University of Baltimore Law Review

Volume 13
Issue 1 *Fall 1983*

Article 7

1983

Comments: Hypnosis in Court: A New Twist on the Old Memory Game

James Kevin MacAlister
University of Baltimore School of Law

HYPNOSIS IN COURT: A NEW TWIST ON THE OLD MEMORY GAME

Law enforcement personnel have increasingly employed hypnotists to aid their criminal investigations. Under hypnosis, a witness who cannot remember a traumatic criminal encounter can be helped to resurrect the emotionally suppressed recall. Unfortunately, due to the inability of the hypnotic process to produce consistently reliable results, courts have expressed a reluctance to admit these memories into evidence. This comment examines how various jurisdictions have chosen to address the accuracy problems associated with hypno-enhanced memories. The article begins with a historical sketch of the treatment accorded hypnosis in related cases, and discusses the merit of each approach. Concluding that none of these judicial strategies has effectively resolved the issue, the author offers a novel approach aimed at finding a more appropriate resolution of the hypnosis controversy.

I. INTRODUCTION

In recent years various jurisdictions have addressed the issue of whether a witness whose memory has been refreshed under hypnosis should be allowed to testify in a criminal case;[1] the results have been anything but consistent. The issue normally arises when a potential eyewitness, who has suppressed the memory of a traumatic criminal encounter,[2] is subjected to pretrial hypnosis in an effort to lower the emotional barriers that are blocking conscious recall of the incident. At the conclusion of the session, the previously amnesic subject often emerges from the hypnotic trance with an improved ability to recall the incident. Since these memories are often inaccurate, legal problems arise when the witness is asked to draw upon these resurrected memories and identify[3] the individual who committed the crime.

---

1. Still unresolved is whether a cognizable difference exists between the admissibility of post-hypnotic recall in criminal and civil cases. Jurisdictions that exclude post-hypnotic recall probably do not recognize a difference. *See* Lemieux v. Superior Court, 132 Ariz. 214, 644 P.2d 1300 (1982) (hypnosis inadmissible in civil cases). Conversely, courts that admit the evidence often provide for a more vigorous evidentiary foundation in criminal cases. *Compare* United States v. Adams, 581 F.2d 193, 199 n.2 (9th Cir.) (must meet certain procedural prerequisites), *cert. denied,* 439 U.S. 1006 (1978) *with* Kline v. Ford Motor Co., 523 F.2d 1067 (9th Cir. 1975) (no prerequisites for civil case); *see also* Landry v. Bill Garrett Chevrolet, 430 So. 2d 1051, 1055 (La. Ct. App. 1983) (difference recognized).
2. The egregious level of brutality and sexual perversion related in the hypnosis decisions makes it easy to understand why victims have difficulty in consciously recalling the horrifying experience. *See, e.g.,* State v. Hurd, 86 N.J. 525, 432 A.2d 86 (1981) (victim repeatedly stabbed); Commonwealth v. Taylor, 294 Pa. Super. 171, 172, 439 A.2d 805, 806 (1982) (in an incident characterized as "gruesome," the victim was beaten, raped by several men, and had her throat slit).
3. The use of hypnosis to obtain eyewitness testimony should be distinguished from instances where it has been used to gather investigative leads. *E.g.,* State v. Po-

The admissibility of this type of evidence depends on how a particular jurisdiction has chosen to address the accuracy problems that plague hypno-enhanced recollections. Some states have adopted an "open door" policy. Under this approach, the evidence is admitted and the task of evaluating its reliability is delegated to the trier of fact. A second group has imposed an outright ban on this testimony. A third cluster has opted for a prophylactic approach that attempts to insulate the trier of fact from any prejudicial impact by imposing strict procedural guidelines on how the sessions are to be conducted.

This comment examines the inability of these judicial strategies to resolve effectively important issues raised by the use of post-hypnotic recall to obtain a conviction. This analysis will review the historical interaction between hypnosis and the legal system, set forth the most commonly cited problems with the use of hypnosis to refresh memories, and examine the merit of the three approaches taken to resolve these issues. The comment concludes with a suggestion that will lead to a more appropriate resolution of the hypnosis issue.

II. BACKGROUND

Few subjects conjure up a greater wealth of misconceptions than hypnosis. Many view hypnosis as a parlor trick practiced by carnival mystics while others conceive of it as an evil device used by sinister villains to enslave the minds of unsuspecting victims. Since World War II, however, it has evolved well beyond these realms by becoming an accredited medical phenomenon[4] that has received approval from the American Medical Association.[5]

Although the term hypnosis derives from the Greek word for sleep, it is the "very opposite of sleep."[6] Indeed, hypnosis is a heightened state of concentration and alertness in which the subject is able to focus on a specific thought or memory, to the exclusion of all else.[7]

---

land, 132 Ariz. 269, 645 P.2d 784 (1982) (hypnosis used to obtain evidence relied upon in stating probable cause for a warrant); State v. Collins, 296 Md. 670, 702-03, 464 A.2d 1028, 1044-45 (1983) (authorizing the use of carefully monitored investigative hypnosis, even though the court barred the use of post-hypnotic testimony).

4. These medical uses include controlling pain, obesity, smoking, impotence, and psychosomatic illnesses.

5. 168 J.A.M.A. 186 (1958). The American Medical Association's (AMA) Council on Mental Health concluded that "[t]he use of hypnosis has a recognized place in the medical armamentarium and is a useful technique in the treatment of certain illnesses." *Id.* at 187; *see also* 1955-1 BRIT. MED. J. 1019-20 (British approval influenced the AMA).

6. Spiegel, *Hypnosis and Evidence: Help or Hindrance?,* 347 ANNALS N.Y. ACAD. SCI. 73, 73 (1980).

7. H. SPIEGEL & D. SPEIGEL, TRANCE AND TREATMENT: CLINICAL USES OF HYPNOSIS 23 (1978). A precise explanation of how hypnosis operates has eluded medical science; for a good summary of various theories, see H. CRASILNECK & J. HALL, CLINICAL HYPNOSIS: PRINCIPLES AND APPLICATION 13-35 (1975) [hereinafter cited as CRASILNECK & HALL].

The use of hypnosis to stimulate recall has been likened to retrieving information from a file cabinet.[8] Ordinarily, an individual's conscious thought process controls the storage and retrieval of information in the files of his unconscious memory. When a traumatic criminal encounter impedes this retrieval process, the probing hypnotist is able to reduce the obstruction to a level where the conscious mind can once again access the files.[9]

Despite its recognition as an identifiable medical phenomenon, the hypnotic process has thus far eluded all scientific efforts to explain its operation.[10] And it is these unsolved mysteries that have formed the catalyst for many of the legal debates.

A. Legal History

Judicial arguments over the proper role hypnosis should have in the courtroom predate the current debate over the proper use of hypnotically stimulated testimony. These early decisions are important because they highlight commonly held misconceptions about the nature of the hypnotic trance. Many of these cases also reflect a judicial skepticism about the reliability of the hypnotic process that has permeated the conflict over its use to enhance recall.[11]

The earliest decisional law and commentary focused primarily on the mistaken belief that hypnotists could dominate the minds of their subjects. Indeed, virtually all of these decisions involved allegations that an unscrupulous hypnotist had either sexually assaulted entranced victims[12] or had compelled a hypnotized dupe to commit a crime.[13] For example, in *Louis v. State*[14] the Supreme Court of Alabama was asked to decide whether a defendant could commit a robbery by ab-

8. C. HARTLAND, MEDICAL AND DENTAL HYPNOSIS AND ITS CLINICAL APPLICATION 13-14 (1971).
9. *Id.* at 13-16.
10. *See generally* CRASILNECK & HALL, *supra* note 7, at 13-35 (review of the different scientific explanations).
11. *See infra* note 24 and accompanying text.
12. Austin v. Barker, 90 A.D. 351, 85 N.Y.S. 465 (1904), *aff'd,* 110 A.D. 510, 96 N.Y.S. 814 (1906). *See generally* Lawrence & Campbell, *Forensic Hypnosis in the Late Nineteenth Century,* 31 INT'L J. CLINICAL & EXPERIMENTAL HYPNOSIS 266, 269-74 (1983) (outlining many unreported cases); Comment, *Legal Aspects of Hypnotism,* 11 YALE L.J. 173, 176-80 (1902) (author notes many early cases); Annot., 40 L.R.A. 269 (1898) (discusses many unreported cases).
13. Lawrence & Campbell, *supra* note 12, at 274-77 (good collection of unreported decisions); Comment, *supra* note 12, at 180-83; Annot., 40 L.R.A. 269 (1898). For more contemporary authority on the subject, see United States v. Phillips, 515 F. Supp. 758 (E.D. Ky. 1981). In *Phillips,* a wife on trial for helping her husband escape from federal custody claimed that he had manipulated her through hypnosis. The trial judge remarked that this case was one of the most dramatic and spellbinding trials he had ever seen. *Id.* at 759. In addition, one of the most newsworthy reports of the use of hypnotism to compel individuals to commit crimes was the 1969 murder of actress Sharon Tate by the followers of Charles Manson. Clark, *Hypnosis as a Defense,* 10 U. BALT. L. FORUM 14 (1979).
14. 24 Ala. App. 120, 130 So. 904 (1930).

sconding with funds withdrawn by a depositor whom he had hypnotized. Although the court ruled that the requisite element of force or threat of force was absent, it never expressed any doubt that the defendant had actually controlled the victim's free will.[15]

A more contemporary conflict has developed over defensive use of hypnosis.[16] Occasionally, clever defense attorneys have sought to have a hypnotist comment upon the accused's rendition of the facts.[17] The theory behind this proffer is that hypnotized persons cannot lie; therefore, the hypnotist, since he hypnotized and questioned the defendant about the alleged criminal incident, can offer an expert opinion that is relevant to whether the defendant is telling the truth. Since this underlying assumption is false,[18] virtually all jurisdictions have rejected these obvious efforts to bolster witness credibility.[19]

In a different context, hypnotists have also been requested to render expert opinions concerning a defendant's ability to entertain the requisite criminal intent. Presumably, the accused will relive the incident while under hypnosis, and the observant hypnotist will be able to gauge the thoughts that were going through his mind.[20] While this strategy has proven successful in at least one jurisdiction,[21] it has steadfastly been rejected by most others because the hypnotic process is

15. *Id.* at 121, 130 So. at 905; *see also* State v. Donovan, 128 Iowa 44, 102 N.W. 791 (1905); State v. Exum, 138 N.C. 599, 50 S.E. 283 (1905). Exactly how much influence a hypnotist can exert over a subject's free will remains the subject of some dispute. *Compare* Orne, *Can A Hypnotized Subject be Compelled to Carry Out Otherwise Unacceptable Behavior?,* 20 INT'L J. CLINICAL & EXPERIMENTAL HYPNOSIS 101 (1972) (limited influence) *with* Perry, *Hypnotic Coercion and Compliance to Wit: A Review of Evidence Presented in a Legal Case,* 27 INT'L J. CLINICAL & EXPERIMENTAL HYPNOSIS 187 (1979) (great influence).

16. In a few instances defendants have sought to have either themselves or a witness hypnotized. While at least one jurisdiction has recognized that the accused has a constitutional right to refresh his memory through hypnosis, Cornell v. Superior Court, 52 Cal. 2d 99, 338 P.2d 447 (1959); *contra* Greenfield v. Robinson, 413 F. Supp. 1113, 1120-21 (W.D. Va. 1976); Sheppard v. Koblentz, 174 Ohio St. 120, 122-23, 187 N.E.2d 40, 41-42 (1962), attempts to compel witnesses and jurors to submit to hypnosis have been steadfastly rejected. United States v. Brooks, 677 F.2d 907, 914 n.6 (D.C. Cir. 1982); People v. Renslow, 98 Ill. App. 3d 288, 293, 423 N.E.2d 1360, 1364 (1981); *see also* People v. Marsh, 170 Cal. App. 2d 284, 338 P.2d 495 (1959) (defendant has no right to be hypnotized in the courtroom).

17. People v. Ebanks, 117 Cal. 652, 49 P. 1049 (1897); People v. Hangsleben, 86 Mich. App. 718, 273 N.W.2d 539 (1979); State v. Pusch, 17 N.D. 860, 46 N.W.2d 508 (1951); Jones v. State, 542 P.2d 1316 (Okla. Crim. App. 1975).

18. *See infra* notes 82-85 and accompanying text.

19. *See supra* note 17.

20. *See* Crasilneck, *The Case of Dora,* 23 AM. J. CLINICAL HYPNOSIS 95 (1980) [hereinafter cited as Crasilneck, *The Case of Dora*]. By playing a recording of a hypnotic interview in which she relived the incident, a defendant was able to show that she had not intended to kill the deceased. It became apparent, from the tape, that the shooting had been accidental. *Id.* at 95-97.

21. People v. Modesto, 59 Cal. 2d 722, 382 P.2d 33, 31 Cal. Rptr. 225 (1963); *cf.* People v. Busch, 56 Cal. 2d 868, 366 P.2d 314 (1961) (must lay proper foundation for expert's opinion).

provably unreliable.[22] The cases barring evidence of criminal intent have contributed to the debate over the use of hypno-enhanced testimony by evidencing a judicial skepticism over the ability of hypnosis to meet appropriate levels of legal certainty.[23] Indeed, many of the decisions that have refused to admit post-hypnotic testimony have relied upon the criminal intent cases for support.[24]

B. Use of Hypnosis to Refresh Recall

The widespread use of hypnosis as a crime solving tool is a relatively recent phenomenon.[25] The Los Angeles Police Department was the first major law enforcement body to institutionalize its use as a method of reviving the memories of traumatized witnesses.[26] Since that time, many police departments have followed Los Angeles' lead. On several occasions, the results obtained have attracted nationwide attention.[27]

The Chowchilla kidnapping incident is probably the most frequently cited example of the spectactular results that can be obtained by hypnotizing a forgetful eyewitness. A driver, whose fully-loaded schoolbus had been seized by masked gunmen, was later asked to identify the kidnappers.[28] Although he claimed that he had concentrated on

22. The major problem with the use of hypnosis to determine a defendant's intent is that, by necessity, the hypnotist is compelled to rely upon the subject's hypnotic rendition of what occurred. And since this recall is often inaccurate, the basis of the expert's testimony is potentially flawed. Greenfield v. Commonwealth, 214 Va. 710, 716, 204 S.E.2d 414, 419 (1974); *see also* Cornell v. Superior Court, 52 Cal. 2d 99, 338 P.2d 447 (1959); Jones v. State, 542 P.2d 1316 (Okla. Crim. App. 1975); State v. Pierce, 263 S.C. 23, 207 S.E.2d 414 (1974). *But see* Warner, *The Use of Hypnosis in the Defense of Criminal Cases,* 27 INT'L J. CLINICAL & EXPERIMENTAL HYPNOSIS 417, 424-26 (1979) (generally accepted that intent testimony may be admissible if the proper foundation is laid).

23. For a discussion of the problems associated with post-hypnotic recall, see *infra* notes 61-100 and accompanying text.

24. State *ex rel.* Collins v. Superior Court, 132 Ariz. 180, 198, 644 P.2d 1266, 1284 (1982); People v. Shirley, 31 Cal. 3d 18, 29-30, 641 P.2d 775, 784, 181 Cal. Rptr. 243, 248-49, *cert. denied,* 103 S. Ct. 133 (1982); State v. Mack, 292 N.W.2d 764, 768, 770 (Minn. 1980).

25. Reiser, *Hypnosis as an Aid in a Homicide Investigation,* 17 AM. J. CLINICAL HYPNOSIS 84 (1974) (good description of how a hypnotic session is conducted); *see also* M.S., *Curious Case of Magnetic Detection,* 1845 ST. LOUIS MAGNET 154 (probably the first reported use of hypnosis to uncover the identity of a "rogue"), *reprinted in* Gravitz, *An Early Case of Investigative Hypnosis: A Brief Communication,* 31 INT'L J. CLINICAL & EXPERIMENTAL HYPNOSIS 224 (1983).

26. Reiser & Neilson, *Investigative Hypnosis: A Developing Specialty*, 23 AM. J. CLINICAL HYPNOSIS 75 (1980) (statistical report of results achieved by Los Angeles police department).

27. Hypnosis has played a role in a number of newsworthy cases including those of Albert DeSalvo (Boston Strangler), the San Francisco cable car nymphomaniac, and Dr. Samuel Sheppard (sensationalized homicide). E. LOFTUS, EYEWITNESS TESTIMONY 105 (1979); Jenkins, *Hypnosis: A New Technique in Crime Prevention*, 8 STUDENT LAW. 27, 28, 33 (Apr. 1980) (use of hypnosis to solve a hit and run case in Montgomery County, Maryland).

28. *See* Kroger & Douce, *Forensic Uses of Hypnosis,* 27 INT'L J. CLINICAL & EXPERI-

memorizing the getaway vehicle's license plate number, he could not remember it when questioned by police. After undergoing hypnosis, the bus driver not only recalled the number and the state printed on the plate, but he was accurate to within one digit.[29]

Recently, much of the enthusiasm and awe generated by the more spectacular cases has begun to fade as witnesses, who have undergone pretrial hypnosis, have been summoned into court for the purpose of inculpating a defendant.

C. Post-Hypnotic Recall in Court

The first major appellate decision on the admissibility of post-hypnotic recall was *Harding v. State*,[30] a 1968 opinion of the Court of Special Appeals of Maryland. The case involved the revived memories of a rape/attempted murder victim whose inconsistent pre-hypnotic statements suggested that she was unable to develop an accurate rendition of the source of her injuries.[31] In a frequently quoted conclusion, the appellate panel affirmed the trial judge's decision to admit the victim's testimony because "[t]he fact that she had told different stories or had achieved her present knowledge after being hypnotized concerns the question of the weight of the evidence which the trier of facts . . . must decide."[32]

Several states, including Florida,[33] Illinois,[34] Louisiana,[35] North Carolina,[36] North Dakota,[37] Oregon,[38] and Wyoming,[39] have followed

---

MENTAL HYPNOSIS 86, 90 (1979) (authors interviewed the bus driver) [hereinafter cited as Kroger & Douce, *Forensic Uses*].

29. *Id.*
30. 5 Md. App. 230, 246 A.2d 302 (1968), *cert. denied,* 395 U.S. 949 (1969).
31. The victim first claimed that she had been abducted by three males who had raped and stabbed her. *Harding,* 5 Md. App. at 233, 246 A.2d at 304. She later changed her story to reflect her having been shot, not stabbed. By the third interview, she could recall the events leading up to being shot by the defendant. It was not until after hypnosis that she was able to recall the rape. *Id.* at 234-35, 246 A.2d. at 305.
32. *Id.* at 236, 246 A.2d at 306.
33. Key v. State, 430 So. 2d 909 (Fla. Dist. Ct. App. 1983); Wiley v. State, 427 So. 2d 283 (Fla. Dist. Ct. App. 1983); Clark v. State, 379 So. 2d 372 (Fla. Dist. Ct. App. 1979). There is, however, some conflict between Florida's intermediate appellate courts. *Compare* Brown v. State, 426 So. 2d 76 (Fla. Dist. Ct. App. 1983) (first district applies stricter standard than that applied in other districts) *with* Crum v. State, 433 So. 2d 1384 (Fla. Dist. Ct. App. 1983) (fifth district rejects limits envisioned by *Brown*).
34. People v. Byas, 117 Ill. App. 3d 979, 453 N.E.2d 1141 (1983); People v. Gibson, 117 Ill. App. 3d 270, 452 N.E.2d 1368 (1983).
35. State v. Moore, 432 So. 2d 209 (La. 1983); State v. Wren, 425 So. 2d 756 (La. 1983).
36. State v. Waters, 308 N.C. 348, 302 S.E.2d 188 (1983); State v. McQueen, 295 N.C. 96, 244 S.E.2d 414 (1978); State v. Hunt, 64 N.C. App. 81, 306 S.E.2d 846 (1983); State v. Peoples, 60 N.C. App. 479, 299 S.E.2d 311 (1983).
37. State v. Brown, 337 N.W.2d 138 (N.D. 1983).
38. State v. Luther, 63 Or. App. 86, 663 P.2d 1261, *aff'd en banc,* 296 Or. 1, 672 P.2d

the *Harding* court's lead and have permitted witnesses to give testimony based on post-hypnotic recall. In fact, throughout the 1970's it appeared as though there would be no controversy because *Harding* was the final word on the subject. For example, the United States Court of Appeals for the Ninth Circuit was so certain that questions about the admissibility of post-hypnotic recall had been resolved that it concluded "there is no issue about the admission of hypnotically refreshed evidence . . . ."[40] Nevertheless, only a year after the Ninth Circuit pronounced the battle over, the first shot was fired.

The admissibility consensus that had existed throughout the 1970's was shattered in 1980 by the Supreme Court of Minnesota. In *State v. Mack*,[41] the court faced a factual record nearly identical to that in *Harding v. State*. The victim, who was bleeding profusely, was admitted to a hospital where she gave contradictory accounts of the source of her injuries.[42] It was not until she was hypnotized, though, that she "remembered" being repeatedly stabbed by her estranged boyfriend.[43]

The *Mack* court addressed the hypnosis issue by applying a novel approach borrowed from *Greenfield v. Commonwealth*,[44] a Virginia case involving a defendant's right to be hypnotized as a means of properly preparing his case.[45] The new standard, developed in *Mack*, characterized post-hypnotic testimony as scientific evidence and required that it satisfy the *Frye* test, a rule that governs the admissibility of scientific evidence.[46] The *Frye* standard requires that, before the product of a scientific process can be admitted into evidence, it must be shown that the procedure used to generate it has become generally accepted by members of the scientific community.[47] Since the hypnotic process remains cloaked in mystery and its results are not consistently accurate, the *Mack* court determined that hypnosis was unable to meet *Frye*'s threshold level of accuracy and, consequently, should be barred from

---

691 (1983); State v. Brom, 8 Or. App. 598, 494 P.2d 434 (1971); State v. Jorgensen, 8 Or. App. 1, 492 P.2d 312 (1971).

39. Gee v. State, 662 P.2d 103 (Wyo. 1983); Chapman v. State, 638 P.2d 1280 (Wyo. 1982).

40. United States v. Awkard, 597 F.2d 667, 669 (9th Cir.), *cert. denied,* 444 U.S. 885 (1979); *see also* Annot., 50 A.L.R. Fed. 604 (1980) (analyzes Ninth Circuit decisions).

41. 292 N.W.2d 764 (Minn. 1980).

42. At first, the victim attributed her injuries to a consensual sexual act, but she later claimed that they were caused by a motorcycle accident. *Id.* at 766. The medical personnel on duty, believing that neither of these incidents could have caused the injuries, were persuaded that she was not giving an accurate factual account. *Id.*

43. The apparent motive for the attack was that she had "run out" on him, a conclusion that was consistent with the events preceding the attack. *Id.* at 767.

44. 214 Va. 710, 204 S.E.2d 414 (1974).

45. *Id.* For a reference to cases on this issue, see *supra* note 16.

46. State v. Mack, 292 N.W.2d 764, 768 (Minn. 1980).

47. Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923). For an in-depth explanation of the *Frye* test, see *infra* notes 130-167 and accompanying text.

the courtroom.[48]

Use of the *Frye* test to exclude post-hypnotic testimony has had a profound impact on the *Harding*-generated consensus. While some states continue to permit the unrestrained use of this evidence,[49] *Mack* has been cited in a growing number of jurisdictions which have barred hypno-enhanced testimony.[50] Indeed, the Maryland court that authored *Harding* recently reversed itself and, relying heavily on *Mack*, ruled that hypno-enhanced evidence was inadmissible.[51] This growing exclusionary trend, however, has not gone unanswered by those who have sought to salvage forensic hypnosis as a crime fighting tool.

The response was delivered, almost a year after *Mack*, by the Supreme Court of New Jersey. In *State v. Hurd*,[52] the court affirmed the trial judge's decision to exclude the post-hypnotic testimony of a multiple stab wound victim.[53] The appellate court, however, declined to base its decision on *Mack*'s per se inadmissibility standard.[54] Instead, it designed a set of procedural regulations to govern the conduct and memorialization of hypnotic interviews.[55] The *Hurd* court rea-

48. State v. Mack, 292 N.W.2d 764, 771 (Minn. 1980).

49. *See supra* notes 33-39.

50. State *ex rel.* Collins v. Superior Court, 132 Ariz. 180, 644 P.2d 1266 (1982); People v. Shirley, 31 Cal. 3d 18, 641 P.2d 775, 181 Cal. Rptr. 243, *cert. denied,* 103 S. Ct. 133 (1982); State v. Collins, 296 Md. 670, 464 A.2d 1028 (1983); Commonwealth v. Kater, 388 Mass. 519, 447 N.E.2d 1190 (1983); People v. Gonzales, 108 Mich. App. 145, 310 N.W.2d 306 (1981), *aff'd,* 415 Mich. 615, 329 N.W.2d 743 (1982); People v. Hughes, 59 N.Y.2d 523, 453 N.E.2d 484, 466 N.Y.S.2d 255 (1983); Commonwealth v. Nazarovitch, 496 Pa. 97, 436 A.2d 170 (1981).

51. Maryland's courts have come full circle on the hypnosis issue. It launched the controversy in 1968 with the *Harding* decision, perpetuated it with State v. Temoney, 45 Md. App. 569, 414 A.2d 240 (1980), *vacated on other grounds,* 290 Md. 251, 429 A.2d 1018 (1981), and ended it with a line of decisions beginning with Polk v. State, 48 Md. App. 382, 427 A.2d 1041 (1981) (the first Maryland decision to apply *Frye* to a hypnosis case); *see also* Collins v. State, 52 Md. App. 186, 447 A.2d 1272 (1982), *aff'd,* 296 Md. 670, 464 A.2d 1028 (1983). The Court of Appeals, apologizing for having waited so long, finally laid the issue to rest in a cluster of decisions authored by Judge Smith. State v. Collins, 296 Md. 670, 682 n.1, 464 A.2d 1028, 1034 n.1 (1983); *see* State v. Metscher, 297 Md. 368, 464 A.2d 1052 (1983); State v. McCoy, 297 Md. 5, 464 A.2d 1067 (1983) (per curiam); Grimes v. State, 297 Md. 1, 464 A.2d 1065 (1983); Simkus v. State, 296 Md. 718, 464 A.2d 1055 (1983). The explanation offered for the shift is that, during the interim between *Harding* and *Collins*, Maryland's highest court adopted the *Frye* test as its standard for gauging the admissibility of scientific evidence. Reed v. State, 283 Md. 374, 381, 391 A.2d 364, 368 (1978). For a thorough explantion of the rules of admissibility before *Reed*, see Note, *Voice Identification Testimony Based on Spectrographic Analysis Inadmissible Because the Technique Has Not Gained General Acceptance in the Scientific Community,* 39 MD. L. REV. 629 (1979).

52. 86 N.J. 525, 432 A.2d 86 (1981).

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

54. *Hurd*, 86 N.J. at 541, 432 A.2d at 94 (per se inadmissibility rule is "unnecessarily broad").

55. *Id.* at 545-546, 432 A.2d at 96-97.

soned that these safeguards would reduce the likelihood that the hypnotic session would produce inaccurate results and would provide a reviewable record of how the session was conducted.[56] To ensure compliance, the *Hurd* court further provided that a post-hypnotic witness would not be allowed to testify unless his sponsor could establish, by clear and convincing evidence, that each of the safeguards was followed.[57] Once these formalities were accomplished, questions over the accuracy of the testimony were relegated to the trier of fact.[58]

A notion gaining popularity is that hypnotic sessions can be structured in a manner that resolves doubts over the accuracy of post-hypnotic recall. Although some states have adopted the *Hurd* standards verbatim,[59] others have fashioned their own standards.[60]

III. THE PROBLEMS WITH HYPNO-ENHANCED MEMORY

The admissibility controversy has principally centered on the inability of hypnosis to produce consistently reliable results. On several documented occasions, witnesses have undergone pretrial hypnosis only to emerge with demonstratively false recollections.[61] While ordinary eyewitness testimony is often fraught with inconsistencies,[62] hypnosis increases the likelihood of false recollections and insulates these falsities from detection.[63] Furthermore, most of the hypnotic interviews are conducted in less than ideal conditions[64] with witnesses

56. *Id.* at 545, 432 A.2d at 96.
57. *Id.* at 546-47, 432 A.2d at 97.
58. *Id.* at 543, 432 A.2d at 95.
59. *See infra* note 171.
60. *See infra* note 169.
61. People v. Tait, 99 Mich. App. 19, 297 N.W.2d 853 (1980) (while under hypnosis, a witness who had previously stated that it was impossible for him to see if the accused pulled the trigger was able to recall having seen it); State v. Mack, 292 N.W.2d 764, 772 (Minn. 1980) (for a list of inconsistencies, see *supra* note 42).
62. Grossman, *Suggestive Identifications: The Supreme Court's Due Process Test Fails to Meet Its Own Criteria,* 11 U. BALT. L. REV. 53, 71-79 (1981); Kubie, *Implications for Legal Procedure of the Fallibility of Human Memory,* 108 U. PA. L. REV. 59 (1959); Levine & Trapp, *The Psychology of Criminal Identification,* 121 U. PA. L. REV. 1079 (1973); Lezak, *Some Psychological Limitations on Witness Reliability,* 20 WAYNE L. REV. 117 (1973).
63. *See infra* notes 66-100 and accompanying text. Of course, not all hypnotists deliberately distort the memories of witnesses. Although deliberate abuse or coercive persuasion may occur, this article is premised upon the assumption that most investigative hypnotists do not consciously attempt to alter a witness's memory. *But see* Emmett v. Ricketts, 397 F. Supp. 1025 (N.D. Ga. 1975). At least one commentator has described *Emmett* as a "nightmare" of abuse. Diamond, *Inherent Problems in the Use of Pretrial Hypnosis on a Prospective Witness,* 68 CALIF. L. REV. 313, 325 (1980); *cf.* United States v. Charles, 561 F. Supp. 694, 697 (S.D. Tex. 1983) (witness declared incompetent due to an unprofessionally conducted session); State v. Luther, 63 Or. App. 86, 663 P.2d 1261 (1983) (allegation that the prosecutors attempted to alter a grand jury witness's testimony), *aff'd en banc,* 296 Or. 1, 672 P.2d 691 (1983).
64. A difference exists between the ideal conditions enjoyed by laboratory researchers and the confused state of affairs associated with a criminal investigation. For ex-

whose credibility is often questionable.[65]

In general, five identifiable problems are linked to the use of hypnosis to stimulate recall: hypersuggestibility, hypercompliance, confabulation, hardening, and post-hypnotic source amnesia.

A. Hypersuggestibility

One of the most controversial features of the hypnotic trance is that it lowers the subject's ability to analyze critically incoming information.[66] While this lowering of sensory barriers permits the hypnotist to probe sensitive memories, it also increases the likelihood that the subject will adopt a response suggested by the hypnotist.[67] After the session, not only does the subject subscribe to the accuracy of the adopted responses with a heightened sense of conviction, but experts are unable to detect whether the witness is testifying from suggested or actual recall.[68] Suggestions can be made as overtly as a detective leaning over an entranced witness and demanding, "Was it Paul?,"[69] or as subtly as a failed pre-hypnotic photo identification session.[70] *Calhoun*

---

ample, victims and witnesses experience a greater pressure to remember than do those involved in laboratory testing. *See* Kroger & Douce, *Hypnosis in Criminal Investigation,* 27 INT'L J. CLINICAL & EXPERIMENTAL HYPNOSIS 358, 366 (1979) [hereinafter cited as Kroger & Douce, *Criminal Investigation*].

65. *See, e.g.,* State v. Mack, 292 N.W.2d 764 (Minn. 1980) (victim's recall clouded because she was intoxicated when the crime occurred); State v. McQueen, 295 N.C. 96, 244 S.E.2d 414 (1978) (key witness, who had been a fugitive during the four year period between the incident and the session, was offered immunity to inculpate the defendant); Commonwealth v. Nazarovitch, 496 Pa. 97, 436 A.2d 170 (1981) (three years after an unsolved murder, an admitted user of hallucinogenic drugs gave a statement to police officers because she was having frequent nightmares about the unsolved crime).
66. Orne, *The Use and Misuse of Hypnosis in Court,* 27 INT'L J. CLINICAL & EXPERIMENTAL HYPNOSIS 311, 326 (1979) [hereinafter cited as Orne, *Hypnosis in Court*]; *see* State v. Hurd, 86 N.J. 525, 432 A.2d 86 (1981) (loss of critical judgment was important because it materially contributed to the likelihood that the subject would adopt speculative information that he would have otherwise questioned).
67. Responses can be overtly suggested in two primary ways: false premise suggestion and leading questions. Comment, *Hypnosis—Its Role and Current Admissibility in the Criminal Law,* 17 WILLAMETTE L.J. 665, 672-73 (1981). False premise suggestion involves the placement of a false factual assumption in the subject's mind. For example, while a person would not take money from a stranger's coat, the hypnotist could overcome this obstacle by suggesting that the coat belonged to the subject. *Id.*; *see also* Orne, *Hypnosis in Court*, *supra* note 66, at 332 (examples of how a leading question can affect recall).
68. *See infra* note 81 and accompanying text.
69. State v. Hurd, 86 N.J. 525, 531, 432 A.2d 86, 89 (1981); *see also* Commonwealth v. Brouillet, 389 Mass. 605, 451 N.E.2d 128 (1983) (suspect's photograph shown to subject while the witness was under hypnosis).
70. State v. Metscher, 297 Md. 368, 370-71, 464 A.2d 1052, 1053 (1983) (at show-up, the victim stated that he could not be sure); Simkus v. State, 296 Md. 718, 722, 464 A.2d 1055, 1058 (1983) (witness only 90% positive at photograph session). Some authorities even posit that the location of the interview can induce recall of information favorable to the prosecution. People v. Gonzales, 108 Mich. App. 145, 155, 310 N.W.2d 306, 311 (1981) (criticizing *Harding* because the session was held

v. State,[71] a 1983 decision by the Court of Appeals of Maryland, exemplifies the latter.

In *Calhoun*, Douglas Cummins, the only survivor of a robbery, was shown an array of photographs in an effort to ascertain the identity of the perpetrators. Although Cummins pointed out Calhoun's photograph and exclaimed, "that's who I'd put my money on,"[72] he was unable to express confidence in his choice because the robbers had worn nylon stocking masks. In a candid remark, the witness revealed to the investigator conducting the session that he had selected Calhoun's photograph because "the shape of the head was similar."[73] After undergoing hypnosis, the doubts Cummins expressed at the photographic session evaporated as he positively identified the defendant at trial.[74] A logical explanation for this heightened level of confidence is that Cummins had subconsciously adopted the character whose photograph he had selected at the photographic session.

B. Hypercompliance

To probe the sensitive areas of an individual's memory, it is essential that the hypnotist establish a good rapport with the subject.[75] This trusting relationship has led several commentators to assert that subjects often feel a strong desire to "remember" events that will please the hypnotist, regardless of whether the events recalled actually occurred.[76]

---

at the police barracks), *aff'd*, 415 Mich. 615, 329 N.W.2d 743 (1982); State v. Mack, 292 N.W.2d 764, 772 (Minn. 1980) (discussion of event with friends, police, and physicians may have colored victim's rendition of facts).

71. 297 Md. 563, 468 A.2d 45 (1983).
72. *Id.* at 575, 468 A.2d at 50.
73. *Id.* For a copy of the interviewing officer's notes, see Joint Record Extract Vol. III at 424, Calhoun v. State, 297 Md. 563, 468 A.2d 45 (1983).
74. The court of appeals, affirming the defendant's conviction, found that the witness's memory was not enhanced because he had been able to identify the defendant at the photograph session. *Calhoun*, 297 Md. at 577-78, 468 A.2d at 51. Inexplicably, however, the court chose not to address the witness's reason for being uncertain about the defendant's identity: the accused had been wearing a mask. Since the witness could not see through the mask, it remains unclear how he acquired the ability to positively identify an individual based solely on the shape of his head.
75. *See* People v. Shirley, 31 Cal. 3d 18, 64, 641 P.2d 775, 802-03, 181 Cal. Rptr. 243, 271, *cert. denied*, 103 S. Ct. 133 (1982). In *Hurd*, the court explained "[t]he hypnotist first establishes a rapport with the subject and creates a passiveness that will make the subject receptive to suggestions." State v. Hurd, 86 N.J. 525, 534, 432 A.2d 86, 90 (1981); *see* Commonwealth v. Nazarovitch, 496 Pa. 97, 104, 436 A.2d 170, 174 (1981); *see also* Spector & Foster, *Admissibility of Hypnotic Statements: Is the Law of Evidence Susceptible?*, 38 OHIO ST. L.J. 567, 571 (1977) (detailing the importance of establishing rapport).
76. State *ex rel.* Collins v. Superior Court, 132 Ariz. 180, 184, 644 P.2d 1266, 1270 (1982) (anxious to assist police in apprehending suspect); Commonwealth v. Kater, 388 Mass. 519, 447 N.E.2d 1190 (1983) (hypnotized persons tend to become attuned to the hypnotist); *see also* Kroger & Douce, *Criminal Investigation, supra* note 64, at 365 (subject's view of how a hypnotized person should act can be decisively suggestive).

This complaint has been expanded to support the argument that since the subject is aware that the purpose of the session is to identify the person who caused the trauma, the subject will be induced to create a memory that will satisfy the probing hypnotist.[77] At least one commentator has attributed the *Harding* victim's testimony to a desire to remember information favorable to the state.[78] Since the victim was aware that a suspect had been apprehended, it is conceivable that she remembered information that would confirm her suspicions and inculpate the individual who had subjected her to a horrifying experience.[79]

C. *Confabulation*

Confabulation occurs when a person under hypnosis invents a memory that did not exist prior to the session.[80] It is an interesting aspect of the hypnosis debate because it reflects how little science knows about the affect hypnosis has on the human mind. The phenomenon is distinguishable from hypersuggestibility because it is the subject, and not an external source, who causes memories to become altered. The process occurs deliberately or unconsciously, and it can be virtually undetectable.[81]

The ability to consciously manufacture memory, otherwise known as fraud or deceit, is not affected by the hypnotic trance.[82] Thus, the

77. Commonwealth v. Kater, 388 Mass. 519, 447 N.E.2d 1190 (1983); State v. Mack, 292 N.W.2d 764, 768 (Minn. 1980); Commonwealth v. Nazarovitch, 496 Pa. 97, 104, 436 A.2d 170, 174 (1981) (desire to please coupled with awareness of the purpose of the session).
78. Dilloff, *The Admissibility of Hypnotically Influenced Testimony,* 4 OHIO N.U.L. REV. 1, 19 (1977).
79. *Id.*
80. Since hypnosis reduces an individual's critical judgment, *supra* note 66, hypnotic subjects are more likely to fantasize answers when there are no existing memories to draw upon. *See generally* Diamond, *supra* note 63, at 316, 335-36. A contemporary branch of this phenomenon has developed over the use of hypnosis to create historic projections. Historic projection involves the use of hypnosis to permit a subject to recall a previous life by aiding him in "remembering" a prior life. *See* M. BERNSTEIN, THE SEARCH FOR BRIDEY MURPHY (1956) (chronicle of a woman who could remember her prior life). Historic projection has recently been explained as an example of the types of fantasies that can evolve during a hypnotic session. Baker, *The Effect of Suggestion on Past Lives Regression,* 25 AM. J. CLINICAL HYPNOSIS 71, 75 (1982). Dr. Orne argues that this type of confabulation also occurs when hypnosis is used to refresh a witness's memory. Orne, *Hypnosis in Court, supra* note 66, at 332.
81. Worthington, *The Use in Court of Hypnotically Enhanced Testimony,* 27 INT'L J. CLINICAL & EXPERIMENTAL HYPNOSIS 402, 414 (1979) (virtually impossible to distinguish confabulated memories from actual recall); *see* Diamond, *supra* note 63, at 333-34 (subjects are generally unable to sort fantasized memories from actual recall).
82. Spector & Foster, *supra* note 75, at 594; *see* Orne, *Hypnosis in Court, supra* note 66, at 333-34 (example of victim who lied convincingly under hypnosis); *see also* State *ex rel.* Collins v. Superior Court, 132 Ariz. 180, 644 P.2d 1266, 1272 (1982) (purposeful lying is a problem with post-hypnotic recall); People v. Shirley, 31 Cal. 3d 18, 31-32, 641 P.2d 775, 782, 181 Cal. Rptr. 243, 250 (reference to expert

popular belief that hypnosis renders a subject incapable of lying is unfounded. In addition, most experts agree that it is not possible to ascertain whether an individual is actually under hypnosis; a trance can be feigned without detection.[83]

People v. Lopez,[84] a 1980 Court of Appeal of California decision, provides a good example of a witness who was able to lie, even though she was hypnotized. The issue arose when a victim was confronted in court with a number of discrepancies in her post-hypnotic rendition of a sexual assault. Several explanations were offered, such as that she feared the defendants would retaliate, she was embarrassed about the nature of the acts committed on her, and she was apprehensive about her parents discovering that she was sexually active. To establish this rehabilitating factor, the prosecution presented a physician who testified that "a person in a state of hypnosis is able to lie, and will lie for the same reasons he would lie in a non-hypnotic condition."[85]

Unconscious memory alteration is a more difficult phenomenon to detect. Experts state that the human memory is not a videotape of everything which occurred in the witness's immediate proximity. A momentary turn of the head or an undigested perception can create gaps in the recollection of an incident.[86] Once under hypnosis, the mind's logical completion mechanism fills the gaps with what it believes must have occurred.[87] The confabulated response, like a missing puzzle piece, often fits into the existing memory so well that it is virtually undetectable.[88] *State v. Hurd* illustrates the process by which the

---

witness who commented upon the subject's ability to be dishonest), *cert. denied,* 103 S. Ct. 133 (1982).

83. Diamond, *supra* note 63, at 336-37; Orne, *Hypnosis in Court, supra* note 66, at 313. Some tests, however, can detect the presence of hypnosis. *See* Spiegel, *supra* note 6, at 80; *see also* Spector & Foster, *supra* note 75, at 575-76; Comment, *supra* note 67, at 670-71.

84. 110 Cal. App. 3d 1010, 168 Cal. Rptr. 378 (1980).

85. *Id.* at 1017, 168 Cal. Rptr. at 382. The victim was engaged in sexual intercourse with her boyfriend when the defendants discovered them. The victim was brutally raped and her boyfriend was beaten to death. To avoid disclosure of the incident, the victim invented an incredible story about an obese man in an automobile. This rendition was so inaccurate that even the hypnotists concluded that it was a lie. *Id.*

86. State *ex rel.* Collins v. Superior Court, 132 Ariz. 180, 184-85, 644 P.2d 1266, 1270-71 (1982) (hypnosis cannot aid in the pursuit of truth when perception or registration is not present); *see* Commonwealth v. Nazarovitch, 496 Pa. 97, 111, 436 A.2d 170, 177 (1981) (witness had been using hallucinogenic drugs); State v. Long, 32 Wash. App. 732, 649 P.2d 845 (1982) (potentially corroborrating witnesses were looking the other way when the crime occurred).

87. People v. Gonzales, 108 Mich. App. 145, 152-53 n.4, 310 N.W.2d 306, 310 n.4 (1981) (excerpt from an affidavit Dr. Martin Orne filed in an unreported California case), *aff'd,* 415 Mich. 615, 329 N.W.2d 743 (1982); State v. Mack, 292 N.W.2d 764, 768 (Minn. 1980) (due to a perceived need to fill gaps in memory, subject will rarely respond, "I don't know"); Orne, *Hypnosis in Court, supra* note 66, at 317.

88. Worthington, *supra* note 81, at 414. The author explains that confabulated memories are "eminently plausible." *Id.* Thus, this makes it virtually impossible for even a highly trained expert to discover confabulations. *Id.*

logical completion mechanism can operate to alter recall.

In *Hurd,* the victim was alleged to have confabulated at least one response. When asked if her former husband had remarried, rather than denying knowledge of his marital status, she responded that he was still single.[89] A subsequent investigation, however, revealed that he had remarried. The victim merely fabricated a plausible memory to fill a gap in her actual recall.[90]

D. Hardening

When a hypnotic session ends and the subject emerges from the trance, a subjective conviction often attaches to the accuracy of the resurrected memories.[91] This heightened conviction applies to all memories, whether they are the product of improperly suggested responses or confabulation.[92] Indeed, one writer has stated that "hypnosis is the induction of conviction."[93] The practical legal impact of the hardening process is that, after hypnosis, a doubting witness becomes an "unshakable" witness.[94]

---

89. State v. Hurd, 173 N.J. Super. 333, 348-49, 414 A.2d 291, 299 (1980), *aff'd,* 86 N.J. 525, 432 A.2d 86 (1981) (expert testimony pointing out several possible examples of confabulation). The lower court's opinion extensively reviewed the expert testimony offered by the litigants. Dr. Martin Orne, whose conclusions were reprinted at some length, cited several examples of how the improperly conducted session could have influenced the victim's present recollections. *Hurd,* 173 N.J. Super. at 343-49, 414 A.2d at 296-99.
90. *See also* Karlin, *Forensic Hypnosis: Two Case Reports,* 31 INT'L J. CLINICAL & EXPERIMENTAL HYPNOSIS 227 (1983) (author notes examples of confabulation in two cases).
91. Commonwealth v. Nazarovitch, 496 Pa. 97, 105, 436 A.2d 170, 174 (1981) (prehypnosis uncertainties become molded into certitude); *see, e.g.,* Harker v. State, 55 Md. App. 460, 463 A.2d 288, *cert. denied,* 297 Md. 312 (1983). The witness testified "[b]elieving that on the final day God will be my judge and all the Saints my jury, there stands the man who tried to murder me." *Harker*, 55 Md. App. at 466-67, 463 A.2d at 292; Commonwealth v. Watson, 388 Mass. 536, 447 N.E.2d 1182 (1983) (court affirmatively found that witness's confidence had been enhanced); *see also* Sheehan & Tilden, *Effects of Suggestibility and Hypnosis on Accurate and Distorted Retrieval from Memory,* 9 J. EXPERIMENTAL PSYCHOLOGY: LEARNING, MEMORY & COGNITION 283, 292 (1983) (study of how hypersuggestion and hardening coalesce to conceal inaccurate recall).
92. Dr. Orne states that "[u]nfortunately, a witness who is uncertain about his recall of a particular set of events can, with hypnosis, be helped to have absolute subjective conviction about what had happened, though the certainty can as easily relate to a confabulation as to an actual memory." People v. Gonzales, 108 Mich. App. 145, 152 n.4, 310 N.W.2d 306, 310 n.4 (1981) (excerpt from an affidavit submitted in an unreported California case), *aff'd,* 415 Mich. 615, 329 N.W.2d 743 (1982); *see* State v. Mack, 292 N.W.2d 764, 769 (Minn. 1980) (post-hypnotic witness able to pass a lie detector test even though memories were false).
93. Kroger & Douce, *Forensic Uses, supra* note 28, at 87.
94. State v. Mack, 292 N.W.2d 764, 769 n.10 (Minn. 1980) (affidavit of Dr. Orne); *see also* Alderman & Barrette, *Hypnosis on Trial: A Practical Perspective on the Application of Forensic Hypnosis in Criminal Cases,* 8 CRIM. L. BULL. 5, 27 (1982) (conceivable that judges and juries will ignore important issues because post-hypnotic recall is so convincing).

One commentator has interpreted the Maryland court of special appeals' unquestioning acceptance of the rape victim's testimony in *Harding v. State* as an illustration of the impact subjective conviction-engendered hypnosis can have on the judicial system. This author concluded that the *Harding* court fell into the "trap" created by the convincing nature of the victim's testimony.[95]

E. Post-Hypnotic Source Amnesia

An individual who has undergone hypnosis may have no recollection of either the session or the source of newly created memories.[96] Instead, the subject assumes that all present memory is genuine.[97] *Collier v. State*[98] contains an example of witnesses who were unable to recall having been hypnotized. Although a sheriff's deputy hypnotized most of them before trial, none of the witnesses could recall ever having been hypnotized.[99] Thus, the evidence was admitted because the court assumed it represented present recall, even though it might have been influenced by the hypnotic process.[100]

IV. THE JUDICIAL RESPONSE: SEARCH FOR A STANDARD

The judicial treatment of hypnosis generally depends upon how different jurisdictions have chosen to characterize it, and once labeled, which evidentiary rules should govern its admissibility. At the center of the controversy is the difficult task of deciding who should resolve the reliability problems associated with the revived memories: the jury, the experts, or the trial judge.

---

95. Dilloff, *supra* note 78, at 22.

96. People v. Shirley, 31 Cal. 3d 18, 65, 641 P.2d 775, 804, 181 Cal. Rptr. 243, 272 (self deception is enhanced because the subject is unable to recall the session), *cert. denied,* 103 S. Ct. 133 (1982); Brown v. State, 426 So. 2d 76, 85 (Fla. Dist. Ct. App. 1983); People v. Gonzales, 108 Mich. App. 145, 156-57, 310 N.W.2d 306, 312 (1981) (inability to remember the session may occur either naturally or as a result of post-hypnotic suggestion), *aff'd,* 415 Mich. 615, 329 N.W.2d 743 (1982); Comment, *The Probative Value of Testimony from Hypnotically Refreshed Recollection,* 14 AKRON L. REV. 609, 611 (1981) (while amnesia is not an essential element, it is very common).

97. The major problem associated with an inability to recall the source of manufactured recall is that the subject will unknowingly assume that all present memories reflect actual experiences. People v. Gonzales, 108 Mich. App. 145, 156-57, 310 N.W.2d 306, 312 (1981), *aff'd,* 415 Mich. 615, 329 N.W.2d 743 (1982); Diamond, *supra* note 63, at 333-35; Comment, *supra* note 96, at 621.

98. 244 Ga. 553, 261 S.E.2d 364 (1979), *cert. denied,* 445 U.S. 946 (1980).

99. *Collier,* 244 Ga. at 557, 261 S.E.2d at 370.

100. *Id.* at 559, 261 S.E.2d at 371; *see also* Stewart v. State, 442 N.E.2d 1026 (Ind. 1982) (dictum) (court believed witness's statement that hypnosis had not helped him).

A. The Open Door—Let the Jury Decide

The rule that Maryland conceived in *Harding v. State*[101] is probably the easiest scheme to understand and implement. It regards post-hypnotic recall as ordinary eyewitness testimony because it is presented, with all its faults, to the jury. It is the jury's responsibility to assign it the appropriate weight.[102] The precise evidentiary foundation that sponsors of a hypno-enhanced witness must lay is the subject of some dispute. Some jurisdictions do not require any expert testimony concerning the hypnotic process; instead, they assign to the defendant the burden and expense of raising the hypnosis issue.[103] In the Ninth Circuit, for example, there is "no need for a foundation concerning the nature and effects of hypnosis."[104] Others argue that only through a battle of the experts will the strengths and weaknesses of the hypnotic process be fully revealed to the trier of fact.[105] Also, assigning the burden of raising the hypnosis issue to the defendant places him in the uneasy position of having to raise an issue that could have negative ramifications.[106]

---

101. 5 Md. App. 230, 246 A.2d 302 (1968), *cert. denied,* 395 U.S. 949 (1969).
102. Wyller v. Fairchild Hiller Corp., 503 F.2d 506, 509 (9th Cir. 1974); *Harding,* 5 Md. App. at 236, 246 A.2d at 306; State v. Greer, 609 S.W.2d 423, 436 (Mo. Ct. App. 1980), *vacated on other grounds,* 450 U.S. 1027 (1981); State v. McQueen, 295 N.C. 96, 119, 244 S.E.2d 414, 427 (1978); State v. Jorgensen, 8 Or. App. 1, 9, 492 P.2d 312, 315 (1971).
103. The burden of raising the issue is on the defendant and, whether by tactical choice or by oversight, a failure to raise the hypnosis issue, either by a motion *in limine* or by cross examination, is a waiver of the right to contest the issue on appeal. Norwood v. State, 55 Md. App. 503, 506, 462 A.2d 93, 95 (1983); State v. McQueen, 295 N.C. 96, 119, 244 S.E.2d 414, 427 (1978); State v. Luther, 296 Or. 1, 672 P.2d 691 (1983) (en banc); Commonwealth v. Taylor, 294 Pa. Super. 171, 178-79, 439 A.2d 805, 809 (1982); State v. Glebock, 616 S.W.2d 897, 902 (Tenn. Crim. App. 1981).
104. United States v. Awkard, 597 F.2d 667, 669 (9th Cir.), *cert. denied,* 444 U.S. 885 (1979).
105. The exchange of the expert testimony ventilates the hypnosis issue, arguably to the point of remedying problems with cross examination. *Dilloff, supra* note 78, at 22-23 (cautionary instruction, expert testimony, and cross examination); Comment, *Safeguards Against Suggestiveness: A Means for Admissibility of Hypno-Induced Testimony,* 38 WASH. & LEE L. REV. 197, 203-04 (1981); *see also* State v. Glebock, 616 S.W.2d 897, 904-05 (Tenn. Crim. App. 1981) (evidentiary foundation must include the testimony of the examining hypnotist); *cf.* Collier v. State, 244 Ga. 553, 558, 261 S.E.2d 364, 370 (1979) (order denying cross examination on the subject of post-hypnotic recall overly broad), *cert. denied,* 445 U.S. 946 (1980); State v. Armstrong, 110 Wis. 2d 555, 329 N.W.2d 386 (burden on the party who proposes to use hypnotically stimulated testimony), *cert. denied*, 103 S. Ct. 2125 (1983).
106. The defendant is placed in the uneasy position of having to choose between waiving his right to challenge the witness's competency, *supra* note 103, and raising an issue which could easily make the witness more credible in the view of the jury. *See infra* notes 140-42 & 153 and accompanying text. *But see* State v. Armstrong, 110 Wis. 2d 555, 573, 329 N.W.2d 386, 395 (problem resolved by requiring the state to show, at a pretrial conference, that the session was not suggestive; once the judge finds that no improper suggestions were made at the hypnotic session, the

The underlying assumption behind admitting hypno-enhanced recall with little or no evidentiary foundation is that jurors are presumed to be capable of detecting faulty memory once the entire process is exposed to them.[107] As one judge observed, "I am firmly of the belief that jurors are quite capable of seeing through flaky testimony and psuedo-scientific clap-trap."[108] In addition, the likelihood that the proffered testimony might be inaccurate is ignored because the factual accuracy of evidence has never been a precondition to its admissibility.[109]

The centerpiece of the full exposure approach is the adversary system.[110] A recurring theme in the decisions that follow *Harding* is that, since the witness and the hypnotist were exposed to prolonged and vigorous cross examination, flaws in the witness's testimony will be unearthed and willful abuse will be deterred.[111] Before allowing this adversarial exchange, most courts have required that the use of pretrial hypnosis as a memory stimulus be disclosed to opposing counsel, regardless of whether this information has been requested in discovery.[112]

---

defendant must raise the hypnosis issue at trial), *cert. denied*, 103 S. Ct. 2125 (1983).

107. People v. Gibson, 117 Ill. App. 3d 270, 452 N.E.2d 1368 (1983); Spector & Foster, *supra* note 75, at 595 (law generally proceeds upon the assumption that jurors are endowed with a sufficient degree of sophistication to choose the "permissible" use of an evidentiary item); Comment, *supra* note 67, at 675 (since jurors can comprehend the frailties of ordinary eyewitness recall, they can readily recognize the fallibility of hypnotic recollections).

108. People v. Williams, 132 Cal. App. 3d 920, 928, 183 Cal. Rptr. 498, 502 (1982) (Gardner, J., concurring).

109. People v. Gibson, 117 Ill. App. 3d 270, 276, 452 N.E.2d 1368, 1373 (1983) (no reason to treat post-hypnotic recall any differently that other eyewitness testimony); Spector & Foster, *supra* note 75, at 584; Comment, *The Admissibility of Testimony Influenced by Hypnosis,* 67 VA. L. REV. 1203, 1218 (1981) (demanding infallibility from post-hypnotic recall is inconsistent with the general rules of evidence that permit unreliable eyewitnesses to testify).

110. Some hypnosis advocates have taken impassioned views of the role of the adversary system. Representative of these views is the following statement: "[t]he final arbiter of truth and accuracy is the trier of fact . . . . In the final analysis, man must judge man, and the role of science should be subordinated to the human adversary system of justice when life, liberty and property are at stake." *Dilloff, supra* note 78, at 23.

111. Wyller v. Fairchild Hiller Corp., 503 F.2d 506, 509-10 (9th Cir. 1974); People v. Gibson, 117 Ill. App. 3d 270, 277-78, 452 N.E.2d 1368, 1374 (1983); Peterson v. State, 448 N.E.2d 673, 680 (Ind. 1983) (Hunter, J., concurring) (clarified an ambiguously written majority opinion); State v. Moore, 432 So. 2d 209, 214 (La. 1983) (vigorous cross examination will reveal any defect which hypnosis might have had on memory); State v. Peoples, 60 N.C. App. 479, 483, 299 S.E.2d 311, 314 (1983); State v. Jorgensen, 8 Or. App. 1, 7, 492 P.2d 312, 314-15 (1971) (vigorous cross examination of witness and experts); *see also* United States v. Narcisco, 446 F. Supp. 252, 282 (E.D. Mich. 1977) (vigorous cross examination can cure defects in an unconstitutionally suggestive identification).

112. The cases reference Brady v. Maryland, 373 U.S. 83 (1963), a decision that mandated the disclosure of material exculpatory information. And because undergoing hypnosis affects the subject's credibility, its use must be disclosed even when not requested in discovery. United States v. Miller, 411 F.2d 825, 828-31 (2d Cir.

Supporters of the *Harding* rule have also relied upon the liberal rules of admissibility that control witness competency and present recollection refreshed. Under the heading of witness competency, some courts contend that banning post-hypnotic testimony is functionally equivalent to declaring the witness incompetent.[113] This "tortured" reading of witness competency is inconsistent with the accepted rule that a witness need only be able to express himself and understand his obligation to tell the truth.[114] The proclaimed injustice associated with a total ban on post-hypnotic recall is that an otherwise competent witness, often the only inculpating eyewitness, is prevented from testifying.[115]

An analogy drawn to present recollection refreshed has also been used to support the unquestioned admission of hypnotically generated testimony.[116] Proponents of this view assume that, at trial, the post-hypnotic witness is testifying from present memory which has merely been revived by hypnosis.[117] Once this assumption has been made, it is relatively simple to admit the testimony because of the liberal rules

---

1969); Emmett v. Ricketts, 397 F. Supp. 1025, 1039-42 (N.D. Ga. 1975); People v. Angelini, 649 P.2d 341 (Colo. Ct. App. 1982); State v. Luther, 63 Or. App. 86, 663 P.2d 1261, *aff'd en banc,* 296 Or. 1, 672 P.2d 691 (1983); *see also* Commonwealth v. Kater, 388 Mass. 519, 447 N.E.2d 1190 (1983) (because the hypnosis issue must be raised before trial, opposing counsel is expected to make a voluntary disclosure). *But see* State v. Brown, 214 Neb. 665, 335 N.W.2d 542 (1983) (no need to disclose aborted attempt to hypnotize the victim); *cf.* State v. Hurd, 86 N.J. 525, 547 n.6, 432 A.2d 86, 97 n.6 (1981) (at minimum, videotape should be disclosed so that opposing counsel can prepare challenges).

113. *See, e.g.,* Key v. State, 430 So. 2d 909, 912 (Fla. Dist. Ct. App. 1983) (difference between credibility and competency); Morgan v. State, 445 N.E.2d 585 (Ind. Ct. App. 1983) (procedural flaws in session affect credibility, not competency).

114. Under the accepted rules of competency, all a witness need show is a first-hand observation of the event in question and demonstrate a capacity to understand the ability to tell the truth. FED. R. EVID. 601, 602. Based on this liberal standard, post-hypnotic recall has been admitted because it is believed to represent the witness's present recall. Kline v. Ford Motor Co., 523 F.2d 1067, 1069 (9th Cir. 1975), and the witness is capable of offering evidence of probative value. People v. Smrekar, 68 Ill. App. 3d 379, 386, 385 N.E.2d 848, 853 (1979); State v. Brown, 337 N.W.2d 138, 151 (N.D. 1983); Comment, *The Admissibility of Polygraph and Hypnotic Evidence to Test the Credibility of a Witness,* 97 DET. C.L. REV. 97, 123-24 (1982). A problem identified with this concept is that often the only way to determine whether a hypnotized individual has witnessed an event first-hand is to accept unquestioningly the subject's post-hypnotic statement to that effect. *See* Note, *Evidence—Admissibility of Present Recollection Restored by Hypnosis—* State v. McQueen, 15 WAKE FOREST L. REV. 357, 368-69 (1979) (only evidence that witness was present at the time of a shooting was her post-hypnotic claim).

115. State v. Brown, 337 N.W.2d 138, 149 (N.D. 1983).

116. *E.g.,* State v. McQueen, 295 N.C. 96, 119-22, 244 S.E.2d 414, 427-29 (1978); Comment, *The Admissibility of Hypnotically Induced Recollection,* 70 KY. L.J. 187, 192-94 (1981).

117. *See* Wyller v. Fairchild Hiller Corp., 503 F.2d 506, 509 (9th Cir. 1974); Clark v. State, 379 So. 2d 372, 375 (Fla. Dist. Ct. App. 1979); People v. Smrekar, 68 Ill. App. 3d 379, 386-88, 385 N.E.2d 848, 853-55 (1979); State v. McQueen, 295 N.C. 96, 122, 244 S.E.2d 414, 429 (1978).

governing the method by which present recollection may be refreshed.[118] As Judge Moylan of the Maryland court of special appeals observed, "anything which produces the desired testimonial prelude, '[i]t all comes back to me now,' " can be used.[119]

The simplistic approach taken by supporters of the *Harding* rule has led many to criticize its underlying assumptions. The most often voiced complaint is that *Harding*'s reliance on the adversary system is misplaced because witnesses who have undergone pretrial hypnosis cannot be effectively cross examined.[120] The obstacle to cross examination is the hardening process which masks the flaws and doubts which can often plague ordinary memory.[121] The witness, often unaware that hypnosis has even taken place, convincingly testifies about his present recollections, regardless of whether they include confabulated and suggested responses.[122] At the very least, this development reveals a fundamental flaw in the observation that the rules governing present recollection refreshed will adequately protect against the problems associated with hypno-enhanced testimony. Under those rules, the only way to determine whether a memorandum has actually refreshed a witness's memory is to cross examine his statements to that effect.[123] Since

118. The *McQueen* court cited Jewett v. United States, 15 F.2d 955, 956 (9th Cir. 1926), for the proposition that "[i]t is quite immaterial by what means memory is quickened; it may be a song, or a face, or a newspaper item, or a writing of some character. It is sufficient that by some mental operation, however mysterious, the memory is stimulated to recall the event." *McQueen,* 295 N.C. at 122, 244 S.E.2d at 429. The only two safeguards offered by the rules governing present recollection refreshed are one, that the judge must find that the memory has, in fact, been refreshed and, two, that the witness's resurrected recall be tested by the adversary system. Some commentators maintain that these measures will adequately ensure the reliability of post-hypnotic recall. Comment, *supra* note 116, at 192-94; Comment, *Refreshing the Memory of a Witness Through Hypnosis,* 5 U.C.L.A. [UCLA]-ALASKA L. REV. 266, 268-69 (1976).

119. Baker v. State, 35 Md. App. 593, 603, 371 A.2d 699, 705 (1977).

120. Post-hypnotic witnesses are considered immune from cross examination because they assume that present memories are genuine and they repeat potentially inaccurate information with a high degree of conviction. State v. Mena, 128 Ariz. 226, 230, 624 P.2d 1274, 1278 (1981); People v. Shirley, 31 Cal. 3d 18, 65-66, 641 P.2d 775, 804, 181 Cal. Rptr. 243, 272, *cert. denied,* 103 S. Ct. 133 (1982); People v. Quintanar, 659 P.2d 710, 712 (Colo. Ct. App. 1982); People v. Gonzales, 108 Mich. App. 145, 160, 310 N.W.2d 306, 314 (1981), *aff'd,* 415 Mich. 615, 329 N.W.2d 743 (1982); State v. Palmer, 210 Neb. 206, 215-16, 313 N.W.2d 648, 653 (1981). Even when new information is not produced by the hypnotic session, the witness's rendition of pre-hypnotic facts becomes fixed and cross examination can be impaired. Orne, *Hypnosis in Court, supra* note 66, at 332.

121. See *supra* notes 91-95 and accompanying text.

122. People v. Shirley, 31 Cal. 3d 18, 53, 641 P.2d 775, 796, 181 Cal. Rptr. 243, 264, *cert. denied,* 103 S. Ct. 133 (1982); Polk v. State, 48 Md. App. 382, 394, 427 A.2d 1041, 1048 (1981); State v. Mack, 292 N.W.2d 764, 769 (Minn. 1980); State v. Hurd, 86 N.J. 525, 536-37, 432 A.2d 86, 91-92 (1981).

123. Baker v. State, 35 Md. App. 593, 600, 371 A.2d 699, 703 (1977) (citing United States v. Riccardi, 174 F.2d 883, 888 (3d Cir. 1949); C. MCCORMICK, HANDBOOK ON THE LAW OF EVIDENCE § 19 (E. Cleary 2d ed. 1972)).

hypno-enhanced recall is exempt from such an inquiry, the rules of present recollection refreshed are of limited use.

In addition to these flaws in *Harding*'s underlying reasoning, the immunity from cross examination raises a myriad of constitutional issues.[124] Most notably, an increasing number of authorities are beginning to recognize that the use of pretrial hypnosis may deprive defendants of their constitutional right to confront opposing witnesses.[125] On several occasions, the Supreme Court has gone beyond merely requiring cross examination and has dictated that according the accused anything less than meaningful cross examination constitutes reversible error.[126] If hypnosis insulates testimony from cross examination, it is fairly simple to understand why this development could impede any effort to achieve meaningful cross examination of the memories on which that testimony is based. Also, since the recollection of an incriminating state witness may be permanently altered under hypnosis, constitutional protections relating to suggestive identifications,[127] when counsel must be present,[128] and destruction of material

---

124. Some dispute exists over whether constitutional problems would arise in a civil context. *Compare* Landry v. Bill Garrett Chevrolet, 430 So. 2d 1051, 1054 (La. Ct. App. 1983) (recognizing constitutional due process right) *with* People v. Hughes, 59 N.Y.2d 523, 542, 453 N.E.2d 484, 494, 466 N.Y.S.2d 255, 265 (1983) (constitutional restrictions do not apply in a civil context). *See generally* Alderman & Barrette, *supra* note 94, at 5 (good discussion of methods used to mount various constitutional attacks on post-hypnotic testimony).

125. United States v. Charles, 561 F.2d 694, 698 (S.D. Tex. 1983) (sixth amendment confrontation right contravened by an unduly suggestive session); State *ex rel.* Collins v. Superior Court, 132 Ariz. 180, 187-89, 644 P.2d 1266, 1273-75 (1982); Peterson v. State, 448 N.E.2d 673, 678 (Ind. 1983). The Court of Appeals of New York has attempted to fashion a three part standard for evaluating the confrontation problem. This standard analyzes: (1) the individual's belief in the ability of hypnosis to yield the truth; (2) the degree to which he has been hypnotized (level of trance); and (3) the extent to which those administering the hypnosis observed the standards recommended by the experts. People v. Hughes, 59 N.Y.2d 523, 546, 453 N.E.2d 484, 496, 466 N.Y.S.2d 255, 267 (1983). *But see* State v. Armstrong, 110 Wis. 2d 555, 569-70, 329 N.W.2d 386, 393-94 (cross examination and use of expert testimony solves constitutional problem), *cert. denied*, 103 S. Ct. 2125 (1983).

126. The purpose behind the constitutional right to cross examination is to accord jurors the opportunity to judge witness demeanor. Bruton v. United States, 391 U.S. 123 (1968); Mattox v. United States, 156 U.S. 237, 242-43 (1895); *see* Ohio v. Roberts, 448 U.S. 56 (1980); Douglas v. Alabama, 380 U.S. 415 (1965); Pointer v. Texas, 380 U.S. 400 (1965).

127. In a more limited context, the suggestive nature of post-hypnotic identifications has been argued. People v. Byas, 117 Ill. App. 3d 979, 453 N.E.2d 1141 (1983) (dictum); Peterson v. State, 445 N.E.2d 673 (Ind. 1983); Alderman & Barrett, *supra* note 94, at 11-12; Comment, *supra* note 109, at 1218-19. The major problem with raising this issue as a defense is that the burden of proving impermissible suggestion is on the party contesting the issue; after a session has passed muster under the evidentiary rules, it is unlikely that the defendant will be able to discover enough evidence to prevail on a constitutional challenge. *See* State v. Hurd, 86 N.J. 525, 548, 432 A.2d 86, 97-98 (1981). *But see* State v. Armstrong, 110 Wis. 2d 555, 571, 329 N.W.2d 386, 394 (party seeking to present post-hypnotic testimony has initial burden of proving that the session was not suggestive), *cert. de-*

evidence[129] may be implicated as well. As a result of these evidentiary and constitutional problems, a growing number of jurisdictions have decided to reject the *Harding* rule in favor of more restrictive admissibility standards.

B. The Frye*-Test—Let the Experts Decide*

Maryland,[130] along with several other states,[131] has recently rejected the *Harding* approach by labeling post-hypnotic testimony as scientific evidence and excluding it under the *Frye* test.[132] Under this test, scientific evidence cannot be admitted until the procedures by which it was obtained earn the general acceptance of their respective scientific communities.[133] The experts who make up the scientific com-

---

nied, 103 S. Ct. 2125 (1983). For authority defining the constitutional limitations on suggestive eyewitness identification, see Manson v. Brathwaite, 432 U.S. 98 (1977); Stovall v. Denno, 388 U.S. 293 (1967); *see generally* Grossman, *supra* note 62, at 53 (application of constitutional standards to suggestive identifications).

128. Due to the inherently suggestive nature of hypnosis and the likelihood of confabulated memories, its pretrial use to identify the defendant can be more prejudicial than conventional identification procedures. Alderman & Barrett, *supra* note 94, at 15-16. In addition, the memories are fixed and thus opposing counsel is unable to challenge them as he would an ordinary eyewitness identification. *Id.* at 16. *Contra* People v. Gibson, 117 Ill. App. 3d 270, 452 N.E.2d 1368 (1983); People v. Smrekar, 68 Ill. App. 3d 379, 388, 385 N.E.2d 848, 855 (1979) (no right to counsel at the investigatory stage because proceedings had not been initiated against defendant). The right to counsel attaches at a "critical stage," a point reached when counsel's absence might "derogate from the accused's right to a fair trial." United States v. Ash, 413 U.S. 300, 306-13 (1973); United States v. Wade, 388 U.S. 218, 226 (1967).

129. People v. Tait, 99 Mich. App. 19, 297 N.W.2d 853 (1980) (tampering with evidence material to the defendant's guilt by conducting an improperly suggestive hypnotic session constitutes prosecutorial misconduct); State v. Long, 32 Wash. App. 732, 649 P.2d 845 (1982) (improper session "deprived the defendant of a material witness who cannot be rehabilitated"); Worthington, *supra* note 81, at 414-15.

130. While *Harding* propelled Maryland to the forefront of the admissibility controversy, recent decisions of Maryland's highest court have repudiated *Harding*'s per se admissibility rule. State v. Metscher, 297 Md. 368, 464 A.2d 1052 (1983); State v. McCoy, 297 Md. 5, 464 A.2d 1067 (1983) (per curiam); Grimes v. State, 297 Md. 1, 464 A.2d 1065 (1983); Simkus v. State, 296 Md. 718, 464 A.2d 1055 (1983); State v. Collins, 296 Md. 670, 464 A.2d 1028 (1983). For a history of the state's intermediate appellate decisions, see *supra* note 51. Maryland's reversal on the admissibility issue has been cited as support for the applicability of the *Frye* test. State *ex rel.* Collins v. Superior Court, 132 Ariz. 180, 197, 644 P.2d 1266, 1283 (1982); People v. Shirley, 131 Cal. 3d 18, 38, 641 P.2d 775, 792, 181 Cal. Rptr. 243, 261, *cert. denied,* 103 S. Ct. 133 (1982).

131. State *ex rel.* Collins v. Superior Court, 132 Ariz. 180, 644 P.2d 1266 (1982); People v. Shirley, 31 Cal. 3d 18, 641 P.2d 775, 181 Cal. Rptr. 243, *cert. denied,* 103 S. Ct. 133 (1982); Commonwealth v. Kater, 388 Mass. 519, 447 N.E.2d 1190 (1983); People v. Tait, 99 Mich. App. 19, 297 N.W.2d 853 (1980); State v. Mack, 292 N.W.2d 764 (Minn. 1980); People v. Hughes, 59 N.Y.2d 523, 453 N.E.2d 484, 466 N.Y.S.2d 255 (1983); State v. Palmer, 210 Neb. 206, 313 N.W.2d 648 (1981); Commonwealth v. Nazarovitch, 496 Pa. 97, 436 A.2d 170 (1981).

132. *See* Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923).

133. *Id.*

munity are regarded as the "scientific jury" and, before the evidence may be admitted, they must determine that the process has evolved beyond the experimental state and progressed to a point where it is generally accepted as being capable of producing reliable results.[134] If they are deadlocked, the process must await a favorable consensus before it can reenter the courtroom.

The major reason for conditioning the admissibility of scientific evidence on a favorable review by the scientific jury is that the experts, and not the jurors, are better equipped to deal with the sophisticated concepts involved.[135] Furthermore, general principles of fairness mandate that, before a defendant should be required to shoulder the burden and expense of challenging a scientific product, he should be entitled to have the experts that compose the relevant scientific community pass judgment upon its reliability.[136] These principles assume added dimensions when dealing with hypnosis. The elusive nature of the results achieved by hypnosis keeps them locked inside the witness's mind where their reliability cannot be objectively tested. While some have responded that corroboration is an effective method to test the accuracy of post-hypnotic recall,[137] no method exists for verifying the accuracy of incriminating memories recalled under hypnosis.[138] Merely because a witness is able to recall some details accurately does not guarantee that others have not been confabulated.[139]

---

134. In general, the scientific jury is comprised of disinterested experts who are knowledgeable in the particular scientific specialty. They must decide whether the procedure has a sufficient scientific basis to produce reasonably uniform and reliable results that will contribute materially to the ascertainment of the truth. For excellent examples of how this test has been applied in hypnosis cases, see State *ex rel.* Collins v. Superior Court, 132 Ariz. 180, 196-99, 644 P.2d 1266, 1285-88 (1982); People v. Shirley, 31 Cal. 3d 18, 54-66, 641 P.2d 775, 796-804, 181 Cal. Rptr. 243, 265-72, *cert. denied*, 103 S. Ct. 133 (1982).

135. United States v. Addison, 498 F.2d 741, 744 (D.C. Cir. 1974) ("*Frye* test assures that those most qualified to assess the general validity of a scientific method will have the determinative voice"); Reed v. State, 283 Md. 374, 386-87, 391 A.2d 364, 370-71 (1978).

136. Reed v. State, 283 Md. 374, 385, 391 A.2d 364, 369-70 (1978).

137. Some courts have argued that a wealth of corroborating evidence would adequately resolve the reliability problems. People v. Smrekar, 68 Ill. App. 3d 379, 388, 385 N.E.2d 848, 854-55 (1979); State v. Moore, 432 So. 2d 209, 214-15 (La. 1983); State v. Temoney, 45 Md. App. 569, 576, 414 A.2d 240, 243-44 (1980), *vacated on other grounds,* 290 Md. 251, 429 A.2d 1018 (1981).

138. Comment, *supra* note 96, at 621 (cannot verify the accuracy of a hypnosis enhanced identification). In cases where the victim accurately recalls many surrounding details, there is still no guarantee that the victim has not confabulated the identity of the defendant. In *Hurd*, for example, the only evidence linking the defendant to the crime was the victim's post-hypnotic recall. Jenkins, *supra* note 27, at 28.

139. An exception to the *Frye* standard has been developed, in other contexts, to handle situations when the evidence is undeniably correct, regardless of general acceptance. *See* People v. Milone, 43 Ill. App. 3d 385, 356 N.E.2d 1350 (1976) (bite marks). When corroborating evidence demonstrably confirms a post-hypnotic identification of the defendant, the identification may be worthy of admission.

The inability of jurors to evaluate post-hypnotic testimony has also produced allegations that the use of this evidence unfairly prejudices the jury against the defendant. Of primary concern is the likelihood that jurors subscribe to the popular misconception that hypnotized people cannot lie.[140] This misconception is aggravated by characterizing hypnosis as a scientific process because this label tends to link hypnosis to the therapeutical and mathematical infallibility associated with other scientific and medical procedures.[141]

When all of these problems are combined, the result is that the misleading aura of certainty and the inability of defense counsel to expose its flaws under cross examination combine to sway the trier of fact in the prosecution's favor. Lastly, due to the serious crimes ordinarily present in hypnosis cases, the prospect of lengthy incarceration based on fantasized memories calls for a cautious approach to the admissibility question.

In addition to these areas of concern, various general policy considerations argue in favor of applying the *Frye* test to hypnosis cases. Most notably, the standard conserves scarce judicial resources. Under ideal conditions, once a scientific procedure has been passed upon by the scientific community, questions of admissibility should not arise again until the process has undergone further refinement.[142] The potential for duplicitous litigation is especially great when dealing with post-hypnotic testimony. Since "[t]he induced recall . . . is dependent upon and cannot be disassociated from the underlying scientific method,"[143] litigants in jurisdictions which follow the *Harding* court's approach will not only have to challenge the credibility of the individual witness, but they will also have to contest the reliability of the hypnotic process. Accordingly, the trial will almost certainly "degenerate into a trial of the technique itself."[144] Compounding this problem is the probability that juries would arrive at inconsistent verdicts, even

---

See State v. Temoney, 45 Md. App. 569, 576, 414 A.2d 240, 244 (1980), *vacated on other grounds,* 290 Md. 251, 429 A.2d 1018 (1981) (rape victim able to recall a unique white spot on her attacker's body).

140. State *ex rel.* Collins v. Superior Court, 132 Ariz. 180, 186, 644 P.2d 1266, 1272 (1982) (typical jurors will give it undue weight); People v. Diggs, 112 Cal. App. 3d 522, 531, 169 Cal. Rptr. 386, 391 (1980) (jurors may be tempted to view the hypnotic process as a "truth serum").

141. People v. Diggs, 112 Cal. App. 3d 522, 531, 169 Cal. Rptr. 386, 391 (1980); Comment, *supra* note 109, at 1216.

142. People v. Kelly, 17 Cal. 3d 24, 31, 549 P.2d 1240, 1244, 130 Cal. Rptr. 144, 148 (1976) (once the evidence is admitted and the decision to admit is affirmed on appeal, the precedent controls until new information about the process becomes available); Reed v. State, 283 Md. 374, 388, 391 A.2d 364, 371-72 (1978).

143. Polk v. State, 48 Md. App. 382, 394, 427 A.2d 1041, 1048 (1981); *see also* State v. Mack, 292 N.W.2d 764, 769-70 (Minn. 1980); State v. Hurd, 86 N.J. 525, 536-37, 432 A.2d 86, 91 (1981); People v. Shirley, 31 Cal. 3d 18, 39, 641 P.2d 775, 787, 181 Cal. Rptr. 243, 255, *cert. denied,* 103 S. Ct. 133 (1982); Commonwealth v. Kater, 388 Mass. 519, 447 N.E.2d 1190 (1983).

144. *See* Reed v. State, 283 Md. 374, 388, 391 A.2d 364, 371-72 (1978).

though they were acting upon nearly identical records.[145] In some cases, the trier of fact would rule favorably upon the accuracy of the hypnotic process, and in others it would rule against it. Not only do inconsistent verdicts affront general principles of fairness, but they mock the precision associated with science. The *Frye* standard's test case feature provides a mechanism that would prevent these inconsistencies while reducing the strain that repeated admissibility arguments would place on crowded court dockets and frequently indigent defendants.

Despite these attributes, the *Frye* standard is not without criticism. Indeed, three major challenges have been leveled at the application of *Frye* to post-hypnotic testimony. Critics contend that: (1) the *Frye* test is facially inapplicable to hypnosis cases; (2) the test itself is obsolete; and (3) the standard produces harsh results.

The connection between *Frye* and post-hypnotic recall is tenuous. An examination of the text of *Frye v. United States* indicates that the court may have intended to limit its holding to cases involving the use of expert testimony: "While courts will go a long way in admitting *expert testimony* . . . 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."[146] In support of the argument against its application to hypnosis cases, opponents regard *Frye* as offering protection for jurors who might otherwise have been misled by convincing expert testimony.[147] This protection, though, is unwarranted when the testimony of a nonexpert eyewitness is offered. Those who advocate *Frye*'s use in hypnosis cases respond by expanding upon their opponents' literal reading of *Frye*. These advocates view *Frye*'s objective as protecting the trier of fact from the misleading aura of certainty associated with all scientific evidence. Post-hypnotic recall is characterized as scientific evidence because it is the product of a scientific procedure,[148] and the evidence produced is only as reliable as the underlying process used to produce it.[149] Those who support the application of *Frye* to hypnosis cases are therefore more concerned with the deceptive nature of the evidence than with whether an expert is used to introduce it.[150]

---

145. Given the division among the state courts, it is inconceivable that juries could be anymore inconsistent.
146. Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923) (emphasis supplied).
147. State v. Temoney, 45 Md. App. 569, 577-78, 414 A.2d 240, 244 (1980), *vacated on other grounds,* 290 Md. 251, 429 A.2d 1018 (1981); Commonwealth v. A Juvenile, 381 Mass. 727, 412 N.E.2d 339 (1980); State v. McQueen, 295 N.C. 96, 122, 244 S.E.2d 414, 429 (1978); State v. Armstrong, 110 Wis. 2d 555, 568, 329 N.W.2d 386, 393, *cert. denied*, 103 S. Ct. 2125 (1983).
148. State v. Mack, 292 N.W.2d 764, 769-70 (Minn. 1980); State v. Hurd, 86 N.J. 525, 536-37, 432 A.2d 86, 91 (1981).
149. *See supra* note 143.
150. *See* People v. Shirley, 31 Cal. 3d 18, 52-53, 641 P.2d 775, 795, 181 Cal. Rptr. 243, 263-64, *cert. denied,* 103 S. Ct. 133 (1982).

The historical treatment accorded *Frye* offers further support for the proposition that it should not be applicable to hypnosis cases. From its inception, *Frye* has normally been cited only in situations where the product of scientific apparatus was offered as proof of the truth of a given statement.[151] Post-hypnotic statements, in contrast, are offered with all their faults as ordinary eyewitness testimony, without indicating to the trier of fact that the statements are true.[152] It is probable, however, that a combination of the subject's immunity from cross examination, the aura of certainty that is created by characterizing hypnosis as a scientific process, and the popular misconception that hypnotized people are incapable of lying, reveals that jurors are just as likely to be misled by hypnotic testimony as they are by expert testimony. Moreover, some authorities go beyond this policy analysis and assert that, since post-hypnotic testimony is the product of a scientific process, the *Frye* test is facially applicable.[153] Therefore, the arguments that *Frye* is limited to cases involving the results of a scientific apparatus are based on a faulty premise.

General complaints about the inflexibility of the *Frye* test have also affected its use in hypnosis cases. The inability of the standard to respond to the recent proliferation of scientific evidence[154] and difficulties associated with applying the test to specific situations[155] has persuaded an increasing number of jurisdictions to abandon it in favor of a more flexible and less complicated standard.[156]

The rigidity and conservatism embodied in the *Frye* test are re-

151. *E.g.,* United States v. Distler, 672 F.2d 954 (6th Cir. 1981) (gas chromatograph analysis); United States v. Brown, 557 F.2d 541 (6th Cir. 1977) (hair follicle analysis); United States v. Baller, 519 F.2d 463 (4th Cir. 1975) (voice spectrograph); United States v. Stifel, 433 F.2d 431 (6th Cir. 1970) (neutron activation analysis); Frye v. United States, 293 F. 1013 (D.C. Cir. 1923) (lie detector test).

152. *See* People v. Gibson, 117 Ill. App. 3d 270, 276, 452 N.E.2d 1368, 1373 (1983) (no similar standard for ordinary eyewitness testimony); State v. Beachum, 97 N.M. 682, 643 P.2d 246 (N.M. Ct. App. 1981), *cert. denied,* 98 N.M. 51, 644 P.2d 1040 (N.M. 1982). As the Court of Appeals of Arizona explained, "[t]he heart of the issue is the reliability of such procedure to revive a witness's memory or to sharpen the witness's ability to perceive and recall, not whether hypnosis is an infallible method of determining the truth from a witness." *Beachum,* 97 N.M. at 687, 643 P.2d at 251; State v. McQueen, 295 N.C. 96, 122, 244 S.E.2d 414, 429 (1978).

153. *See supra* note 143.

154. Imwinkelried, *A New Era in the Evolution of the Weight of Scientific Evidence,* 23 WM. & MARY L. REV. 261 (1981) (many of the new developments are attributable to the influx of funding from various federal agencies).

155. Gianelli, *The Admissibility of Novel Scientific Evidence: Frye v. United States, A Half-Century Later,* 80 COLUM. L. REV. 1197, 1204-28 (1980).

156. United States v. Williams, 583 F.2d 1194 (2d Cir. 1978); United States v. Baller, 519 F.2d 463 (4th Cir. 1975); Whalen v. State, 434 A.2d 1346, 1354-55 (Del. 1980); Coppolino v. State, 233 So. 2d 168, 170-71 (Fla. Dist. Ct. App. 1969). *See generally* McCormick, *Scientific Evidence: Defining a New Approach to Admissibility,* 67 IOWA L. REV. 879 (1982) (analysis of cases rejecting *Frye*); C. MCCORMICK, *supra* note 123, § 203 (*Frye* standard impractical and overly rigorous). *But see* United States v. McFillin, No. 80-5063, slip op. at 6-9 (4th Cir. Aug. 12, 1981) (appellate

vealed in an examination of the burden it imposes on the proponent of a novel-evidence gathering technique. The sponsor must not only demonstrate that the proffered results are accurate, but he must also establish that the process has crossed the threshold of general acceptance in its scientific community. One commentator has characterized this burden as requiring that the proponent demonstrate "unanimity . . . in a world still believed by some to be flat."[157] Evidence unable to meet *Frye*'s general acceptance standard is thus excluded, even though the results in a specific case are accurate. Consequently, the trier of fact is deprived of otherwise probative evidence to use in its search for the truth.

The hypnosis cases provide an excellent example of the draconian sanction the *Frye* test imposes upon proposed evidence that is unable to meet its mandate. By excluding post-hypnotic testimony, the standard often deprives the prosecution of the only eyewitness capable of implicating the defendant. Without this evidence, an otherwise guilty defendant must be set free.

Several jurisdictions, in an attempt to temper the harsh results obtained by a sweeping application of *Frye*,[158] have retreated from the total incompetency stance and have permitted hypno-enhanced testimony about matters that the witness could recall prior to having undergone hypnosis.[159] In *People v. Wallach*,[160] for example, the Court of Appeals of Michigan went to the extreme of articulating a *Harding*-like standard that would permit defendants to use cross examination and expert testimony to sever pre-hypnotic memory from potentially con-

---

court cast doubt on its rejection of the *Frye* test in *Baller* by unflinchingly applying the *Frye* standard to "taggants").

157. Strong, *Questions Affecting the Admissibility of Scientific Evidence,* 1970 U. ILL. L.J. 1, 14; *see also* Costley, *Scientific Evidence—Admissibility Fryed to a Crisp,* 21 S. TEX. L.J. 62, 67 (1980) (*Frye*, which requires infallibility, is a higher standard than that required of other types of evidence).

158. People v. Hughes, 59 N.Y.2d 523, 545, 453 N.E.2d 484, 495, 466 N.Y.S.2d 255, 266 (1983) (court noted the "odd result" which would obtain if the only eyewitness was declared incompetent).

159. State *ex rel.* Collins v. Superior Court, 132 Ariz. 180, 209, 644 P.2d 1266, 1295 (1982) (court originally declared all post-hypnotic witnesses incompetent, but later modified its holding to permit pre-hypnotic testimony); People v. Quintanar, 659 P.2d 710, 713 (Colo. Ct. App. 1982); Simkus v. State, 296 Md. 718, 464 A.2d 1055 (1983); Commonwealth v. Watson, 388 Mass. 536, 447 N.E.2d 1182 (1983); People v. Gonzales, 108 Mich. App. 145, 310 N.W.2d 306 (1981), *aff'd*, 415 Mich. 615, 329 N.W.2d 743 (1982); State v. Koehler, 312 N.W.2d 108, 110 (Minn. 1981); State v. Patterson, 213 Neb. 686, 692, 331 N.W.2d 500, 504 (1983); People v. Hughes, 59 N.Y.2d 523, 453 N.E.2d 484, 466 N.Y.S.2d 255 (1983); Commonwealth v. Taylor, 294 Pa. Super. 171, 177, 439 A.2d 805, 808 (1982). Some jurisdictions have gone beyond recognizing a distinction between pre- and post-hypnotic recollection and have held, instead, that the former is absolved from any evidentiary problem because it is not the "product" of a hypnotic interview. United States v. Waksal, 539 F. Supp. 834, 838 (S.D. Fla. 1982); State v. Hutchinson, 99 N.M. 616, 661 P.2d 1315 (1983) (no need to follow procedural safeguards if no post-hypnotic recall was generated).

160. 110 Mich. App. 37, 312 N.W.2d 387 (1981).

taminated post-hypnotic recall.[161] Other states have either articulated similarly vague guidelines[162] or have refused to decide the question.[163] The difficulty experienced by the judiciary is understandable because there is no established process that will reliably divide pre- from post-hypnotic recall.[164] As the Supreme Judicial Court of Massachusetts candidly admitted, "[i]t will not be easy for lay witnesses to limit themselves to their pre-hypnotic memory."[165] Indeed, one authority has noted that it is "difficult to reconcile" these cases because the courts involved have dwelled upon the pervasive influence that hypnosis exerts over all memory and then have argued that the witness and the adversary system can somehow determine which memories have remained unaffected by hypnosis.[166] Although a more sensible approach would be to preserve pre-hypnotic recall by deposition,[167] the problem associated with declaring the only eyewitness incompetent would remain unaddressed.

C. State v. Hurd — *Let the Judge Decide*

In an apparent effort to strike a balance between the extreme results achieved by proponents of unlimited admissibility and complete exclusion, some states have followed New Jersey's lead and have adopted guidelines to regulate hypnotic interviews if the results are to

161. *Id.* at 40, 312 N.W.2d at 404-05.

162. Commonwealth v. Kater, 388 Mass. 519, 447 N.E.2d 1190 (1983) (disclosure and cross examination used to attack the potential effect of hypnosis); People v. Hughes, 59 N.Y.2d 523, 535, 453 N.E.2d 484, 496, 466 N.Y.S.2d 255, 267 (1983) (full opportunity to test pre-hypnotic recall including a less vigorous application of the hearsay rules).

163. The Court of Appeals of Maryland, for instance, has expressly declined to undertake the duty of establishing guidelines for preserving pre-hypnotic recall, conducting hypnotic sessions, or isolating post-hypnotic memories. The reason given for refusing to clarify the law is that "[t]o do otherwise is to risk omission of acceptable solutions which do not occur to us." State v. Collins, 296 Md. 670, 702-03, 464 A.2d 1028, 1045 (1983). The *Collins* court, however, did find the procedural safeguards employed by the Arizona courts persuasive. *Id.* (citing State *ex rel.* Collins v. Superior Court, 132 Ariz. 180, 644 P.2d 1266 (1982)). Indeed, the only guidance offered by Maryland's highest court is that pre-hypnotic recollections must be established by clear and convincing evidence. State v. Metscher, 297 Md. 368, 374, 464 A.2d 1052, 1055 (1983).

164. *See also* State v. Mena, 128 Ariz. 226, 232, 624 P.2d 1274, 1280 (1981) (inability to separate pre- from post-hypnotic recall supports a finding of per se incompetence); People v. Shirley, 31 Cal. 3d 18, 68-69, 641 P.2d 775, 806, 181 Cal. Rptr. 243, 274 (it would "fly in the face of" the judicial consensus that hypnosis produces unreliable memories to rely upon the witness's uncorroborated statement that memory is pre-hypnotic), *cert. denied,* 103 S. Ct. 133 (1982); State v. Collins, 296 Md. 670, 715-16, 464 A.2d 1028, 1051 (1983) (Murphy, C.J., concurring and dissenting) (Chief Judge Murphy expressed frustration over how tainted post-hypnotic memories could be separated from others).

165. Commonwealth v. Kater, 388 Mass. 519, 447 N.E.2d 1190 (1983).

166. State v. Brown, 337 N.W.2d 138, 149 (N.D. 1983).

167. State v. Mena, 128 Ariz. 226, 232 n.1, 624 P.2d 1274, 1280 n.1 (1981).

be admitted into evidence.[168] While various guidelines have been proposed,[169] the six procedures adopted by the Supreme Court of New Jersey in *State v. Hurd*[170] are thus far the most widely accepted.[171]

The *Hurd* standards require that the sponsor of hypnotically enhanced testimony lay a two tiered foundation before the witness will be permitted to testify: (1) the hypnotic session was conducted according to dictated procedures; and (2) the proffered testimony is generally reliable. These twin burdens must be satisfied by clear and convincing evidence.[172]

The *Hurd* guidelines provide that: (1) the session should be conducted by a trained hypnotist; (2) the person conducting the interview must be independent of all parties; (3) any information supplied to the hypnotist prior to the beginning of the session must be in writing; (4) before inducing hypnosis, the hypnotist should interview the subject to determine the extent of pre-hypnotic recall; (5) all contacts between the hypnotist and the witness must be recorded, preferably on videotape;[173] and (6) only the hypnotist and the subject should be present in the room while the session is in progress.[174]

The second level, general reliability, is somewhat elusive. The reliability inquiry is limited to general issues such as whether hypnosis

168. The safeguards were adopted at the urging of Dr. Martin Orne, a well-respected authority on hypnosis and an often called expert witness. State v. Hurd, 86 N.J. 525, 545, 432 A.2d 86, 96 (1981).

169. United States v. Adams, 581 F.2d 193, 199 n.3 (9th Cir.), *cert. denied,* 439 U.S. 1006 (1978); OR. REV. STAT. § 136.675 (1981) (the nation's only statutorily defined hypnosis gudelines); Ault, *FBI Guidelines for Use of Hypnosis*, 27 INT'L J. CLINICAL & EXPERIMENTAL HYPNOSIS 449 (1979) (detailing FBI guidelines); Mutter, *Critique of Videotape Presentation on Forensic Hypnotic Regression: "The Case of Dora,"* 23 AM. J. CLINICAL HYPNOSIS 99, 100 (1979) (six guidelines); Warner, *supra* note 22, at 428-29 (nine standards, as adopted by unreported Wisconsin trial court); Comment, *supra* note 109, at 1230-32 (list of five safeguards).

170. 86 N.J. 525, 432 A.2d 86 (1981).

171. State v. Beachum, 97 N.M. 682, 643 P.2d 246 (N.M. Ct. App. 1981), *cert. denied,* 98 N.M. 51, 644 P.2d 1040 (N.M. 1982); State v. Long, 32 Wash. App. 732, 649 P.2d 845 (1982). Other jurisdictions have cited the standards as nonmandatory persuasive authority for use when reviewing the reliability of a hypnotic interview. Key v. State, 430 So. 2d 909, 912 (Fla. Dist. Ct. App. 1983); Landry v. Bill Garrett Chevrolet, 430 So. 2d 1051, 1056 (La. Ct. App. 1983). Even the *Frye*-test states rely on the *Hurd* standards to minimize the detrimental effects of hypnosis on pre-hypnotic recall. State *ex rel.* Collins v. Superior Court, 132 Ariz. 180, 210, 644 P.2d 1266, 1275 (1982) (record pre-hypnotic rendition and apply some of the *Hurd* standards); Commonwealth v. Kater, 388 Mass. 519, 447 N.E.2d 1190 (1983); People v. Gonzales, 108 Mich. App. 145, 161 n.9, 310 N.W.2d 306, 314 n.9 (1981), *aff'd,* 415 Mich. 615, 329 N.W.2d 743 (1982); *see also* State v. Collins, 296 Md. 670, 702-03, 464 A.2d 1028, 1044-45 (1983) (adoption of standards articulated in *Collins,* 132 Ariz. 180, 644 P.2d 1266, as a suggestion, but not mandatory).

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

173. Excerpts from hypnotic session transcripts are occasionally reproduced. *See, e.g.,* Harker v. State, 55 Md. App. 460, 464-66, 463 A.2d 288, 291-92, *cert. denied,* 297 Md. 312 (1983); Crasilneck, *The Case of Dora, supra* note 20, at 95.

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

was appropriate in light of the memory lost, the witness's motivation for not remembering, whether the interview was suggestive, and the amenability of the subject to hypnosis.[175] Furthermore, the *Hurd* court specified that ordinary eyewitness testimony should be the measure of accuracy when determining whether the memory produced is generally reliable.[176] More specific questions concerning factual accuracy are relegated to the trier of fact.[177] In short, the general reliability component is quite limited.

In contrast to *Harding*, any adversarial exchange takes place outside the jury's presence. The trial judge acts as gatekeeper because he must determine whether the procedures were followed and that the witness's present memory is not the product of a suggestive session.[178] The exchange, however, is somewhat limited. All challenges must be confined to whether the appropriate procedures were followed or whether the resulting memory is generally accurate since opposing counsel is barred from litigating the general unreliability of the hypnotic process.[179]

Supporters of the safeguard approach argue that hypnosis has the potential to make a valuable contribution by providing an otherwise unavailable supply of information.[180] Their essential inquiry is not whether hypnosis is per se admissible or excludable, but rather they search for the parameters of the hypnotic process.[181] Using this information, supporters of this approach have attempted to design a set of procedures which can reside within the boundaries of reliability.[182] Recently, this inquiry has been analogized to an ordinary relevancy inquiry[183] whereby the court weighs the probative value and prejudicial impact of an evidentiary item; the conclusion reached is that, once the proper procedures are followed, the probative value exceeds the prejudicial impact.[184]

---

175. *Id.* at 543, 432 A.2d at 95.
176. *Id.*
177. *Id.*
178. *Id.* at 543-44, 432 A.2d at 95-96.
179. *Id.* at 546, 432 A.2d at 97.
180. *Id.* at 543, 432 A.2d at 95.
181. The prosecutor in *Hurd* stated that:

> The hypnotic evidence is crucial in this case because it's the only way we can tie the defendant in . . . . We have nothing else. We have no fingerprints, and his alibi is that he was still home in bed, which cannot be corroborated. We don't have the weapon. If the judge finds the hypnotic evidence inadmissible, there wouldn't be much sense in trying him. We wouldn't have a case.

Jenkins, *supra* note 137, at 28.
182. Spector & Foster, *supra* note 75, at 577-78 (hypnotist who is aware of the problems with hypnosis can act to minimize them); Spiegel, *supra* note 6, at 84.
183. FED. R. EVID. 401, 403.
184. *See, e.g.,* State v. Hurd, 86 N.J. 525, 432 A.2d 86 (1981), where the court held that hypnosis could satisfy a modified *Frye* test because, if carefully controlled, hypnosis "is generally accepted as a reliable means of obtaining accurate recall." *Id.* at

While some authorities have expressed "amazement" that the *Hurd* court could cite so many defects associated with the hypnotic testimony and still provide for its admission,[185] most have challenged its underlying reasoning and have suggested that it ignored crucial areas of concern.

Questions directed to *Hurd*'s underlying assumptions relate mostly to whether suggested responses can be detected with any degree of certainty. Although videotaping sessions provide a record of overt and obvious suggestions, it is possible that either the hypnotist or an investigating officer will accidentally place a thought in the witness's memory that will merge with actual recall under hypnosis.[186] For example, it cannot be determined with any degree of certainty whether an offered identification of the accused is the product of actual recall or stems from an unsuccessful pre-hypnotic lineup. Indeed, *Hurd*'s candid admission that experts are unable to spot suggested responses[187] has led at least one court to challenge the New Jersey court's conclusion that a judge is somehow better qualified to rule on whether a given session was suggestive.[188]

The second major criticism of *Hurd* is that its procedures completely ignore confabulation. Unlike suggestion, confabulation takes place in the recesses of the subject's mind, beyond the reaches of the videotape camera.[189] One court has gone so far as to charge that the *Hurd* standards aggravate the problem by giving post-hypnotic testi-

---

539, 432 A.2d at 93; Brown v. State, 426 So. 2d 76, 88-89 (Fla. Dist. Ct. App. 1983); State v. Beachum, 97 N.M. 682, 643 P.2d 246 (N.M. Ct. App. 1981), *cert. denied,* 98 N.M. 51, 644 P.2d 1040 (N.M. 1982); Comment, *supra* note 109, at 1220-32 (illustrates procedures for applying federal rules of evidence to hypnosis cases).

185. Commonwealth v. Nazarovitch, 496 Pa. 97, 108, 436 A.2d 170, 176 (1981) (the *Hurd* court's opinion is replete with problems associated with hypnotic memory retrieval).

186. "[S]afeguards cannot insure that hypnotically recalled testimony is reliable . . . . No matter how carefully the safeguards are followed, the risk of producing 'recall' containing a mix of fact and fantasy is unavoidable. . . ." State *ex rel.* Collins v. Superior Court, 132 Ariz. 180, 186, 206, 644 P.2d 1266, 1272, 1292 (1982); People v. Shirley, 31 Cal. 3d 18, 40, 641 P.2d 775, 787, 181 Cal. Rptr. 243, 255, *cert. denied,* 103 S. Ct. 133 (1982); Comment, *supra* note 96, at 629.

187. State v. Hurd, 86 N.J. 525, 539, 432 A.2d 86, 93 (1981) (difficult for an expert reviewing a videotape to identify all "possible cues").

188. People v. Shirley, 31 Cal. 3d 18, 39 n.24, 641 P.2d 775, 787 n.24, 181 Cal. Rptr. 243, 255 n.24 ("[i]f even an expert cannot confidently make that identification, it is vain to believe that a layman such as the trial judge can do so"), *cert. denied,* 103 S. Ct. 133 (1982); People v. Gonzales, 108 Mich. App. 145, 160, 310 N.W.2d 306, 313 (1981), *aff'd,* 415 Mich. 615, 329 N.W.2d 743 (1982).

189. *See* People v. Hughes, 59 N.Y.2d 523, 543-44, 453 N.E.2d 484, 494-95, 466 N.Y.S.2d 255, 265-66 (1983). *Hughes* rejected the *Hurd* safeguards because " 'the greatest variable in hypnosis . . . is the individual himself.' No procedures have yet been devised for eliminating the common risk that the subject . . . is more likely to confabulate or fantisize . . . . Nor is there any scientific method for detecting this type of 'recollection' . . . ." *Id.* (quoting Dilloff, *supra* note 78, at 5).

mony an "unearned indicia of reliability in the eyes of the jury."[190] Procedural approaches also do not address any of the constitutional problems raised by hypnotic memory stimulation.[191]

The third major criticism is that, not unlike *Harding*, *Hurd* requires a case-by-case resolution of the admissibility issue. Experts will have to be retained to review the videotapes and testify at future court appearances. Furthermore, the vague language used to define the reliability standard provides a fertile field for litigation as parties struggle to define the standard of reliability for ordinary eyewitnesses.[192]

In light of its inability to provide guarantees of accurate results, the *Hurd* approach, while indicative of a step in the right direction, is an expensive and time consuming process that creates more problems than it solves. Moreover, it places decisions concerning the reliability of hypnotic evidence on an individual who is ill equipped to spot any of the more subtle defects: the trial court judge. Other than reviewing the hypnotic record to see that all procedures were followed, it is inconceivable that the average jurist would be capable of determining the reliability or suggestive nature of a hypnotic session. Even experts do not claim to be capable of such a feat. Finally, the *Hurd* standards offer little assistance to law enforcement officers because the guidelines merely provide a post-hypnotic review of a hypnotic session. This has the effect of forcing the state to gamble with its main witness: if all goes well, they have a case; if something goes awry, the defendant goes free.

V. SUGGESTED COURSE OF ACTION

Although the elusive nature of the hypnotic process suggests the absence of an ideal solution to the problems it creates, the complete exclusion of eyewitness testimony merely because the individual has undergone hypnosis is a solution that too easily admits defeat. Because of its potential judicial contributions, courts should not so easily dismiss hypnotic testimony. Instead, a solution to the hypnosis controversy should consider the strengths and weaknesses of the approaches discussed in the previous sections to discover an alternative that will properly balance society's interest in prosecuting criminals with the equally compelling goal of preventing erroneous convictions. The result is an amalgam of the most attractive features of each of the theories.

From *Harding* comes the realization that the jury, not the experts, eventually must decide a defendant's fate; only if the jurors are exposed

190. *Gonzales,* 108 Mich. App. at 159-60, 310 N.W.2d at 313.

191. People v. Quintanar, 659 P.2d 710, 713 (Colo. Ct. App. 1982) (rejects *Hurd* because cross examination problems remain unresolved).

192. State *ex rel.* Collins v. Superior Court, 132 Ariz. 180, 207, 644 P.2d 1266, 1293 (1982); People v. Shirley, 31 Cal. 3d 18, 39, 641 P.2d 775, 787, 181 Cal. Rptr. 243, 255, *cert. denied*, 103 S. Ct. 133 (1982).

to every conceivable shred of non-prejudicial evidence will their ability to discover the truth be improved. From *Frye* comes the recognition that the experts, not the jurors, are better equipped to understand and properly resolve complicated scientific issues; their involvement in the hypnosis debate protects defendants from erroneous and often prejudicial information. Finally, from *Hurd* comes the notion that it is possible to design a hypnotic session that is capable of producing reasonably reliable results; a criminal should not be set free merely because he has succeeded in traumatizing his victim into an amnesic state.

The best methods of combining these considerations would be to create a panel of experts, similar to the administrative tribunals found in many agencies.[193] This panel would resemble the science courts which were the subject of debate during the last decade.[194] In addition to institutionalizing the "scientific jury" concept, it would avoid the advocacy bias frequently found in expert testimony supplied by interested parties.[195]

The board would be primarily responsible for approving each session by offering a detached and disinterested expert evaluation of the need to employ hypnosis. Presently, decisions over the use of hypnosis are made by law enforcement officers; such an important and potentially incriminating decision should not be left to interested parties. In determining whether hypnosis is appropriate, the board should consider the status of police investigations, the type of information the witness is capable of providing, the potential harm which would occur if the witness was later declared incompetent, and whether the state has exhausted all other investigative procedures. The exhaustion requirement is essential to guarantee that procedures that are as unreliable as hypnosis are only used as a last resort. Furthermore, it would provide opposing counsel, who are frequently absent from hypnotic sessions, with an inventory of investigative tactics that might have suggested the identity of a specific defendant. The panel's post-hypnotic review would be similar to the procedural review contemplated by *Hurd* with the element of corroboration as an additional, but not decisive, consideration.

---

193. *See generally* Freedman, *Expertise and the Administrative Process,* 28 ADMIN. L. REV. 363 (1976) (details historical role of admininstrative expertise).

194. Kantrowitz, *The Science Court Experiment,* 13 TRIAL 48 (1977); Martin, *The Proposed Science Court,* 75 MICH. L. REV. 1058 (1977); *see* Commonwealth v. Lykus, 367 Mass. 191, 212-13, 327 N.E.2d 671, 682-83 (1975) (Kaplan, J., dissenting) (judge called for the legislature to create a commission to handle questions involving the validity of new methods of scientific measurement and demonstration in court).

195. An advocacy bias may lead to inconsistent results at trial. *Compare* Collins v. State, 296 Md. 670, 464 A.2d 1028 (1983) (hypnosis is unable to satisfy the *Frye* test) *with* State v. Armstrong, 110 Wis. 2d 555, 567 n.14, 329 N.W.2d 386, 393 n.14 (1983) (court recognized a "strong argument" that hypnosis satisfies the *Frye* test).

VI. CONCLUSION

The final resolution of the hypnosis issue must come from an in-depth appraisal by the judiciary and the legislature of the problems associated with hypno-enhanced testimony and the shortcomings in the approaches taken to resolve them. Only from this searching analysis can a proper balance be struck between the competing interests of prosecuting criminals and preventing erroneous convictions. The idea of creating a panel to review the decision represents an effort to achieve such a balance, but it is not presented as the definitive solution. The only answer that can be deduced with any degree of certainty is that the approaches taken thus far have created confusion.

James Kevin Mac Alister