No one factor is controlling. Taken together, the factors must show that the expert possesses special knowledge beyond the lay jury's experience which will enable the expert to provide a helpful, valid opinion.

A physician or psychologist does not necessarily qualify as an expert in hypnosis, People v. Busch, 56 Cal. 2d 868, 876-78, 366 P.2d 314, 319-20, 16 Cal. Rptr. 898, 902-04 (1961); neither does a lay hypnotist without scientific understanding, State v. Mack, 292 N.W.2d 764, 772 (Minn. 1980). But a master's-level psychologist with professional experience in hypnosis may qualify. Harding v. State, 5 Md. App. 230, 235-36, 246 A.2d 302, 306 (1968), *cert. denied*, 252 Md. 731, *cert. denied*, 395 U.S. 949 (1969).

Doctor Diamond cautions that some experts who are skilled in the therapeutic and diagnostic use of hypnosis should not qualify as experts in hypnosis because these "so-called" experts are unfamiliar with the problems of hypnosis in the legal setting. Conversely, law enforcement hypnotists tend to be ignorant of current scientific knowledge and research. Diamond, supra note 30, at 341. Courts should therefore carefully scrutinize the qualifications of the individual expert witness.

[114] FED. R. EVID. 703 provides: "The facts or data in the particular case upon which an expert bases an opinion . . . [i]f of a type reasonably relied upon by experts in the particular field in forming opinions . . . need not be admissible in evidence." This view marks a break from tradition. Traditionally, expert witnesses who lacked first-hand knowledge could only testify based on hypothetical questions. Many jurisdictions further required information

rely on hypnotically induced statements made by subjects, the judicial trend is to admit expert opinions based on such statements.[115] One commentator has termed the legal decision allowing experts to base an opinion on hypnosis "easy,"[116] as this use of hypnosis does not depend upon balancing the benefits to the legal system with the harms caused by the inherent uncertainties.[117]

The more difficult legal issue in this context is whether to allow an expert to repeat statements, or to show recordings, made during hypnosis when demonstrating the basis for an opinion.[118] This evidence is useful to the jury in understanding an expert's opinion which interprets the mental condition, motivation, or intent of a subject. On the other hand, the statements or recordings carry the danger that the jury will lose objectivity and unbiased judgment.[119] The court must therefore balance the value of the hypnotic evidence in establishing the basis for an expert's opinion against the danger that the evidence will prejudice the jury.

Courts have not been uniform in exercising this discretion. Some courts allow disclosure of hypnotically induced statements along with the expert's analysis of the statements.[120] A few courts admit recordings of the actual examination to support the expert's testimony.[121] Most courts, however, find that the risk of jury prejudice outweighs the usefulness of such evidence and exclude the statements and recordings.[122]

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used in the questions to be admissible at trial. MCCORMICK, *supra* note 40, §§ 14-15, at 31-34. Nevertheless, the view expressed in Rule 703 represents the modern trend. *See, e.g.,* Spector & Foster, *supra* note 23, at 598; Spector & Foster, *Reflections supra* note 57, at 704-05.

[115] R. UDOLF, *supra* note 5, at 72. *See, e.g.*, People v. Modesto, 59 Cal. 2d 722, 382 P.2d 33, 31 Cal. Rptr. 225 (1963) (permitted psychiatrist to testify, giving her opinion on defendant's state of mind, based on her hypnotic examination); People v. Hiser, 267 Cal. App. 2d 47, 72 Cal. Rptr. 906 (1968) (psychiatrist allowed to testify to defendant's mental state based in part on hypnotically induced statements); State v. Harris, 241 Or. 500, 405 P.2d 492 (1965) (same); State v. Pierce, 263 S.C. 23, 207 S.E.2d 414 (1974) (hypnotist allowed to testify to what defendant said under hypnosis when defendant's statements helped hypnotist form his opinion of defendant's mental state).

[116] Warner, *supra* note 31, at 424.

[117] The reliability or truth of the hypnotic data in this context is irrelevant. *See, e.g.,* Spector & Foster, *supra* note 23, at 598; Spector & Foster, *Reflections, supra* note 57, at 705.

[118] As with many difficult legal questions, no firm rule on this issue exists. The decision whether to admit hypnotically induced statements to show how the expert arrived at an opinion lies within the discretion of the trial judge. FED. R. Evid. 705 provides: "The expert may testify in terms of opinion or inference and give his reasons therefor . . . unless the court requires otherwise." See R. UDOLF, supra note 5, at 69; Spector & Foster, *Reflections, supra* note 57, at 706; Spector & Foster, *supra* note 23, at 601.

[119] Such evidence might confuse the jury and cause jurors to use the evidence as substantive proof rather than to understand the expert's opinion. R. UDOLF, *supra* note 5, at 69.

[120] *See, e.g.*, People v. Modesto, 59 Cal. 2d 722, 382 P.2d 33, 31 Cal. Rptr. 225 (1963).

[121] People v. Thomas, Crim. No. 3274 (Cal. Ct. App., 4th App. Dist., Jan. 9, 1969).

[122] *See, e.g.,* People v. Hiser, 267 Cal. App. 2d 47, 72 Cal. Rptr. 906 (1968) (within discretion of the trial court not to admit tape recording of hypnotic interview); State v. Pierce, 263 S.C. 23, 207 S.E.2d 414 (1974) (hypnotist could not present statements made by hypnotized defendant); Rodriguez v. State, 327 So. 2d 903 (Fla. Dist. Ct. App. 1976) (hypnotist could not testify as to statements made by defendant while hypnotized). Courts especially exclude the statements and recordings when the expert's opinion concerns the reliability of the statements or the effectiveness of the hypnotic procedures, as the state of the art of hypnosis precludes expert opinions in these areas. R. UDOLF, *supra* note 5, at 122. Some courts exclude a hypnotist's opinion testimony interpreting the reliability or truthfulness of statements when that opinion was formed during pretrial hypnotic interviews. *See, e.g.,* State v. Pusch, 77 N.D. 860, 887-88, 46 N.W. 508, 521-22 (1950) (refused to admit doctor's testimony as to the truthfulness of the answers given by defendant in the hypnotic state); Jones v. State, 542 P.2d 1316, 1327 (Okla. Crim. 1975) (rejected defendant's offer to introduce expert testimony to establish the truth of hypnotic declarations).

In certain cases a balancing approach is unnecessary. When the jurisdiction admits hypnotically induced testimony, for example, an expert need not explain the benefits of hypnosis as a memory-enhancing device. Such

D. Summary of the Balancing Approach

The process of hypnosis possesses inherent problems from both a scientific and a legal vantage. Compounding this realization is the knowledge that scientists do not fully comprehend all of these problems. As a result, the law currently precludes the use of hypnotically produced evidence in some areas. The law's refusal to admit hypnotically produced statements as substantive proof is one such example.

In other areas of the law, however, the legal system acknowledges that hypnosis is useful as a recollection device and that hypnosis only marginally aggravates the problems characteristic of ordinary witness testimony. Although courts retain careful scrutiny through a balancing approach, they admit evidence involving hypnosis as an investigatory tool and as the basis for expert opinion. This background illustrates the judicial balancing of the problems inherent in hypnosis against its usefulness to the law.

IV. BALANCING AND THE FOUR LEGAL POSITIONS

When courts apply a similar balancing approach to the issue of hypnotically refreshed testimony, four separate legal positions result. Commentators generally recognize three legal positions; this note identifies a fourth approach. When courts first addressed the issue of hypnotically refreshed testimony, they responded with an initial credibility approach. Courts in two lines of cases later developed the procedural safeguards approach, which only a few courts follow today, and the general acceptance test, which represents the majority position. This note suggests that cases establish a recent trend toward a relevancy approach. All four positions attempt, however, a balancing approach that weighs the problems and benefits of hypnosis.

A. Credibility

The first decision which considered the use of hypnosis to enhance a witness's testimony established the *credibility* approach.[123] This initial approach holds that pretrial hypnosis affects the weight and credibility, but not the admissibility, of the witness's refreshed testimony.[124] Jurisdictions adopting this position generally permit the hypnotically refreshed witness to testify.[125] Under a balancing approach, this liberal position gives insufficient weight to the

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was the case in United States v. Awkard, 597 F.2d 667, 669 (9th Cir.), *cert. denied*, 444 U.S. 885 (1979). *See also* Wyller v. Fairchild Hiller Corp., 503 F.2d 506 (9th Cir. 1974) (discussing the necessity and admissibility of expert testimony on the reliability of hypnotically refreshed recollection).

[123] Harding v. State, 5 Md. App. 230, 236, 246 A.2d 302, 306 (1968) (a rape and assault victim recalled the event under hypnosis and the court allowed the jury to hear her testimony so refreshed), *cert. denied*, 252 Md. 731, *cert. denied*, 395 U.S. 949 (1969). Because other courts followed this decision, the credibility approach became the initial rule. *See, e.g.*, Note, *"Chapman v. State" Hypnotically Refreshed Testimony-An Issue of Admissibility or Credibility*, 1983 UTAH L. REV. 381, 384. This approach retains vitality today. Among the courts which have recently upheld the credibility approach are: People v. Gibson, 117 Ill. App. 3d 270, 452 N.E.2d 1368, 72 111. Dec. 672 (4th Dist. 1983); State v. Wren, 425 So. 2d 756 (La. 1983); Chapman v. State, 638 P.2d 1280 (Wyo. 1982). For additional cases, see 3 D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE § 260, at 45 (1979).

[124] *See supra* text accompanying note 14.

[125] Even in these jurisdictions, however, the judge retains discretion to exclude the evidence. When hypnosis does not actually refresh the testimony, or when the danger of undue suggestion outweighs the probative value of the testimony, the judge may refuse to admit the evidence. McCORMICK, *supra* note 40, § 9, at 16-18.

problems inherent in hypnosis. The mere fact that these courts permit posthypnotic testimony does emphasize, however, that some courts find hypnotically enhanced evidence useful to the legal system.

The hypnotically refreshed testimony of a witness may prove invaluable in a particular case, and hypnosis may be a valuable tool in uncovering forgotten evidence.[126] The credibility position acknowledges this usefulness and continues the general judicial trend toward a liberal admissibility policy. This position recognizes the generally accepted view that one of the best methods for discovering truth is to admit all relevant evidence for jury assessment.[127] Checks on complete admissibility of all evidence exist: the credibility approach relies heavily on the traditional safeguards of cross-examination and expert testimony concerning hypnosis in allowing the jury to assess the credibility of hypnotically refreshed testimony.[128]

In placing the responsibility on the jury to assess the impact of pretrial hypnosis on a witness's credibility, the credibility approach fails to fully account for the special problems associated with hypnosis. The jury may not be competent to judge the credibility of a hypnotized witness. As a scientific process, hypnosis carries an aura which may lead the jury to accord hypnotically refreshed testimony undue weight. A hypnotized witness gains increased subjective certainty in memory. These facts may mislead the jury. Jurors' misconceptions may further inhibit the jury's ability to properly evaluate credibility.[129]

Even assuming that the jury avoids these pitfalls, the question remains whether a jury is technically able to evaluate the reliability of hypnotically induced testimony. Subtle considerations of suggestibility and a desire to please are relevant,[130] and an expert opinion on these matters may be of little help.[131] Further, cross-examination may prove futile as an aid for the jury's analysis.[132] Even when cross-examination successfully reveals inaccuracies in the witness's hypnotically refreshed memory, the jury may be incapable of assessing the distorting effects of hypnosis.[133]

Because the credibility position relies almost exclusively on the jury to uphold the integrity of the fact-finding process, this position misplaces its reliance. The credibility position fosters the important goal of admitting relevant testimony otherwise lost, but also entails a high cost: insufficient checks on the abuse of such testimony exist. In recognizing this drawback, many commentators would require that courts initially determine admissibility.[134]

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[126] *See supra* text accompanying notes 104-06.

[127] The Federal Rules of Evidence would admit all relevant evidence unless such evidence is specifically excluded by the Constitution, rules prescribed by the Supreme Court, or by an act of Congress. FED. R. EVID. 402. The Model Code of Evidence states that "all relevant evidence is admissible." MODEL CODE OF EVIDENCE RULE 9(a), (f) (1942).

[128] The rules of evidence provide a further check on complete admissibility of all evidence: relevant evidence is inadmissible when it may mislead the jury, result in unfair prejudice, confuse issues, or cause undue delay. See FED. R. EVID. 403; MODEL CODE OF EVIDENCE RULE 303 (1942).

[129] One such misconception is the erroneous belief that hypnotized subjects cannot lie. *See supra* text accompanying notes 53-58.

[130] *See supra* text accompanying notes 42-46.

[131] *See supra* text accompanying notes 121-22.

[132] *See supra* text accompanying notes 62-65.

[133] Note, *supra* note 123, at 386.

[134] *See, e.g.,* Ruffra, *supra* note 13, at 314; Note, *Testimony Influenced, supra* note 13, at 1217. For an analysis which supports the opposite conclusion, that prejudicial effects of posthypnotic testimony do *not* require an initial judicial finding on admissibility, see Note, *supra* note 123. The author contends that cross-examination and other challenges to a witness's credibility avoid "alleged" prejudicial effects. *Id* at 395.

B. Procedural Safeguards

Some courts agreed with these commentators that courts should initially determine whether to admit hypnotically refreshed testimony and established a second approach. To provide guidelines for courts' rulings, this approach analogizes hypnotically refreshed testimony to identification testimony. A common problem underlies this analogy, first proposed by the court in *State v. Hurd*,[135] because both identification testimony and hypnotically refreshed testimony possess questionable accuracy and reliability. This common problem also has a common cause: inherent suggestiveness.

The guidelines resulting from this analogy are a set of procedural requirements-safeguards-designed to increase the accuracy and reliability of the hypnotic, or identification, procedure.[136] The *Hurd* court concluded that when hypnotically refreshed testimony satisfies certain procedural requirements, that testimony also will meet the Supreme Court's due process standards requiring minimal suggestiveness to assure reliable identification testimony.[137]

By focusing on the particular procedure used to hypnotize a witness, the *procedural safeguards* position excludes only evidence that courts find unreliable and thus the position allows courts to admit useful testimony. Furthermore, courts must scrutinize the procedural safeguards. This position therefore may avoid the problem raised by the credibility position of the jury's doubtful ability to assess the credibility of post-hypnotic testimony.[138] The procedural safeguards position also offers a second possible advantage over the credibility approach. When the hypnotic process complies with safeguards, the court has guidelines and may be able to evaluate the effect of hypnotic risks in an individual case.

Doctor Martin T. Orne proposed the most detailed set of minimum procedural safeguards which courts should apply to the process of hypnosis.[139] Although courts have reacted differently to Orne's proposal,[140] the New Jersey Supreme Court in *Hurd* followed the recommendation and established a six-pronged set of procedural safeguards. The court indicated that if the hypnotic process meets these safeguards, the court would admit the hypnotically refreshed testimony which results.[141]

The New Jersey court's first prerequisite to admitting hypnotically refreshed testimony is that a qualified psychiatrist or psychologist with experience in using hypnosis conduct the

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[135] 86 N.J. 525, 546-48, 432 A.2d 86, 97-98 (1981).

[136] Such safeguards purport to protect a party's constitutional right under the due process clause to a fair trial. Courts applying this approach follow the standard enunciated by the United States Supreme Court concerning pretrial identification: a procedure which is unnecessarily suggestive and conducive to irreparable mistake denies due process of law. Stovall v. Denno, 388 U.S. 293, 301-02 (1967). For further discussion of this constitutional issue, see text accompanying notes 47-49.

[137] 86 N.J. 525, 548, 432 A.2d 86, 98 (1981).

[138] Whether these safeguards adequately minimize the risks of hypnosis, however, is unclear. *See supra* text accompanying notes 40-79. Further, when the court finds that the hypnotic session meets the required safeguards and admits refreshed testimony, the jury *may* have to assess the credibility of this posthypnotic testimony. If the party adverse to the hypnotic testimony raises the issue at trial, perhaps attempting to impeach the witness, the jury *will* have to assess the credibility of both the witness and the witness's testimony. *See infra* text accompanying notes 155-56 and 234-35.

[139] See Orne, *supra* note 41, at 335-36, *reprinted at* 99-100, for a listing of the safeguards Orne proposed. Doctor Orne is Professor of Psychiatry at the University of Pennsylvania.

[140] R. UDOLF, *supra* note 5, at 165.

[141] State v. Hurd, 86 N.J. 525, 546, 432 A.2d 86, 96 (1981).

session. Such an interrogation increases the likelihood of accurate recall.[142] Requiring the professional to be independent of the litigation is the court's second prerequisite. This prerequisite reduces the possibility that beliefs and possible bias of the hypnotist will infect the hypersuggestive subject.

Third, the law enforcement authorities must supply all of the information provided to the hypnotist before the session in a recorded memorandum. This third requirement facilitates later analysis to assess suggestiveness, as a court will know the extent of the information which the hypnotist has given to the subject.[143] Prior to the hypnotic session, the hypnotist must obtain a recorded statement of the facts which the subject remembers. This fourth requirement allows the hypnotist to avoid cues which add new information to the subject's memory,[144] allows the hypnotist to avoid areas where the subject is susceptible to suggestion,[145] and allows the court to document that the hypnotist did not cue a witness.[146]

The *Hurd* court also advised recording the hypnotic session, as a recording may enable courts to determine whether suggestibility tainted the subject's memory.[147] Although the court merely suggested a video tape of the session,[148] Doctor Orne *mandates* a videotape.[149] Most com mentators agree with Doctor Orne's conclusion that other recording methods are inadequate; such records fail to disclose subtle cueing.[150] Finally, to assure reliability of a witness's hypnotically refreshed testimony, only the hypnotist and the subject may attend the hypnotic session. This requirement's purpose is avoiding inadvertent, suggestive communication by observers to the subject.[151]

Although the New Jersey Supreme Court held Doctor Orne's safeguards sufficiently protective against hypnotic risks, a uniform set of procedural safeguards eludes the various jurisdictions. Other courts adopted only some of Orne's safeguards; Oregon adopted similar procedural safeguards by statute in 1977.[152] The Federal Bureau of Investigation (FBI) uses hypnosis as a tool for investigation and adopted a significantly different set of safeguards.[153]

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[142] *Id.* at 545, 432 A.2d at 96.

[143] *Id.* at 546, 432 A.2d at 96. *See also* Note, *Evidence, supra* note 13, at 553.

[144] State v. Hurd, 86 N.J. 525, 546, 432 A.2d 86, 96 (1981).

[145] Note, *Evidence, supra* note 13, at 553.

[146] Orne, *supra* note 41, at 336, *reprinted at* 100.

[147] Compare recording hypnotic sessions when courts address suggestibility concerns in evaluating hypnotically refreshed testimony with recording pretrial identifications when courts address similar concerns in evaluating suspect identifications. The United States Supreme Court has suggested a recording as a safeguard in the latter context. United States v. Wade, 388 U.S. 218, 236-37 n.26. (1967) (citing Murray, *The Criminal Lineup at Home and Abroad,* 1966 UTAH L. REV. 610, 627-28).

[148] State v. Hurd, 86 N.J. 525, 546, 432 A.2d 86, 97 (1981). In merely suggesting a videotape, the court allowed the use of an audio recording or transcript.

[149] Orne, *supra* note 41, at 336, *reprinted at* 100.

[150] R. UDOLF, *supra* note 5, at 166; Diamond, *supra* note 30, at 339; Note, *Evidence, supra* note 13, at 553-54.

[151] Orne, *supra* note 41, at 336, *reprinted at* 100; Comment, *supra* note 22, at 1064; Note, *Evidence, supra* note 13, at 554.

[152] OR. REV. STAT. § 136.675 (1981).

[153] The United States Department of Justice issued the Federal Bureau of Investigation (FBI) safeguards in 1968. The FBI permits physicians and dentists to qualify as hypnotists without requiring that the hypnotist work independently. Although the FBI requires recording of the hypnotic session, no recording of other information is necessary. Thus the hypnotist need not record either a statement of the facts which the subject remembers or the information provided by law enforcement authorities prior to the session. Although the FBI prefers a videotape of the hypnotic session, an audiotape will suffice. Finally, an FBI agent must participate in the session as a liaison between the hypnotist and subject. Special Agent Richard Ault outlines the entire set of safeguards along with his comment in Ault, *FBI Guidelines for Use of Hypnosis,* 27 INT'L J. CLINICAL & EXPERIMENTAL HYPNOSIS

These FBI procedural safeguards are markedly less stringent than those of Orne and *Hurd,* as the FBI seeks only to protect the integrity of investigative procedures. Nevertheless, these various sets of safeguards illustrate that a variety of possible protections for hypnotically refreshed testimony are available to the courts.[154]

One of the benefits of the procedural safeguards position is that the jury is absent when a court initially determines whether compliance with the safeguards assures reliability in the hypnotic process.[155] Once the court finds compliance, no need exists to inform the jury that the witness used hypnosis unless counsel uses the fact of hypnosis to impeach the witness's testimony.[156] Thus, the procedural safeguards approach may address the legal system's concern that the problems inherent in the hypnotic process will affect the jury.[157]

The more important benefit of the procedural safeguards position is that the safeguards directly address the central problem with hypnosis: suggestibility.[158] All six of the *Hurd* court's requirements reduce the likelihood that a witness's memory will incorporate suggested cues. The position developed by the *Hurd* court therefore recognizes the benefits of hypnotically refreshed testimony, while at the same time the position addresses some of the risks inherent in the hypnotic process.

Nevertheless, the procedural safeguards position has several flaws. One primary concern is that the position addresses the *symptoms* of the risks inherent in hypnosis rather than the heart of those risks. Some courts state that hypnotically refreshed testimony is simply unreliable, regardless of the safeguards imposed.[159] No procedural safeguards could prevent, for example, a subject from confusing confabulation under hypnosis with actual previous memory.[160]

A second concern is that the proposed safeguards cannot fully address the problems with hypnosis. Doctor Diamond recognizes the importance of a videotape recording of the pretrial hypnotic sessions.[161] Doctor Diamond urges, however, that a complete record of the hypnotic experience is impossible. Influences occurring before, during, and after the session become integrated into this experience. Even if recording all of these influences were possible, the very fact that the subject knows a recording is underway might influence the subject's testimony.

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449 (1979).

[154] To assure compliance with whatever procedural requirements a court adopts to safeguard the accuracy and reliability of a witness's testimony, the *Hurd* court advocates the use of shifting burdens and standards of proof. The party who attempts to introduce hypnotically refreshed testimony would have the initial burden of showing by clear and convincing evidence that the hypnotic session was reliable. If the party should meet this burden, the burden would then shift to the adverse party to show by a preponderance of the evidence that the testimony is overly suggestive. State v. Hurd, 86 N.J. 525, 546-48, 432 A.2d 86, 97-98 (1981).

[155] The *Hurd* court suggests a pretrial hearing wherein the court views videotapes, hears expert testimony, and determines whether the hypnotic session complies with the required procedures. *Id*. at 543, 432 A.2d at 95.

[156] Counsel opposing the witness's hypnotically refreshed testimony may cross-examine the witness about the hypnosis despite compliance with the procedural safeguards. If the issue of hypnosis arises in this manner, then both parties may employ experts to testify about the problems and benefits of hypnosis as rebuttal to adverse assertions. Compare the accused's right to subject a pretrial identification to scrutiny at trial, including cross-examination, after the identification complies with constitutional safeguards. United States v. Wade, 388 U.S. 218, 235 (1967).

[157] *See supra* text accompanying notes 67-77.

[158] *See supra* text accompanying notes 42-52.

[159] People v. Bicknell, 114 Cal. App. 3d 388, 406 (1980) (the potential for abuse in hypnotically refreshed testimony is real and factual rather than potential or avoidable; because the abuse is in the admission of incompetent testimony, safeguards which protect the procedures used in preparing the testimony are irrelevant).

[160] Orne, *Affidavit, supra* note 46, at 15-16.

[161] Diamond, supra note 30, at 339.

Thus, a hypnotic session might follow all possible safeguards yet might still generate distorted testimony.

Even assuming that such safeguards are successful in assuring at least partial reliability, some courts still doubt their own ability to administer procedural safeguards.[162] The preliminary judicial determination which the procedural safeguards position requires might create practical hardships for courts.[163] Furthermore, the procedural safeguards analogy derives from a constitutional approach which addresses suspect identification procedures. Because hypnosis usually produces more information than that produced in a simple identification, one commentator worries how courts will extend the safeguards to hypnosis.[164]

A final concern with the adequacy of the procedural safeguards approach is that the safeguards should not be a talisman for admissibility. Although the goal of the safeguards is to minimize the risks inherent in hypnotically refreshed testimony, totally eliminating these risks is impossible. Courts therefore should not admit such testimony simply because a hypnotic session meets the safeguards.[165] Conversely, courts should not exclude such testimony when a session fails to meet the safeguards. Although the procedural safeguards position recognizes the benefits of hypnotically refreshed testimony and addresses some of the problems inherent in the hypnotic process, the position is not without flaws.

C. Test of General Acceptance

A third group of courts views hypnotically refreshed testimony as data gathered in a scientific experiment. These courts refuse to analogize a pretrial hypnotic session to an identification procedure involving procedural safeguards. These courts also decline to analogize hypnosis to memoranda which refresh a witness's memory and affect the witness's credibility. Instead, hypnotically refreshed testimony must meet the general admission standard applicable to scientific procedures or techniques: the *Frye* test.[166]

This test requires the scientific technique which produces the evidence in question to be reliable. Only when the scientific field developing the new technique generally accepts that technique will the procedure be reliable and will the evidence produced be admissible.[167] Although all scientific evidence is not subject to the *general acceptance* standard,[168] some courts

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[162] People v. Shirley, 31 Cal. 3d 18, 39, 641 P.2d 775, 787, 181 Cal. Rptr. 243, 255, *cert. denied*, 459 U.S. 860 (1982).

[163] Special hearings and appeals could escalate so that "the game is not worth the candle." *Id*. at 39, 641 P.2d at 787, 181 Cal. Rptr. at 255.

[164] Note, *Testimony Influenced, supra* note 13, at 1219.

[165] Courts may exclude evidence under other evidentiary principles. Examples of other evidentiary problems include the risk that the jury will assign the hypnotically refreshed testimony undue weight, that the testimony will cause undue delay, or that the testimony will cause other prejudice. Note, *Testimony Influenced, supra* note 13, at 1219 n.102.

[166] The United States Court of Appeals for the District of Columbia Circuit established the general standard in *Frye* v. United States, 293 F. 1013 (D.C. Cir. 1923).

[167] *Frye* held that before a court can admit "expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs." *Id*. at 1014.

[168] *Frye* addressed the admissibility of expert testimony in connection with a then-new scientific technique-the lie detector or polygraph. Today the test extends to numerous other scientific tests and procedures. Courts have held that the test applies, for example, to radar, State v. Dantonio, 18 N.J. 570, 115 A.2d 35 (1955); to voiceprints, United States v. McDaniel, 538 F.2d 408 (D.C. Cir. 1976); to truth serum, State v. Washington, 229 Kan. 47, 622 P.2d 986 (1981); and to hair analysis, United States v. Brown, 557 F.2d 541 (6th Cir. 1977). Courts also apply the *Frye* test

have applied the standard to hypnosis and to the hypnotically refreshed testimony which the hypnotic session produces.[169] Courts which apply the *Frye* rule to such testimony implicitly analogize statements made under hypnosis to statements made under truth serum or lie detector tests.[170]

On the other hand, courts do not justify applying *Frye* to hypnotically refreshed testimony merely upon the analogy to truth serum or the polygraph. By applying the test of general acceptance, courts recognize the problems inherent in the hypnotic process. The purpose of the *Frye* rule is to ensure reliability. The test of general acceptance circumvents the doubtful ability of the factfinder to assess the reliability of hypnosis. Those persons most qualified to assess the reliability of the hypnotic process-the scientists in the community-perform this task. Further, two procedural aspects of judicial efficiency support applying a test of general acceptance.[171] First, the danger that the reliability of a particular hypnotic session will dominate a case and cause undue delay does not exist under the general acceptance position. In addition, the *Frye* test initially determines validity and might promote uniformity among the lower courts.[172]

One criticism of the general acceptance position, however, is the lack of uniformity in how courts apply the *Frye* test to hypnotically refreshed testimony. Most courts which apply the test to hypnosis hold that hypnosis fails to satisfy the requirements of *Frye.*[173] Other courts hold that the process of hypnosis *does* meet the general test of scientific reliability, and therefore find that hypnotically refreshed testimony is admissible under some conditions.[174]

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to other scientific procedures. *See, e.g.*, United States v. Tranowski, 659 F.2d 750 (7th Cir. 1981) (photograph dating); Scales v. City Court, 122 Ariz. 231, 594 P.2d 97 (1979) (breathalyzer); *see generally* Note, supra note 29, at 341 n.35; Comment, *supra* note 22, at 1061 n.81. Whether courts will apply the standard to particular scientific evidence, however, is unclear. *See* Gianelli, *The Admissibility of Novel Scientific Evidence*: *Frye* v. United States, *A Half-Century Later*, 80 COLUM. L. REV. 1197, 1221, 1228 (1980) ("Instead of using *Frye* as an analytical tool to decide whether novel scientific evidence should be admitted, it appears that many courts apply it as a label to justify their own views about reliability of particular forensic techniques.").

[169] See Appendix A under "Majority Position" for a list of cases which have applied the *Frye* standard to hypnosis. Most of these cases have found hypnosis to fail that standard.

[170] Both courts and commentators recognize this analogy. *See, e.g.*, State v. Hurd, 86 N.J. 525, 536, 432 A.2d 86, 91 (1981) (like the results of the polygraph or voiceprint tests, hypnotically refreshed testimony depends on the reliability of the scientific procedure used); State v. Beachum, 97 N.M. 682, 688-89, 643 P.2d 246, 252-53 (N.M. App. 1981), *cert. denied*, 98 N.M. 51, 644 P.2d 1040 (1982) (the same rationale applies to both polygraph evidence and hypnotically refreshed recollection of a witness); R. UDOL.F, *supra* note 5, at 71, 77; MCCORMICK, *supra* note 40, § 208, at 510 (declarations made under hypnosis have been treated judicially in a manner similar to drug-induced statements); Spector & Foster, *supra* note 23, at 584; Note, *Hypnosis, Truth Drugs, and the Polygraph: An Analysis of Their Use and Acceptance by the Courts*, 21 U. FLA. L. REV. 541 (1969).

[171] Both of these procedural aspects arise because the *Frye* test renders a case-by-case analysis of admissibility unnecessary. Courts concluding that the scientific community does not deem posthypnotic testimony reliable suppress such testimony in all cases. Until a review of the scientific community indicates a change of consensus, a case-by-case evaluation of inadmissibility is unnecessary.

[172] Ruffra, *supra* note 13, at 317 n.152.

[173] *See supra* note 169. For additional cases, *see* Note, *Testimony Influenced, supra note* 13, at 1217 n.88; Note, *supra note* 29, at 341 n.37.

[174] *See, e.g., State v. Hurd*, 86 N.J. 525, 432 A.2d 86 (1981) (after finding that the credibility of recall stimulated by hypnosis depends upon the reliability of the scientific procedure used, the court found such recall admissible in a criminal trial when certain safeguards are met); *State v. Beachum*, 97 N.M. 682, 643 P.2d 246 (N.M. App. 1981), *cert. denied*, 98 N.M. 51, 644 P.2d 1040 (1982) (applied the *Frye* rule yet held hypnosis admissible in certain instances). Not all cases which have held hypnotically refreshed testimony admissible have expressly or implicitly found the *Frye* test met; many courts simply do not apply the *Frye* test to such testimony.

Those courts which agree that the scientific community does not generally accept hypnosis as reliable divide on the result which this finding requires. One approach considers the posthypnotic witness incompetent to testify on any matter raised during the hypnotic session.[175] An alternative approach modifies this rule of strict incompetency and admits testimony which a witness demonstrably recalls before hypnosis.[176] Although this latter approach is the trend, some courts continue to disagree and refuse to modify the strict incompetency rule.[177]

Disagreement also surrounds a more basic criticism of the general acceptance test. Some courts and commentators believe that the Federal Rules of Evidence, and similar state provisions, abolish the *Frye* standard.[178] Under this view, evidence admissible under the rules of evidence must therefore be admissible in court. The question is open, however, as to whether the general acceptance test retains vitality.[179]

Most courts that admit hypnotically refreshed testimony agree that hypnotically refreshed testimony is not subject to the *Frye* standard.[180] The basis for this agreement is courts' belief that the standard applies only to the admissibility of expert opinions interpreting the results of a scientific technique and to the experimental data resulting from that technique.[181] Further, hypnosis does not purport to indicate or elicit truth, but rather to enhance recall, so that applying

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[175] The California Supreme Court, in *People v. Shirley*, 31 Cal.3d 18, 641 P.2d 775, 181 Cal. Rptr. 243, *cert. denied*, 459 U.S. 860 (1982), adopted the "strict incompetency rule." The court found the testimony of a witness with a hypnotically restored memory inadmissible as to all matters relating to events in issue "from the time of the hypnotic session forward." *Id.* at 66-67, 641 P.2d at 804, 181 Cal. Rptr. at 273. Doctor Diamond originated the "contamination theory:" "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." *Diamond*, *supra note* 30, at 314. Even the strict incompetency rule has one exception, however: Hypnosis will not render a defendant's testimony inadmissible if the defendant elects to take the stand. 31 Cal.3d 18, 67, 641 P.2d 775, 804, 181 Cal. Rptr. 243, 273. This exception is necessary to protect a criminal defendant's constitutional rights.

[176] *See, e.g., State ex rel. Collins v. Superior Court*, 132 Ariz. 180, 209, 644 P.2d 1266, 1295 (1982) (a hypnotized witness permitted to testify regarding matters the witness could recall and relate before hypnosis). For additional decisions, *see Ruffra, supra note* 13, at 320.

[177] The court in *People v. Shirley*, 31 Cal.3d 18, 45-50, 641 P.2d 775, 790-93, 181 Cal. Rptr. 243, 258-62, *cert. denied*, 459 U.S. 860 (1982), cited cases from other jurisdictions which imposed complete incompetency. Recent decisions in those jurisdictions, however, allow testimony as to what the witness remembered before hypnosis. *See Ruffra, supra note* 13, at 319-20; Note, *supra note* 29, at 355-56.

[178] *United States v. Williams*, 583 F.2d 1194, 1200 n.1l (2d Cir. 1978) (Federal Rules of Evidence impliedly abolish the *Frye* standard); *State v. Williams*, 388 A.2d 500, 503-04 (Me. 1978) *(Frye* is incompatible with state rules identical to the Federal Rules of Evidence); 22 C. WRIGHT & K. GRAHAM, FEDERAL PRACTICE AND PROCEDURE § 5168 (1978) *(Frye* test repealed by the Federal Rules of Evidence). These authorities reason that if the hypnotically refreshed testimony meets the requirements of Rules 401 and 402, the testimony must be admissible because the trial judge cannot create new exclusionary rules of evidence. *Ruffra*, *supra note* 13, at 319 n.164.

[179] One treatise holds that the Federal Rules of Evidence did not disturb the *Frye* test. S. SALTZBURG & K. REDDEN, FEDERAL RULES OF EVIDENCE MANUAL 452 (3d ed. 1982). One court notes that the question whether the Federal Rules of Evidence silently abolished or accepted the *Frye* test is "unresolved." *United States v. Valdez*, 722 F.2d 1196, 1201 (5th Cir. 1984). Some commentators argue that the general acceptance test is inapplicable to hypnosis even assuming that the *Frye* standard survives the new rules of evidence. Note, *Testimony Influenced*, *supra note* 13, at 1217; Note, *supra note* 29, at 351; Comment, *The Probative Value of Testimony From the Hypnotically Refreshed Recollection*, 14 AKRON L. REV. 609, 615 (1981).

[180] *See* Appendix A which lists the courts that hold that hypnotically refreshed testimony presents an issue of credibility rather than admissibility. *See also United States v. Valdez*, 722 F.2d 1196, 1201 (5th Cir. 1984).

[181] Hypnotically refreshed testimony, in contrast, raises the issue of admissibility of eyewitness testimony, not the admissibility of a scientist's observations or a hypnotized witness's statements. The distinction is that admissibility depends on the reliability of the hypnotically refreshed testimony rather than on the reliability of the hypnotic process.

a standard which requires valid, truthful results may be illogical. By limiting the applicable scope of the *Frye* test,[182] therefore, some authorities free hypnosis from the restraints of the general acceptance standard.

Although the general acceptance test addresses the reliability problem inherent in hypnosis, the test may do so too strictly. Normal eyewitness testimony is often unreliable, yet the scrutiny of the general acceptance test does not apply to such testimony.[183] Because the test merely addresses the reliability problem, those courts which find that hypnosis satisfies the standard, and which therefore admit hypnotically refreshed testimony, fail to consider the other hypnotic risks.

A final criticism of the general acceptance position is that this position fails to consider fully the benefits of hypnotically refreshed testimony. When a jurisdiction finds that hypnosis flunks the *Frye* test, no posthypnotic testimony is admissible. This result excludes not only unreliable evidence, but also excludes testimony which is both relevant and reliable. Consequently, such a position disregards the American trend toward liberal admissibility.[184] In addition to overlooking the benefits that the hypnotic process offers the legal system, the general acceptance position negates a case-by-case balancing of the problems inherent in hypnosis against these benefits. The position thus de-emphasizes the trial judge's usual discretion on matters of admissibility.[185]

D. Relevancy

The Federal Rules of Evidence do not specifically deal with the admissibility of hypnotically refreshed testimony.[186] A fourth legal position, however, expressly provides that the federal rules, and state rules which parallel the federal rules, govern the issue of hypnotically refreshed testimony. Because this approach applies rules covering relevancy and its limits, this note labels the fourth legal stance the *relevancy* position. Three recent decisions, including two federal cases, have developed this position.[187] Each of these cases refused to apply Federal

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[182] One commentator notes the proposal that the *Frye* test only extends to mechanical testing devices, such as radar and voiceprints. Comment, *supra* note 22, at 1061.

[183] *See supra* text accompanying notes 89-103. One commentator has suggested that applying different standards to hypnotically refreshed testimony and to ordinary eyewitness testimony is unjust. Note, *Testimony Influenced*, *supra note* 13, at 1218.

[184] *See, e.g.,* Note, *supra note* 123, at 388.

[185] For further discussion of this discretion, see *Ruffra, supra note* 13, at 318.

[186] Courts often attempt to use the federal rules, however, when addressing the hypnosis issue. The credibility position implicitly applies Federal Rule of Evidence 104(e) and allows the jury to hear evidence relevant to weight or credibility. Federal Rule of Evidence 104(b) applies to relevancy conditional on fulfillment of a fact, and the procedural safeguards position follows this rule. Under this position, the judge makes a preliminary finding whether the foundation evidence-here the required procedures-supports a finding of relevance. Following this finding, the jury makes the final conclusion on the issue of relevancy.

The general acceptance position, on the other hand, considers hypnotically refreshed testimony as either a question of witness qualification or of admissibility of evidence. The court essentially decides the question, therefore, under Rule 104(a). Most courts which adopt this position apply the *Frye* test. Although courts do not refer specifically to the rules of evidence when invoking any of these three positions, courts have followed the theories underlying the rules. This may prove to be important, as an increasing number of states have adopted the Federal Rules of Evidence. Spector & Foster, *supra note* 23, at 606.

[187] *United States v. Valdez*, 722 F.2d 1196 (5th Cir. 1984); *United States v. Charles*, 561 F. Supp. 694 (S.D. Tex. 1983); *State v. Contreras*, 674 P.2d 792 (Alaska App. 1983). At least two commentators proposed this relevancy position before these three courts applied the approach: Note, *Awakening from the Exclusionary Trance:*

Rules of Evidence 104(a), (b), and (e), which the three entrenched positions implicitly follow,[188] and each denounced these three approaches.[189]

In developing the relevancy position, the court began with basic evidentiary concepts, including Rule 601 which provides that all witnesses are generally competent to testify.[190] One defendant argued to exclude hypnotically refreshed testimony under Alaska Rule of Evidence 601, which is similar to Federal Rule of Evidence 601.[191] The court, however, declined to adopt a per se rule rendering a previously hypnotized witness incompetent to testify.[192]

In a second case, the United States Court of Appeals for the Fifth Circuit agreed that a per se exclusionary rule is inappropriate,[193] and thus negated the general acceptance test view that a witness is incompetent to testify after hypnosis. Although Rule 602 limits the presumption of competency by requiring that a witness have personal knowledge of the testimonial subject matter, and although the suggestiveness of the hypnotic process might cast doubt on the extent of the previously hypnotized witness's personal knowledge, no court has yet addressed this possibility.[194] The first prong of the relevancy position thus includes a presumption of witness competency, possibly tempered by a personal knowledge requirement.

The second prong of the relevancy position considers Federal Rules of Evidence 401, 402, and 403. Rule 401 provides that all evidence having any tendency to make a fact of consequence to the lawsuit more or less probable is "relevant." Posthypnotic testimony often is relevant, and Rule 402 states that all relevant evidence is admissible.[195] Nevertheless, Rule 403

A Balancing Approach to the Admissibility of Hypnotically Refreshed Testimony, 61 TEX. L. REV. 719 (1982); Note, *Testimony Influenced, supra note* 13, at 1220.

[188] *See supra note* 186.

[189] FED. R. EVID. 104(e) states: "This rule [104] does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility." Under the relevancy position, the judge determines admissibility. Rule 104(e) is therefore inapplicable. Relevancy is not conditional on the fulfillment of a fact, however, instead the court considers all of the circumstances. Rule 104(b) is therefore inapplicable, as FED. R. EVID. 104(b) provides that "[w]hen the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon . . . support . . . of the fulfillment of the condition."

Although the court determines the admissibility of the evidence, the court is bound by Rule 403 in its determination. Rule 104(a) is therefore inapplicable. FED. R. Evid. 104(a) provides: "Preliminary questions concerning the qualification of a person to be a witness . . . or the admissibility of evidence shall be determined by the court . . . In making its determination it is not bound by the rules of evidence . . . " All three cases which have adopted the relevancy position have done so after recognizing the three traditional approaches.

[190] FED. R. EVID. 601 states: "Every person is competent to be a witness except as otherwise provided in these rules."

[191] Alaska Rule of Evidence 601 states: "A person is competent to be a witness unless the court finds that (1) the proposed witness is incapable of expressing himself . . ., or (2) the proposed witness is incapable of understanding the duty of a witness to tell the truth."

[192] *State v. Contreras*, 674 P.2d 792, 796 (Alaska App. 1983).

[193] *United States v. Valdez*, 722 F.2d 1196, 1201 (5th Cir. 1984).

[194] Perhaps the liberal stance which courts have adopted in applying Rule 602 precludes such an attack. The personal knowledge requirement of Federal Rule of Evidence 602 does not require certainty. A witness who uses his or her senses to record an event may testify to an "impression" or "belief" even if the testimony reflects uncertainty. D. LOUISELL & C. MUELLER, *supra note* 123, § 261, at 45. *See, e.g., United States v. Evans*, 484 F.2d 1178, 1181 (2d Cir. 1973) (holding three eyewitnesses competent to testify and to identify defendant in court despite their prior uncertainties); *Auerbach v. United States*, 136 F.2d 882, 885 (6th Cir. 1943) (allowing a witness to identify defendant's voice although the witness "could be mistaken"). On the other hand, Rule 602 is essentially a specialized application of Rule 104(b) which considers conditional relevancy. Perhaps in eschewing the procedural safeguards approach, the relevancy position renders application of Rule 602 unnecessary.

[195] *United States v. Valdez*, 722 F.2d 1196, 1201 (5th Cir. 1984); *United States v. Charles*, 561 F. Supp. 694, 697 (S.D. Tex. 1983); *State v. Contreras*, 674 P.2d 792, 795 (Alaska App. 1983). No courts or commentators

requires courts to exclude even relevant evidence when the dangers of that evidence outweigh the evidence's probative value.[196] Unlike the three entrenched positions, the relevancy approach directly addresses the key issue: balancing the benefits or probative value of hypnotically refreshed testimony against the dangers inherent in the hypnotic process.

A review of the three decisions which employed the relevancy position reveals several factors which the courts found important in applying this balancing approach. All three courts were aware of the problems inherent in the hypnotic process.[197] The court in *United States v. Charles* invoked the balancing approach of Federal Rule of Evidence 403 and held that the danger of unfair prejudice to defendants outweighed the probative value of the hypnotically refreshed testimony in issue.[198] In that case, an inexperienced investigator for the District Attorney had acted as hypnotist.[199] In addition, the court held that the investigator's unavailability for trial violated the defendants' sixth amendment right to confront witnesses against them. The court also found the hypnotic session suggestive.[200] Thus, the court in *Charles* considered some of the problems inherent in hypnosis and precluded this hypnotically refreshed testimony. The court, however, provided little information concerning the probative value or usefulness of the witness's testimony.

The United States Court of Appeals for the Fifth Circuit, on the other hand, considered the hypnotically refreshed identification testimony at issue in *United States v. Valdez* "persuasive."[201] The court noted the usefulness of the testimony, particularly because the court had relied on that testimony to reverse the district judge's original acquittal.[202] Nevertheless, the court held that the testimony failed the Rule 403 balancing and reversed defendant's conviction.

Compelling facts supported the *Valdez* court's decision. The fact that the hypnotized subject identified the defendant for the first time under highly suggestive circumstances was foremost in importance.[203] Further, the procedures used-whereby an attorney, F.B.I. agents, and Texas Rangers were all present during the session-were highly suggestive. The absence of a full videotape of the session prevented the court from determining which recollections were attributable to subtle cues of the non-hypnotists. Finally, because enmity existed between the witness and defendant, the court found the situation ideal for confabulation.[204]

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propose to exclude hypnotically refreshed testimony on the grounds that such testimony is irrelevant.

[196] The dangers which Rule 403 recognize include the possibilities that relevant evidence will unfairly prejudice, confuse the issues, mislead the jury, cause undue delay, waste time, or needlessly present cumulative evidence.

[197] The United States District Court for the Southern District of Texas relied on a psychologist specializing in hypno-therapy to inform the court on the nature of hypnosis. *United States v. Charles*, 561 F. Supp. 694, 696 (S.D. Tex. 1983). Both other courts discussed the problems extensively in their written opinions. *United States v. Valdez*, 722 F.2d 1196, 1198-1203 (5th Cir. 1984); *State v. Contreras*, 674 P.2d 792, 802-17 (Alaska App. 1983).

[198] 561 F. Supp. 694 (S.D. Tex. 1983).

[199] The investigator's experience had consisted solely of a one week course and three previous subjects. *Id.* at 696.

[200] The court based its finding of suggestiveness on two factors: (1) the session immediately followed an interrogation by the hypnotist, and (2) a review of the transcript of the hypnotic session showed critical leading questions. *Id.* at 697.

[201] *United States v. Valdez*, 722 F.2d 1196, 1205 (5th Cir. 1984).

[202] *Id.* at 1205.

[203] The subject already knew defendant was under suspicion. No corroboration for this personal identification existed and the witness failed to identify the defendant before hypnosis.

[204] The *Valdez* case presented an ideal factual setting for a court to apply the relevancy position. The compelling facts of that case, however, would also allow a court to apply the procedural safeguards position, as the hypnotic session violated most of the accepted safeguards. The test of general acceptance would also reach the same

The third case which develops the relevancy position also involved an identification. The court in *State v. Contreras* was the only court in this triad, however, to conclude that the probative value of refreshed testimony outweighed any possible prejudice.[205] The court emphasized the usefulness of the identification, and independent corroboration of the testimony convinced the court of the identification's accuracy. In addition, the court found that the witness was unlikely to confabulate. These rather summary findings, however, failed to consider the full range of problems inherent in hypnotically refreshed testimony.[206] The court did derive benefit from expert opinion testimony which established that psychological problems exist with ordinary eyewitness testimony as well as with the testimony of hypnotized witnesses[207] and that the hypnotic session substantially satisfied procedural safeguards.[208]

The diversity of balancing factors which the three decisions illustrate indicates one benefit which the relevancy position offers. Unlike the general acceptance position, a court adopting the relevancy position must determine the admissibility of hypnotically refreshed testimony on a flexible case-by-case basis. Thus, the relevancy position avoids the overly strict emphasis on the problems of hypnosis which often characterizes the general acceptance test. Instead, the relevancy position recognizes that ordinary eyewitness testimony is often unreliable yet that such testimony is generally useful to the legal system.[209]

The flexibility of the relevancy position appears advantageous in comparison to the general acceptance test. That same flexibility becomes a burden, however, in comparison to the procedural safeguards position. Although both positions determine admissibility on a case-by-case basis, the relevancy position lacks the benefit of an established set of guidelines. This shortcoming aggravates a problem which characterizes all four positions: a lack of uniform application. Although it fails to create complete uniformity, the procedural safeguards position at least attempts to address the problem. Courts which apply the safeguards, for example, are certain to address suggestibility. On the other hand, courts often may not consider the suggestibility problem under the relevancy position.

This comparison between the relevancy and safeguards positions further illustrates the complicated issue of how much flexibility in deciding admissibility is beneficial. Commentators criticize the less flexible procedural safeguards approach because the limited safeguards cannot

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result as these two positions, but this test would not consider the persuasive nature of the testimony. Only the competency position might have failed to provide the legal system with a just decision based on the facts in *Valdez*: the refreshed testimony of a law enforcement agent which is "persuasive" could mislead a jury.

The Fifth Circuit applied the relevancy position in a later case to uphold a conviction which relied on hypnotically enhanced identification. *United States v. Harrelson*, 754 F.2d 1153, 1180-81 (5th Cir. 1985). The court distinguished Valdez because the hypnotic procedures were not "unduly suggestive;" these procedures were "conducted with care and circumspection." *Id.* at 1180. In addition, a full videotape preserved the hypnotic sessions and the witness did not fail to identify the defendant before hypnosis.

[205] *State v. Contreras*, 674 P.2d 792, 819 (Alaska App. 1983).

[206] Doctor Diamond argues, for example, that corroboration of hypnotically influenced testimony is ineffective. Diamond, *supra* note 30, at 338.

[207] *State v. Contreras*, 674 P.2d 792, 811 (Alaska App. 1983) (Doctor Diamond conceded this fact on effective cross-examination).

[208] *Id.* at 812 (testimony of Doctor Donald Rossi). Although the relevancy position does not require procedural safeguards to be met, compliance with such safeguards is a factor for courts to weigh in the Rule 403 balance.

[209] Courts may reach the same result under both the rules of evidence and the *Frye* test-a jurisdiction might preclude all hypnotically refreshed testimony because dangers presently outweigh the usefulness of any testimony, no matter how probative. Nevertheless, the flexibility of the relevancy position does allow courts to admit testimony without waiting for a scientific consensus once scientists reduce those dangers.

fully address the problems inherent in hypnosis.[210] The relevancy position offers the flexibility to address any prejudicial problem, but at the cost of uniformity. In addition, the relevancy position eliminates the delusion that safeguards will prevent the risks inherent in hypnotically refreshed testimony. Courts will not admit or exclude testimony based solely on compliance with a set of fixed safeguards. Finally, both positions suffer because the judge has sole discretion in deciding the issue of admissibility. The ability of courts to administer either the procedural safeguards or Rule 403 balancing on an individual case-by-case basis is unclear.[211]

On the other hand, the fact that the judge has sole discretion can avoid many of the jury problems present under the credibility approach. One factor explicit in Rule 403 balancing is whether the evidence will mislead the jury. If a judge finds that the dangers posed by the aura of hypnosis as a scientific process or by a jury's misconceptions about the process are substantial, the judge may exclude the evidence. A learned judge should be better able than the average jury to assess subtle considerations of suggestibility and a desire to please, or at least should be better able to understand helpful expert testimony which addresses these considerations. The relevancy position therefore avoids many of the pitfalls of the credibility position while retaining the policy basis underlying the latter position: an emphasis on liberal admissibility of relevant evidence.

V. RECOMMENDATION

A. Balancing the Statistics

Today the legal system adopts four positions when addressing the issue of hypnotically refreshed testimony: credibility, procedural safeguards, general acceptance, and relevancy. Courts have developed the relevancy position recently. The legal system therefore has not yet had an opportunity to evaluate the merits of this position. Although each of the three more established positions possesses some merit, and although each focuses on various factors important to the balancing approach, each of the positions fails to consider other important factors.[212]

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[210] *See supra note* 161 and accompanying text.

[211] *See supra note* 162-64 and accompanying text.

[212] Table I attempts to quantify those factors relevant to the balancing approach that each of the four positions addresses.

TABLE I

BALANCING FACTORS	CREDIBILITY	PROCEDURAL SAFEGUARDS	GENERAL ACCEPTANCE	RELEVANCY
A) Reliability Problem		X	X	X
1. Suggestion		X	X	X
2. Confabulation		X	X	X
3. Purposeful Deceit				
4. Safeguards Cannot Ensure Reliability				
B) Legal Process Problem				
1. Hypnotic Recall Not Always Scientifically Reliable		X	X	X
2. Hardening of Pseudomemory (cross-examination, credibility)			X	X
3. Undue Weight by Jury (scientific aura)			X	X
4. Misconceptions Mislead Jury			X	X
5. Judicial Administration	X		X	
C) Usefulness				
1. Hypnosis Refreshes Recall	X	X		X

The proper approach which the legal system should take concerning hypnotically refreshed testimony is to balance the benefits of hypnotically refreshed testimony against the problems inherent in the hypnotic process. A good measure of each position's merit, therefore, will be the number of factors-both problematic and beneficial-which each position takes into account in its balancing approach. Based upon this measure, the preferable legal positions are, in order: relevancy, general acceptance, procedural safeguards, and credibility.[213]

This order of preference parallels the number of states which have adopted each position.[214] Although only one state now adopts the developing relevancy approach, more than half of the thirty-five states with a legal position on hypnotically refreshed testimony have adopted the general acceptance position.[215] Approximately one quarter of the states recognize admissibility when the hypnotic session meets procedural safeguards, and only five states retain the credibility position. Noting this parallel between the majority legal position and the number of balancing factors which the position addresses, this note predicts that the relevancy position will become the majority approach.

Courts would do well to adopt the relevancy position, as this position can reach most of the factors relevant to balancing. More importantly, the relevancy position *directly* adopts a balancing approach, whereas each of the three established positions advocates to some extent a per se rule regarding admissibility.[216] Although each position accounts for various balancing

2.	All Relevant Evidence to Jury	X			X
3.	Similar Problems with Ordinary and Hypnotically Refreshed Testimony	X	X		X
	Number of Factors which the Position Takes into Account:	4	6	9	11
	Number of States Adopting this Position (Appendix A):	5	9	19	1
	Percentage of States Adopting this Position* :	15%	26%	56%	3%

KEY: "X" denotes that the legal position addresses the balancing factor.

*: of those thirty-four states which adopt one of the four positions one state, Idaho, rejects all four positions, *see infra* note 215.

[213] Table I, *supra* note 212, illustrates that of 12 possible balancing factors, the relevancy position accounts for all but one; the general acceptance position accounts for two-thirds; the procedural safeguards position accounts for one-half; and the credibility position accounts for only one-third of the factors.

[214] Compare Appendix A with Table *I, supra* note 212. This parallelism indicates the ability of the legal system to move gradually towards the best available approach to a given issue. Because the initial majority position-credibility--only addresses a few of the important factors, the trend of the legal system has been to abandon this position in favor of the better-suited general acceptance position. The procedural safeguards position is an intermediate step.

[215] The court in *State v. Iwakiri*, 682 P.2d 571, 578 (Idaho 1984), rejected all four positions on admissibility of hypnotically refreshed testimony which this note outlines. The Idaho Supreme Court applied a "totality of the circumstances" test which required the judge, in a pretrial hearing, to determine whether the proposed testimony was reliable. The court did, however, provide a modified version of the Orne safeguards to guide the trial courts. In providing approximate statistics for illustrative purposes, therefore, this note treats Idaho as an "outlier" and excludes this jurisdiction. Thirty-five states, however, now have a legal position on hypnotically refreshed testimony.

[216] The credibility position admits hypnotically refreshed testimony. Because this position fails to adequately recognize the problems inherent in hypnosis, an undesirable result ensues: unreliable testimony may undermine the integrity of the legal system. The general acceptance position's rule of inadmissibility, on the other hand, thwarts the truth-seeking goal of the legal system by excluding reliable testimony. Finally, the procedural safeguards position also represents an undesirable per se rule. If the hypnotic session follows the proper safeguards, the testimony is admissible, but if the session fails to comply with procedural safeguards, the testimony is inadmissible.

factors, a per se rule contradicts the spirit of the balancing approach. The fundamental issue in deciding the impact of hypnotically refreshed testimony on the legal system should not be whether to classify hypnosis as a memory refresher or as a scientific technique. Instead, the fundamental issue should be whether the benefits of hypnotically refreshed testimony outweigh the risks involved.

Although the relevancy position is the most preferable of the current positions, courts may improve even on this position. The relevancy position has an identifiable fault: the relevancy position fails to highlight the key issue of whether hypnotic recall is reliable.[217] An approach eliminating this fault would improve the relevancy position. This note proposes that such improvement is possible if a court borrows concepts from the three established legal positions.

B. Outline: The Three-Tiered Approach

The relevancy position emphasizes the courts' balancing role under Rule 403 while the credibility position relies on the jury's ability to balance usefulness against dangers. The entire issue as to the admissibility of hypnotically refreshed testimony is whether the testimony refreshed is actually what the witness experienced. The court's role in deciding this issue initially should be to determine whether the potential for reliable recall exists. Having accomplished this, the court should then make a Rule 403 relevancy balance between the legal process problems and the benefits of the testimony to the legal system.[218] Once the court establishes reliability and relevancy, however, the jury should decide whether the recall is credible. Both the judge and the jury should evaluate the hypnotic testimony in a balanced, informed manner.

This note therefore recommends that courts facing the issue of hypnotically refreshed testimony adopt a three-tiered approach.[219] First, the *court* should initially determine that the hypnotic process was reliable. In making this decision, the court should take guidance from a set of procedural safeguards, but should also balance all of the circumstances. When the proponent of hypnotically refreshed testimony cannot show a reasonable reliability in the hypnotic session, the court should hold the resulting refreshed testimony inadmissible.[220] Once the court finds the session sufficiently reliable, the *court* should then perform a Rule 403 relevancy balance between the problems and benefits of the refreshed testimony. Although this second tier should consider general acceptance test concepts because whether the scientific community generally accepts hypnotic principles may bear on the probative value of the evidence, these concepts must not completely constrain the court's balancing. Finally, the *jury* should evaluate the credibility of a

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[217] Although a court may account for the reliability problem inherent in hypnosis when performing a Rule 403 balance, courts must give the reliability problem greater emphasis.

[218] Legal process problems include the potential for hardening of pseudomemory, undue weight given by the jury, and hypnotic recall is not always scientifically reliable. The policy which favors providing the jury with all relevant evidence, the fact that hypnosis refreshes recall, and the fact that problems with ordinary witness testimony often parallel the problems with hypnotically refreshed testimony-all support the usefulness to the legal system of hypnotically refreshed testimony.

[219] A recent federal case addressing the issue of hypnotically refreshed testimony has applied this note's three-tiered recommendation. *Sprynczynatyk v. General Motors Corp.*, 771 F.2d 1112 (8th Cir. 1985).

[220] The court should hold only the resulting refreshed testimony inadmissible. The witness still may testify to memories which the court finds were present before hypnosis. This note thus refuses to follow the view that hypnosis renders a witness incompetent to testify. *See supra* text accompanying notes 79 and 175-77.

witness testifying from a hypnotically refreshed memory. This third tier would involve an informed jury incorporating the dangers of hypnosis into its credibility balance.

C. The Three Tiers

1. The First Tier: Reliability Balance

Lack of reliability is a fundamental criticism of hypnotically refreshed testimony. The hypnotic process involves a state of hypersuggestiveness and memory involves the opportunity to confabulate-a problem which suggestiveness exacerbates. In addition, a subject remains capable of purposeful deceit while hypnotized. All of these factors undermine the reliability of an individual hypnotic session and that session's ability to produce untainted, refreshed memory.[221] Further, the scientific community recognizes that hypnotic recall is not always reliable.[222] Thus, courts must recognize that memory distortion is possible. Nevertheless, such distortion does not occur in every hypnotic-enhancing case. A detailed examination of the particular procedures used and questions asked during the session will allow the court to assess the reliability of the witness's refreshed memory.[223]

When a court assesses the reliability of the scientific process of hypnosis, the court removes itself from its sphere of expertise. Consequently, some scientific guidance must aid the court. A set of procedural safeguards developed by those most qualified to address the scientific problems of relevancy-the scientific community-would help the court.[224] Legislative recommendations defining the important safeguards would be appropriate, as the legislature possesses superior fact-finding ability to that of the judiciary.[225] Hearings which involve the scientific community could produce the legislature's recommended list of procedural safeguards. Even detailed safeguards, however, cannot guarantee reliability.[226] Hence the procedural safeguards should be guidelines, not requirements, in establishing reliability, and the court should evaluate each case in light of all the circumstances. When a hypnotist does comply with the safeguards, however, the likelihood that a court will find the testimony reliable should increase.

In determining whether the hypnotic session and resulting refreshed testimony are reliable, the court should hold a hearing on the issue. Evidence which illustrates compliance with the recommended procedural safeguards should be the focal point of this hearing, and the court should view videotapes of the hypnotic session. Adversaries may use expert opinion testimony to educate the judge on the problems in using hypnosis and to help the judge in deciding whether the procedure used was proper.[227] Although this reliability decision will be difficult for a judge, the decision should be no more difficult than other preliminary questions

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[221] *See supra* text accompanying notes 40-58.

[222] *See supra* notes 42-45.

[223] *See supra* text accompanying notes 143 and 146-50.

[224] Doctor Orne's proposed safeguards are one example. *See supra* text accompanying notes 139-51.

[225] OR. REV. STAT. § 136.675 (1984). This statute is the only existing statute found that attempts to specify conditions precedent for admissibility of hypnotically influenced testimony.

[226] Distorted testimony may result even when a hypnotist observes all practical safeguards. On the other hand, the hypnotist might ignore many of the safeguards yet may produce reliable testimony. R. UDOLF, *supra* note 5, at 166.

[227] The hypnotist should testify, for example, to the validity of the hypnotic induction process used, the depth of the trance, and other factors which illustrate actual hypnosis.

which trial judges must decide.[228] Based upon the hearing and all of the circumstances of the case, the court thus should determine whether the facts supporting reliability outweigh those negating reliability.

2. The Second Tier: Relevancy Balance

Assuming that the balance indicates reliability and admissibility, the court should next perform a Rule 403 relevancy balance. The court should consider whether the legal process problems caused by hypnosis outweigh the usefulness of reliable evidence to the legal system. A court should exclude relevant, reliable evidence under this basic evidentiary analysis when the dangers of unfair prejudice, confusion of the issues, or misleading the jury substantially outweigh the probative value of such evidence.[229]

This suggested second tier approach would consider the probative value and prejudicial risks of hypnotically refreshed evidence in the same manner that courts analyze other kinds of evidence. Rule 403 would place the burden of convincing the court to exclude evidence on the party seeking to exclude the evidence.[230] The party must demonstrate the dangers which hypnotically refreshed testimony poses, and would stress the prejudicial tendency of hypnosis to harden a subject's pseudomemory.

When the party adverse to the hypnotically refreshed testimony raises the issue of hypnosis at trial, the court must consider other dangers.[231] The aura of scientific evidence tends to over-impress jurors, thus negating the jury's role of critical assessment. Because misconceptions might mislead the jury, the court should evaluate whether the fact of hypnosis will merely guide the jury in its own assessment of the evidence, or whether this fact will render the jury incapable of estimating either the accuracy of experts' conclusions or the witness's credibility. Factors such as the jury's sophistication and whether experts will testify should be important to the court's evaluation. All of these problems inherent in the hypnotic process may affect the integrity of the factfinding process.

Against these problems, the court should balance the usefulness of hypnotically refreshed testimony to the legal system. Many of the problems are those which the court commonly encounters with ordinary witness testimony. Noting the policy which favors providing the trier of fact with all relevant evidence, courts are liberal in admitting such testimony. The courts should recognize the scientific principle that hypnosis can refresh recollection and can provide useful information otherwise lost. Factors important to the probative worth of testimony should include the need for the evidence, the availability of other proof, and the significance of the issue to which the evidence relates.

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[228] For examples of other difficult preliminary questions that a trial judge must answer, *see* Spector & Foster, *supra note* 23, at 610 n.197.

[229] *See* FED. R. EVID. 403. One commentator calls such a Rule 403 balancing approach an "exclusionary principle of general application." G. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE 29 (1978). The court must consider these last two dangers-confusion of the issues and misleading the jury-only when the party adverse to the hypnotic testimony will raise the issue of hypnosis at trial. *See infra* text accompanying notes 234-35.

[230] FED. R. EVID. 403 requires proof that the dangers of the evidence "substantially" outweigh the probative value.

[231] On the other hand, the adverse party may not desire to raise the fact of hypnosis. Under this condition, the court will not address dangers that hypnotically refreshed testimony creates for a jury; the jury will not know that hypnotism refreshed the witness's testimony. *See infra* text accompanying notes 234-35.

Another factor which bears on the probative value of hypnotically refreshed testimony is the extent to which scientific experts in the field of hypnosis accept hypnotic principles. Thus, the concerns of the general acceptance position enter into this proposal as a factor in the court's Rule 403 balance. When a scientific community accords hypnosis little support, a court in that jurisdiction should consider this factor as reducing the usefulness of hypnotically refreshed testimony. The court should review the scientific literature to assess the scientific community's stance. Information such as the hypnotist's qualifications, the technique applied by the hypnotist, and the technique's potential for producing distorted testimony should be relevant to the court. Data which the court garners in the hearing concerning reliability will also prove helpful to the court in weighing the general acceptance test factors in the relevancy balance.

The trial judge should be at ease when applying the relevancy balance and weighing the usefulness of hypnotically refreshed testimony against the dangers of hypnosis. Unlike the reliability balance, the trial judge commonly applies a relevancy balance to evaluate prejudicial, misleading, and confusing aspects of evidence in determining whether to admit or exclude *non*-hypnotic evidence.[232] This second tier leaves the final decision to the judge's discretion in a manner similar to other Rule 403 relevancy situations.[233]

3. The Third Tier: Credibility Balance

Once the court establishes reliability and relevancy of the hypnotically refreshed testimony, the testimony is admissible. At trial, courts should preclude the proponent of the hypnotically refreshed testimony from exploring the issue of hypnotism. If the proponent were able to raise the fact of hypnosis, then issues concerning misuse of this fact would arise.[234] The party adverse to the hypnotically refreshed testimony also may abstain from the subject of hypnosis.[235] Under this condition, the jury will hear the hypnotically refreshed testimony and will evaluate the credibility of such testimony, without reference to the prior hypnosis.

On the other hand, the adverse party may attempt to impeach the hypnotically refreshed testimony by raising the fact of hypnosis. Both parties then may introduce testimony which addresses the effect of hypnosis on the *credibility* of the witness's testimony. The evidence at trial should address the specific issue of the witness's credibility and avoid duplicating proof offered at the hearing on the general reliability of hypnosis. Although some overlap will exist, the court should restrict evidence irrelevant to credibility.

When the parties introduce evidence relevant to the credibility of hypnotically refreshed testimony at trial, the jury should decide whether the recall is credible. By requiring that the trier of fact assess the credibility of the witness and of the witness's testimony, the credibility position acknowledges the jury's ability to perform this function. The court should incorporate this

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[232] *Gianelli*, *supra note* 168, at 1237.

[233] Rule 403 provides that the "evidence may be excluded" by the trial judge. *See* FED. R. EVID. 403 (emphasis added).

[234] The concern exists that jurors will accord excessive weight to information provided by scientific techniques such as hypnosis. *See supra* text accompanying notes 69-74. By raising the fact of hypnosis, the proponent might attempt to give the witness an aura of invincibility: the witness's testimony must be true because a scientific technique establishes veracity. Such an attempt would misuse the fact of hypnosis.

[235] Various rationales might induce the adverse party to avoid the subject of hypnosis. The hypnotically refreshed testimony may not damage, or may even benefit, that party's case. Some cases do not justify the expense of research and experts required to develop the issue of hypnosis. Fears that the jury will accord the testimony increased weight, despite attempts to impeach, also may support avoidance.

ability in its relevancy balance when the court considers the dangers which the hypnotic process poses. Courts should not undermine the jury's truthfinding function, however, by excluding evidence based solely upon the cynical view that jurors cannot evaluate hypnotic evidence. Traditional safeguards of cross-examination, expert testimony, and jury instructions often will enable the juror to judge adequately the credibility of posthypnotic testimony.

Cross-examination allows the adverse party to elicit information, and thus permits the jury to weigh the credibility of the witness's claim that hypnosis actually refreshed the witness's memory.[236] Cross-examination also can expose discrepancies in the witness's testimony, inconsistencies between the testimony and previous statements by the witness, and differences between the testimony and other evidence.[237] Further, the adverse party may cross-examine the hypnotist. Such cross-examination may provide the jury with information concerning the hypnotist's credentials and procedures used during hypnosis.[238] When coupled with clarifying expert testimony, this information would help the trier of fact judge the testimony's credibility.

An important key to effective cross-examination is lack of surprise. When an attorney introduces hypnotically refreshed testimony at trial and surprises opposing counsel, little opportunity remains for meaningful cross-examination.[239] The court should therefore explore the issues which hypnotically refreshed testimony presents at the hearing, so that the adverse party will have the opportunity to prepare adequately. A properly prepared attorney should be able to conduct an effective cross-examination and should be able to provide the jury with information sufficient to perform a credibility balance.[240]

Experts who are competent to explore the limitations of hypnosis may provide a second source of information for the jury.[241] Expert testimony which addresses the hypnotic technique used in a specific case will aid the trier of fact in judging credibility.[242] Although introducing scientific evidence describing hypnosis may result in substantial delay, this delay would not constitute an undue waste of time,[243] as the jury's factfinding function is critical to the legal

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[236] *See, e.g., Wyller v. Fairchild Hiller Corp.*, 503 F.2d 506, 509-10 (9th Cir. 1974) (allowing cross-examination of the witness to attack the reliability of recall).

[237] Note, *supra note* 123, at 384. Hypnosis may harden the witness's erroneous memory and may strengthen the witness's confidence in that memory, however, thereby rendering cross-examination less effective. *See supra notes* 62-63 and accompanying text. These two factors might frustrate the adversarial process and deny defendant's constitutional right to confront and to cross-examine witnesses. *See supra notes* 64-65 and accompanying text. Neither factor, however, would undermine the ability of the cross-examiner to illustrate inconsistencies.

[238] *See Wyller v. Fairchild Hiller Corp.*, 503 F.2d 506, 510 (9th Cir. 1974) (allowing cross-examination of the hypnotist to attack the reliability of the hypnotic procedure); *State v. Jorgensen*, 8 Or. App. 1, 7, 492 P.2d 312, 314-15 (1971) (defendant challenged the credibility of hypnotically refreshed testimony by cross-examining the psychiatrist-hypnotists).

[239] When the hypnotically refreshed testimony is inconsistent with the witness's prior testimony, the likelihood of meaningful cross-examination further decreases. *See* Note, *Testimony Influenced, supra note* 13, at 1222.

[240] *United States v. Bailer*, 519 F.2d 463, 466 (4th Cir.), *cert. denied*, 423 U.S. 1019 (1975) (in a criminal case, the appellate court stressed the attorney's thorough knowledge of the subject as demonstrated by a detailed cross-examination developing the possibility of error in a scientific technique).

[241] *Id.* (the appellate court stressed the availability of competent witnesses to expose the limitations of the scientific technique).

[242] *See Harding v. State*, 5 Md. App. 230, 237-44, 246 A.2d 302, 306-10 (1968) (expert testimony used extensively), *cert. denied*, 252 Md. 731, *cert. denied*, 395 U.S. 949 (1969); *Chapman v. State*, 638 P.2d 1280, 1281 (Wyo. 1982) (defendant used expert witness to discredit the reliability of hypnosis).

[243] *See* FED. R. EVID. 403.

process. Finally, instructions may protect the jury's ability to balance factors which affect the credibility of hypnotically refreshed testimony and of the hypnotized witness.[244]

VI. CONCLUSION

Scientists recognize that the process of hypnosis carries risks. This recognition concerns courts, as courts realize that the risks inherent in testimony refreshed by hypnosis create problems for the legal system. Some scientists and legal commentators, on the other hand, suggest that critics overstate the risks of hypnosis. The scientific literature also documents that hypnosis can benefit the legal system. As the trend toward using hypnosis in the legal system escalates, courts must continually balance these competing interests in deciding whether to admit or to exclude hypnotically refreshed testimony.

Courts which have addressed this balance have resolved the issue in different ways. Nevertheless, all courts agree that a balancing approach should apply to the issues which hypnotically refreshed testimony presents. Each of these different positions has merit; each addresses some of the recognized balancing factors. Consequently, a standard, uniform balancing approach which combines the best reasoning of each position is possible. This note proposes such a balancing approach in three tiers. Because this three-tiered balancing approach incorporates most of the recognized balancing factors, this approach would provide the legal system with reliable, relevant, and useful testimony while minimizing the risks inherent in the process of hypnosis.

KEVIN R. CASEY

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[244] Although forceful jury instructions cannot adequately safeguard the jury from all prejudice, instructions do offer some protection. *See supra note* 77 and accompanying text. Even conceding the uncertain ability of jury instructions to protect, jury instructions may provide a third informative tool for jurors. For example, the court may instruct the jurors concerning the role of the jury in deciding credibility or as to the proper weight to accord expert testimony. The appellate court in *United States v. Williams*, 583 F.2d 1194, 1200-01 n.13 (2d Cir. 1978), *cert. denied*, 439 U.S. 1117 (1979), praised the following "excellent" instruction:

> You may consider Mr. Lundgren's [an expert in voice identification] opinion on this matter [spectrographic analysis]. You may give that opinion whatever weight you feel it deserves, taking into account Mr. Lundgren's qualifications, his methods, and the reasons he gave for his opinion. But I want to stress again that you are the finders of fact in this case . . . . You may conclude that his opinion is not based on adequate education, training, or experience. You may decide that the technique of spectrographic analysis is not reliable.

APPENDIX A

SUMMARY OF THE JURISDICTIONAL POSITIONS

I. INITIAL POSITION (Credibility)

(1) Clay v. Vose, 771 F.2d 1 (1st Cir. 1985)
(2) United States v. Awkard, 597 F.2d 667 (9th Cir.), *cert. denied,* 444 U.S. 885 (1979)
(3) United States v. Waksal, 539 F. Supp. 834 (S.D. Fla. 1982)
(4) United States v. Narciso, 446 F. Supp. 252 (E.D. Mich. 1977)
(5) People v. Gibson, 117 Ill. App.3d 270, 452 N.E.2d 1368, 72 Ill. Dec. 672 (4th Dist. 1983)
(6) State v. Wren, 425 So.2d 756 (La. 1983)
(7) State v. Little, 674 S.W.2d 541 (Mo. 1984) (en banc), *cert. denied,* 105 S. Ct. 1398 (1985)
(8) State v. Glebock, 616 S.W.2d 897 (Tenn. Crim. App. 1981)
(9) Chapman v. State, 638 P.2d 1280 (Wyo. 1982)

II. MINORITY POSITION (Procedural Safeguards)

(1) United States v. Adams, 581 F.2d 193 (9th Cir.), *cert. denied,* 439 U.S. 1006 (1978)
(2) Pearson v. State, 441 N.E.2d 468 (Ind. 1982)
(3) State v. Seager, 341 N.W.2d 420 (Iowa 1983)
(4) House v. State, 445 So.2d 815 (Miss. 1984)
(5) State v. Hurd, 86 N.J. 525, 432 A.2d 86 (1981)
(6) State v. Beachum, 97 N.M. 682, 643 P.2d 246 (N.M. App. 1981)
(7) State v. Brown, 337 N.W.2d 138 (N.D. 1983)
(8) State v. Long, 32 Wash. App. 732, 649 P.2d 845 (1982)
(9) State v. Armstrong, 110 Wis.2d 555, 329 N.W.2d 386, *cert. denied*, 461 U.S. 946 (1983)
(10) Or. Rev. Stat. § 136.675 (1984)

III. MAJORITY POSITION (General Acceptance)

(1) Arizona v. Poland, 144 Ariz. 388, 698 P.2d 183 (en banc), *cert. granted,* 106 S. Ct. 60 (1985)
(2) People v. Shirley, 31 Cal.3d 18, 641 P.2d 775, 181 Cal. Rptr. 243, *cert. denied,* 459 U.S. 860 (1982)
(3) People v. Quintanar, 659 P.2d 710 (Colo. App. 1982)
(4) State v. Atwood, 39 Conn. Supp. 273, 479 A.2d 258 (1984)
(5) Delaware v. Davis, No. 84-05-0089 (Del. Super. Ct. Jan. 24, 1985)
(6) Bundy v. State, 471 So.2d 9 (Fla. 1985)
(7) Bobo v. State, 254 Ga. 146, 327 S.E.2d 208 (1985)
(8) Kansas v. Haislip, No. 56,886 (Kan. June 21, 1985)
(9) State v. Collins, 296 Md. 670, 464 A.2d 1028 (1983)
(10) Commonwealth v. Kater, 388 Mass. 519, 447 N.E.2d 1190 (1983)
(11) People v. Gonzales, 415 Mich. 615, 329 N.W.2d 743 (1982)
(12) State v. Blanchard, 315 N.W.2d 427 (Minn. 1982)

(13) State v. Palmer, 210 Neb. 206, 313 N.W.2d 648 (1981)
(14) People v. Hughes, 59 N.Y.2d 523, 466 N.Y.S.2d 255, 453 N.E.2d 484 (1983)
(15) State v. Peoples, 311 N.C. 532, 319 S.E.2d 177 (1984)
(16) Robison v. State, 677 P.2d 1080 (Okla. Crim. App.), *cert. denied,* ___ U.S.___, 104 S. Ct. 3524 (1984)
(17) Commonwealth v. Nazarovitch, 496 Pa. 97, 436 A.2d 170 (1981)
(18) Burnett v. State, 642 S.W.2d 765 (Tex. Crim. App. 1983)
(19) Greenfield v. Commonwealth, 214 Va. 710, 204 S.E.2d 414 (1974)

IV. RECENT TREND (Relevancy)

(1) United States v. Valdez, 722 F.2d 1196 (5th Cir. 1984)
(2) United States v. Charles, 561 F. Supp. 694 (S.D. Tex. 1983)
(3) State v. Contreras, 674 P.2d 792 (Alaska App. 1983)

APPENDIX B

The Process of Hypnosis

The first step in the process of hypnotism is the *pre-induction* procedure. The hypnotist and subject meet alone in a quiet, relaxed setting, free from interruptions. A topical discussion follows, in which the hypnotist attempts to relax the subject and to allay unexpressed anxieties. Because hypnosis is a cooperative effort, the hypnotist and subject must establish a rapport.[a] The pre-induction discussion is extremely important: this procedure may determine the success or failure of the hypnotic process.[b]

Following the pre-induction discussion, the *induction* procedure can begin. Although one can induce hypnosis alone, the more common situation involves both a hypnotist and a subject. Practitioners use a variety of techniques to induce hypnosis.[c] The motivational technique, which involves progressive relaxation, is one method of induction. By pairing suggestions with desired responses, the hypnotist may initiate the requisite motivation for hypnosis.[d] The hypnotist does not induce a delineated hypnotic state. Rather, the subject passes through a series of progressively deeper levels of hypnotic trances.

The hypnotist distinguishes the trance levels, or *depths*, by a characteristic set of mental and physical acts that the subject is capable of performing at each level.[e] The hypnotist must determine the depth, as the hypnotist's choices between methods for inducing recall and between verification techniques will depend upon the subject's trance depth.[f] Although practitioners disagree on how many depths exist,[g] most identify at least three basic depths: light, medium, and deep trances. The light trance exhibits localized catalepsies, or an inability to move a body part, upon suggestion. Analgesia, whereby the subject feels no pain upon suggestion, and amnesia, whereby the subject cannot recall information upon suggestion, both characterize the medium trance. A subject in a deep trance is able to hallucinate and experiences neither touch nor pain.[h]

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a. M. TEITELBAUM, *supra* note 38, at 14. A recalcitrant person usually is impossible to hypnotize. L. WOLBERG, *supra* note 37, at 61.

b. Kroger & Doucé, *Hypnosis in Criminal Investigation*, 27 INT'L J. CLINICAL & EXPERIMENTAL HYPNOSIS 358, 361 (1979). Not all people are susceptible to the process of hypnotism. In one experiment, hypnotism failed in 3 of the 53 subjects. *Id* at 360. For an explanation of common resistances to hypnotism, see L. WOLBERG, *supra* note 37, at 61.

c. For a discussion on how to induce hypnosis, see M. TEITELBAUM, *supra* note 38, at 36113; L. WOLBERG, *supra* note 37, at 87-116. See W. KROGER, *supra* note 6, for a description of various induction techniques.

d. Kroger & Doucé, *supra* note b, at 362.

e. 1 R. GOLDENSON, THE ENCYCLOPEDIA OF HUMAN BEHAVIOR 576-77 (1976).

f. H. ARONS, *supra* note 12, at 137.

g. Practitioners have identified between three and ten different depths. M. TEITELBAUM, *supra* note 38, at 30. For a detailed description of six depths, see Spector & Foster, *supra* note 23, at 571-72. One commentator describes the number of trance states as "limitless." R. UDOLF, *supra* note 5, at 1.

h. The characteristics associated with each depth which this appendix outlines follow the Davis Hypnotic Suggestibility Test. I R. GOLDENSON, *supra* note e, at 576. Practitioners often use such standard rating scales as a general guide to the depth of a trance, but others rely on observation alone. Kroger & Doucé, *supra* note b, at 362. The scales are merely a guide, and disagreement exists regarding their reliability. *Id.* at 364 ("[amnesia] is not a reliable criterion of the hypnotic state").

Because individual traits affect the subject's susceptibility to hypnotic suggestion, the ultimate depth of hypnosis varies among subjects.[i] Deeper hypnosis is desirable for improving recall because the deeper trances enhance the subject's willingness to accept suggestion.[j]

Once hypnotized, the subject is ready for the final step in the process of hypnosis: attaining recall. Hypnotists commonly employ three techniques, revivification, age-regression, and hypermnesia, to refresh the memory of a witness. Hypermnesia, or hypnotic recall, involves a state of heightened memory wherein the subject mentally observes a past event as if watching the occurrence on a television.[k] The subject's conscious memory improves through examining the subconscious memory. The hypermnesia process is most useful when the subject remembers portions of an event but is unable to recall information in detail.[l] Revivification and age-regression, on the other hand, are more useful when a subject is completely unable to recall an event.[m] The subject mentally relives an earlier event in revivification. Suggestions progressively disorient the subject as to time until the subject believes the events occurring in the mind are presently happening.[n] The distinction between age-regression and revivification is one of degree and depends on the depth of the trance attained. Age-regression, sometimes called pseudo revivification, does not require as deep a trance. The subject does not actually relive the event, instead the subject plays a role by acting out past events.[o]

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i. Traits such as age, intelligence, motivation, and attention control notably affect the depth of trance attainable. Hilgard, *Individual Differences in Hypnotizability*, HANDBOOK OF CLINICAL AND EXPERIMENTAL HYPNOSIS 391 (J. Gordon ed. 1967). On the average, between 10 and 20% of subjects reach the deep trance. Kroger & Doucé, *supra* note b, at 364. Distinguish the fact that some subjects are not susceptible to hypnosis at all. See *supra* note b.

j. M. TEITELBAUM, *supra* note 38, at 14.

k. Kroger & Doucé, *supra* note b, at 363.

1. W. KROGER, *supra* note 6, at 16.

m. Id. at 16.

n. Kroger & Doucé, *supra* note b, at 362-63.

o. W. KROGER, *supra* note 6, at 16.