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Antonia F. Giuliana

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Cover Page Footnote

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BETWEEN A *ROCK* AND A *HURD* PLACE: PROTECTING THE CRIMINAL DEFENDANT'S RIGHT TO TESTIFY AFTER HER TESTIMONY HAS BEEN HYPNOTICALLY REFRESHED

*Antonia F. Giuliana**

INTRODUCTION

Imagine you are a criminal defendant accused of murder, and facing the possibility of a death sentence. You sit at the defendant's table anxiously awaiting the jury's verdict. You stare at the witness stand, now empty, and ponder your fate. You focus on the dark wood and the angular frame of the witness box. The voices around you begin to fade. But your eyes never move from the witness stand. Your attention is completely focused on the witness stand. The witness stand absorbs you. All of a sudden the witness stand is no longer empty. You see a man pointing at you. He is saying that you were in the pharmacy on the night of the robbery, that you took his wallet, that you pointed the gun at the pharmacist, that you fired the gun. . . .

The judge's gavel hits the hard wood of the bench three times. Startled, you look away from the witness stand and notice that the jury has returned. The verdict is read. You are found guilty and sentenced to death.[1]

On what evidence is your death sentence based? The State's "rock-solid"[2] case that seals your fate consists of "unbelievable 'memories' retrieved through the super-human 'zoom' vision of mesmerized witnesses"[3]—otherwise known as hypnotically refreshed testimony.[4]

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1. This scenario is based on *Sims v. State*, 444 So. 2d 922 (Fla. 1983), *aff'd per curium*, 602 So. 2d 1253 (1992), *cert. denied*, 506 U.S. 1065 (1993). Terry Melvin Sims was convicted and sentenced to death for allegedly participating in a robbery and shooting. *Sims*, 444 So. 2d at 923. A witness testified that he was a customer in the pharmacy on the night of the crime. *Id.* He testified that he saw Sims point a gun at the pharmacist. *Id.* When he tried to leave the pharmacy, the witness said he was stopped by Sims who took his wallet and then shot another man who was entering through the front door. *Id.* Prior to testifying, this witness had been hypnotized by a police officer with no formal educational training in hypnosis who used a "highly unorthodox, quirky, and suggestive form of hypnosis." *Sims*, 602 So. 2d at 1258 (Kogan, J., dissenting).

2. *Id.* at 1259.

3. *Id.*

4. The hypnotist in the *Sims* case used the "Reiser Screen Technique," a form of hypnosis developed by Martin Reiser, Ed.D., a psychologist employed by the Los Angeles Police Department. *Id.* at 1255; People v. Shirley, 723 P.2d 1354, 1377 (Cal. 1982) (en banc). The "Reiser Screen Technique" is premised upon the notion that:

> Human memory is like a videotape machine that (1) faithfully records, as if on film, every perception experienced by the witness, (2) permanently stores

Now imagine you are a criminal defendant charged with manslaughter for shooting your husband during a violent domestic dispute.[5] Your day in court has come.[6] You are scared but anticipate your chance to take the stand and tell your "story" to a jury of your peers. You approach the witness stand and raise your right hand as you are sworn in. You take your seat in the witness box. Your lawyer poses the first question. You open your mouth, and as your first word is formed—the first word of the most important story you will ever tell—the prosecutor objects.

Because you underwent hypnosis to aid your recollection of the events surrounding the crime with which you are charged, the judge issued a pre-trial order limiting your testimony to "matters remembered and stated to the [hypnotist] prior to being placed under hypnosis."[7] Unfortunately, the hypnotist did not take copious notes during the pre-hypnotic interview.[8] As a consequence, when you finally confront your accusers and begin to tell them your version of events relating to the alleged crime, the prosecutor repeatedly interrupts your testimony objecting to every detail not expressly stated in the hypnotist's notes.[9] The result? You are virtually prevented from describing any events surrounding the shooting even though the testi-

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such recorded perceptions in the brain at a subconscious level, and (3) accurately "replays" them in their original form when the witness is placed under hypnosis and asked to remember them.

Id. at 1377. A hypnotist employing this technique may assure the hypnotized subject that because her memory functions like a video recorder, she has the ability to move the action in her mind's eye forward and backward or freeze the action and "zoom in" on a scene she is attempting to remember. *Sims*, 602 So. 2d at 1255. At trial, an expert witness testified that the theory of memory espoused by the Reiser Screen Technique is "sheer science fiction." *Id.* at 1258. The expert explained that human eyes are not "electronic gadgets that can 'zoom' in this manner. And this type of 'zooming' certainly cannot be done after the fact inside the mind." *Id.* In fact, as Justice Kogan points out in his dissent, such a proposition is tantamount to assuring the subject that she, like the cartoon hero "Superman," possesses "X-ray vision" and can see through solid walls. *Id.*

Unfortunately, the *Sims* case is not an isolated instance of this suspect form of hypnosis being employed in a criminal prosecution. *See, e.g.*, Barnes v. Henderson, 725 F. Supp. 142, 144 (E.D.N.Y. 1989) (stating that the police officer-hypnotist told the witness that he was going to "plant a very powerful suggestion in his mind"); State *ex rel.* Neely v. Sherrill, 799 P.2d 849, 850 (Ariz. 1990) (stating that the investigator in the case, who was neither a psychologist nor a psychiatrist, hypnotized the victim of an armed robbery by using the "T.V. technique" in which the victim was told to "go back" to the crime scene and recall the events as if viewing them on a television set); Commonwealth v. Kater, 567 N.E.2d 885, 890 (Mass. 1991) (noting that the hypnotized witnesses were told they could visualize the crime and "zoom in" on particular aspects of the scene).

5. This example is based on Rock v. Arkansas, 483 U.S. 44 (1987).

6. *Id.* at 51. In *Rock*, the Court noted that a criminal defendant's right to her day in court is ingrained in our system of jurisprudence. *Id.*

7. *Id.* at 48 n.3.

8. *Id.* at 48 & n.4.

9. *Id.* at 48 n.4.

mony of other witnesses at trial corroborates many of those events.[10] Without having the chance to present *your own* version of events[11] in *your own* words,[12] you are convicted of manslaughter[13] and sentenced to ten years imprisonment.[14]

In 1987, the United States Supreme Court addressed the issue of the admissibility of hypnotically refreshed testimony in criminal trials.[15] In *Rock v. Arkansas*,[16] a sharply divided Court held that States cannot adopt per se rules that exclude a criminal defendant's hypnotically refreshed testimony because such rules infringe impermissibly on the accused's constitutional right to testify on her own behalf.[17] With respect to witnesses other than the accused, the Court stated, "This case does not involve the admissibility of testimony of previously hypnotized witnesses other than criminal defendants, and *we express no opinion on that issue*."[18] Therefore, as the Court implies and as the above examples illustrate, there is something clearly unique about the criminal defendant as a witness.[19] This Note contends that the "story" the Constitution entitles the accused to tell distinguishes her from other witnesses she presents in her defense who testify, not to tell a story, but to produce reliable information.

Accordingly, this Note argues that the Court's holding in *Rock* should be limited exclusively to criminal defendants, allowing state and federal governments, free of constitutional constraints, to adopt per se rules of exclusion applicable to the hypnotically refreshed testimony of all other witnesses. Moreover, this Note urges that, due to

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10. *Id.* at 57.

11. *Id.* at 52.

12. *Id.*

13. *Id.* at 48. Fortunately, the landmark Supreme Court decision of *Rock* vacates and remands your case so that you will have the opportunity to testify on your own behalf. *Id.* at 62.

14. Charles D. Gill, Jr., Note, *The Admissibility of Hypnotically Refreshed Testimony:* Rock v. Arkansas, 30 B.C. L. Rev. 573, 575 (1989).

15. *Rock*, 483 U.S. at 45.

16. 483 U.S. 44 (1987).

17. *Id.* at 62.

18. *Id.* at 58 n.15 (emphasis added).

19. Many courts and commentators, however, do not distinguish the criminal defendant from other defense witnesses. *See, e.g.*, People v. Romero, 745 P.2d 1003, 1021 (Colo. 1987) (Lohr, J., concurring) (remarking that the court sees no reason why *Rock* should not apply to all defense witnesses), *cert. denied*, 485 U.S. 990 (1988); Gary M. Shaw, *The Admissibility of Hypnotically Enhanced Testimony in Criminal Trials*, 75 Marq. L. Rev. 1, 63-64 (1991) (arguing that "*there is nothing unique about the defendant* as a witness that makes [her hypnotically refreshed] recall more reliable for the defendant than any other defense witness" (emphasis added)). In response, this Note agrees with Professor Shaw's statement that there is nothing unique about the accused that would tend to make her hypnotically refreshed testimony more reliable than other defense witnesses. What is unique, however, about the accused that distinguishes her from other defense witnesses is her autonomy interest in presenting testimony "in her own words." *But see* Gill, *supra* note 14, at 595 (noting a distinction between the accused and other defense witnesses).

the present scientific consensus that hypnotically refreshed testimony is "inherently unreliable,"[20] as a matter of policy, state and federal governments *should* exercise their discretion and adopt such rules. Finally, this Note proposes a doctrinal test that courts should apply when deciding whether to admit the hypnotically refreshed testimony of a criminal defendant—a test that appropriately considers both the policy interests and the unique constitutional considerations at stake when determining the admissibility of such testimony.

Part I of this Note explores the scientific literature on the effect of hypnosis on memory. It reveals a present consensus within the scientific community that the use of hypnosis to refresh a witness' recollection of events is inadvisable because such recollection is inherently unreliable. Part II reviews the history of hypnotically refreshed testimony in criminal trials and notes the current trend in the case law which tends towards refusing to admit the hypnotically refreshed testimony of witnesses other than the criminal defendant. Part III argues that hypnotically refreshed testimony should be per se inadmissible with respect to witnesses other than the accused but admissible on a case-by-case basis with respect to the criminal defendant. To support this conclusion, part III examines the distinction between witnesses and the accused in criminal cases. Witnesses other than the accused testify to present reliable information. In distinction, this Note reasons that a criminal defendant testifies in her defense not necessarily to provide reliable information, but more importantly, to tell her

20. The Council on Scientific Affairs has found that hypnotically elicited memories can be contaminated by confabulations and pseudomemories and appear to be less accurate and reliable than non-hypnotic recall. *See* Council on Scientific Affairs, Council Report, *Scientific Status of Refreshing Recollection by the Use of Hypnosis*, 253 J. Am. Med. Ass'n 1918 (1985) [hereinafter Council Report]. Moreover, Dr. Martin T. Orne, a leading researcher in the field of forensic hypnosis, who has testified in numerous criminal trials as an expert, has concluded that information obtained under hypnosis is inherently unreliable and therefore, hypnotically refreshed testimony creates the risk of a "serious miscarriage of justice" if used in criminal prosecutions. Wayne G. Whitehouse et al., *Hypnotic Hypermnesia: Enhanced Memory Accessibility or Report Bias?*, 97 J. Abnormal Psychol. 289, 294 (1988). Orne has advocated this view as late as 1996. *See* Campbell Perry et al., *Rethinking Per Se Exclusions of Hypnotically Elicited Recall as Legal Testimony*, 44 Int'l J. Clinical & Experimental Hypnosis 66, 78 (1996) (arguing that "a per se exclusion of hypnotically elicited testimony still appears to be the most prudent policy"). For a listing of Orne's credentials, see People v. Shirley, 723 P.2d 1354, 1381 n.45 (Cal. 1982) (en banc) (acknowledging that Martin T. Orne, M.D., Ph.D., is a well known and respected member of the medical profession who has testified often as a hypnosis expert and who has been recognized repeatedly in published opinions). Dr. Orne has served as a Professor of Psychiatry at the University of Pennsylvania and as the President of the International Society of Hypnosis. *Id.* The cases in which Dr. Orne has testified include: United States v. Gatto, 924 F.2d 491, 494 (3d Cir. 1991); People v. Wilson, 626 N.E.2d 1282, 1293-94, (Ill. App. Ct. 1993), *reh'g denied*, 631 N.E.2d 717 (Ill. 1994); State v. Mack, 292 N.W.2d 764, 766 (Minn. 1980); State v. Dreher, 598 A.2d 216, 221 (N.J. Super. Ct. App. Div. 1991), *cert. denied*, 606 A.2d 374 (N.J. 1992); and State v. Hurd, 414 A.2d 291, 296 (N.J. Super. Ct. Law Div. 1980). Dr. Orne's affiliation with the University of Pennsylvania has continued as late as 1996. Perry, *supra*, at 66.

"story," which is an exercise of her autonomy interest. A criminal defendant's autonomy interest does not render reliability irrelevant, however, when deciding whether evidentiary rules concerned with accurate fact finding can limit the right to testify; rather, reliability is only part of an equation in which courts must weigh the probative value of the proof against exclusion's cost to the defendant's right to participate in her trial in perhaps the most fundamental way. Thus, exclusive concern with the reliability of testimony from witnesses other than the criminal defendant permits per se exclusion of *their* hypnotically refreshed testimony, while the autonomy interest uniquely implicated by the criminal defendant's testimony requires an individualized finding that *her* particular hypnotically refreshed testimony is sufficiently untrustworthy to overcome the right to testify.

I. HYPNOSIS AND ITS EFFECT ON MEMORY

A discussion of hypnotically refreshed testimony would be incomplete without first exploring essential principles of memory and hypnosis as defined by the scientific community. As an initial matter, this part examines general features of memory and then proceeds to explore hypnosis. After examining the various uses of hypnosis, this part discusses the problems inherent in the hypnotic process, and notes the present scientific consensus that memories elicited by hypnosis are inherently unreliable. Accordingly, this part concludes that the use of hypnosis as a means of refreshing the recollections of witnesses in legal proceedings is inadvisable.

A. *Memory*

In *Remembrance of Things Past*,[21] Marcel Proust describes a moment in his life in which his recollection is triggered.[22] Proust recalls returning home on a cold winter day when his mother offered him a cup of tea.[23] Although it was not his usual habit to do so, he accepted the tea, and his mother then sent for "one of those squat, plump, little cakes called 'petites madeleines' "[24] which Proust mechanically soaked in his tea.[25] Upon tasting the warm mixture of madeleine and tea; Proust was filled with a sensation he could not identify, when suddenly the memory revealed itself, and Proust was transported back into a time in his childhood when he would visit his aunt who would serve him petites madeleines and lime-blossom tea; and all at once

21. Marcel Proust, 1 Remembrance of Things Past (1954).
22. *Id.* at 48-51.
23. *Id.* at 48.
24. *Id.*
25. *Id.*

"the whole of Combray and its surroundings . . . . sprang into being," from his cup of tea.[26]

Dormant memories lie within each individual, waiting for the appropriate cue to bring the recollection to the surface of awareness. This section discusses general principles of memory and explains how cues allow memories to surface and how, in some instances, cues may function to distort memory.

1. How Memory Works

"[T]rying to remember the past is sometimes like trying to capture a darting phantom."[27]

Memory is composed of three phases: encoding, storage, and retrieval.[28] First, an experience is "encoded" or transformed into a memory.[29] An event is encoded if special attention is paid to the event when it occurs.[30] Second, the memory is "stored."[31] "Engrams," defined as "the transient or enduring changes in our brains that result from encoding an experience," are the storage mechanisms for memory.[32] Finally, the memory is retrieved by cues that allow us to remember.[33] During this process, "a retrieval cue combines with an engram in order to yield a subjective experience that we call a memory."[34]

Scientists agree that memories are not literal recordings of reality or mere replicas of events.[35] In 1932, Sir Frederic C. Bartlett, in a pioneer study of memory, found that:

> [M]emory is productive rather than reproductive . . . . Remembering is not the re-excitation of innumerable fixed, lifeless and frag-

26. *Id.* at 48, 50-51; *see also* Diane Ackerman, A Natural History of Love 117 (1994) (describing Proust as a "voluptuous animist" who "believed that memories hid like demons or sprites inside objects").

27. Daniel L. Schacter, Searching for Memory 3 (1996).

28. David Spiegel, *Hypnosis and Suggestion*, *in* Memory Distortion 129, 131 (Daniel L. Schacter ed., 1995). Richard Semon is credited with developing this framework for analyzing memory. *See* Schacter, *supra* note 27, at 57. In 1904, Semon published a monograph entitled *Die Mneme* which advanced these stages: "*engraphy* is Semon's term for encoding information into memory; *engram* refers to the enduring change in the nervous system (the 'memory trace') that conserves the effects of experience across time; and *ecphory* is the process of activating or retrieving a memory." *Id.*

29. *Id.* at 42.

30. *Id.*

31. Spiegel, *supra* note 28, at 131.

32. Schacter, *supra* note 27, at 58.

33. *Id.* at 68. Schacter distinguishes between "associative" retrieval and "effortful" retrieval. *Id.* Associative retrieval is "an automatic reminding process" that "occurs when a cue automatically triggers an experience of remembering." *Id.* Effortful or "strategic" retrieval "involves a slow, deliberate search of memory." *Id.*

34. *Id.* at 70.

35. *Id.* at 5. Schacter acknowledges the present scientific consensus that the human mind does not function like a "video recorder." *Id.* at 40.

> mentary traces. It is an imaginative reconstruction, or construction, built out of the relation of our attitude towards a whole active mass of organized past reactions or experience.[36]

The California Supreme Court notes that Bartlett's view that memory is reconstructive is the generally accepted view of the profession.[37] The view that memory is reconstructive rather than reproductive has significant implications within the legal context. If memory is reconstructive, it follows that the potential for memory distortion exists.[38] If the memory of a witness is distorted, her testimony is unreliable and may lead to the threat of a serious miscarriage of justice.[39] The New Jersey Supreme Court has noted that while the "fallibility of human memory poses a fundamental challenge to our system of justice . . . it is an inescapable fact of life that must be understood and accommodated."[40]

2. Memory Distortion

"*[T]he murky twilight zone where memory and reality grope for each other, usually coupling nicely but sometimes yielding strange concoctions . . . .*"[41]

In the modern work on memory distortion, the basic notion is that the human mind stores memories, not in isolated compartments, but in a "world" of other memories that can—and usually do—interfere with each other.[42] In addition, there is evidence that the human mind is adept in grasping the general character of past events, but inept in recounting specific instances.[43] Furthermore, retrieval cues affect how

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36. People v. Shirley, 723 P.2d 1354, 1378 (Cal. 1982) (en banc) (quoting Sir Frederic C. Bartlett, Remembering (1932, reprinted 1964)) .

37. *Id.* Bartlett's view is followed today by Schacter who believes that memories are constructed out of fragments of experience and it is important to understand how the fragments are constructed and reconstructed. *See* Schacter, *supra* note 27, at 42; *see also* State v. Collins, 464 A.2d 1028, 1030 (Md. 1983) (quoting Dr. Daniel Stern, who testified as an expert and explained the reconstructive theory of memory and who, at the time of the trial, was a clinical psychologist, Director of Psychological Service at North Charles General Hospital and assistant professor of psychology at Loyola College).

38. Schacter, *supra* note 27, at 101.

39. Whitehouse, *supra* note 20, at 294.

40. State v. Hurd, 432 A.2d 86, 95 (N.J. 1981).

41. Schacter, *supra* note 27, at 101 (describing memory distortion).

42. *Id.* at 98-104.

43. *Id.* at 9. Consider the following exercise that is intended to demonstrate how retrieval cues may distort memory. Allow yourself twenty seconds to memorize the following sequence of words: candy, sour, sugar, bitter, good, taste, tooth, nice, honey, soda, chocolate, heart, cake, eat, pie. *Id.* at 103. Choose the word(s) that appeared on the list from the following sequence of words: taste, point, sweet. *Id.*

Most people will say that they "vividly recall" seeing "sweet" in the first sequence even though "sweet" was not in fact in the first sequence of words. *Id.* Between 80-90% of subjects fall for the "sweet" trap. *Id.* This example demonstrates that people remember things generally, not specifically. Individuals encode the first sequence of words as "sweet" things and that is the reason why they remember seeing "sweet"

an experience is "remembered."[44] This has significant implications in the context of criminal prosecutions because this notion suggests that memory may be manipulated by employing retrieval cues geared at obtaining a predetermined result.

In a recent study conducted by Professor Daniel L. Schacter, college students were shown photographs of people and then heard them speak in either a pleasant or an irritating tone of voice.[45] Later, the subjects were shown the photos again and were asked to recall the tone of voice the person in the picture had used.[46] The results of the experiment are fascinating:

> When students saw a face with a bit of a smile, they tended to say that the person had previously spoken in a pleasant tone of voice; when they saw a face with a slight scowl, they tended to say that the person had spoken in an unpleasant tone. In fact, there was no relationship between facial expression and tone of voice. Thus, the "memories" that people reported contained little information about the event they were trying to recall (the speaker's tone of voice) but were greatly influenced by the properties of the retrieval cue that [was given to] them (the positive or negative facial expression).[47]

The results of this study have important implications within the context of a criminal prosecution. For example, in the investigative phase of a crime, the way police pose questions to witnesses affects how they will respond.

The "Wee Care" nursery school sex abuse scandal provides a disturbing example of this phenomenon.[48] In this case, Margaret Kelly Michaels, a nursery school teacher, was indicted on 163 counts of various charges alleging bizarre acts of sexual abuse involving twenty Wee Care boys and girls.[49] She was convicted and sentenced to a forty-seven year jail term.[50] The New Jersey Appellate Court reversed the conviction and remanded the case for retrial due to the trial court's error of not holding a pretrial hearing to decide whether the testimony of the children who were allegedly sexually abused should have been excluded because the improper questioning by State investigators had

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appear in the first sequence of words even though it did not. For a thorough discussion of the "sweet" phenomenon, see Henry L. Roediger III & Kathleen B. McDermott, *Creating False Memories: Remembering Words Not Presented in Lists*, 21 J. Experimental Psychol.: Learning, Memory, & Cognition 803, 812 (1995) (finding "dramatic evidence" of false memories when subjects were exposed to lists of words like the "sweet" list above and concluding that the illusion of remembering events that never happened can occur quite readily).

44. *See infra* notes 45-57 and accompanying text.

45. Schacter, *supra* note 27, at 70.

46. *Id.*

47. *Id.* at 70-71.

48. State v. Michaels, 642 A.2d 1372 (N.J. 1994).

49. *Id.* at 1375.

50. *Id.* at 1374-75; *see also Ex-Day Care Teacher Suing over Child Sex Abuse Case*, The Record, June 16, 1996, at B5.

compromised the reliability of the evidence.[51] The following excerpt from the children's pre-trial interviews demonstrates the suggestive nature of the line of questioning employed by the investigators:

> [The following excerpt is from an interview with R.F., a three year old girl.]
>
> Detective: Do you think Kelly can hurt you?
> R.F.: No.
> Detective: Did Kelly say she can hurt you? Did Kelly ever tell you she can turn into a monster?
> R.F.: Yes.
> Detective: What did she tell you?
> R.F.: She was gonna turn into a monster.[52]

After reviewing the transcripts of the children's interviews, the appellate court reversed Michaels's conviction finding that it had been based on testimony that was the product of "coercive and unduly suggestive methods" employed by the investigators.[53] In affirming the Appellate Division's reversal of the conviction, the Supreme Court of New Jersey noted that there were numerous instances in the record in which the investigators asked the children leading questions or provided details of abuse that the children themselves had not mentioned.[54]

The investigators in the *Michaels* case manipulated the retrieval process of memory by utilizing "cues" that caused the children to "remember" instances of abuse that were never corroborated by physical evidence. Intriguingly, during the seven-month period that Michaels worked at Wee Care, the nursery school never received a complaint about her from the children, parents, or staff.[55] Michaels also passed a lie detector test.[56] Not until ten years later, however, was the legal ordeal resolved for Michaels—an ordeal that could have been avoided had the police used non-coercive questioning techniques instead of manipulating the memories of thirty-four pre-school children with overt suggestions of abuse.[57]

Likewise, hypnosis is a "coercive method" that law enforcement officials may use to manipulate the memories of witnesses. The next section discusses hypnosis and explains how it may be abused within the context of a criminal prosecution.

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51. *Michaels*, 642 A.2d at 1374.
52. *Id.* at 1385-86.
53. *Id.* at 1380.
54. *Id.*
55. *Id.* at 1374.
56. *Id.* at 1375.
57. *Id.* at 1380. Recently, Michaels filed suit against the prosecutors and other authorities involved in her case for malicious prosecution. *See Ex-Day Care Teacher*, *supra* note 50, at B5.

B. *Hypnosis*

The term "hypnotism" was coined in 1842 by Dr. James Braid,[58] and is derived from the Greek root "hypno" which means "sleep."[59] Hypnos, the Greco-Roman god of sleep, was the son of Nyx (Night) and the brother of Thanatos (Death).[60] Through Hypnos's chamber in the underworld ran the river of forgetfulness and oblivion.[61] According to myth, Hera enlisted the aid of Hypnos to lull Zeus to sleep so that she could assist the Greeks in their war against Troy.[62] Even by its designation then, the connotation attached to hypnosis suggests a somewhat sinister nature. In order to discern hypnosis' "true self," this section offers a historical overview of hypnosis, and notes its controversial emergence in both the scientific and legal fields. After discussing the various uses of hypnosis, this part explores the problems inherent in the hypnotic process and examines the present scientific consensus that hypnotically refreshed recollections are inherently unreliable.

1. Historical Overview

"Several commentators have suggested that the Serpent used hypnotism on Eve in the Garden."[63]

Hypnosis has been around for centuries.[64] One source suggests that hypnosis is as ancient a practice as that of sorcery, magic, and medicine.[65] The use of hypnosis as a scientific tool began in the late 1700s when Franz Mesmer, a Viennese physician, began to use the technique to treat patients.[66] Hypnosis first appeared in the American

58. 5 Oxford English Dictionary 504-05 (1961).

59. *Id.* at 504.

60. 6 New Encyclopaedia Britannica 203 (15th ed. 1994) [hereinafter *Encyclopaedia Britannica*].

61. *Id.*

62. *Id.*

63. Richard H. Underwood, *Truth Verifiers: From the Hot Iron to the Lie Detector*, 84 Ky. L.J. 597, 639 (1996).

64. *See* People v. Shirley, 723 P.2d 1354, 1361 (Cal. 1982) (en banc). The California Supreme Court notes in *Shirley* that "[w]hile passing through periods of vogue and of disrepute, hypnosis has been practiced in one form or another for centuries." *Id.*

65. *Encyclopaedia Britannica*, *supra* note 60. This section was edited by Dr. Martin T. Orne, an expert in the field of hypnosis. *See Shirley*, 723 P.2d at 1381 n.45.

66. *Encyclopaedia Britannica*, *supra* note 60, at 203. Mesmer was soon discredited, however, because his theory rested on the belief that hypnosis was an occult force. *Id.* Mesmer's theory of "animal magnetism" was premised on the notion that a "force flowed through the hypnotist into the subject." *Id.* Hypnotism continued to interest medical practitioners, however, and in the late nineteenth century, gained Sigmund Freud's attention. *Id.* Freud, an Austrian physician, later deemed the father of psychoanalysis, used hypnosis to treat patients with neurotic disorders. *Id.* Due to various factors, including the difficulty he encountered in hypnotizing certain patients, Freud later discarded hypnosis. *Id.* The use of hypnosis as a psychotherapeutic tool, however, continued in the early twentieth century and included the treatment of soldiers with combat neuroses during World Wars I and II. *Id.* Later in the twentieth

court system in 1897[67] but was quickly discredited until recently when hypnosis began to be utilized as a method of refreshing a witness recollection in legal proceedings.[68]

2. What Is Hypnosis?

"Virtually everyone has heard of hypnotism; no one knows exactly what it is—including hypnotism researchers."[69]

Presently, there is no single, generally accepted theory or definition of hypnosis.[70] One definition explains hypnosis as "a state of aroused, attentive, focused concentration with a relative constriction of peripheral awareness . . . and heightened responsiveness to social cues."[71] *Black's Law Dictionary* defines hypnosis as "[a] state of heightened concentration with diminished awareness of peripheral events. . . [that] is generally characterized by extreme responsiveness to suggestions from the hypnotist."[72] Modern memory expert Professor Daniel L. Schacter describes hypnosis as "a social process in which the suggestions and cues provided by the hypnotist guide the hypnotized individual through an imaginative, role-playing activity."[73] At least one court has defined hypnosis as a "highly suggestible state into which a willing subject is induced."[74] Common to these varying definitions of hypnosis is the feature of suggestibility. This is significant because, as discussed *infra*, heightened suggestibility of the hypnotized subject is the primary problem with using hypnosis in criminal prosecutions.

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century, hypnosis began to be used for a variety of medical purposes which this Note discusses in part I.B.3.

67. *See infra* notes 150-57 and accompanying text.

68. *See* Andrew C. Callari, Note, Rock v. Arkansas: *Hypnotically "Refreshed" Testimony or Hypnotically "Manufactured" Testimony?*, 74 Cornell L. Rev. 136, 137-38 (1988); William G. Traynor, Comment, *The Admissibility of Hypnotically Influenced Testimony*, 55 Tenn. L. Rev. 785, 785 n.2 (1988); *Shirley*, 723 P.2d at 1361. One source indicates that the first officially approved course in hypno-investigation was implemented by the Ridgefield, New Jersey police department in 1962. Whitney S. Hibbard & Raymond W. Worring, Forensic Hypnosis: The Practical Application of Hypnosis in Criminal Investigations 23 (rev'd 1st ed. 1996).

69. Shaw, *supra* note 19, at 1.

70. Council Report, *supra* note 20, at 1919. For a discussion of the various "scientific medico-legal" theories of hypnotic effects, see Mary Christine Bonnema, *"Trance on Trial": An Exegesis of Hypnotism and Criminal Responsibility*, 39 Wayne L. Rev. 1299, 1301-09 (1993).

71. Spiegel, *supra* note 28, at 129.

72. Black's Law Dictionary 742 (6th ed. 1990) (citation omitted).

73. Schacter, *supra* note 27, at 107.

74. State v. Mack, 292 N.W.2d 764, 765 (Minn. 1980) (citing J. Coleman, Abnormal Psychology and Modern Life 579 (2d ed. 1960)).

How does one become hypnotized?[75] There are three main features of hypnosis: absorption, dissociation, and suggestibility.[76] Absorption involves the narrow focusing of attention.[77] Dissociation entails the restriction of attention away from the periphery of awareness.[78] Suggestibility refers to the fact that the hypnotized subject accepts instructions from the hypnotist relatively uncritically.[79]

The three phases of memory[80] are each affected by the three features of hypnosis:[81] encoding is affected by absorption,[82] storage is affected by dissociation, and retrieval is affected by suggestibility.[83] Considering that retrieval cues help to shape the construction of a

75. While testifying in a criminal trial, a hypnotist offered the following comment, perhaps in an effort to demystify the hypnotic process: "Hypnosis . . . takes no great feat. Essentially anyone can do it, despite what appears to be a very mysterious kind of process. All that is involved in inducing a person into hypnosis is a very boring voice and monotonous repetition of words." Harding v. State, 246 A.2d 302, 306 (Md. Ct. Spec. App. 1968).

76. Spiegel, *supra* note 28, at 130-31.

77. *See id.* at 130.

78. *See id.*

79. *See id.* at 131.

80. *See supra* note 28 and accompanying text.

81. *See supra* note 76 and accompanying text.

82. The phenomenon of "weapon focus" provides an example of how the absorption process of hypnosis affects encoding. Weapon focus occurs when a victim becomes fixated on—or "absorbed" by—the weapon used by the perpetrator in commission of the crime. Schacter, *supra* note 27, at 210. Because the weapon captures the subject's attention, other aspects of the scene are not well encoded into memory. *Id.* As a result, the victim will have an accurate memory of the weapon but her memory of other aspects of the event will be less clear. *Id.* For example, she may be unable to remember what the perpetrator's face looked like. *Id.* In such a case, the police may use hypnosis to refresh the victim's recollection of the perpetrator's physical characteristics. This is problematic from a scientific standpoint because the current belief is that individuals remember only what they have encoded. *See id.* at 52. Accordingly, it is illogical to believe that hypnosis may restore a memory that does not exist because it was not encoded at the time of the experience.

83. Schacter comments that an individual's memory of an experience is to a large extent constructed or invented at the time of attempted recall. Schacter, *supra* note 27, at 21-22. Schacter adds that the recollection of an event depends on the individual's purposes and goals at the time she attempts to remember it. *Id.* at 22. A study conducted by Loftus and Palmer illustrates this principle. *See* Elizabeth F. Loftus & John C. Palmer, *Reconstruction of Automobile Destruction: An Example of the Interaction Between Language and Memory*, 13 J. Verbal Learning & Verbal Behav. 585 (1974). In this study, the researchers found that the types of questions used to stimulate a subject's memory influences how she remembers what happened. *Id.* at 586. The subjects were shown a videotaped car crash. *Id.* They were then asked how fast the cars were traveling when they "smashed into each other" or when they "hit each other." *Id.* Those subjects that were asked how fast the cars were traveling when they "smashed into each other" "remembered" the cars as going faster than those subjects that were asked how fast the cars were going when they "hit each other." *Id.* at 588. The researchers suggested that the word "smashed" connoted greater impact than the word "hit." *Id.* at 586. The results of this study demonstrate that retrieval cues—in this case, the verbal suggestions provided by the examiners—may be manipulated to affect how a subject "remembers" an event.

memory,[84] the retrieval process of a hypnotized subject is especially vulnerable to memory distortion due to the heightened suggestibility that accompanies hypnosis. In the worst case scenario, the subject may be transformed into an "honest liar"—an individual who believes strongly in implanted or imagined memories.[85] Consequently, hypnotically refreshed recollection is especially vulnerable to memory distortion, and its use within criminal prosecutions as a means of presenting reliable testimony into evidence in order to ascertain the truth of the matter is questionable at best.[86]

3. The Uses of Hypnosis

"Can hypnosis recover repressed memories of sexual abuse, satanic ritual abuse, past life abuse, and abuse at the hands of aliens?"[87]

Hypnosis is currently used for certain therapeutic purposes.[88] For example, hypnosis has been used to relieve the pain associated with cancer,[89] severe burns,[90] and irritable bowel syndrome.[91] In addition, hypnosis is used in psychotherapy to treat the aftereffects of trauma[92] and to retrieve "repressed" memories of past abuse.[93] On the lighter

84. Schacter, *supra* note 27, at 105, 321 n.14.

85. Spiegel, *supra* note 28, at 139. The "honest liar" effect of hypnosis occurs when the hypnotized individual experiences herself as retrieving information from her memory when she is actually creating the information in an imaginative process. *Id.* at 140; People v. Sorscher, 391 N.W.2d 365, 367 (Mich. Ct. App. 1986) (describing the "honest liar" effect as occuring when a "hypnotized person . . . become[s] so attached to a certain premise that the person . . . confabulate[s] facts which never occurred to support the premise and present[s] these 'facts' with the conviction of an honest [person]"). This effect is compounded by the fact that the individual who has been hypnotized may have a falsely elevated estimate of the accuracy of her recollection. Spiegel, *supra* note 28, at 140. The overall effect of the "honest liar" phenomenon is the greater likelihood of confident errors. *Id.*

86. *See infra* notes 139-48 and accompanying text.

87. Jill Neimark, *The Harvard Professor & the UFOs*, Psychol. Today, Mar.-Apr. 1994, at 48.

88. "Hypnosis has been officially endorsed as a therapeutic method by medical, psychiatric, dental, and psychological associations throughout the world." *Encyclopaedia Britannica*, *supra* note 60, at 203.

89. NIH Technology Assessment Panel on Integration of Behavioral and Relaxation Approaches into the Treatment of Chronic Pain and Insomnia, *Integration of Behavioral and Relaxation Approaches into the Treatment of Chronic Pain and Insomnia*, 276 J. Am. Med. Ass'n 313 (1996).

90. D.R. Patterson et al., *Hypnosis in the Treatment of Patients with Severe Burns*, 38 Am. J. Clinical Hypnosis 200 (1996).

91. J.L. Roy, *Hypnotherapy and Refractory Irritable Bowel Syndrome*, 31 Revue Francaise de Gastro-Enterologie 863 (1995).

92. See Spiegel, *supra* note 28, at 129.

93. For a discussion of "repressed memory syndrome," see Douglas R. Richmond, *Bad Science: Repressed and Recovered Memories of Childhood Sexual Abuse*, 44 U. Kan. L. Rev. 517 (1996); Matthew J. Eisenberg, Note, *Recovered Memories of Childhood Sexual Abuse: The Admissibility Question*, 68 Temp. L. Rev. 249 (1995).

side, hypnosis has been acknowledged as a method to cure hiccoughs.[94]

The therapeutic use of hypnosis does not require historical accuracy.[95] For example, in one case, a hypno-therapist "regressed" a patient back to the period before her birth; under this form of hypnosis, the patient recalled in vivid detail thoughts she had while she was a fetus in the womb.[96] Such use of hypnosis may be defended because it is therapeutic. The acceptance of hypnosis as a valid therapeutic tool, however, does not legitimize the use of hypnosis to refresh a witness' recollection within the legal setting. Because historical accuracy of witness testimony is crucial in criminal prosecutions, testimony tainted by a method that compromises historical accuracy—hypnosis, for example—should not be admitted under the guise of reliability.[97]

Despite the threat that hypnosis may distort memory and jurors may, nevertheless, rely on hypnosis as a means of obtaining reliable, historically accurate testimony,[98] hypnosis continues to be used for various purposes in the legal setting. Hypnosis is often used in the investigative phase of criminal proceedings.[99] For example, law enforcement officials may hypnotize a witness to recall facts that may lead to other hard evidence,[100] such as the numbers on a license plate.[101] Such use of hypnosis is not problematic in itself because it

94. Zani v. State, 758 S.W.2d 233, 249 (Tex. Crim. App. 1988) (en banc) (Teague, J., dissenting) (citation omitted).

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

96. State v. Martin, 684 P.2d 651, 652 (Wash. 1984) (en banc) (noting that hypnosis was used in this statutory rape case because the alleged victim could not remember the incident giving rise to the charge).

97. The possibility that a jury may be unfairly persuaded by hypnotically refreshed testimony is bolstered by a recent study that supports the proposition that many people believe that hypnosis increases the accuracy of eyewitness memory. Graham F. Wagstaff et al., *The Effect of Hypnotically Elicited Testimony on Jurors' Judgments of Guilt and Innocence*, 132 J. Soc. Psychol. 591, 591 (1992). *But see* Edith Greene et al., *Impact of Hypnotic Testimony on the Jury*, 13 Law & Human Behav. 61, 74 (1989) (finding that jurors view hypnotically refreshed testimony with a certain amount of skepticism).

98. *Wagstaff*, *supra* note 97, at 591.

99. *See* Hibbard, *supra* note 68, at 193-219.

100. *Id.*

101. For example, law enforcement officials used hypnosis in the Chowchilla bus kidnapping case. *See* Paul C. Giannelli, *The Admissibility of Hypnotic Evidence in U.S. Courts*, 43 Int'l J. Clinical & Experimental Hypnosis 212, 213 (1995). In this case, a busload of school children and their driver were kidnapped and driven 100 miles to a quarry where they were imprisoned in a van that had been buried underground. *Id.* Fortunately, the group was able to escape 16 hours later. *Id.* Unfortunately, none of the victims could provide meaningful leads to identify their abductors. *Id.* The investigators then decided to hypnotize the bus driver hoping that he would be able to recall the numbers on the license plate of the vehicle used by the kidnappers. *Id.* The police were then able to use the partial license plate number to locate the abductors. *Id.* at 214. Although this case may appear to indicate a triumph for proponents of the investigative use of hypnosis, two important details may detract from its force. First, during the abduction, the bus driver "tried desperately to memorize" the license plate

leads to corroborating evidence—evidence that stands independent of the hypnosis.

Such use becomes problematic, however, when a previously hypnotized witness intends to testify in a criminal trial. Foremost, the risk remains that her testimony, if not corroborated, has been irrevocably contaminated by the suggestive nature of the hypnotic process. Second, the potential exists for police to abuse the hypnotic procedure and "create witnesses"[102] via the "honest liar" effect[103] of hypnosis.

In addition to its therapeutic and forensic uses, hypnosis has a number of questionable uses that invite scrutiny. For example, hypnosis has been used for entertainment purposes,[104] and to recover memories of alien abductions,[105] past lives,[106] and satanic ritual abuse.[107]

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numbers. *Id.* at 213. Therefore, because the bus driver engaged in an "elaborative encoding" process, he was primed to recall the numbers without hypnosis. Schacter, *supra* note 27, at 44 (describing "elaborative encoding" as the process by which an individual forms meaningful mental associations between information that is already part of her memory and information that she is trying to incorporate into her memory so that subsequent retrieval of the "new" information will be facilitated). In addition, while under hypnosis, the bus driver provided two license plate numbers, one of which was wrong. *Id.*

102. "There is evidence that some law enforcement agencies hypnotize appropriate prospective witnesses not to fill gaps in their memory but merely to bolster their credibility and make them 'unshakable' on the stand." People v. Shirley, 723 P.2d 1354, 1385 n.56 (Cal. 1982) (en banc) (citation omitted); *see also* State v. Mack, 292 N.W.2d 764, 769 n.10 (Minn. 1980) (en banc).

103. *See supra* note 85 and accompanying text.

104. Hypnosis, as a form of entertainment, can have serious consequences. Recently, a television hypnotist was sued by a man he put in a trance on stage. Jon Ungoed-Thomas, *Paul McKenna Sued by Man in a Trance*, Daily Mail, Oct. 15, 1996, at 32. The man claims that "being hypnoti[z]ed triggered acute schizophrenia in him" and that now he "hears voices from God." *Id.* In addition, the man insists that he "regressed to childhood for about two weeks and wanted to play with toys all the time . . . doodle and blow bubbles through a straw." *Id.* During the stage trance, the man asserts that he was made to believe that he was "Mick Jagger, a boy of five, an interpreter for aliens, a ballet dancer and a Blind Date contestant." *Id.* The hypnotist, a member of the Federation for Ethical Stage Hypnotists, avers that there is no evidence linking the man's condition to stage hypnotism. *Id.* The case has not yet been settled. *Id.*

105. *See* Neimark, *supra* note 87, at 79. In this article, Dr. John Mack, Pulitzer Prize-winning psychiatrist, Harvard professor, and self-proclaimed "co-investigator and co-creator of the abduction phenomenon," discusses his controversial, best-selling book *Abduction* which details the "kidnappings" of thirteen individuals by aliens. *Id.* at 47, 76 (describing Dr. Mack as the "high priest" of the abduction phenomenon). Dr. Mack obtained the abduction stories by hypnotizing and regressing nearly eighty abductees. *Id.* at 76. One "abductee" interviewed in Dr. Mack's book claimed to have seen what he initially believed to be a 15-foot kangaroo, but which he later realized was actually a small spaceship. Robert S. Boynton, *Professor Mack, Phone Home*, Esquire, Mar. 1994, at 48. Another subject from Mack's study reported feeling "torn" between his family on earth and his alien family. *Id.* Because of abduction stories like those above, Dr. Mack was investigated by his affiliate University. C. Eugene Emery, Jr., *John Mack: Off the Hook at Harvard, but with Something Akin to a Warning*, Skeptical Inquirer, Nov. 21, 1995, *available in* 1995 WL 12544290. After a year-long investigation, the Dean of Harvard Medical School announced in a public press release that Dr. Mack continues to be in good standing with the University. *Id.*

As if the non-therapeutic "uses" of hypnosis were not problematic enough, the next section demonstrates that problems inherent in the hypnotic process itself cautions against its use in criminal prosecutions.

4. Inherent Problems of Hypnosis

Six essential problems are associated with using hypnosis in legal proceedings: suggestibility, confabulation, pseudomemory, memory hardening, source amnesia, and loss of critical judgment.[108] Suggestibility is a state of increased receptiveness and responsiveness to suggestions communicated by the hypnotist.[109] Dr. Bernard Diamond, a hypnosis expert,[110] has argued that the suggestibility effect of hypnosis is impossible to prevent because hypnosis is practically by definition, a

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For a different explanation of the abduction phenomenon, see Nicholas P. Spanos et al., *Close Encounters: An Examination of UFO Experiences*, 102 J. Abnormal Psychol. 624 (1993). Because the majority of reports of alien sightings in the experiment were sleep related, Spanos concluded that the sightings were probably explicable in terms of "sleep paralysis" noting that "[s]leep paralysis is typically associated with extreme fear and a feeling of suffocation as well as with auditory and visual hallucinations and the sense of a presence." *Id.* at 630. Under these conditions, an individual may confuse internally produced images and sensations with external reality. *Id.*

Fueled by such opposing explanations as those enunciated above, the alien abduction controversy rages on, enveloping a subtle, symbolic significance in that it represents "a war over the nature of memory and access routes to it, particularly hypnosis." Neimark, *supra* note 76, at 48.

106. Studies have been performed that document hypnotized subjects that confidently remember past lives. *See, e.g.*, Nicholas P. Spanos et al., *Secondary Identity Enactments During Hypnotic Past-Life Regression: A Sociocognitive Perspective*, 61 J. Personality & Soc. Psychol. 308 (1991) [hereinafter Spanos, *Past-Life Regression*]. In this study, 110 college students were hypnotized and given the suggestion to "regress beyond the point of their birth." *Id.* at 310. Thirty-five of the 110 subjects recalled a past-life while under hypnosis. *Id.* Spanos concluded that "past-life reports are fantasies that subjects construct on the basis of their often limited and inaccurate historical information." *Id.* at 311. For example, a subject who confidently "remembered" having lived a past-life as Julius Caesar admitted post-experimentally that he was presently studying about Caesar in a history course. *Id.* Furthermore, under hypnosis, "Caesar" claimed that it was A.D. 50 and that he was emperor of Rome even though Caesar died in 44 B.C. and was never crowned emperor. *Id.* Spanos also noted that subjects learn to develop past-life identities that are consistent with the expectations of their hypnotist. *Id.* at 313. This conclusion provides yet another example of the powerful influence that suggestion has on the hypnotized subject.

107. Despite extensive investigation, the Federal Bureau of Investigation has failed to document even a single case of satanic ritual abuse, even though such abuse is not infrequently "remembered" under hypnosis. Schacter, *supra* note 27, at 269.

108. *See* Little v. Armontrout, 819 F.2d 1425, 1429-30 (8th Cir. 1987); People v. Shirley, 723 P.2d 1354 (Cal. 1982) (en banc).

109. *See Encyclopaedia Britannica*, *supra* note 60, at 203.

110. *Shirley*, 723 P.2d at 1381 n.45 (describing Dr. Diamond, a Clinical Professor of Psychiatry and Professor of Law at the University of California, as a "nationally known specialist in [the] field" of forensic hypnosis).

state of enhanced suggestibility[111] and that the hypnotist's suggestions control each step of the hypnotic process.[112] Dr. Diamond insists that the hypnotist, no matter how skilled and attentive, cannot avoid implanting suggestions in the subject's mind because such cues are not always verbal.[113] In fact, subtle cues[114] such as the hypnotist's demeanor and attitude or the context and purpose of the hypnotic session may provide the occasion for suggestion as easily as pointed verbal cues such as the manner in which a question is posed to the subject.[115] In addition, most hypnotic subjects "aim to please"[116] the hypnotist and this may lead them to respond to questions to which they do not know the answer.[117]

Confabulation occurs when the hypnotized subject unconsciously fills in the gaps in her recollection with fantasized material.[118] This occurs in order to present the experience the subject is trying to remember as a logical whole instead of as a series of disconnected details and events.[119] Because the subject "aims to please" the hypnotist, she feels compelled to produce the particular responses she believes the hypnotist expects of her.[120] A hypnotized individual is unwilling to admit that she does not know the answer to a question posed by the hypnotist.[121] Instead, she will produce a "memory" that may consist of: relevant actual facts, irrelevant actual facts, confabulations unconsciously invented to fill gaps in the story, and conscious lies.[122] The problematic result of this process is that the hypnotized subject's "memory" will appear perfectly logical to the hypnotist and others with whom she shares the recollection who may take its truthfulness for granted.[123]

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111. Bernard L. Diamond, *Inherent Problems in the Use of Pretrial Hypnosis on a Prospective Witness*, 68 Cal. L. Rev. 313, 333 (1980).

112. *Id.* For example, the Spanos study on past-life regression found that "past-life reports, like hypnotic responding more generally, reflect the goal-directed enactments of imaginative subjects who employ information from the experimental context . . . to create the experiences called for by the suggestions they are administered." Spanos, *Past-Life Regression*, *supra* note 106, at 313.

113. Diamond, *supra* note 111, at 333.

114. For example, Orne has asserted that the "cues as to what is expected may be unwittingly communicated before or during the hypnotic procedure, either by the hypnotist or by someone else, for example, a previous s[ubject], a story, a movie, a stage show, etc." *Id.* (alteration in original) (citing Orne). In addition, "the nature of these cues may be quite obscure, both to the hypnotist, to the s[ubject], and even to the trained observer." *Id.* (alteration in original).

115. *Id.*

116. *Id.*

117. *See id.*

118. People v. Shirley, 723 P.2d 1354, 1382 (Cal. 1982) (en banc).

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.* at 1382-83.

Pseudomemories are the false memories that are created by confabulation or in response to suggestion.[124] At least one researcher has argued that pseudomemories are in part the result of social demands.[125] In other words, the creation of pseudomemories is related in part to the subject's desire to present herself as a "good hypnotic subject[ ]"[126] in the eyes of the hypnotist. In addition to the effect social demands may exert on the hypnotized subject, there is an extensive range of potentially subtle contextual factors that affect the rate at which pseudomemories are created.[127] Another study has noted that pseudomemory is a multi-faceted phenomenon[128] under which hypnotized subjects report pseudomemories more readily when responses to questions were implicitly suggested or cued by the hypnotist.[129]

The greatest danger the instance of pseudomemory poses in legal proceedings is the inability of observers to distinguish false recollection from true memory absent corroboration by independent means.[130] In addition, because the hypnotized subject feels pressured to present the hypnotist with a logical and complete memory of the prior event, neither the detail, coherence, nor plausibility of the resulting recollection guarantees the truthfulness or accuracy of the memory.[131] Rather, because the human mind, although adept at grasping

124. State *ex rel.* Collins v. Superior Court *ex rel.* Maricopa, 644 P.2d 1266, 1281 (Ariz. 1982); Spanos, *Past-Life Regression*, *supra* note 106, at 314.

125. Gregory J. Murrey et al., *Hypnotically Created Pseudomemories: Further Investigation into the "Memory Distortion or Response Bias" Question*, 101 J. Abnormal Psychol. 75 (1992). This study was designed to test the assertion that "subjects may be motivated to present themselves as 'good hypnotic subjects' (being attuned to the social demands of the experiment) but that when it is important to distinguish fantasy from reality, subjects can do so." *Id.* at 75. In this experiment, four groups of highly hypnotizable subjects viewed a video of a robbery simulation. *Id.* at 76. One week later, three of the groups heard an audio tape that contained false suggestions concerning details of the crime scene. *Id.* Those subjects that were exposed to the false suggestions were more likely to create pseudomemories incorporating the false suggestions into their recollection of the event. *Id.* Intriguingly, those subjects that were told they would receive a monetary reward if they were able to remember the scenario accurately created less pseudomemories than those subjects that were not given the chance to earn a monetary reward for correct recollections. *Id.* at 77. These results demonstrate that, despite being hypnotized, subjects retain the ability to distinguish fact from fantasy if motivated to do so. *Id.*

126. *Id.* at 75.

127. Steven Jay Lynn et al., *Hypnosis and Pseudomemories: The Effects of Prehypnotic Expectancies*, 60 J. Personality & Social Psychol. 318 (1991).

128. Peter W. Sheehan et al., *Pseudomemory Effects over Time in the Hypnotic Setting*, 100 J. Abnormal Psychol. 39 (1991).

129. *Id.* at 39.

130. *See* People v. Shirley, 723 P.2d 1354, 1382-83 (Cal. 1982) (en banc); *see also* Schacter, *supra* note 27, at 108 (noting that there is no reliable way to tell the difference between an accurate memory and an illusory memory).

131. *Shirley*, 723 P.2d at 1383.

"the gist" of past experience,[132] is inept to recall specific details of an experience,[133] such testimony should be regarded with skepticism.

Memory hardening occurs when a witness who does not have confidence in her recollection prior to being hypnotized becomes convinced by the process that the story she told under hypnosis is both truthful and accurate.[134] In this sense, memory hardening provides the subject with "false confidence" in her recollections. Within the context of a criminal prosecution, the fear of perjury as a factor ensuring reliable testimony may be eliminated due to the witness' conviction that her hypnotically refreshed memories are true and accurate.[135]

Post-hypnotic source amnesia occurs when the hypnotized subject returns to the waking state and she remembers the content of her memory but forgets its source.[136] In other words, the subject forgets that she acquired the memory during the hypnotic session. Source amnesia compounds the problem of memory hardening because not only may the subject forget the "dubious source" of her memory, but she may place unwarranted and uncritical confidence in such memory.

The final problem associated with hypnosis is the loss of critical judgment.[137] This occurs because hypnosis causes the subject to give credence to memories so vague and fragmentary that she would not have relied on them prior to being hypnotized.[138]

Because of the problems associated with hypnosis, the present scientific consensus is that memories elicited by hypnosis are "inherently unreliable."[139] The Council on Scientific Affairs adheres to this position and has found that hypnotically aided recollections can consist of confabulations and pseudomemories.[140] Moreover, the Council has found that hypnotically refreshed recollections not only fail to be more accurate, but actually appear to be less reliable than non-hyp-

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132. *See supra* notes 42-43 and accompanying text.

133. *See supra* notes 42-43 and accompanying text.

134. *Shirley*, 723 P.2d at 1383.

135. State v. Coe, 750 P.2d 208, 218 (Wash. 1988) (Dore, J., dissenting) (citing State v. Martin, 684 P.2d 651 (1984)).

136. Schacter, *supra* note 27, at 119. Schacter provides the following example of how source amnesia may affect memory in an every day experience:

> [Suppose] you are waiting in a checkout line in the supermarket and notice a tabloid containing an ugly story that impeaches the honesty or fidelity of a public figure, you may be inclined to dismiss it because you maintain little faith in the reliability of the source. But what if several months later you are engaged in a conversation about the honesty of public figures, and you remember the negative story but no longer recall the exact source? You may be inclined to stake more belief in the story than is warranted because you fail to remember that your information was acquired from a dubious source.

Id. at 116.

137. *See* Diamond, *supra* note 111, at 337-38.

138. *Id.*

139. Council Report, *supra* note 20, at 1918.

140. *Id.* at 1921.

notic recall.[141] Furthermore, in a recent meta-analysis of twenty-four research studies that involved the differences in recall accuracy of hypnotized versus non-hypnotized eyewitnesses,[142] the researchers concluded that hypnosis is not necessarily a source of accurate information and that, at worst, it may be a source of inaccurate information provided with confident testimony.[143] The article concluded by urging caution in the use of hypnotically refreshed testimony.[144] Moreover, prominent hypnosis researchers Dr. Diamond and Dr. Orne,[145] advocate the same cautioned approach to hypnotically refreshed testimony in criminal trials. Diamond has stated, "I believe that once a potential witness has been hypnotized for the purpose of enhancing memory [her] recollections have been so contaminated that [s]he is rendered effectively incompetent to testify."[146] Likewise, Orne warns that "there is a considerable risk that the inherent unreliability of information confidently provided by a hypnotized witness may actually be detrimental to the truth-seeking process."[147] Furthermore, memory expert Schacter notes that "controlled studies suggest that hypnosis does nothing to enhance the accuracy of memory retrieval. Instead, hypnosis creates a retrieval environment that increases a person's willingness to call just about any mental experience a 'memory.' "[148]

The present scientific consensus creates a very strong presumption against admission of hypnotically refreshed testimony. Because the problems associated with hypnosis inevitably transform witnesses into "honest liars," such "inherently unreliable" hypnotically refreshed testimony should never be allowed for the purpose of presenting reliable information into evidence in criminal trials.

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141. *Id.*

142. *See* Nancy Mehrkens Steblay & Robert K. Bothwell, *Evidence for Hypnotically Refreshed Testimony: The View from the Laboratory*, 18 Law & Human Behav. 635 (1994).

143. *Id.* at 648.

144. *Id.* at 648-49.

145. People v. Shirley, 723 P.2d 1354, 1381 n.45 (Cal. 1982) (en banc) (describing Orne and Diamond as "the most persuasive spokesmen for the relevant scientific community").

146. Diamond, *supra* note 111, at 314.

147. Whitehouse, *supra* note 20, at 294. Orne has recently advocated this view. *See* Perry, *supra* note 20, at 78 (stating that "a per se exclusion of hypnotically elicited testimony still appears to be the most prudent policy").

148. Schacter, *supra* note 27, at 107-08.

II. HYPNOTICALLY REFRESHED TESTIMONY IN CRIMINAL TRIALS: *ROCK V. ARKANSAS* AND ITS PROGENY

"What happens when the black letter of the law confronts the black art of hypnosis?"[149]

The current year, 1997, marks the centennial anniversary of the emergence of hypnosis in the American court system. In 1897, the Supreme Court of California in *People v. Ebanks*[150] reviewed a trial court case in which Joseph Japhet Ebanks was convicted of first degree murder and sentenced to death.[151] Ebanks's conviction was

149. Lisa K. Rozzano, Comment, *The Use of Hypnosis in Criminal Trials: The Black Letter of the Black Art*, 21 Loy. L.A. L. Rev. 635, 705-06 (1988) (advocating the cautioned use of hypnosis in criminal trials). There is a vast body of literature that responds this question. *See, e.g.*, Ira Mickenberg, *Mesmerizing Justice: The Use of Hypnotically-Induced Testimony in Criminal Trials*, 34 Syracuse L. Rev. 927, 931 (1983) (contending that a per se exclusion of hypnotically refreshed testimony is the wisest approach); Shaw, *supra* note 19, at 1 (arguing that hypnotically "enhanced" testimony should be per se inadmissible as a matter of policy); Callari, *supra* note 68, at 136-37 (arguing that per se exclusions of hypnotically "manufactured" testimony are constitutional and therefore, *Rock v. Arkansas* was wrongly decided); Paul J. Chevlin, Comment, State v. Brown: *The Admissibility of Hypnotically Refreshed Testimony in a Criminal Trial*, 18 Am. J. Trial Advoc. 231, 244 (1994) (speculating that in light of *Rock v. Arkansas*, courts will not reject hypnotically refreshed testimony because such testimony is just as reliable as other eyewitness testimony); Beth A. Clemens, Comment, *Hypnotically Enhanced Testimony: Has It Lost Its Charm?*, 15 S. Ill. U. L.J. 289, 320 (1991) (suggesting that courts determine the admissibility of hypnotically refreshed testimony on a case-by-case basis); Amy M. Davis, Note, *Does Hypnosis Belong in the Legal Process?*, 12 Am. J. Trial Advoc. 125, 126 (1988) (encouraging the use of hypnosis in the legal process); Gill, *supra* note 14, at 57 (arguing that *Rock v. Arkansas* was wrongly decided and poses "a serious threat" to the integrity of the trial process by forbidding per se exclusions of testimony a criminal defendant presents on her own behalf); Justin Harsel, Note, R. v. Haywood, 20 Melb. U. L. Rev. 897, 907 (1996) (arguing that courts must impose standards for admissibility commensurate with the dangers, limitations, and benefits of hypnotically refreshed testimony); Mark Leen, Note, *Hypnosis and the Defendant's Right to Testify in a Criminal Case*, 1989 Utah L. Rev. 545, 565 n.112, 570 (asserting that the reliability problem of hypnotically refreshed testimony may be solved if courts use Federal Rule of Evidence 602 to determine if a previously hypnotized defendant has "personal knowledge" of matters to which she will testify); Karyn Diane McBride, Comment, *The Continuing Problems with the Use of Hypnosis in Light of* Rock v. Arkansas, 9 Hamline J. Pub. L. & Pol. 319, 340-41 (1989) (urging courts to restrict the use of hypnotically "induced" testimony by applying extensive safeguards to such testimony); Kimbro Stephens, Note, Rock v. Arkansas: *Hypnosis and the Criminal Defendant's Right to Testify*, 41 Ark. L. Rev. 425, 481 (1988) (urging courts to employ a safeguards approach to hypnotically refreshed testimony); Traynor, *supra* note 68, at 788 (arguing that *Rock v. Arkansas* should be read narrowly because hypnotically refreshed testimony is unreliable).

150. 49 P. 1049 (Cal. 1897).

151. *Id.* Ebanks's "story" is told as follows: In the summer of 1895, Ebanks, a loner, set out on a quest to a religious sect. *Id.* at 1051. At the same time, Harriet Stiles, her husband, Leroy Stiles, and her father, J.B. Borden, went camping at the beach. *Id.* at 1050. Leroy went fishing one day without his wife and her father. *Id.* 1050-51. When he returned to the tent, Leroy found the bullet-ridden bodies of Harriet and J.B. *Id.* at 1051. Ebanks's flour sack—in which he kept all of his worldly possessions—was found near the scene of the murders. *Id.* at 1052. The police found

based on circumstantial evidence.[152] In his defense, Ebanks called as a witness a hypnotist who had previously hypnotized him.[153] The hypnotist's testimony was to include his opinion that defendant was not guilty because he had denied his guilt while under hypnosis.[154] The trial court disallowed the testimony because it would be an "illegal defense"[155] considering that the "law of the United States does not recognize hypnotism."[156] The California Supreme Court agreed with the lower court on this point and upheld the conviction and death sentence.[157]

In subsequent years, hypnosis re-emerged within the context of various legal issues.[158] The current controversy surrounding hypnosis in the legal context centers on the admission of hypnotically refreshed testimony.[159] Most courts distinguish among three types of testimony that result once a witness has been hypnotized: pre-hypnotic, hypnotic, and post-hypnotic testimony.[160] Pre-hypnotic testimony refers to what the witness remembered prior to the hypnotic session.[161] Pre-hypnotic testimony is usually admissible if it relates to matters recalled prior to the hypnosis and if an independent basis is given for the recollection.[162] Hypnotic testimony is testimony offered while under hypnosis.[163] Generally, this type of testimony is per se inadmissible.[164] Post-hypnotic testimony, the subject of much controversy and

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a revolver—the alleged murder weapon—in the sack. *Id.* When the police located Ebanks and questioned him about his location during the relevant time frame, he replied that he had little recollection of his whereabouts or actions during that time because he was excessively drunk. *Id.* at 1051. The jury subsequently found Ebanks guilty of the murders. *Id.* at 1049.

152. *Id.* at 1051-52.

153. *Id.* at 1053.

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.* at 1054.

158. *See, e.g.*, State v. Donovan, 102 N.W. 791, 791-93 (Iowa 1905) (affirming the conviction of defendant, a married man, for seduction for using flattery, love-making, and hypnosis to obtain control over a twenty-two year old school teacher); State v. Exum, 50 S.E. 283 (N.C. 1905) (finding that the accused's use of hypnosis on his wife to influence her served to discredit her testimony against him in his murder trial); People v. Bishop, 194 N.E. 238 (Ill. 1934) (holding that defendant's claim that he involuntarily signed an arson confession and confessed while under hypnosis affects the weight of the confession rather than its admissibility); United States v. Narciso, 446 F. Supp. 252, 252, 263 (E.D. Mich. 1977) (addressing a discovery dispute involving the hypnotic induction profiles of various patients at Ann Arbor Veterans Administration Hospital where, after 51 patient deaths in two months, two nurses were charged with murder for unlawfully poisoning the food of patients).

159. *See, e.g.*, Traynor, *supra* note 68, at 785 n.2.

160. State v. Johnston, 529 N.E.2d 898, 902-03 (Ohio 1988).

161. *Id.* at 903.

162. *Id.*

163. *Id.*

164. *Id.*; Creamer v. State, 205 S.E.2d 240, 241 (Ga. 1974) (recognizing that statements made by a witness while in a hypnotic trance are inadmissible).

the focus of this Note, is testimony that has been refreshed by hypnosis.[165]

Currently, there are at least four approaches to the admissibility of hypnotically refreshed testimony in criminal trials—that such testimony is per se admissible,[166] per se inadmissible,[167] admissible if certain safeguards are present,[168] or admissible based upon the totality-of-the-circumstances.[169]

This part presents the approaches to the admissibility of hypnotically refreshed testimony chronologically. First, this part discusses the cases ruling on the admissibility question prior to the 1987 landmark Supreme Court decision of *Rock v. Arkansas*.[170] After analyzing the *Rock* opinion, this part examines *Rock*'s influence on subsequent cases, noting a trend towards the inadmissibility of hypnotically refreshed testimony.

A. *Pre-*Rock *Approaches to Admissibility (1968-1987)*

This section examines pre-*Rock* approaches to the admissibility of hypnotically refreshed testimony in criminal trials. The following approaches are discussed respectively: that hypnotically refreshed testimony is per se admissible, per se inadmissible, admissible if certain safeguards are satisfied, and admissible on a case-by-case basis or based upon the totality-of-the-circumstances.

1. Hypnotically Refreshed Testimony Is Per Se Admissible

The view that hypnotically refreshed testimony is per se admissible[171] is based on the premise that hypnosis raises questions of credi-

165. *Johnston*, 599 N.E.2d at 904.

166. *See infra* notes 171-76 and accompanying text.

167. *See infra* notes 181-88 and accompanying text.

168. *See infra* notes 189-98 and accompanying text.

169. *See infra* notes 199-207 and accompanying text.

170. This Note does not offer an extensive analysis of pre-*Rock* cases dealing with the admissibility of hypnotically refreshed testimony. For a thorough account of the pre-*Rock* case law concerning hypnotically refreshed testimony, see Rozzano, *supra* note 149, at 636-76.

171. *See, e.g.*, Beck v. Norris, 801 F.2d 242, 243-45 (6th Cir. 1986) (recognizing that the State of Tennessee allows the admission of hypnotically refreshed testimony, and therefore, affirming the district court's denial of the defendant's petition for a writ of habeas corpus because such testimony was not prejudicial to the defendant); United States v. Awkard, 597 F.2d 667, 669 (9th Cir.), *cert. denied*, 444 U.S. 885 (1979) (involving the hypnotically refreshed testimony of a witness to a prison murder); United States v. Adams, 581 F.2d 193, 198-99 (9th Cir. 1978) (upholding the admission of testimony made by a previously hypnotized postal worker who witnessed a robbery of the Lennox Post Office by a fellow disgruntled postal worker); Clark v. State, 379 So. 2d 372, 375-76 (Fla. Dist. Ct. App. 1979) (holding that the police officer-hypnotist's testimony regarding the procedure used to refresh an eyewitness's recollection of the crime was admissible); Creamer v. State, 205 S.E.2d 240, 241 (Ga. 1974) (upholding the admission of statements made by a previously hypnotized witness of the State in a double murder case despite defendant's objections that the "witness was tainted by

bility, but not admissibility.[172] The rationale for such an approach is that the testimony of a witness whose memory has been refreshed by hypnosis should be treated like any other present recollection refreshed.[173] Such an approach recognizes that issues of credibility are the province of the jury and relies on the jury to serve as "the lie detector" in the courtroom.[174] As an added safeguard, skillful cross-examination will enable the jury to evaluate the effect of hypnosis on the witness and the credibility of the testimony.[175]

The landmark case in this area is *Harding v. State*.[176] *Harding* was the first case to rule on the admissibility of hypnotically refreshed testimony,[177] holding that such testimony is per se admissible.[178] *Harding* was subsequently overruled in the Maryland courts by *State v. Collins*[179] in favor of a per se inadmissible approach to hypnotically refreshed testimony.[180]

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virtue of hypnotic trances and seances" conducted by an applied psychologist); State v. Wren, 425 So. 2d 756, 758-60 (La. 1983) (refusing to "assess squarely" the admissibility issue in a case where the witness's prehypnotic recollection matched his post-hypnotic statements, but holding that the effect of hypnosis on a previously hypnotized witness is a factual issue going to the weight of the testimony rather than to its admissibility). For a more extensive listing of cases, see Thomas M. Fleming, Annotation, *Admissibility of Hypnotically Refreshed or Enhanced Testimony*, 77 A.L.R.4th 927 (1990); State v. Hurd, 432 A.2d 86, 91 (N.J. 1981).

172. Harding v. State, 246 A.2d 302, 306 (Md. Ct. Spec. App. 1968), *cert. denied*, 395 U.S. 949 (1969), *overruled by* State v. Collins, 464 A.2d 1028 (Md. 1983)

173. *Hurd*, 432 A.2d at 91; Clark v. State, 379 So. 2d 372, 375 (Fla. Dist. Ct. App. 1979). Under the "present recollection refreshed" doctrine, a device such as a written statement may be used in an attempt to revive a witness' recollection of an event that she claims not to remember. Fed. R. Evid. 803(5); Kline v. Ford Motor Co., Inc., 523 F.2d 1067, 1070 (9th Cir. 1975) (citation omitted).

174. *See Awkard*, 597 F.2d at 671 (citation omitted).

175. *Id.* at 670-71.

176. 246 A.2d 302 (Md. Ct. Spec. App. 1968). James Milton Harding was convicted in a jury trial for assault with intent to rape and assault with intent to murder and appealed to the Court of Special Appeals of Maryland. *Id.* at 302-03. Harding had met M.C., the prosecuting witness, in a bar and they later left with another couple to go for a drive. *Id.* at 304. During the drive, Harding became angry with M.C. because she refused to have sexual relations with him. *Id.* When Harding told M.C. that she would have sex with him before she left the car, M.C. responded that she would kill him first. *Id.* The next morning, M.C. was found in a state of shock lying on the side of the road; she had been shot. *Id.* Because M.C. could not remember what had happened, she was hypnotized a month after the attack at the request of the police. *Id.* at 305. Under hypnosis, M.C. recalled the attack and identified Harding as her assailant. *Id.* In determining that the trial court properly admitted M.C.'s hypnotically aided testimony, the Maryland Special Court of Appeals noted that "[t]he fact that she . . . achieved her present knowledge after being hypnotized concerns the question of the weight of the evidence which the trier of facts . . . must decide." *Id.* at 306.

177. *See* Traynor, *supra* note 68, at 785 n.2.

178. *Harding*, 246 A.2d at 312.

179. 464 A.2d 1028, 1044-45 (Md. 1982).

180. *State v. Collins* is addressed in the next section which examines the per se inadmissibility approach to hypnotically refreshed testimony.

2. Hypnotically Refreshed Testimony Is Per Se Inadmissible

The view that hypnotically refreshed testimony is per se inadmissible[181] is usually based on some version of the *Frye* rule[182] developed in *Frye v. United States*[183] which requires that novel scientific evidence must be "generally accepted as reliable in the relevant scientific community"[184] to be admissible. Under this approach, because the scientific community does not endorse hypnosis as a means of rendering historically accurate recollection,[185] hypnotically refreshed testimony is usually found to be unreliable, and therefore inadmissible.[186] The leading cases in this area are *State v. Mack*[187] and *People v. Shirley*,[188] both of which involved extensive analyses demonstrating that hypnotically refreshed testimony is an unreliable form of evidence.

181. *See, e.g.*, State *ex rel.* Collins v. Superior Court *ex rel.* Maricopa, 644 P.2d 1266, 1294, 1296 (Ariz. 1982) (holding that hypnotically refreshed testimony is per se inadmissible because "the law has long recognized that there are few dangers so great in the search for truth as man's propensity to tamper with the memory of others," and such evil must be prevented); State v. Mena, 624 P.2d 1274, 1276, 1280 (Ariz. 1981) (reversing defendant's conviction of aggravated assault and remanding for a new trial because the hypnotically "adduced" testimony of the victim was erroneously admitted); People v. Shirley, 723 P.2d 1354, 1384 (Cal. 1982) (en banc) (holding that the testimony of a witness who has been hypnotized for the purpose of restoring her memory of events in issue is per se inadmissible); State v. Moreno, 709 P.2d 103, 105 (Haw. 1985) (adopting a rule that requires a witness to show that her testimony relates to matters recalled prior to being hypnotized); State v. Collins, 464 A.2d 1028, 1044-45 (Md. 1983) (holding that hypnotically "enhanced" testimony is per se inadmissible); State v. Mack, 292 N.W.2d 764, 772 (Minn. 1980) (holding that the testimony of a previously hypnotized witness may not be admitted in a criminal prosecution); People v. Hughes, 453 N.E.2d 484, 496 (N.Y. 1983), *cert. denied*, 492 U.S. 908 (1989) (limiting a previously hypnotized witness' testimony to matters remembered prior to the hypnotic session); State v. Martin, 684 P.2d 651, 657 (Wash. 1984) (justifying a per se exclusion of hypnotically refreshed testimony due to the failure of hypnosis to satisfy the *Frye* rule of novel scientific evidence which requires such evidence to be deemed reliable by the scientific community). For a more extensive listing of cases, see Fleming, *supra* note 171, at 927.

182. Frye v. United States, 293 F. 1013 (D.C. 1923). Under the *Frye* rule, "the results of mechanical or scientific testing are not admissible unless the testing has developed or improved to the point where experts in the field widely share the view that the results are scientifically reliable as accurate." State v. Mack, 292 N.W.2d 764, 768 (Minn. 1980). *Frye* has recently been overruled in federal courts by the U.S. Supreme Court's decision in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), on the basis that the Federal Rules of Evidence supersede *Frye*. *Id.* at 585. Several states continue to adhere to *Frye*-like rules in determining the admissibility of novel scientific evidence, however. Accordingly, recognition of the *Frye* rule remains relevant to a discussion of the admissibility of hypnotically refreshed testimony.

183. 293 F. 1013 (D.C. 1923).

184. People v. Shirley, 723 P.2d 1354, 1362 (Cal. 1982) (en banc). The *Frye* rule is intended to "prevent the jury from being misled by unproven and unsound scientific methods." Alsbach v. Bader, 700 S.W.2d 823, 829 (Mo. 1985).

185. *See supra* notes 139-45 and accompanying text for the present scientific consensus.

186. *See supra* note 181 listing cases that employ a per se inadmissibility approach to hypnotically refreshed testimony.

187. 292 N.W.2d 764 (Minn. 1980).

188. 723 P.2d 1354 (Cal. 1982) (en banc).

3. Hypnotically Refreshed Testimony Is Admissible if Certain Safeguards Are Implemented

Some courts admit testimony that has been refreshed by hypnosis if certain safeguards are implemented surrounding the hypnotic session.[189] The rationale for this approach is that hypnotically refreshed testimony can be made sufficiently reliable to be introduced into evidence.[190] The landmark decision in this area is *State v. Hurd*[191] which implemented the following safeguards developed by Dr. Martin T. Orne, a leading expert in the field of forensic hypnosis:[192]

> (1) The hypnotic session should be conducted by a licensed psychiatrist or psychologist trained in the use of hypnosis.
>
> (2) The qualified professional conducting the hypnotic session should be independent of and not responsible to the prosecutor, investigator or the defense.
>
> (3) Any information given to the hypnotist by law enforcement personnel prior to the hypnotic session must be in written form so that subsequently the extent of the information the subject received from the hypnotist may be determined.
>
> (4) Before induction of hypnosis, the hypnotist should obtain from the subject a detailed description of the facts as the subject remembers them, carefully avoiding adding any new elements to the witness' description of the events.
>
> (5) All contacts between the hypnotist and the subject should be recorded so that a permanent record is available for comparison and study to establish that the witness has not received information or suggestion which might later be reported as having been first described by the subject during hypnosis. Videotape should be employed if possible, but should not be mandatory.
>
> (6) Only the hypnotist and the subject should be present during any phase of the hypnotic session, including the pre-hypnotic testing and the post-hypnotic interview.[193]

The above safeguards serve a dual purpose: to ensure a minimum level of reliability[194] and to reduce the effects of confabulation[195] or

189. *See, e.g.*, House v. State, 445 So. 2d 815, 817, 826-27 (Miss. 1984) (adopting eight safeguards to be applied to a witness' hypnotically refreshed recollection to prevent hypnosis from "contaminating" her testimony); State v. Hurd, 432 A.2d 86, 89-90 (N.J. 1981) (adopting six safeguards developed by hypnosis expert Martin Orne to be applied to hypnotically refreshed testimony); State v. Weston, 475 N.E.2d 805, 814-15 (Ohio 1984) (adopting the *Hurd* guidelines); Brown v. State, 426 So. 2d 76, 91-94 (Fla. Dist. Ct. App. 1983) (adopting eight safeguards and a cautionary jury instruction to warn the jury of the pitfalls of hypnosis). For a more extensive listing of cases adhering to this approach, see Fleming, *supra* note 171, at 927.

190. *Hurd*, 432 A.2d at 92.

191. 432 A.2d 86 (N.J. 1981).

192. *See supra* note 20 for a listing of Dr. Orne's credentials.

193. *Hurd*, 432 A.2d at 89-90. Orne has ultimately disavowed his support for these guidelines. *See infra* notes 244-47 and accompanying text.

194. *Id.* at 89.

suggestion[196] that would otherwise contaminate testimony.[197] A safeguards approach to hypnotically refreshed testimony is premised on the assertion that a per se rule of inadmissibility is too broad as it may exclude evidence that is as trustworthy as other eyewitness testimony.[198]

4. Hypnotically Refreshed Testimony Is Admissible Based upon the Totality-of-the-Circumstances

This approach is used primarily in federal courts and in a minority of state courts. Under a totality-of-the-circumstances approach to the admissibility of hypnotically refreshed testimony,[199] safeguard compliance is only one part of a balanced inquiry.[200] In *McQueen v. Garrison*,[201] the Fourth Circuit noted that "these appeals must be determined by a detailed factual analysis on a case-by-case basis."[202] Other factors considered by courts include the presence of suggestive statements,[203] the nature of the memory loss,[204] corroboration of the testimony by independent evidence,[205] and any other factors the court deems relevant to the case before it.[206] The rationale defending a case-by-case analysis of hypnotically refreshed testimony is that a per se rule of inadmissibility may exclude otherwise reliable evidence.[207]

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195. *See supra* notes 118-23 and accompanying text.

196. *See supra* notes 109-17 and accompanying text.

197. *Hurd*, 432 A.2d at 89-90.

198. *Id.* at 94.

199. *See, e.g.*, McQueen v. Garrison, 814 F.2d 951, 958 (4th Cir. 1987), *cert. denied*, 484 U.S. 944 (holding that the determination of whether hypnotically refreshed testimony was properly admitted in an individual case requires a detailed factual analysis on a case-by-case basis); United States v. Valdez, 722 F.2d 1196, 1201 (5th Cir. 1984) (examining whether the probative value of the witness' hypnotically refreshed testimony was outweighed by "the dangers of unfair prejudice, jury confusion, or jury misapprehension"); State v. Iwakiri, 682 P.2d 571, 578 (Idaho 1984) (directing trial judges to conduct pretrial hearings on the procedures used during the hypnotic session in question and then to apply a "totality of the circumstances" test to determine whether the witness' testimony is reliable enough to be admitted); *see also* Fleming, *supra* note 171, at 956-58 for a more extensive listing of cases adhering to this approach.

200. *McQueen*, 814 F.2d at 959. McQueen was decided only two months before the landmark Supreme Court decision *Rock v. Arkansas*, 483 U.S. 44 (1987).

201. 814 F.2d 951 (4th Cir. 1987).

202. *Id.* at 958.

203. *Id.* at 959.

204. *Id.* at 960; *see also* State v. Fertig, 668 A.2d 1076, 1078 (N.J. 1996) (noting that "[h]ypnotically-refreshed testimony is more reliable when the cause of the witness's memory loss is trauma rather than the passage of time").

205. *McQueen*, 814 F.2d at 959.

206. State v. Iwakiri, 682 P.2d 571, 578 (Idaho 1984).

207. *Id.* at 577-78.

B. Rock v. Arkansas: *The United States Supreme Court Addresses the Issue of the Admissibility of Hypnotically Refreshed Testimony*

In 1987, the United States Supreme Court addressed the issue of whether hypnotically refreshed testimony should be admissible in criminal trials.[208] *Rock v. Arkansas* involved a criminal defendant who was charged with manslaughter arising from the death of her husband.[209]

Vickie Rock's "story" arises out of events that occurred during a violent domestic dispute one summer night in 1983.[210] That evening, an argument erupted when Frank Rock refused to let his wife have any pizza and prevented her from leaving their apartment to get anything else to eat.[211] When police arrived at the scene, Frank Rock was lying on the floor with a bullet wound in his chest.[212] Vickie Rock told police that Frank grabbed her by the throat, that she in turn grabbed a gun, that it went off, and that she did not mean to shoot him.[213] Because she could not remember the precise details of the shooting, Vickie Rock's attorney suggested that Rock undergo hypnosis to refresh her recollection.[214] After hypnosis, Vickie Rock was able to remember that at the time of the shooting, she had her finger on the hammer of the gun, but not on the trigger, and that the gun had accidentally fired.[215] At trial, the court issued an order limiting Rock's testimony to "matters remembered and stated to the examiner prior to being placed under hypnosis."[216] Because the examiner did not take copious notes during the pre-hypnotic interview, the prosecutor repeatedly objected to Rock's testimony when she was on the witness stand.[217] The result was that " 'ninety-nine percent of everything [Rock] testified to in the proffer' was inadmissible."[218] Without having had the chance to meaningfully testify—to tell her story—Vickie Rock was convicted of manslaughter.[219] Rock then appealed to the United States Supreme Court which vacated the conviction.[220]

A sharply divided Court held that a per se rule excluding all hypnotically refreshed testimony infringes impermissibly on a criminal de-

208. Rock v. Arkansas, 483 U.S. 44 (1987).
209. *Id.* at 45.
210. *Id.*
211. *Id.*
212. *Id.*
213. *Id.* at 46 n.1.
214. *Id.*
215. *Id.* at 47.
216. *Id.*
217. *Id.* at 48 n.4.
218. *Id.* at 48.
219. *Id.*
220. *Id.* at 62.

fendant's right to testify on her own behalf.[221] The Court explicitly stated that "[t]his case does not involve the admissibility of testimony of previously hypnotized witnesses other than criminal defendants and *we express no opinion on that issue.*"[222] Thus, the only question answered definitively by *Rock* with respect to hypnotically refreshed testimony is that such testimony is admissible to the extent that it would otherwise deprive a criminal defendant of her constitutional right to testify on her own behalf.[223]

C. *Post-*Rock *Cases and the Trend Towards Inadmissibility of Hypnotically Refreshed Testimony*

Since *Rock*, courts have continued to determine the admissibility of hypnotically refreshed testimony of witnesses other than the defendant in criminal trials in at least four different ways. Recently, the Court declined to resolve this issue.[224] The most recent account of the current trend in the case law is summarized in *State v. Fertig*:[225]

> Twenty-six courts now conclude that hypnotically-refreshed testimony is per se inadmissible . . . . Today, only four states consider such testimony to be generally admissible . . . . Many federal courts evaluate post-hypnotic testimony under a form of the totality-of-the-circumstances test . . . . [A] significant number of courts use procedural safeguards similar to those in *Hurd* to determine case-by-case whether hypnotically-refreshed testimony is admissible.[226]

This section examines the effect of *Rock v. Arkansas* on jurisdictions applying the four approaches to the admissibility of hypnotically refreshed testimony, and reveals a trend towards the inadmissibility of hypnotically refreshed testimony across jurisdictions.

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221. *Id.* The criminal defendant's right to testify on her own behalf is grounded in three distinct provisions of the U.S. Constitution: in the Compulsory Process Clause of the Sixth Amendment, as a necessary corollary to the Fifth Amendment's guarantee against compelled testimony, and in the Due Process Clause of the Fourteenth Amendment. *Id.* at 51-53.

222. *Id.* at 58 n.15 (emphasis added).

223. Some commentators read *Rock* as standing for the proposition that hypnotically refreshed testimony may be made sufficiently reliable so that witnesses other than the criminal defendant may also offer such testimony. *See, e.g.*, Gill, *supra* note 14, at 593 (arguing that there is no logical distinction between a criminal defendant and the witnesses she presents on her behalf and that *Rock* may be read as legitimizing the admission of the hypnotically refreshed testimony of defense witnesses other than the accused).

224. Biskup v. McCaughtry, 20 F.3d 245 (7th Cir. 1994), *cert. denied*, 116 S. Ct. 1262 (1996).

225. 668 A.2d 1076 (N.J. 1996).

226. *Id.* at 1081 (citations omitted).

1. The Effect of *Rock* on Per Se Admissible Jurisdictions

Since *Rock*, only one case has been decided in which a per se rule of admissibility was followed.[227] In *Prime v. State*,[228] the Wyoming Supreme Court interpreted the *Rock* decision as consistent with its prior decisions[229] and adhered to the approach that hypnosis raises issues of credibility rather than admissibility.[230] The court in *Prime* interpreted the *Rock* decision as legitimizing the use of hypnosis as a method of refreshing testimony.[231] *Prime* is the only decision, however, to use *Rock* to defend a per se admissibility approach to hypnotically refreshed testimony.

2. The Effect of *Rock* on Totality-of-the-Circumstances Jurisdictions

In *Rock*, the Court suggested that a "State's legitimate interest in barring unreliable evidence does not extend to per se exclusions that may be reliable in an individual case."[232] Most courts have interpreted this statement as requiring a criminal defendant's hypnotically refreshed testimony to be reviewed under a case-by-case approach.[233] Indeed, *Rock* directs the States to establish guidelines to assist trial courts in evaluating the reliability of testimony that has been hypnotically refreshed.[234] Some courts have gone a step further, however, and interpret *Rock* as standing for the proposition that *all* hypnotically refreshed testimony must be judged on a case-by-case basis[235]—

227. Prime v. State, 767 P.2d 149 (Wyo. 1989).
228. *Id.*
229. *Id.* at 153.
230. *Id.*
231. *See id.*
232. Rock v. Arkansas, 483 U.S. 44, 61 (1987).
233. Zani v. State, 758 S.W.2d 233, 243 (Tex. Crim. App. 1988) (en banc). Factors that may be used to determine the reliability of hypnotically refreshed testimony of the defendant include: (1) the utilization of safeguards such as those set forth in *Hurd*, (2) corroborating evidence, (3) the opportunity for effective cross-examination of the defendant, and (4) cautionary instructions given to the jury regarding the dangers of hypnosis on recall. *Id.* (citing *Rock*, 483 U.S. at 60-61).
234. *Rock*, 483 U.S. at 61.
235. *Zani*, 758 S.W.2d at 243. Employing a "what's good for the goose is good for the gander" justification for this position, one court has postulated:

> [I]f safeguards, corroboration and traditional means of testing believability of eyewitness testimony are deemed sufficient tests of reliability to require admission of hypnotically refreshed testimony on behalf of the accused in certain cases, they must also be considered sufficient gauges of reliability to permit admission of such testimony when proffered by the State in certain others.

Id. at 243. Another court has suggested:

> Although the actual holding of *Rock* is limited to a rejection of a per se rule that prevents a defendant from testifying, the language of the opinion has broader implications . . . if the defense witnesses can present hypnotically enhanced testimony, it is unfair to prevent the prosecution from introducing such evidence.

despite the *Rock* Court's insistence that the opinion was not directed towards previously hypnotized witnesses other than criminal defendants.[236] Accordingly, in absence of a criminal defendant's constitutionally protected right to testify on her own behalf, the *Rock* Court does not demand intensive investigations in individual cases where the hypnotically refreshed testimony of the criminal defendant is not in issue. Moreover, the problems the scientific community has attributed to hypnosis pose a challenge to this approach as well.[237] If memory and hypnosis experts insist that it is impossible—even for an expert—to determine the reliability of hypnotically refreshed recollection, how can courts be expected to do so?

3. The Effect of *Rock* on Jurisdictions Requiring Adequate Safeguards

The most significant development in the trend towards the inadmissibility of hypnotically refreshed testimony[238] involves the safeguards approach to admissibility.[239] In 1996, the New Jersey Supreme Court, which promulgated the *Hurd* guidelines[240] that have subsequently been adopted by numerous courts,[241] revealed that in an appropriate case it may abandon *Hurd* because of the problems hypnotically refreshed testimony poses[242] and the current trend in the case law towards inadmissibility.[243] In addition, Dr. Orne, the creator of the

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People v. Romero, 745 P.2d 1003, 1021 (Colo. 1987), *cert. denied*, 485 U.S. 990 (1988).

For post-*Rock* cases employing a totality-of-the-circumstances approach, see Armstrong v. Young, 34 F.3d 421, 428-31 (7th Cir. 1994); Adams v. Leapley, 31 F.3d 713, 713-14 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 754 (1995); Boykin v. Leapley, 28 F.3d 788, 793-94 (8th Cir. 1994); Biskup v. McCaughtry, 20 F.3d 245, 251-54 (7th Cir. 1994); Beachum v. Tansy, 903 F.2d 1321, 1325-27 (10th Cir.), *cert. denied*, 498 U.S. 904 (1990); Haislip v. Roberts, 788 F. Supp. 482, 485-86 (D.C. Kan. 1992), *aff'd*, 992 F.2d 1085 (10th Cir. 1993); Chamblee v. State, 527 So. 2d 173, 176 (Ala. Crim. App. 1988); People v. Romero, 745 P.2d 1003, 1016 (Colo. 1987); State v. Bainbridge, 787 P.2d 231, 239 (Idaho 1990); State v. Cook, 605 N.E.2d 70, 77-78 (Ohio 1992), *cert. denied*, 114 S. Ct. 681 (1994); State v. Johnston, 529 N.E.2d 898, 906 (Ohio 1988); State v. Evans, 450 S.E.2d 47, 51 (S.C. 1994); Spence v. State, 795 S.W.2d 743, 756 (Tex. Crim. App. 1990) (en banc); Horst v. State, 758 S.W.2d 311, 317-18 (Tex. Ct. App. 1988).

236. Rock v. Arkansas, 483 U.S. 44, 58 n.15 (1987).

237. *See supra* notes 139-47 and accompanying text.

238. *See infra* notes 246-56 and accompanying text.

239. Since *Rock* was decided, a number of courts have adopted a safeguards approach to the admissibility of hypnotically refreshed testimony. *See* United States v. Bourgeois, 950 F.2d 980, 985 (5th Cir. 1992); Commonwealth v. Romanelli, 560 A.2d 1384, 1386-87 (Pa. 1989); State v. Boykin, 432 N.W.2d 60, 67-68 (S.D. 1988); State v. Beard, 461 S.E.2d 486, 503 (W. Va. 1995).

240. *See supra* notes 189-93 and accompanying text.

241. *See supra* notes 189 & 239 for a listing of cases employing the safeguards approach to hypnotically refreshed testimony.

242. *See* State v. Fertig, 668 A.2d 1076, 1081 (N.J. 1996). The court indicated that it was aware of the problems posed by hypnotically-refreshed testimony, but declined to abandon *Hurd* without a more complete record. *Id.*

243. *Id.* at 1081.

Hurd guidelines,[244] has renounced the safeguards[245] based on his current belief that procedural safeguards are inadequate to ensure a minimum level of reliability of hypnotically aided recall.[246] In admonition to the courts, Dr. Orne has declared that "hypnosis should not be used to prepare a witness to testify in court."[247]

4. The Current Trend Towards the Inadmissibility of Hypnotically Refreshed Testimony

The current trend towards the inadmissibility of hypnotically refreshed testimony stems from judicial skepticism of hypnosis as a means of reliably refreshing recollection[248] and the concern that juries may be misled by "scientifically unreliable" evidence.[249] Current per se inadmissibility approaches,[250] like their pre-*Rock* counterparts,[251] are usually predicated on the "inherent unreliability" of hypnotically refreshed testimony[252] under some version of the *Frye* rule.[253] Courts applying such a rule to the testimony of witnesses other than the criminal defendant distinguish *Rock* by noting that the only issue the Court was deciding in *Rock* was whether a criminal defendant could offer her own hypnotically refreshed testimony in her defense.[254]

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244. State v. Hurd, 432 A.2d 86, 89-90 (N.J. 1981).

245. *Fertig*, 668 A.2d at 1081.

246. *Id.*

247. *Id.*

248. For example, Judge Teague's dissent in *Zani v. State* referred to hypnotically refreshed testimony as "irrelevant 'gypsy-voodoo' evidence." 758 S.W.2d 233, 249 (Tex. Crim. App. 1988). Judge Teague continued his diatribe against hypnosis by opining that hypnotism "amounts to little more than self-taught 'gypsy-voodooism,' which . . . might be warranted in finding a cure for the hiccoughs but not for finding the truth of the matter asserted." *Id.* at 250.

249. *Id.* at 249. At least one court has voiced its concern that "[m]any laymen believe that the power of hypnosis, clothed in its veil of mystery, prevents willful deception." Brown v. State, 426 So. 2d 76, 85 (Fla. Dist. Ct. App. 1983) (citation omitted).

250. *See* State v. Sherrill, 799 P.2d 849, 852 (Ariz. 1990); People v. Miller, 790 P.2d 1289, 1303-04 (Cal. 1990); People v. Hayes, 783 P.2d 719, 724 (Cal. 1989); People v. Johnson, 764 P.2d 1087, 1099-1100 (Cal. 1988), *cert. denied*, 493 U.S. 829 (1989); Stokes v. State, 548 So. 2d 188, 196 (Fla. 1989); People v. Zayas, 546 N.E.2d 513, 518 (Ill. 1989); Peterson v. State, 514 N.E.2d 265, 270 (Ind. 1987); Commonwealth v. Kater, 567 N.E.2d 885, 888-89 (Mass. 1991); People v. Lee, 537 N.W.2d 233, 239 (Mich. Ct. App. 1995); State v. Grimmett, 459 N.W.2d 515, 517-18 (Minn. Ct. App. 1990); State v. Post, 901 S.W.2d 231, 237 (Mo. Ct. App. 1995); State v. Baker, 451 S.E.2d 574, 590-91 (N.C. 1994); State v. Blackmun, 875 S.W.2d 122, 143 (N.C. 1994); State v. Annadale, 406 S.E.2d 837, 845 (N.C. 1991); State v. Munson, 886 P.2d 999, 1003 (Okla. Crim. App. 1994); Commonwealth v. Laskaris, 561 A.2d 16, 23 (Pa. Super. Ct. 1989); Hall v. Commonwealth, 403 S.E.2d 362, 370 (Va. Ct. App. 1991); State v. Coe, 750 P.2d 208, 211 (Wash. 1988).

251. *See supra* note 181.

252. *See supra* note 181 and accompanying text.

253. *See supra* note 182 and accompanying text.

254. Rock v. Arkansas, 483 U.S. 44, 58 n.15 (1987). For examples of cases distinguishing *Rock*, see State v. Pollitt, 530 A.2d 155, 164 n.6 (Conn. 1987) (noting the *Rock* Court's insistence that the only issue the Court was addressing was the admissibility of a criminal defendant's hypnotically refreshed testimony); Stokes v. State, 548

Most jurisdictions adhering to a per se inadmissibility approach to hypnotically refreshed testimony carve out an exception for pre-hypnotic testimony.[255] Under such an approach, witnesses are permitted to testify to matters they remembered prior to hypnosis if a record of such pre-hypnotic recollection exists.[256]

If a court finds that a per se inadmissibility approach to hypnotically refreshed testimony yields an unpalatable result in an individual case, there are at least two ways the court may circumvent the per se exclusion. First, a court may find that no hypnosis occurred, and therefore, the per se exclusion does not apply to the case before it.[257]

So. 2d 188, 196 n.9 (Fla. 1989) (stating that "the Court's decision in *Rock* was expressly limited to the testimony of criminal defendants, and therefore, may have no effect on the state court's decision to exclude testimony of another witness" (citation omitted)); People v. Zayas, 546 N.E.2d 513, 519 (Ill. 1989) (noting that Rock does not preclude the court from per se excluding the hypnotically refreshed testimony of a witness other than the criminal defendant); Hall v. Commonwealth, 403 S.E.2d 362, 367 (Va. App. 1991) ("[T]he United States Supreme Court has not addressed the issue of whether, in a criminal proceeding, the hypnotically refreshed testimony of a witness other than the defendant is admissible."); State v. Coe, 750 P.2d 208, 212 (Wash. 1988) (noting that because the *Rock* decision "is expressly limited to the testimony of criminal defendants, it has no effect upon our decision here regarding post hypnotic testimony of other witnesses").

255. *See, e.g.*, State v. Sherrill, 799 P.2d 849, 851-52 (Ariz. 1990) (reaffirming the holding of *Collins II* which "intended to elucidate a bright line rule: post-hypnotic recall is inadmissible, but pre-hypnotic recall is admissible provided it has been recorded prior to hypnosis"); People v. Hayes, 783 P.2d 719, 727-28 (Cal. 1989) (allowing pre-hypnotic testimony to be admitted if statutory safeguards are satisfied); People v. Lee, 537 N.W.2d 233, 239 (Mich. Ct. App. 1995) (holding that the testimony of previously hypnotized witnesses was properly admitted because such testimony was limited to their pre-hypnotic recollections); State v. Grimmett, 459 N.W.2d 515, 518 (Minn. Ct. App. 1990) (admitting testimony of pre-hypnotic recollection if such recall conforms to the witness' pre-hypnotic statement of events); State v. Blackman, 875 S.W.2d 122, 143 (N.C. 1994) (permitting the witness to testify regarding matters recalled prior to hypnosis); State v. Annadale, 406 S.E.2d 837, 845 (N.C. 1991) (allowing testimony of previously hypnotized witness where the post-hypnotic testimony matched the pre-hypnotic statement); Hall v. Commonwealth, 403 S.E.2d 362, 370-71 (Va. Ct. App. 1991) (adopting a per se rule of inadmissibility while carving out an exception for pre-hypnotic testimony).

256. *See supra* note 255 for jurisdictions recognizing this exception.

257. *See* State v. Joly, 593 A.2d 96 (Conn. 1991). This case involved the murder of a fifteen-year-old girl whose death was caused by a fractured skull. *Id.* at 98. She was found in the woods near the Pequabuck River. *Id.* The State's case against the defendant was comprised of circumstantial evidence including the hypnotically refreshed testimony of an eyewitness who claimed to have seen the "defendant alone with the victim in the immediate area of the woods between 2:30 and 3:45 p.m. on the date of her death." *Id.* at 99. The witness, in this case, was hypnotized with the hope of obtaining a more detailed description of the defendant. *Id.* The witness' pre-hypnotic statement to police of the perpetrator was lost. *Id.* Without such a statement, there was no way to determine the scope of the witness' pre-hypnotic recollection, which may be admitted where recollection refreshed by hypnosis may not. State v. Pollitt, 530 A.2d 155, 165 (Conn. 1987). Because such an error is subject to reversal, the State argued that although undergoing hypnosis, the witness was never actually hypnotized, and therefore admission of the witness' testimony was not "the unreliable product of hypnosis." *Joly*, 593 A.2d at 98. To defend this position, the State offered

Second, a reviewing court may find that it was error to admit such testimony, but that the error was harmless.[258]

III. A Rationale for Distinguishing the Criminal Defendant from Any Other Witness

This part argues that the criminal defendant has a powerful autonomy interest when she testifies on her own behalf, and that the respect for this interest is the driving force of the *Rock* opinion. After discussing the jurisprudence of autonomy, this part proposes a three pronged test that courts should employ when determining whether the accused's right to testify has been properly secured. In order to illustrate the principles embodied in the admissibility analysis, this part then applies each strand of the analysis to post-*Rock* cases in which the criminal defendant's right to testify was at issue. Because the predominant theme of this Note is that the criminal defendant has a right to tell her "story" before she succumbs to the law, this part closes by examining two instances in which criminal defendants were permitted to tell their stories, and discusses the effect that the proposed admissibility test would have had on their cases.

A. Rock v. Arkansas *Revisited*

Witnesses testify to assist the jury in determining questions of fact[259]—in other words, to present reliable testimony into evidence.[260] Consequently, if a court deems a witness incompetent—not legally fit to present reliable testimony—she will not be permitted to testify. As a policy matter then, the interest served by allowing witnesses to testify is that of reliability. Because hypnotically refreshed testimony is "inherently unreliable," such testimony should never be presented for the purpose of admitting reliable testimony into evidence. Therefore,

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the witness' opinion that he was never hypnotized—that he, in fact, feigned hypnosis because of "the attitude problem we were having with the police." *Id.* at 100. Relying on the witness' assertion that he had feigned hypnosis, the trial court found that no hypnotism occurred. *Id.* at 102. As a result, the admissibility problems associated with hypnotically refreshed testimony were circumvented. The Connecticut Supreme Court agreed with the trial court and upheld the conviction. *Id.*; *see also* People v. Caro, 761 P.2d 680, 688 (Cal. 1988), *cert. denied*, 490 U.S. 1040 (1989) (upholding the trial court's determination that no hypnosis occurred based on hypnotist's opinion and admitting the testimony); State v. Grimmett, 459 N.W.2d 515, 517 (Minn. Ct. App. 1990) (rejecting the State's argument that the witness was not successfully hypnotized during her therapy sessions, and therefore, concluding that her hypnotically refreshed testimony was admissible).

258. *See* People v. Johnson, 764 P.2d 1087, 1100-01 (Cal. 1988), *cert. denied*, 493 U.S. 829 (1989); State v. Hall, 403 S.E.2d 362, 373 (Va. Ct. App. 1991).

259. *See* People v. Ruiz, 419 N.Y.S.2d 864, 866 (1979).

260. Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579, 590 (1993) ("[A] witness who testifies to a fact which can be perceived by the senses must have had an opportunity to observe, and must have actually observed the fact [due to] common law insistence upon '*the most reliable sources of information.*' " (citation omitted)).

as a general matter, witnesses should not be hypnotized for purposes of refreshing recollection as to matters to be testified to and then subsequently offer testimony in a court of law.

In *Rock v. Arkansas*,[261] the Court indicated that there is something unique about the criminal defendant as a witness.[262] In striking down a state rule "designed to ensure trustworthy evidence"[263] because such a rule "interfered with the ability of a defendant to offer testimony,"[264] the Court acknowledged that the interest present when a criminal defendant testifies on her own behalf is more complex than a straightforward policy that evidence should be reliable.[265]

As discussed *supra*, *Rock* involved a criminal defendant who was charged with manslaughter arising from the death of her husband.[266] A sharply divided court held that a per se rule excluding a criminal defendant's hypnotically refreshed testimony infringes impermissibly on her right to testify on her own behalf.[267]

The Court recognized the importance that the accused be given the opportunity to speak in an "unfettered exercise" of her own will[268] and grounded the criminal defendant's right to testify in three distinct constitutional provisions:[269] in the Due Process Clause of the Fourteenth Amendment,[270] as a necessary corollary to the Fifth Amendment's guarantee against compelled testimony,[271] and in the Compulsory Process Clause of the Sixth Amendment.[272]

Foremost, the Court reasoned that the right to testify is "one of the rights that 'are essential to due process of law in a fair adversary process' "[273] because the "necessary ingredients of the Fourteenth Amendment's guarantee that no one shall be deprived of liberty without due process of law include *a right to be heard and offer testimony*."[274] Due Process grants a criminal defendant a right to "her day in court,"[275] a right that is basic to our system of jurisprudence.[276]

261. 483 U.S. 44 (1987).

262. One student author remarks, "[t]he Court attached great significance to the difference between an accused and those of other witnesses." Traynor, *supra* note 68, at 820. Traynor did not, however, suggest what the difference may be.

263. *Rock*, 483 U.S. at 53.

264. *Id.*

265. *See infra* notes 284-309 and accompanying text.

266. *See supra* notes 209-20 and accompanying text.

267. *Rock*, 483 U.S. at 62. Accordingly, the Supreme Court of the United States vacated the judgment and remanded the case to the Arkansas Supreme Court. *Id.*

268. *Id.* at 53 (citation omitted).

269. *Id.* at 51-53.

270. *Rock*, 483 U.S. at 51; U.S. Const. amend. XIV.

271. *Rock*, 483 U.S. at 52-53; U.S. Const. amend. V.

272. *Rock*, 483 U.S. at 52; U.S. Const. amend. VI.

273. *Id.* at 51 (citing *Faretta v. California*, 422 U.S. 806, 819 n.15 (1975)).

274. *Id.* (emphasis added).

275. *Id.*

276. *Id.*

Therefore, the "right to be heard" is conferred upon the criminal defendant out of respect for the inherent dignity of the individual.

The Court also grounded the accused's right to testify in the Fifth Amendment.[277] The Fifth Amendment prevents the government from compelling a criminal defendant to either incriminate herself or perjure herself by granting her the right "to remain silent unless [s]he chooses to speak in the unfettered exercise of [her] own will."[278] Accordingly, the guiding force of the Fifth Amendment, like that of the Fourteenth Amendment, is respect for the individual's sense of dignity.

Finally, the Court grounded the accused's right to testify in the Compulsory Process Clause of the Sixth Amendment.[279] The Compulsory Process Clause grants the criminal defendant the right to call witnesses in her favor.[280] Likening the criminal defendant to other witnesses she may present in her defense, the Court reasoned that a defendant's opportunity to conduct her own defense by calling witnesses is incomplete if she may not present herself as a witness.[281] The Court's reasoning on this point is inconsistent with the general theme of the opinion, however.

The overarching theme of the Court's opinion is that there is something unique about the criminal defendant as a witness.[282] Indeed, the Court grounded the accused's right to testify in three constitutional amendments that are geared towards protecting the accused's rights in a criminal trial. Moreover, comparable constitutional support is not available to witnesses other than the accused. Therefore, it is the recognition of the unique position of the criminal defendant coupled with the respect for the inherent dignity of the individual that guides the Court to hold for the first time ever that a criminal defendant has a constitutional right to testify on her own behalf.[283]

The Court falters then when it bases the right to testify on the Compulsory Process Clause of the Sixth Amendment by analogizing the

277. *Id.* at 52.
278. *Id.* at 53.
279. *Id.* at 52.
280. *Id.*
281. *Id.*
282. *See supra* notes 268-72 and accompanying text.
283. *See* Louis M. Holscher, *The Legacy of* Rock v. Arkansas: *Protecting Criminal Defendants' Right to Testify in Their Own Behalf*, 19 New. Eng. J. Crim. & Civ. Confinement 223, 226 (1993) ("Whether a defendant has a constitutional right to testify was not resolved authoritatively . . . until the *Rock* decision."). Tracing the historical development of the criminal defendant's right to testify, Holscher notes:

> By the late 1600s, courts had repudiated the belief that a defendant's statements could be considered as testimony, and during the 1700s the general rule was that a defendant was incompetent to testify . . . . By the end of the 19th Century, all states except Georgia had enacted statutes that declared criminal defendants competent to testify . . . . The privilege of criminal defendants to testify in their own defense . . . has now developed into a constitutional right protected by the Fifth, Sixth, and Fourteenth Amendments.

accused to other witnesses she may present in her defense. The accused is arguably distinct from any other witness that either the defense or the prosecution may introduce in a criminal trial. It is only the accused that the Constitution entitles to due process of law, promising that she will receive "her day in court." Moreover, it is solely the accused that the Constitution grants the right to decide whether or not to testify. Furthermore, it is exclusively the privilege of the accused to have a complete defense. Clearly then, although partially misguided, the Court's compulsion to ground the accused's right to testify in three distinct Constitutional provisions indicates that a powerful interest is present when the accused testifies. The following section identifies this interest as autonomy.

B. *Autonomy: The Touchstone of the Criminal Defendant's Right to Testify on Her Own Behalf*

Autonomy, the jurisprudence of which is discussed in this section, has been defined as "the purported metaphysical foundation of people's capacity and also their right to make and act on their own decisions, even if those decisions are ill-considered and substantively unwise."[284] An individual's sense of autonomy encompasses the interest of self-government.[285] Central to the ability to govern oneself is the capacity to speak on one's own behalf. In order to secure the accused's autonomy interest in testifying on her own behalf, this section proposes an admissibility analysis that courts should apply when a criminal defendant's right to testify is at stake.

1. The Contemplation of Autonomy

Autonomy may be characterized as an individual's interest in governing herself as she sees fit and in directing her destiny as she so determines.[286] Within the context of a criminal prosecution, the accused may exercise her autonomy interest in various ways. For example, a criminal defendant has the right to appear *pro se* at her trial.[287] This right exists as an affirmation of the "dignity and autonomy of the accused."[288] In *Faretta v. California*,[289] the Court held that a criminal

Id. at 226-28. For another account of the historical development of the criminal defendant's right to testify, see Kimbro Stephens, Rock v. Arkansas: *Hypnosis and the Criminal Defendant's Right to Testify*, 41 Ark. L. Rev. 425, 431-37 (1988).

284. Richard H. Fallon, *Two Senses of Autonomy*, 46 Stan. L. Rev. 875, 878 (1994).

285. *Id.*

286. *See* United States *ex rel.* Maldonado v. Denno, 348 F.2d 12, 15 (2d Cir. 1965), *cert. denied*, 384 U.S. 1007; Fallon, *supra* note 284, at 878.

287. *See, e.g.*, McKaskle v. Wiggins, 465 U.S. 168, 176-77 (1984) (commenting that the right to proceed *pro se* may be undermined by "unsolicited and excessively intrusive participation by standby counsel"). Furthermore, the right to speak on one's own behalf "entails more than the opportunity to add one's voice to a cacophony of others." *Id.* at 177.

288. *Id.* at 176-77.

289. 422 U.S. 806 (1974).

defendant has an independent constitutional right of self-representation.[290] Finding this right in the structure of the Sixth Amendment,[291] the Court held that the "Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused *personally* the right to make his defense."[292] As a result, *Faretta* permits the criminal defendant to make the personal decision to refuse appointed counsel and represent herself, if that is her wish.[293] *Faretta* reasons that if the government were allowed to "force"[294] counsel upon the accused, counsel would then be acting not as an "assistant,"[295] but as the "master"[296] of the accused.[297] Significantly, *Faretta* recognizes that although a criminal defendant may conduct her own defense ultimately to her own detriment, her "choice must be honored out of '*that respect for the individual which is the lifeblood of the law*.' "[298] Accordingly, *Faretta* confers through the Sixth Amendment a right of self-representation upon a criminal defendant out of respect for the autonomy interest of the accused.[299]

The Court did not contend, however, that the autonomy interest of the accused is absolute.[300] The court conceded that "the right of self-representation is not a license to abuse the dignity of the courtroom . . . [nor] is it a license not to comply with relevant rules of procedural and substantive law."[301] Therefore, in the appropriate case, the criminal defendant's autonomy interest may be limited.[302]

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290. *Id.* at 807.

291. *Id.* at 821 (stating that "[t]he Sixth Amendment, when *naturally read*, thus implies a right of self-representation" (emphasis added)).

292. *Id.* at 819 (emphasis added).

293. *See id.*

294. *Id.* at 807.

295. *Id.* at 820.

296. *Id.*

297. *Id.*; *see also* Jones v. Barnes, 463 U.S. 745, 759 (1983) ("[T]he function of counsel under the Sixth Amendment is to protect the dignity and autonomy of a person on trial by 'assisting' h[er] in making choices that are h[ers] to make, not to make choices for h[er]."(emphasis omitted)).

298. *Faretta*, 422 U.S. at 834 (emphasis added) (quoting Illinois v. Allen, 397 U.S. 337, 350-51 (1970)). Referring to the criminal defendant's Sixth Amendment right to a complete defense, the Court notes, "to deny h[er] in the exercise of h[er] free choice the right to dispense with some of these safeguards . . . is to imprison a [wo]man in h[er] privileges and call it the Constitution." *Id.* (quoting Adams v. United States *ex rel.* McCann, 317 U.S. 269, 279 (1942)).

299. *See* United States *ex. rel.* Maldonado v. Denno, 348 F.2d 12, 15 (2d Cir. 1965), *cert. denied*, 384 U.S. 1007 (1966) (noting that "even in cases where the accused is harming h[er]self by insisting on conducting h[er] own defense, respect for *individual autonomy* requires that [s]he be allowed to go to jail under h[er] own banner if [s]he so desires").

300. *Id.*

301. *Id.*

302. Upon granting Faretta the opportunity to represent himself, the trial judge explained to him: "We are going to treat you like a gentleman. We are going to respect you. We are going to give you every chance, but you are going to play with the same ground rules that anybody plays." *Id.* at 808 n.2. Faretta was unable to

In his dissent in *Faretta*, Justice Blackmun characterized the majority opinion as acknowledging that society's interest in obtaining a just result in a criminal prosecution[303] does not outweigh the individual criminal defendant's autonomy interest.[304] Accordingly, if Blackmun's opinion is credited, the fact that, upon balancing these competing interests, the majority of the Court concluded that the individual criminal defendant's interest outweighed the interests of society as a whole demonstrates that although not absolute, the autonomy interest of the accused is powerful.

In a broader sense, *Faretta* indicates that an accused may exercise her autonomy interest not only by *conducting* her own defense but also by *participating* in it:

> Implicit in *Faretta* is the notion that when society, through its government, brings an individual before the court to face criminal charges, "that respect for the individual which is the lifeblood of the law" requires that the defendant be allowed, if [s]he so desires, to speak directly to h[er] accusers, and the court and jury that will decide h[er] fate.[305]

The Court's recognition of justice's respect for the individual as providing the foundation for a criminal defendant's right to testify indicates an equally significant autonomy interest in presenting such testimony.

In *Riggins v. Nevada*,[306] the Court held that the forced administration of antipsychotic medication during the defendant's trial violated

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demonstrate that he had adequate knowledge of the law, however, and the judge reversed his earlier ruling and appointed a public defender to represent Faretta. *Id.* at 808-10.

303. *Id.* at 849 (Blackmun, J., dissenting).

304. *Id.* at 851. In his dissent, Blackmun criticizes the majority of the court for holding "that self-representation must be allowed despite the obvious dangers of unjust convictions in order to protect the individual defendant's right of free choice." *Id.* Drawing his tirade against the majority opinion to a poignant close, Blackmun declared, "If there is any truth to the old proverb that 'one who is h[er] own lawyer has a fool for a client,' the Court by its opinion today now bestows a constitutional right on one to make a fool of h[er]self." *Id.* at 852 (emphasis omitted).

305. United States v. Teague, 908 F.2d 752, 759 (11th Cir. 1990), *vacated for rehearing en banc*, 932 F.2d 899 (1991), *aff'd*, 953 F.2d 1525, 1532 (1992) (reaffirming that the criminal defendant has a constitutional right to testify in her own behalf). Under *Teague II*, the principles espoused in *Teague I* remain unchanged:

> In making the choice on whether to testify, just as the choice on whether to represent [her]self, the defendant elects whether to become an active *participant* in the proceeding that affects h[er] life and liberty and to inject h[er] own action, voice and personality into the process to the extent the system permits. . . . To deny a defendant the right to tell h[er] story from the stand dehumanizes the administration of justice. I cannot accept a decision that allows a jury to condemn to death or imprisonment a defendant who desires to speak, without ever having heard the sound of h[er] voice.

Teague II, 953 F.2d at 1532 (quoting Justice Godbold's impassioned dissent in *Wright v. Estelle*, 572 F.2d 1071, 1078, 1081 (1978) (emphasis added)).

306. 504 U.S. 127 (1992).

rights guaranteed by the Sixth[307] and Fourteenth Amendments.[308] Explaining how the forced administration of Mellaril infringed on the defendant's right to testify, the court stated:

> It is clearly possible that such side effects [impacted] not just Riggins' outward appearance, but also the *content of his testimony* on direct [and] cross-examination . . . . We also are persuaded that allowing Riggins to present expert testimony about the effect of Mellaril on his demeanor did nothing to cure the possibility that the *substance of his own testimony* . . . [was] compromised by forced administration of Mellaril.[309]

This statement illustrates that the United States Supreme Court acknowledges the importance of the accused's right to tell her story in her own words, and the autonomy interest this right naturally implies. Conceding that an accused has an autonomy interest in testifying on her own behalf, how should courts determine if this interest has been respected?

2. Protecting the Criminal Defendant's Right to Testify: A Proposed Test of Admissibility

In order to determine whether a criminal defendant's right to testify has been protected, this Note proposes a three-pronged test. Because the right to testify is intended to confer upon the criminal defendant the opportunity to confront her accusers by telling them her "story," the appropriate analysis should be tailored to protect this interest.

First, the criminal defendant should have had the opportunity to present her defense "in her own words."[310] This inquiry is necessary to determine if the accused's autonomy interest in presenting testimony on her own behalf was properly respected. Second, this privilege should only apply to live testimony the criminal defendant personally offers from the witness stand.[311] This requirement is necessary because although *Rock* held that a defendant's testimony is not subject to per se exclusions,[312] reliability is still a factor in determining whether the accused will be permitted to testify in an individual case.[313] When an accused takes the stand, the elements of confrontation—the oath, cross-examination, and observation of the witness' de-

307. Defendant's core contention was that the involuntary administration of Mellaril, an antipsychotic medication, denied him a full and fair trial. *Id.* at 133.

308. "The forcible injection of medication into a nonconsenting person's body . . . represents a substantial interference with that person's liberty." *Id.* at 134 (quoting Washington v. Harper, 494 U.S. 210, 229 (1990)).

309. *Id.* at 137-38 (emphasis added) (quoting Washington v. Harper, 494 U.S. 210, 229 (1990)).

310. *See infra* notes 317-36 and accompanying text.

311. *See infra* notes 337-54 and accompanying text.

312. Rock v. Arkansas, 483 U.S. 44, 61 (1987).

313. *See id.*

meanor—function as safeguards of reliability.[314] Third, the State's interest in barring the testimony should be balanced against the defendant's right to testify on her own behalf.[315] For example, when a criminal defendant seeks to offer her own hypnotically refreshed testimony, the State's interest may be the interest to exclude unreliable testimony, the inquiry being the extent to which the proffered testimony is reliable.[316]

3. The Admissibility Test Applied to Post-*Rock* Cases Involving the Defendant's Right to Testify

This subsection explores the three strands of the admissibility analysis presented *supra*. In order to illustrate the principles embodied by each prong of the analysis, each strand is applied to cases in which the accused's right to testify was at issue.

a. *"In Her Own Words:" The Polygraph & Truth Serum Cases*

Most courts approach the issue of determining whether a criminal defendant has been deprived of her constitutional right to testify on her own behalf by examining whether she was able to present her defense "in her own words." For example, *Haakanson v. State*[317] involved a criminal defendant convicted of ten counts of sexual abuse of a minor in the first degree.[318] Haakanson appealed the conviction, contending that the trial court erred in refusing to admit the results of a polygraph test that he had taken.[319] Haakanson denied any sexual contact with the three complainants during the polygraph examination.[320] The examiner testified that, in his professional opinion, the results of the polygraph test indicated that Haakansan's denial was truthful.[321] The trial court, however, refused to admit the test results because the polygraph examination did not meet the *Frye* test for novel scientific evidence.[322] The appellate court upheld this determination, defending its position by commenting that "Haakanson was not prohibited from presenting *his own version of the facts through his testimony*. He was merely precluded from presenting evidence of his polygraph examination."[323] Accordingly, the court concluded that

314. Maryland v. Craig, 497 U.S. 836, 847 (1990).
315. *See infra* notes 355-74 and accompanying text.
316. *Rock*, 483 U.S. at 61.
317. 760 P.2d 1030 (Alaska Ct. App. 1988).
318. *Id.* at 1031.
319. *Id.*
320. *Id.* at 1032.
321. *Id.*
322. *Id.* at 1034-35.
323. *Id.* at 1034 n.3 (emphasis added).

"unlike the criminal defendant in *Rock*, Haakanson's right to testify was not abridged."[324]

Implicit in the court's holding is the recognition that a criminal defendant's testimony serves a purpose other than presenting reliable evidence.[325] In *Haakanson*, the court acknowledged that while the criminal defendant's right to testify does not afford her the privilege to present unreliable evidence, such right nevertheless grants her the opportunity to present her own version of the facts through her testimony. Arguably then, the accused's right to "tell her story" is not predicated upon the notion that her story will be entirely reliable, but that her story must be told in order to preserve the her autonomy interest. This notion explains why the hypnotically refreshed testimony of the accused must be admitted, whereas polygraph results of the accused are not protected by a similar constitutional guarantee.

A similar analysis is appropriate when the accused seeks to present evidence pertaining to truth serum results.[326] "Truth serum" is supposed to lower inhibitions in the conscious mind and allow the subject to speak freely.[327] For example, *Cogburn v. State*[328] involved a criminal defendant, accused of sexually abusing his daughter,[329] who sought to admit the testimony of an expert that performed an amytal interview[330] on the defendant. In a pre-trial deposition, the doctor stated that "[w]hile under the influence of the truth serum . . . Cogburn achieved a hypnotic state and denied having sexual contact or experience with the victim."[331] The doctor concluded that, in his professional opinion, the test provided evidence in favor of Cogburn's

324. *Id.* Haakanson's conviction was reversed on other grounds, however. *Id.* at 1039.

325. Another case illustrating this principle is *Misskelley v. State*. 915 S.W.2d 702, (Ark. 1996), *cert. denied*, 117 S. Ct. 246 (1996). In this case, the criminal defendant cited *Rock v. Arkansas* as standing for the proposition that "evidence which might ordinarily be considered unreliable is admissible to protect a defendant's constitutional rights." *Id.* at 715. The defendant used this argument in order to persuade the court to admit an expert's opinion pertaining to the results of the defendant's polygraph examination. *Id.* at 714-15. The court distinguished *Rock* from the circumstances before it by declaring that *Rock* only applies to the criminal defendant's testimony and not to the testimony of other witnesses. *Id.* at 715. Due to this distinction, such an argument, which this Note contends may be successful in the appropriate case, failed in *Miskelley*. In restricting *Rock*'s application to a criminal defendant's testimony, the Arkansas Supreme Court implicitly recognized the first strand of the admissibility test proposed in this Note—specifically, that autonomy need not be guarded where testimony is not "in the accused's own words."

326. Cogburn v. State, 732 S.W.2d 807, 812 (Ark. 1987) ("Truth serum tests are generally held to occupy the same position as polygraph tests and most courts do not recognize the admissibility of either test for the purpose of proving the truth of the matter asserted.").

327. *Id.*

328. 732 S.W.2d 807 (Ark. 1987).

329. *Id.* at 808.

330. An amytal interview refers to the administration of truth serum. *Id.* at 812.

331. *Id.*

innocence.[332] The State then filed a motion in limine to suppress the doctor's testimony.[333] The trial court granted the motion,[334] and the Arkansas Supreme Court ultimately agreed with the trial court's decision to suppress the testimony.[335] In affirming the determination to suppress the expert's testimony involving the results of Cogburn's truth serum test, the court noted that under the majority rule, the results of truth serum tests are inadmissible.[336] Because the results of truth serum tests do not constitute testimony of an accused "in her own words," these results are not protected by the criminal defendant's constitutional right to testify. In addition, truth serum results do not constitute "live testimony of an accused" which is the second prong of the admissibility analysis this Note proposes, and which is set out in the next subsection.

b. *"Live Testimony Personally Offered by the Accused:" The Insanity Plea Cases*

In some instances, defendants have attempted to admit pre-trial interviews taken of the accused based on the constitutional right to testify.[337] These scenarios typically involve out-of-court interviews with defendants while they are under the influence of truth serum or hypnosis in order to establish an insanity defense.[338] The problem with admitting such interviews is apparent—it would allow the accused to "smuggle in" testimony without having to be subjected to cross-examination.[339] Therefore, a criminal defendant's autonomy interest applies only to live testimony offered by the accused.[340] Tracing the language of *Rock v. Arkansas*,[341] as the "opportunity to testify is . . . a necessary corollary to the Fifth Amendment's guarantee against compelled testimony,"[342] so is the duty to defend her story a "necessary corollary" to the constitutional guarantee that an accused may tell her story in the first place.

State v. Alley[343] illustrates this principle. In *Alley*, the criminal defendant was convicted of first-degree murder, kidnapping, and aggravated rape and sentenced to death.[344] Defendant appealed alleging numerous errors including the trial court's decision to exclude video-

332. *Id.*
333. *Id.*
334. *Id.*
335. *Id.*
336. *Id.*
337. State v. Alley, 776 S.W.2d 506 (Tenn. 1989), *cert. denied*, 493 U.S. 1036 (1990); United States v. Stark, 24 M.J. 381 (C.M.A. 1987), *cert. denied*, 484 U.S. 1026 (1988).
338. *Id.*
339. *See Stark*, 24 M.J. at 384.
340. *See* State v. L.K., 582 A.2d 297, 306 (N.J. Super. Ct. App. Div. 1990).
341. 483 U.S. 44 (1987).
342. *Id.* at 52.
343. 776 S.W.2d 506 (Tenn. 1989), *cert. denied*, 493 U.S. 1038 (1990).
344. *Id.* at 508.

taped hypnotic and sodium amytal interviews of the defendant from the jury's consideration.[345] Alley argued that viewing the tapes would assist the jury's understanding of his diagnosis[346] of multiple personality disorder.[347] This diagnosis would "raise the issue of his sanity and shift the burden to the State to prove beyond a reasonable doubt that he was able to appreciate the wrongfulness of his conduct and had the capacity to conform his conduct to the requirements of the law."[348] The Tennessee Supreme Court upheld the trial court's decision to exclude the videotaped interviews of the defendant[349] which was based on the finding that such tapes were "sensational"[350] and "unreliable"[351] and that Alley was a "malingerer."[352]

Under the admissibility analysis proposed by this Note, videotaped interviews of the defendant unquestionably include testimony "in the defendant's own words," and therefore, satisfy the first prong of the admissibility analysis. Such testimony fails, however, to satisfy the second prong of the test because a videotaped interview does not constitute "live testimony of an accused." *Alley* highlights the necessity of this requirement. In *Alley*, if the pre-trial interviews in which the defendant told a sensational story were admitted, the defendant would have escaped cross-examination. Consequently, the accused's duty to defend her story—the natural and necessary corollary to the right to tell it in the first place[353]—would have been circumvented. Under such circumstances, fairness would be compromised, and injustice would result. Therefore, the accused must offer "live testimony" in order to preserve her autonomy interest.[354]

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345. *Id.* at 515.

346. *Id.*

347. *Id.* at 510. During the pre-trial sodium amytal and hypnosis interviews, two alternate personalities were revealed. *Id.* Defendant alleged that his alternate personalities "Power"—who also answered to the name "Death"—and "Billie" were in control at the time of the offense. *Id.*

348. *Id.*

349. *Id.* at 516.

350. *Id.* at 515.

351. *Id.*

352. *Id.* at 511.

353. *See supra* notes 328-29 and accompanying text.

354. *United States v. Stark* provides another example of this problem. 24 M.J. 381 (C.M.A. 1987), *cert. denied*, 484 U.S. 1026 (1988). In this case, the United States Military Court of Appeals upheld the general court-martial's conviction of the defendant for the unpremeditated murder of his wife. *Id.* at 381. In convicting the defendant, the general court-martial determined that videotapes of a psychiatrist's interviews with the accused were inadmissible. *Id.* at 385. The defendant wanted the tapes admitted to help court members evaluate the psychiatrist's opinion that defendant either lacked mental responsibility or was insane at the time of the killing. *Id.* at 384. The U.S. Military Court of Appeals agreed with the general court-martial that admitting the tapes into evidence would permit the defendant to "smuggle" hearsay evidence before the court. *Id.* at 385. Distinguishing *Rock v. Arkansas* from the case before it, the court noted that "there was no limitation on [the defendant's] ability to testify in his own defense." *Id.* This statement indicates that the court in *Stark* recognized, if

c. *"When Justice Must Censor Her Story:" Limitations on the Autonomy Interest of the Accused*

The criminal defendant's autonomy interest in presenting testimony on her own behalf is not absolute.[355] *Rock v. Arkansas* recognized that the right may in the appropriate case be limited by other legitimate interests in the criminal trial process.[356] The Court also noted, however, that restrictions on a defendant's right to testify may not be "arbitrary or disproportionate to the purposes they are designed to serve."[357] A State has a legitimate interest, for example, in excluding unreliable evidence. Likewise, a State may have other legitimate interests that supersede the accused's right to testify that justify censoring the accused's story.

The interplay between the criminal defendant's and the State's interests are highlighted by *Stephens v. Miller*[358] which involved a Rape Shield Statute[359] that conflicted with the accused's right to testify.[360] The statute hindered the defendant's ability to "present his own version of events in his own words."[361] Stephens was convicted of attempted rape after the trial court excluded statements that Stephens claims he made during the events that led to his conviction.[362] The case against Stephens was a classic case of conflicting stories. Stephens claimed that M.W., the alleged victim, consented to sexual activity[363] whereas M.W. insisted that no consent was given to the defendant.[364] Pursuant to the Indiana Rape Statute,[365] the trial court prevented the defendant from testifying that "the two of them were 'doing it doggy fashion' when he said to her '[d]on't you like it like this? . . . [T.H.] said you did' "[366] and that "he said something to

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only implicitly, the importance that an accused be provided the opportunity to tell her story in her own words.

355. *See* Rock v. Arkansas, 483 U.S. 44, 55-56. There is no constitutional right, for example, to commit perjury. United States v. Dunnigan, 507 U.S. 87, 96 (1993).

356. 483 U.S. 44, 55 (1987).

357. *Rock*, 483 U.S. at 56.

358. 13 F.3d 998 (7th Cir.) (en banc), *cert. denied*, 115 S. Ct. 57 (1994).

359. Ind. Code Ann. § 35-37-4-4 (Burns 1994). Under this statute, counsel may not inquire into matters concerning the victim's sexual history.

360. *Stephens*, 13 F.3d at 1000-01.

361. Rock v. Arkansas, 483 U.S. 44, 52 (1987).

362. *Stephens*, 13 F.3d at 1000.

363. The defendant claimed that M.W. invited him into her trailer to talk in the living room. *Id.* According to the defendant, he asked if he could kiss her and then "[o]ne thing led to another . . . until the two of them ended up on the floor as two consenting adults engaged in sexual intercourse." *Id.*

364. M.W.'s story differed markedly from the defendant's. M.W. claimed that she forgot to lock the door prior to falling asleep on the living room couch. *Id.* When she awoke, she found the defendant in her trailer who then attempted to make sexual advances on her. *Id.* M.W. claims that she pushed him off her and ran screaming into her sister's bedroom, while the defendant made a hasty exit out the front door. *Id.*

365. Ind. Code Ann. § 35-37-4-4 (Burns 1994).

366. *Stephens*, 13 F.3d at 1000.

[M.W.] about 'switching partners.' "[367] The court did, however, permit the defendant to testify that "he said something to [M.W.] that angered her and led her to fabricate the attempted rape charge."[368]

After the Indiana Supreme Court affirmed his conviction, the defendant appealed to the Seventh Circuit contending that the Indiana court erred in excluding the proffered testimony.[369] Stephens's main argument was that "Indiana denied him his constitutional right to testify in his own defense when it did not allow him to tell his version of the events, in their entirety and in his own words, about what happened"[370] that night at M.W.'s trailer.

Applying the admissibility test to this case, the defendant unquestionably satisfied the first two prongs: (1) that such testimony be "in his own words" and (2) that the right to tell his story applies only to "live testimony" from the defendant. The accused in this example, however, failed to satisfy the third prong of the analysis proposed by this Note—that there be no legitimate State interest that outweighs the defendant's right to testify. Tracing the language of *Rock*, the Seventh Circuit in *Stephens* found that "the [trial] court did nothing arbitrary or disproportionate to the purposes the Indiana Rape Shield Statute was designed to serve when it excluded 'doggy fashion' and 'partner switching' statements."[371] The Seventh Circuit noted further that "the Indiana Rape Shield Statute was enacted to prevent just this kind of generalized inquiry into the reputation or past sexual conduct of the victim in order to avoid embarrassing her and subjecting her to possible public denigration."[372] The Seventh Circuit determined that the trial court "properly balanced" the competing rights of the State in protecting victims from embarrassment and public denigration and the defendant in testifying on his own behalf.[373] Accordingly, the Seventh Circuit concluded that the State's interest served by the Indiana Rape Shield Statute justified "this very minor imposition on Stephens' right to testify."[374]

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367. *Id.*

368. *Id.* at 1001.

369. *Id.* at 1001-02. Stephens argued that "the Indiana court violated the federal constitution when it excluded his statements about 'doggy fashion' sexual intercourse and partner switching." *Id.*

370. *Id.* at 1001.

371. *Id.* at 1002.

372. *Id.* (citations omitted).

373. *Id.* The Seventh Circuit noted that "the Indiana trial court properly balanced Stephens' right to testify with Indiana's interests because it allowed him to testify about what happened and that he said something to upset [M.W.]." *Id.*

374. *Id.*

C. *Criminal Defendants and the Stories They Tell: Towards Admitting the Accused's Hypnotically Refreshed Testimony*

"Stories are one way to bring law down to life . . . ."[375]

There is a movement in legal scholarship referred to as "legal storytelling" which argues that "law should concern itself more with the concrete lives of persons affected by it."[376] The key term in this discourse is "empathy."[377] Undoubtedly, this principle is already embodied—at least to some degree—in legal scholarship. In law school class rooms, for example, we study not disembodied, abstract legal principles; rather, we study the application of these rules to concrete instances—stories, if you will—as exemplified in case law. We study actual cases because, on the most basic level, it is through "stories" that we construct our understanding of the world in which we live. Stated simply, it is through stories that we learn.

And so why should the accused not be given this opportunity to relate to her accusers in this most fundamental and human way? And why should we, as her accusers, be prevented from learning from the lessons embedded in her story—lessons that may be revealed simply by allowing her to speak?

This section argues that it is imperative that courts acknowledge the constitutional considerations at stake when determining whether or not to admit the testimony of an accused. Concededly, the analysis becomes complicated when the accused seeks to admit testimony that has been hypnotically refreshed, and the proposed admissibility test is tailored to address such intricacies. In order to illustrate the potential consequences of the admissibility analysis on cases involving the hypnotically refreshed testimony of criminal defendants, this section presents the stories of two such criminal defendants and then applies the analysis to both cases.

1. *State v. Butterworth*:[378] "I'm a Coward, Not a Killer"

State v. Butterworth involved a criminal defendant charged with three counts of first-degree murder.[379] On New Year's Eve in 1987, Melvin P. Fager and his daughters, Sherri and Kelli, were found dead in their home in Wichita, Kansas.[380] The family car was missing—as well as Butterworth—who had been employed by the Fagers' to build a solarium adjoining their home.[381] Three days after the Fagers' bodies were found, Butterworth telephoned his wife from Florida who

375. Toni M. Massaro, *Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds?*, 87 Mich. L. Rev. 2099, 2105 (1989).
376. *Id.* at 2099.
377. *Id.*
378. 792 P.2d 1049 (Kan. 1990).
379. *Id.* at 1050.
380. *Id.* at 1051.
381. *Id.*

informed him that he was wanted for the triple murder of the Fager family.[382] Butterworth voluntarily surrendered to the police and was charged with killing the Fagers.[383]

Because he had no memory of the crimes with which he was charged, Butterworth was hypnotized on ten occasions over a four month period by a licensed psychologist for both forensic and therapeutic reasons.[384] Under hypnosis, Butterworth made a shocking revelation which he later shared with a jury of his peers at trial.[385] Exercising his constitutional right to testify, Butterworth told the following story:

On the afternoon of the murders, Butterworth had returned to the solarium after his lunch break.[386] He remembered starting to work when he noticed the smell of chlorine and condensation on the glass in the solarium.[387] He concluded that someone was in the spa.[388] Figuring it to be Kelli Fager and her boyfriend,[389] Butterworth decided to leave until they were finished using the spa so he could work without disturbing them.[390] In the meantime, Butterworth decided to go to the shopping mall to see if there were any after-Christmas sales.

It was getting dark when Butterworth left the mall and returned to the Fager home.[391] What he found upon his arrival made his blood run cold.[392]

> He cried as he recalled opening the solarium door and seeing Sherri Fager face up in the spa. He started to pull her out and realized she was dead. He went into the house and saw Mr. Fager lying dead on the floor. He knelt beside him, saw some keys beside him, and picked them up. . . . He . . . started to get up when he thought he heard something . . . like somebody trying to cry or scream . . . he thought it might be the Fagers' dog . . . he started toward the basement stairs where he thought the sound came from . . . . It wasn't the dog.[393]

At this point, Butterworth testified that he became frightened and ran away.[394] Because he believed that the "sound" he had heard was made by Kelli, who Butterworth imagined was still alive, and who he

382. *Id.*
383. *Id.*
384. *Id.* Butterworth claimed that he remembered preparing for work on the morning of December 30 and that his next recollection was of listening to a news broadcast on the radio about the Fager murders, after which he called his wife. *Id.*
385. *Id.* at 1051-53.
386. *Id.* at 1052.
387. *Id.*
388. *Id.*
389. *Id.*
390. *Id.*
391. *Id.*
392. *Id.* at 1052-53.
393. *Id.*
394. *Id.* at 1052.

believed he could have saved, he fled to Florida ashamed and unable to face his own family.[395] Butterworth then added that "if he had not been cowardly, Kelli might not have been killed"[396] and that "he feared he might abandon his own children in such a situation."[397]

Intriguingly, Butterworth's insight into his psyche was gained only *after* his therapist had told him that, in his expert opinion, "he believed Butterworth to be innocent but suffering from guilt and self-condemnation."[398] Nine days after the doctor shared this opinion with Butterworth—after four months of therapy in which he was hypnotized nine times and revealed no such complex[399]—Butterworth made the "shocking" revelation that he was not a killer, but a coward, and accordingly, his memory loss was triggered by the accompanying emotions of "guilt and self-condemnation."[400]

After hearing Butterworth's testimony, the jury acquitted him of all charges.[401] Subsequently, the Kansas Supreme Court upheld the acquittal.[402] In defending the trial court's decision to admit Butterworth's hypnotically refreshed testimony, the Kansas Supreme Court adopted the *Hurd* safeguards[403] to be applied when determining the admissibility of a criminal defendant's hypnotically refreshed testimony.[404] In addition, the court adopted an additional safeguard that the hypnosis should be conducted in a neutral setting if possible.[405] Moreover, the court ruled that it is the defendant's burden to establish by a preponderance of the evidence that substantial safeguards were utilized.[406]

2. *State v. L.K.*:[407] "I'm No 'Angel,' So Acquit Me"

In *State v. L.K.*, L.K., a nineteen year old college student,[408] was accused of murdering her father and aunt.[409] One evening in October 1988, L.K. met with her cousin, a former high school football star,

395. *Id.* at 1053.
396. *Id.* at 1052.
397. *Id.*
398. *Id.*
399. *Id.* at 1052-53.
400. *Id.* at 1052.
401. *Id.* at 1055.
402. *Id.* at 1059. The State was able to appeal the judgment because it reserved the question of the propriety of the admission of Butterworth's testimony. *Id.* at 1050.
403. *See supra* note 182 and accompanying text.
404. *Butterworth*, 792 P.2d at 1057-58.
405. *Id.* at 1058. The office of the expert who will conduct the hypnosis is an example of a neutral setting. *Id.*
406. *Id.* at 1059.
407. 582 A.2d 297 (N.J. Super. Ct. App. Div. 1990).
408. *See* Joyce A. Venezia, *Student Draws 30-Year Term for Plotting to Kill Father, Aunt: Judge Rejects Defendant's Attempt to Withdraw Earlier Admission of Guilt*, Star Ledger, May 5, 1991, at 13.
409. *Id.*

Patrick,[410] in her home in the wealthy residential community of Upper Saddle River, New Jersey.[411] L.K. confided in Patrick and told him that her father, a banker, had embezzled millions of dollars and stashed the money in foreign banks.[412] Motivated by the promise of a substantial inheritance, L.K. and Patrick conspired to kill her family.[413]

The next morning, L.K. poisoned her father's coffee.[414] He did not drink it, however, because it tasted bitter.[415] Frustrated that the murder attempt failed, L.K. left the family's home and went to the library leaving Patrick to finish the deed.[416] Patrick then bludgeoned to death L.K.'s father and aunt[417] with a two-foot long,[418] fifteen pound metal pipe.[419] L.K.'s younger brother was also beaten but survived the attack.[420]

L.K.'s plan to "live like a queen and travel the world"[421] was quashed, however, when she was charged with the murders of her father and aunt.[422] Under the direction of her lawyers, L.K. was examined by a psychiatrist. Under hypnosis, L.K. told the following story:

She was five years old when her father began to beat and sexually abuse her.[423] As a defensive measure, L.K. created alter personalities to cope with the abuse.[424] L.K. had two other personalities, Angelique and Angel.[425] Angelique was the "nurturer," an excessively good-natured personality.[426] In contrast, Angelique's alter ego, Angel, was the "protector,"[427] a vengeful personality that encouraged Patrick to kill L.K.'s father and aunt.[428] L.K., the host personality,

410. Tom Hester, *Defense to Cite Multiple Personalities in a "First" for a Jersey Murder Trial: Bergen Woman Will Claim Insanity in Killing of Wealthy Father, Aunt*, Star-Ledger, Oct. 30, 1990, at 19.

411. Bill Sanderson, *Psychiatrist Sees Three Faces of Laura Kaldawy's Multiple Personalities*, The Record, Feb. 27, 1990, at A1 [hereinafter Sanderson, *Three Faces of Laura K.*].

412. *Id.* at A12.

413. Hester, *supra* note 410, at 19.

414. Sanderson, *Three Faces of Laura K.*, *supra* note 411, at A12.

415. *Id.*

416. *Id.*

417. Venezia, *supra* note 408, at 13.

418. Hester, *supra* note 410, at 19.

419. Sanderson, *Three Faces of Laura K.*, *supra* note 411, at A12.

420. *Id.*

421. *Id.*

422. *Id.*

423. State v. L.K., 582 A.2d 297, 300 (N.J. Super. Ct. App. Div. 1990); Sanderson, *Three Faces of Laura K.*, *supra* note 411, at A1.

424. *Id.*

425. *Id.*

426. *Id.* at A1, A12.

427. *Id.* at A1.

428. State v. L.K., 582 A.2d 297, 301 (N.J. Super. Ct. App. Div. 1990).

was oblivious to Angel's plan to kill her father.[429] Angel explained that L.K. had never agreed to kill her father because L.K. loved him and he was all she had left.[430] Nevertheless, Angel made the decision to murder him.[431]

Because the State anticipated that L.K. would use an insanity defense based on Multiple Personality Disorder,[432] the prosecutor filed an interlocutory appeal asking the court to decide in advance how the *Hurd* procedural safeguards must be applied to a criminal defendant's hypnotically refreshed testimony.[433] The Supreme Court of New Jersey held that the *Hurd* guidelines apply to both the criminal defendant and the State.[434] Furthermore, the court held that an additional safeguard must be utilized when the hypnotically refreshed testimony of the accused is at issue: that the trial judge "conduct an *in camera* review of the prehearing evidence required by *Hurd* before the same is delivered to the prosecutor . . . and redact the prehearing evidence if it exceeds the scope contemplated by *Hurd*."[435] The court explained that the purpose of this additional safeguard is to prevent the need to establish reliability from clashing with any legitimate rights of the accused.[436]

Just before L.K. was to be examined by the State's psychiatrist to determine if she indeed suffered from Multiple Personality Disorder, L.K. agreed to plead guilty for attempting to murder her father and aunt. At her sentencing hearing, L.K.'s lawyer explained to the court

429. Bill Sanderson, *Insanity Plea Due in Double Murder: Girl to Claim Multiple Personality*, The Record, Feb. 28, 1990, at B1 [hereinafter Sanderson, *Insanity Plea*].

430. *Id.*

431. *Id.*

432. Multiple Personality Disorder as a basis of the insanity defense has been sardonically referred to as "The Devil Made Me Do It" defense. *See* United States v. Denny-Shaffer, 2 F.3d 999, 1022 (10th Cir. 1993) (Logan, J., concurring). Ironically, in this case, the defendant claims that an alter-ego named "Angel" made her do it. Such a defense has been accepted in a minority of jurisdictions where individuals suffering from Multiple Personality Disorder are found insane as a matter of law. *See* Jacqueline R. Kanovitz et al., *Witnesses With Multiple Personality Disorder*, 23 Pepp. L. Rev. 387, 408 n.73 (1996) (quoting Professor Saks who "contends that the host personality and the perpetrator are, in a philosophical sense, different people and consequently, that the host should not be sent to prison for 'some[one] else's' crimes" (citations omitted)). *But see id.* at 408 (citing cases adhering to the majority approach that "place[s] the focus on the perpetrating identity's mental state. . . [and finding that the] multiple is deemed to be legally sane if the state in control at the time of the act appreciates the criminality of the conduct"). At least one group of police investigators, however, has opted to eschew philosophical theories of Multiple Personality Disorder, and apply a practical approach instead when faced with a criminal defendant claiming to be so afflicted. State v. Blackman, 875 S.W.2d 122, 130 (Mo. Ct. App. 1994) (urging a criminal defendant who was accused of killing a police officer and who claimed to be afflicted with MPD to "have his 'good side' tell what his 'bad side' had done").

433. *L.K.*, 582 A.2d 297, 298 (N.J. Super. Ct. App. Div. 1990).

434. *Id.* at 302.

435. *Id.* at 305.

436. *Id.*

that his client, a "sad, unhappy, confused and emotionally unstable child,"[437] deserved a lenient sentence because she "had a change of heart" on the morning of the murders and warned her father not to drink the coffee that she had poisoned.[438] Unmoved by her lawyer's pleadings, the judge sentenced L.K. to two consecutive fifteen year prison terms.[439] The court subsequently refused to allow L.K. to withdraw her guilty pleas.[440]

3. Applying the Proposed Admissibility Test to *Butterworth* and *L.K.*

Because the admissibility analysis proposed in this Note is a rights-oriented test, results under this test may seem unpalatable in some situations. For example, the testimony offered by the defendant in *Butterworth* satisfied all three prongs of the analysis. The testimony Butterworth offered was "in his own words," and therefore the first prong of the test, which is geared towards protecting the accused's autonomy interest, was satisfied. Butterworth personally offered the testimony at trial, thereby satisfying the second prong of the analysis which is designed to ensure a minimum level of reliability by subjecting the accused to the elements of confrontation: Butterworth swore to tell the "truth," he was cross-examined by the prosecutor, and the jury was able to observe his demeanor while he testified. Finally, the State was not able to successfully argue that its interest in barring Butterworth's testimony outweighed Butterworth's constitutional right to testify in his defense, and accordingly, the third prong of the admissibility analysis was satisfied. The occasional unpalatable result must be tolerated, however, in the effort to protect individual rights.

Nevertheless, a rights-oriented analysis like the test proposed in this Note may render palatable results while simultaneously protecting individual rights. *L.K.* provides an example. In this case, the court held that the *Hurd* guidelines applied to the testimony of the defendant. Adherence to the safeguards would cause the defendant's contacts with her hypnotist and any information she related during hypnosis to be a matter of record. As a result, every detail of L.K.'s hypnotically elicited "story" would be available for scrutiny by the prosecutor who could then confront L.K. with inconsistencies in her story during cross-examination. In order to satisfy the second prong of the admissibility analysis, L.K. would have to face cross-examination. Instead of adhering to the safeguards set out by the court in order to preserve her right to tell her "story," L.K. pleaded guilty and was subsequently sentenced to a thirty-year prison term.

437. Venezia, *supra* note 408, at 13.
438. *Id.*
439. *Id.*
440. *Id.*

CONCLUSION

Because the criminal defendant has the right to testify on her own behalf, her interest in testifying differs from that of any other witness. Therefore, two standards are necessary to determine the admissibility of hypnotically refreshed testimony. Hypnotically refreshed testimony of witnesses other than the accused should be per se inadmissible as a matter of policy because such testimony is inherently unreliable. Nonetheless, a criminal defendant's hypnotically refreshed testimony should be admissible on a case-by-case basis employing the rights-oriented analysis proposed by this Note which balances the accused's autonomy interest in telling her "story" against the State's interest in barring unreliable testimony.

By securing the right of the accused to testify on her own behalf, we further not only the individual criminal defendant's interests, but those of society as a whole. For at the heart of our justice system is the fundamental precept that all individuals should be recognized, heard, and respected by the law.[441] Thus, out of respect for the inherent dignity of the individual, a criminal defendant—even the criminal defendant accused of the most heinous crime—should be granted the opportunity to approach the witness stand and tell her own unique "story" to the court that will determine her fate.[442]

441. The admissibility analysis proposed by this Note is related to a movement in legal scholarship that is characterized as "a call to context." Massaro, *supra* note 375, at 2099. This approach beckons courts to allow compassion and substantive justice affect their decision-making process when analyzing the legal issues that individual litigants bring before the court. *Id.* at 2100. Legal decision-makers are urged to acknowledge the "unique life story that each litigant represents." *Id.* One way to further this goal is to allow individuals who are before the court to tell their "stories" because "[t]elling stories can move us to care, and hence pave the way to action." *Id.* at 2105.

442. In his impassioned dissent in *Wright v. Estelle*, 572 F.2d 1071 (5th Cir. 1978), Judge Godbold proclaimed:

> Indeed, our history is replete with trials of defendants who faced the court, determined to speak before their fate was pronounced: Socrates, who condemned Athenian justice heedless of the cup of hemlock; Charles I, who challenged the jurisdiction of the Cromwellians over a divine monarch; Susan B. Anthony, who argued for the female ballot; and Sacco and Vanzetti, who revealed the flaws of the tribunal.

Id. at 1078. Godbold's dissent was specially filed in response to the majority's opinion which can be found in 549 F.2d 971 (5th Cir. 1977).