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A Daubert Test of Hypnotically Refreshed Testimony in the Criminal Courts

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ARTICLE

A *DAUBERT* TEST OF HYPNOTICALLY REFRESHED TESTIMONY IN THE CRIMINAL COURTS

Professor Earl F. Martin†

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I. INTRODUCTION

Any discussion of hypnotically refreshed testimony must begin by defining hypnosis. Unfortunately, this is easier said than done. A list of the various definitions that have been offered for the term could easily fill a couple of pages.[1] However, such an exercise is unnecessary for present purposes. Instead, this Article will proceed under the influence of a relatively broad definition of hypnosis; *i.e.*, a state of consciousness that entails the concentration of attention on a specific theme or image with an accompanying diminished interest in one's surroundings.[2]

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1. *See* DANIEL BROWN ET AL., MEMORY, TRAUMA TREATMENT, AND THE LAW 288–89 (1998); 2 JANE CAMPBELL MORIARTY, PSYCHOLOGICAL AND SCIENTIFIC EVIDENCE IN CRIMINAL TRIALS § 13:21 (2002); ALAN W. SCHEFLIN & JERROLD LEE SHAPIRO, TRANCE ON TRIAL 121–23 (1989).

2. RICHARD OFSHE & ETHAN WATTERS, MAKING MONSTERS: FALSE MEMORIES, PSYCHOTHERAPY, AND SEXUAL HYSTERIA 143 (1994); *see also* SCHEFLIN & SHAPIRO, *supra* note 1, at 134 ("Hypnosis is an altered state of consciousness, characterized by intensified concentration of awareness on certain suggested themes, along with a diminished interest in competing perceptions. Subjects who are hypnotized experience perceptual and sensory distortions and enhanced abilities to utilize normally unconscious mental mechanisms."); Alan W. Scheflin et al., *Forensic Uses of Hypnosis*, *in* THE HANDBOOK OF FORENSIC PSYCHOLOGY 474, 478 (Allen K. Hess & Irving B. Weiner eds., 2d ed. 1999) ("Hypnosis is a complex alteration in consciousness that can be understood as attentive, receptive concentration characterized by parallel, or dissociated, awareness. This shift in concentration may result in intense absorbing perceptual experiences but is always controllable and reversible. It may involve sensitivity to internal cues in self-hypnosis.").

The roots of hypnosis can be traced to late eighteenth and nineteenth century physicians who used the technique in their practices.[3] In the late 1800s, hypnosis caught the attention of Sigmund Freud, who used it with his patients before abandoning it in favor of free association.[4] The modern interest in the practice developed at the end of World War II when it was discovered that soldiers suffering from war stress disorders responded favorably to hypnosis.[5] From that time until now, the use of hypnosis has become more pervasive.[6] For example, in a survey that sought to gather information about psychotherapists' attitudes towards hypnosis and the prevalence of its use in their practices, over one-half of the 869 respondents said that they used hypnosis in their work, and over one-third of the respondents said that they, at least occasionally, used it to retrieve memories from their patients.[7]

Following the lead of clinicians, the use of hypnosis in criminal investigations has increased over the last few decades,[8] and it is this use that will be the focus of this Article. Specifically, this Article will look at the reliability of hypnotically refreshed testimony in the criminal courts. In Part II, attention will turn to a review of how the common law has responded to the questions raised by hypnotically refreshed testimony. With this background in mind, Parts III and IV will proceed to consider the impact the United States Supreme Court case of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[9] may have on this evidence. Part III will discuss *Daubert* and the more recent case of *Kumho Tire Co. v. Carmichael*,[10] in an effort to detail the construct

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3. Jacqueline Kanovitz, *Hypnotic Memories and Civil Sexual Abuse Trials*, 45 VAND. L. REV. 1185, 1209 (1992); *see also* MORIARTY, *supra* note 1, § 13:22 ("[I]n the late 1800s, hypnosis began to receive a substantial amount of attention as a pathway to the unconscious.").

4. Kanovitz, *supra* note 3, at 1209–10.

5. *Id.* at 1210; BROWN ET AL., *supra* note 1, at 291; SCHEFLIN & SHAPIRO, *supra* note 1, at 56.

6. *See* Bernard L. Diamond, *Inherent Problems in the Use of Pretrial Hypnosis on a Prospective Witness*, 68 CAL. L. REV. 313, 320–21 (1980).

7. Michael D. Yapko, *Suggestibility and Repressed Memories of Abuse: A Survey of Psychotherapists' Beliefs*, 36 AM. J. CLINICAL HYPNOSIS 163, 166 (1994). *See generally* D. Stephen Lindsay & J. Don Read, *"Memory Work" and Recovered Memories of Childhood Sexual Abuse: Scientific Evidence and Public, Professional, and Personal Issues*, 12 PSYCHOL. PUB. POL'Y & L. 846, 851 (1995) (reporting on a 1995 survey by "certified psychotherapists in the United States . . . and the United Kingdom . . . [which] found that 71% . . . [of the respondents] reported using technique[s] such as hypnosis, body work, and dream interpretation to help clients remember [child sexual abuse]").

8. *See* Thomas M. Fleming, Annotation, *Admissibility of Hypnotically Refreshed or Enhanced Testimony*, 77 A.L.R.4TH 927, 932–33 (1991); Kevin M. McConkey, *Hypnosis, Memory, and the Ethics of Uncertainty*, 30 AUSTL. PSYCHOLOGIST, March 1995, at 1, 2; SCHEFLIN & SHAPIRO, *supra* note 1, at 66–68; Gary M. Shaw, *The Admissibility of Hypnotically Enhanced Testimony in Criminal Trials*, 75 MARQ. L. REV. 1, 42 (1991).

9. 509 U.S. 579 (1993).

10. 526 U.S. 137 (1999).

that *Daubert* has created to test the reliability of scientific evidence. Then, Part IV will employ this new construct as a means of investigating whether the behavioral science literature can support the forensic application of hypnotically refreshed testimony in criminal prosecutions.

Before proceeding further, one important caveat needs to be considered. The typical scenario that serves as the background for this Article is that of a subject being put under hypnosis as a means of retrieving a memory that is otherwise unavailable to the subject due to traumatic amnesia. Generally, although not well-defined and differentiated, "the psychological defense mechanisms of repression, suppression, and dissociation are invoked" as the explanations that justify the use of hypnosis to extract unavailable memories.[11] The validity of the concept of psychological defense and the specific mechanisms just mentioned are part of the controversy surrounding the use of hypnosis,[12] especially in the instances that involve the phenomenon of "recovered memories."[13] Therefore, as a precursor to litigating the reliability of any particular strand of hypnotically refreshed testimony, one should anticipate the possibility of a reliability battle surrounding these psychological mechanisms. A debate, however, on the reliability of the science that underlies these mechanisms is beyond the scope of this Article.

II. The Common Law Response to Hypnotically Refreshed Testimony

For the vast majority of this country's history, the courts have refused to allow hypnotically refreshed testimony into evidence.[14] However, that changed in 1968, when the Maryland Court of Special Appeals, in *Harding v. State*,[15] upheld the admission of hypnotically refreshed testimony from the victim of a brutal assault who recalled under hypnosis that it was the defendant who had sexually attacked her.[16] Even though the victim provided different accounts of her attack over time and achieved her in-court version of events only after being hypnotized, the *Harding* court said that any questions regarding

11. Fred H. Frankel & Nicholas A. Covino, *Hypnosis and Hypnotherapy, in* Trauma and Memory 344, 347 (Paul S. Appelbaum et al. eds., 1997).

12. *See id.* at 348, 353–55.

13. *See* Lindsay & Read, *supra* note 7, at 846–47; McConkey, *supra* note 8, at 4.

14. Scheflin et al., *supra* note 2, at 476.

15. 246 A.2d 302 (Md. Ct. Spec. App. 1968), *overruled by* State v. Collins, 464 A.2d 1028 (Md. 1983).

16. *Id.* at 305–06. Prior to being placed under hypnosis, the victim had identified the defendant as the person who shot her, but she had not claimed that he also raped her. *Id.* at 304–06.

the reliability of the hypnotically refreshed testimony went to the weight of the testimony and not to its admissibility.[17]

Following *Harding*'s lead, other courts began to admit hypnotically refreshed testimony in criminal cases,[18] and this encouraged police agencies to expand their use of hypnosis as an investigative technique.[19] This, perhaps inevitably, led to investigative abuses and to increased scrutiny and criticism of the use of hypnotically refreshed testimony from courts, legislatures, professional groups, and scholars.[20] Eventually, this heightened consideration of the issue resulted in four different approaches to the admissibility of hypnotically refreshed testimony, ranging from liberal admission to absolute prohibition. Between these two extremes, a number of courts have tried to fashion tests that limit the admissibility of hypnotically refreshed testimony to situations where its reliability has been sufficiently established.

At one end of the admissibility spectrum lies the *per se* admissible approach to hypnotically refreshed testimony.[21] Jurisdictions that follow this path hold that the effect of a hypnotic session on the reliability of a witness's recall goes to the weight and credibility of the witness's testimony and not to its admissibility or to the witness's competence.[22] These courts place great faith in the ability of the jury to evaluate the testimony accurately in light of cross-examination, expert testimony, and jury instructions.[23] As one court put it regarding the first of these safeguards, "skillful cross-examination will enable the jury to evaluate the effect of hypnosis on the witness and the credibility of his testimony."[24] This *per se* admissible approach "has sparsely been followed since 1980."[25]

At the opposite end of the admissibility spectrum lie a larger number of jurisdictions that hold that hypnotically refreshed testimony is

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17. *Id.* at 306. A majority of the court's opinion was spent assessing the sufficiency of the victim's testimony to support the defendant's conviction for attempted rape. *See id.* at 306–12.

18. *See* Shaw, *supra* note 8, at 42.

19. *See id.*; Fleming, *supra* note 8, at 932–33.

20. *See* MORIARTY, *supra* note 1, § 13:23; SCHEFLIN & SHAPIRO, *supra* note 1, at 71; Shaw, *supra* note 8, at 42–43; *see also* Diamond, *supra* note 6, *passim* (the entire article is such a critique).

21. *See* Fleming, *supra* note 8, at 934; MORIARTY, *supra* note 1, § 13:36; Shaw, *supra* note 8, at 15–16.

22. *See* Fleming, *supra* note 8, at 934; MORIARTY, *supra* note 1, § 13:36; Shaw, *supra* note 8, at 15–16 & n.80 (listing the states following this approach).

23. *See* 27 CHARLES ALAN WRIGHT & VICTOR JAMES GOLD, FEDERAL PRACTICE AND PROCEDURE § 6011, at 124 (1990).

24. State v. Brown, 337 N.W.2d 138, 151 (N.D. 1983).

25. People v. Zayas, 546 N.E.2d 513, 516 (Ill. 1989); *see also* Roark v. Commonwealth, 90 S.W.3d 24, 32 (Ky. 2002) ("Only four state court jurisdictions presently follow the rule of *per se* admissibility.").

per se inadmissible.[26] Some of these courts will not allow a witness who has been hypnotized regarding the matter under consideration to take the stand at all.[27] Others will not allow a witness to take the stand and testify about memories that were recovered as a result of a hypnotic session.[28] In this second category of cases, if a party wants to put a witness on the stand who has been hypnotized in connection with the substance of his testimony, the court must be convinced that the subject matter of that testimony is based entirely upon recollections that were available to the witness before she was hypnotized.[29]

One rationale given by many of the *per se* inadmissible jurisdictions is that, consistent with the requirements of the test first enunciated in *Frye v. United States*,[30] hypnosis "has not gained general acceptance within the relevant scientific community as a reliable means of [extracting] historically accurate memor[ies]."[31] Furthermore, there are courts that have barred this testimony based upon the claim that its admission would violate a criminal defendant's constitutional right to confront the witnesses against him because of the tendency of hypnosis to lead to memory hardening; that is, overconfidence on the part of the witness regarding those matters recalled under hypnosis.[32] Finally, some courts embrace the *per se* inadmissible approach on the ground that the prosecution's use of hypnotically refreshed testimony violates due process.[33] These courts hold that a defendant is deprived of a fair trial when the state hypnotizes a witness, because any resulting taint of the witness's memory is equivalent to tampering with or manufacturing evidence.[34] Such taint can result from the fact that an individual under hypnosis is susceptible to suggestion from verbal and

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26. *See Roark*, 90 S.W.3d at 32 ("At present, twenty-six states adhere to some form of the *per se* inadmissible rule."); Fleming, *supra* note 8, at 933–34; MORIARTY, *supra* note 1, § 13:38; Shaw, *supra* note 8, at 16 & nn. 82–83 (listing the states following this approach); 27 WRIGHT & GOLD, *supra* note 23, § 6011, at 128–31.

27. *See* Fleming, *supra* note 8, at 933–34; MORIARTY, *supra* note 1, § 13:38; 27 WRIGHT & GOLD, *supra* note 23, § 6011, at 128–29.

28. MORIARTY, *supra* note 1, § 13:38; *see* 27 WRIGHT & GOLD, *supra* note 23, § 6011, at 129.

29. MORIARTY, *supra* note 1, § 13:38.

30. 293 F. 1013 (D.C. Cir. 1923). The defendant in *Frye*, who had been convicted of second degree murder, challenged the trial court's refusal to allow him to introduce expert testimony regarding the results of a systolic blood pressure deception test that he had taken. *Id.* at 1013–14. The court of appeals affirmed the trial judge's ruling, saying that expert testimony based upon a scientific principle or discovery will be admitted when that principle or discovery is "sufficiently established [so as] to have gained general acceptance in the particular field in which it belongs." *Id.* at 1014.

31. MORIARTY, *supra* note 1, § 13:38; *see* Fleming, *supra* note 8, at 934; 27 WRIGHT & GOLD, *supra* note 23, § 6011, at 132–33 (1990 & Supp. 2002).

32. Fleming, *supra* note 8, at 934; *see* MORIARTY, *supra* note 1, § 13:38; 27 WRIGHT & GOLD, *supra* note 23, § 6011, at 147–48 (1990).

33. *See* 27 WRIGHT & GOLD, *supra* note 23, § 6011, at 160.

34. *See id.*

nonverbal cues planted by the hypnotist,[35] and from the fact that a hypnotized person may fill in the gaps in her memory, or "confabulate," as a means of making her recollection of an event more comprehensible.[36]

Before leaving the *per se* inadmissible approach, a United States Supreme Court case from the 1980s needs to be discussed because of its undeniable impact on this issue. In *Rock v. Arkansas*,[37] the Court held Arkansas's rule that a criminal defendant's hypnotically refreshed testimony was *per se* inadmissible to be unconstitutional.[38] Although it acknowledged that the dangers of memory hardening, suggestibility, and confabulation all created the potential for hypnosis to generate inaccurate memories,[39] the Court nevertheless concluded that certain procedural safeguards could reduce the likelihood of error in post-hypnotic testimony.[40] Therefore, because the right to testify on one's behalf is so rooted in the Constitution,[41] the Court found Arkansas's inflexible approach to a criminal defendant's hypnotically refreshed testimony to be an "arbitrary restriction on the [defendant's] right to testify in the absence of clear evidence by the State repudiating the validity of all post-hypnosis recollections."[42] Even though the Court explicitly limited the reach of its holding by refusing to express an opinion as to the appropriate rule of admissibility for testimony from previously hypnotized witnesses other than criminal defendants,[43] the case has caused a number of jurisdictions to at least reconsider their *per se* ban on hypnotically refreshed testimony.[44]

In contrast to the two polar opposite treatments of hypnotically refreshed testimony, a number of jurisdictions employ one of two schemes that require the proffered testimony to satisfy a certain level of reliability before a judge will allow it to be considered for its substance.[45] The first of these traces its roots to a New Jersey Supreme Court case from 1981 called *State v. Hurd*.[46]

35. MORIARTY, *supra* note 1, § 13:26; *see* 27 WRIGHT & GOLD, *supra* note 23, § 6011, at 119–20.

36. MORIARTY, *supra* note 1, § 13:28; *see* 27 WRIGHT & GOLD, *supra* note 23, § 6011, at 120–21.

37. 483 U.S. 44 (1987).

38. *Id.* at 62.

39. *Id.* at 59–60.

40. *Id.* at 60–61.

41. *Id.* at 51–53. The Court grounded this constitutional right in the Fourteenth Amendment's Due Process Clause, the Compulsory Process Clause of the Sixth Amendment, and the "Fifth Amendment's guarantee against compelled testimony." *Id.* at 51–53.

42. *Id.* at 61.

43. *Id.* at 58 n.15.

44. Burral v. State, 724 A.2d 65, 78–88 (Md. 1999); *see* 27 WRIGHT & GOLD, *supra* note 23, § 6011, at 166 & n.196.

45. *See* Fleming, *supra* note 8, at 934; MORIARTY, *supra* note 1, § 13:37; 27 WRIGHT & GOLD, *supra* note 23, § 6011, at 167–75 (1990 & Supp. 2002).

46. 432 A.2d 86 (N.J. 1981).

In *Hurd*, the court was called upon to review the admissibility of hypnotically refreshed testimony that implicated the defendant in a knife attack on his ex-wife.[47] By casting the inquiry in terms of whether hypnosis was generally accepted by the scientific community "as a means of overcoming amnesia and restoring the memory of a witness," instead of requiring it to be generally accepted as a means of reviving historically accurate recall, the court found that the process satisfied its formulation of the *Frye* test.[48] The court justified this more forgiving posture toward hypnotically refreshed testimony by equating recall generated through hypnosis with recall generated through more traditional means, which the court noted was "often historically inaccurate."[49] For a number of reasons, however, the *Hurd* court was concerned about the reliability of hypnotically refreshed testimony within the context of specific cases.[50]

Relying upon the trial court testimony of Dr. Martin Orne, a leading expert of the day on hypnosis, and other authorities available to it, the *Hurd* court listed several features of the hypnotic experience that it believed called the ability of hypnosis to obtain accurate recall into question.[51] First, a person undergoing hypnosis is extremely vulnerable to suggestions that can take the form of "intentional or inadvertent cues."[52] Second, a person under hypnosis is susceptible to a loss of critical judgment, in that he is "more willing to speculate and will respond to questions with a confidence he would not have as a waking person."[53] Third, in response to a post-hypnotic suggestion that he will remember what he has recalled under hypnosis after he awakes from the trance, a person coming out of hypnosis may indiscriminately confound or mix his hypnotic recall together with his waking memory.[54] And fourth, after coming out of hypnosis, the person "will have strong subjective confidence in the validity of his new recall" (*i.e.*, the aforementioned "memory hardening"), making it "difficult for an expert or a jury to judge the credibility of his memory."[55]

Although the *Hurd* court was troubled by these potential problems, it believed that "a rule of *per se* inadmissibility [was] unnecessarily broad and [would] result in the exclusion of evidence that [was] as trustworthy as other eyewitness testimony."[56] Therefore, it held that "testimony enhanced through hypnosis [was] admissible in a criminal

47. *Id.* at 88-89.
48. *Id.* at 92 ("The purpose of using hypnosis is not to obtain truth, as a polygraph or 'truth serum' is supposed to do. Instead, hypnosis is employed as a means of overcoming amnesia and restoring the memory of a witness.").
49. *See id.*
50. *See id.* at 92-94.
51. *See id.* at 92-95.
52. *Id.* at 93.
53. *Id.*
54. *Id.*
55. *Id.* at 93-94.
56. *Id.* at 94.

trial if the [judge found] that the use of hypnosis in the particular case was reasonably likely to result in recall comparable in accuracy to normal human memory."[57] Consistent with this case-by-case approach, the court fashioned a test that put the burden on the proponent of the hypnotically refreshed testimony to prove its reliability to a clear and convincing standard, taking into account "both the kind of memory loss that hypnosis was used to restore and the specific technique employed."[58]

As for the first part of its test, the *Hurd* court said that a trial judge "must consider . . . the appropriateness of using hypnosis for the kind of memory loss encountered."[59] The court found that "hypnosis often is reasonably reliable in reviving normal recall where there is a pathological reason, such as a traumatic neurosis, for the witness's inability to remember," but "the likelihood of obtaining reasonably accurate recall diminishes if hypnosis is used simply to refresh a witness'[s] memory concerning details where there may be no recollection at all, or to 'verify' one of several conflicting accounts given by a witness."[60] The court also noted that a "related factor to be considered is whether the witness has any discernible motivation for not remembering or for 'recalling' a particular version of the events."[61]

Turning to the second part of its test, the *Hurd* court said that if "a case is of a kind likely to yield normal recall if hypnosis is properly administered, then it is necessary to determine whether the procedures followed were reasonably reliable."[62] The court said the priority must be to guard against contamination of the witness's testimony, and thus, a trial judge should be particularly sensitive to the manner of questioning, the presence of cues or suggestions, and the amenability of the subject to hypnosis.[63] Furthermore, in order to provide an adequate record for evaluating the reliability of the hypnotic procedure, the *Hurd* court adopted several procedural requirements based on the testimony of Dr. Orne and what was prescribed by the court below.[64] These requirements are:

(1) "a psychiatrist or psychologist experienced in the use of hypnosis must conduct the session;"

(2) "the professional conducting the hypnotic session should be independent of and not regularly employed by the prosecutor, investigator or defense;"

57. *Id.* at 95.
58. *Id.* at 95, 97.
59. *Id.* at 95.
60. *Id.* at 95–96.
61. *Id.* at 96.
62. *Id.*
63. *Id.*
64. *Id.*

(3) "any information given to the hypnotist by law enforcement personnel or the defense prior to the hypnotic session must be recorded, either in writing or another suitable form;"
(4) "before inducing hypnosis the hypnotist should obtain from the subject a detailed description of the facts as the subject remembers them;"
(5) "all contacts between the hypnotist and the subject must be recorded;"
(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."[65]

Over time, some jurisdictions have adopted the *Hurd* guidelines verbatim, while others have followed *Hurd* with their own additions and subtractions from its requirements.[66] For example, courts have relaxed the prohibition against third parties being present during any phase of the hypnotic session,[67] have added a corroboration factor,[68] and/or have required that the hypnotic session take place at a neutral site.[69]

The second case-by-case admission scheme for hypnotically refreshed testimony, which has found most of its adherents in the federal system, employs a "totality of the circumstances" test to assess the reliability of the disputed testimony.[70] Unlike the *Hurd* approach, this scheme does not profess to offer a laundry list of relevant factors; rather, it follows a more fungible practice of allowing each case to be judged based upon its unique facts, with the litigants being given great freedom in the range of their arguments regarding the reliability or unreliability of the hypnotically refreshed testimony.[71] Ultimately, the trial court is called upon to balance the risk of unreliable testimony against the value of the testimony if reliable, with the question being whether the testimony is more likely than not to advance accurate fact-finding.[72] Not surprisingly, however, over time, certain factors have been recognized as particularly important in assisting judges

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65. *Id.* at 96–97.

66. *See* MORIARTY, *supra* note 1, § 13:37; Shaw, *supra* note 8, at 27–30 (including examples of various states that modify the *Hurd* guidelines).

67. *See* State v. Iwakiri, 682 P.2d 571, 578 (Idaho 1984) (stating that this court would allow third parties to be present "if their attendance can be shown to be essential and steps are taken to prevent their influencing the results of the session").

68. *See* People v. Romero, 745 P.2d 1003, 1017 (Colo. 1987).

69. *See* State v. Butterworth, 792 P.2d 1049, 1058 (Kan. 1990) ("If possible, the hypnosis should be conducted in a neutral setting such as the expert's office. The use of offices or locations controlled by the prosecution or the defense should be avoided.").

70. *See* Roark v. Commonwealth, 90 S.W.3d 24, 35 (Ky. 2002); MORIARTY, *supra* note 1, at § 13:37; 27 WRIGHT & GOLD, *supra* note 23, § 6011, at 171–73.

71. *See* 27 WRIGHT & GOLD, *supra* note 23, § 6011, at 171–73 (1990 & Supp. 2002).

72. *See id.* at 171.

in making this determination.[73] Specifically, courts have highlighted such factors as:

> the use of procedural safeguards, the presence of suggestive statements or other cues, . . . the quality of the witness's subsequent testimony, whether the testimony is corroborated by independent evidence, the nature of the witness's memory loss, the consistency of the testimony with prehypnosis recollection, the importance of the testimony to the case, and the availability of evidence concerning the hypnotist and the hypnotic session.[74]

Putting the four common-law approaches into reliability terms, the *per se* admissible camp has decided that hypnotically refreshed testimony is reliable enough so that a witness's testimony that is partially the product of hypnosis will not generally be kept away from the fact-finder. On the other hand, the *per se* inadmissible approach holds that hypnosis is such a potentially contaminating exercise that no witness's hypnotically refreshed testimony is trustworthy enough to allow that witness to be heard on the merits. This camp simply rejects, as a matter of course, the reliability of hypnotically refreshed testimony.

Those jurisdictions that follow one of the two conditional admission approaches do not bar the receipt of hypnotically refreshed testimony as too unreliable, but neither do they turn a blind eye to the issue. Instead, each approach states that in the right situation, hypnotically refreshed testimony can be reliable enough to allow the fact-finder to use that testimony in reaching its decision. A finding of reliability in any particular case depends upon the court either holding that a list of *Hurd*-inspired factors are present or holding that the totality of the circumstances satisfies the threshold standard of reliability. A similar, although more in-depth, case-by-case inquiry into the reliability of scientific evidence has been called for by the Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[75] and the Court's treatment of the general reliability issue in that case is the subject of the next Part of this Article.

III. THE *DAUBERT* TEST FOR SCIENTIFIC RELIABILITY

In *Frye v. United States*,[76] the United States Court of Appeals for the District of Columbia, in a short and citation-free opinion, created the "general acceptance" test for determining the admissibility of novel scientific evidence.[77] Over time, the *Frye* test became the test of choice, in both federal and state courts, for determining the admissi-

73. *See id.* at 171–72.
74. *Id.* (citations omitted). *See Roark*, 90 S.W.3d at 35.
75. *See* 509 U.S. 579, 592–93 (1993).
76. 293 F. 1013 (D.C. Cir. 1923).
77. *Id.* at 1014.

bility of scientific evidence.[78] In June of 1993, however, that changed in the federal courts and began to change in the state courts with the publication of the United States Supreme Court's *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[79] opinion. Based upon the adoption of the Federal Rules of Evidence (hereinafter FRE), specifically FRE 702 regarding expert testimony,[80] the *Daubert* Court rejected *Frye*'s general acceptance test as an absolute prerequisite to the admissibility of scientific evidence, and instead called for a more liberal and flexible standard of admissibility that would be grounded in the principles of relevance and reliability.[81]

Daubert's insistence on relevance flows directly from language in FRE 702 that requires that evidence or testimony "'assist the trier of fact to understand the evidence or to determine a fact in issue.'"[82] This part of FRE 702 demands that any offered evidence or testimony be relevant to the proceeding, which means that the information has the "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[83] The *Daubert* Court used the word "fit" to describe, in more simple terms, what it was talking about, and in doing so the Court said that "[fit] is not always obvious and that scientific validity for one purpose is not necessarily scientific validity for other, unrelated purposes."[84] The key to the inquiry is to determine whether the offered evidence or testimony would be helpful to the trier of fact.[85] This will only be the case when there is a valid scientific connection between the offered evidence or testimony and the pertinent inquiry at hand.[86]

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78. *See* 1 PAUL C. GIANNELLI & EDWARD J. IMWINKELRIED, SCIENTIFIC EVIDENCE § 1-5, at 11-12 (3d ed. 1999).

79. *See* 509 U.S. 579 (1993).

80. FED. R. EVID. 702 states:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Id.

81. *See Daubert*, 509 U.S. at 588-89.

82. *See id.* at 591 (quoting FED. R. EVID. 702).

83. FED. R. EVID. 401.

84. *See Daubert*, 509 U.S. at 591 (citing James E. Starrs, Frye v. United States *Restructured and Revitalized: A Proposal to Amend Federal Evidence Rule 702*, 26 JURIMETRICS J. 249, 258 (1986)).

85. *See id.* at 591-92.

86. *See id.* The Court offered the following example to illustrate the point:

> The study of the phases of the moon . . . may provide valid scientific "knowledge" about whether a certain night was dark, and if darkness is a fact in issue, the knowledge will assist the trier of fact. However (absent creditable grounds supporting such a link), evidence that the moon was full on a certain

Focusing on the expert scientific testimony that was the subject of the case (*i.e.*, whether Bendectin was a human teratogen[87]), the Court said that in order for this testimony or any scientific evidence to be admissible, it must be not only relevant, but also reliable.[88] Given its dependence on a scientific dispute for its substance, the *Daubert* Court explained that this meant that for the testimony to satisfy evidentiary reliability it must be based upon scientific validity. In other words, the underlying principle must support what it purports to show.[89]

Offering what it called "some general observations," the *Daubert* Court then discussed some non-exclusive factors that could bear on the ultimate inquiry.[90] The first of these is whether a theory or technique can be and has been tested, because "'[s]cientific methodology [ ] is based on generating hypotheses and testing them to see if they can be falsified.'"[91] The second is whether the theory or technique has been subjected to scrutiny by others in the field through peer review and publication.[92] The Court said that "submission to the scrutiny of the scientific community is a component of 'good science,' in part because it increases the likelihood that substantive flaws in methodology will be detected."[93] The third and fourth factors concern whether, in respect to a particular technique, there is a high known or potential rate of error, and whether there are standards controlling the technique's operation.[94] The fifth and final factor reinvigorates the *Frye* test by asking whether the theory or technique enjoys general acceptance within a relevant scientific community.[95] The Court did not want a return to the dominance of *Frye*, but it recognized that "[w]idespread acceptance can be an important factor in ruling particular evidence admissible, and 'a known technique which has been able to attract only minimal support within the community' . . . may properly be viewed with skepticism."[96]

> night will not assist the trier of fact in determining whether an individual was unusually likely to have behaved irrationally on that night.

Id. at 591.

87. *Id.* at 582–83.

88. *See id.* at 594–95.

89. *See id.* at 590 & n.9.

90. *Id.* at 593–94.

91. *Id.* at 593 (quoting Michael D. Green, *Expert Witnesses and Sufficiency of Evidence in Toxic Substances Litigation: The Legacy of* Agent Orange *and Bendectin Litigation,* 86 Nw. U. L. Rev. 643, 645 (1992)).

92. *Id.*

93. *Id.* (citing John Ziman, Reliable Knowledge: An Exploration of the Grounds for Belief in Science 130–33 (1978); Arnold S. Relman & Marcia Angell, *How Good Is Peer Review?*, 321 New Eng. J. Med. 827 (1989)).

94. *Id.* at 594 (citing United States v. Smith, 869 F.2d 348, 353–54 (7th Cir. 1989); United States v. Williams, 583 F.2d 1194, 1198 (2d Cir. 1978)).

95. *See id.* (quoting United States v. Downing, 753 F.2d 1224, 1238 (3d Cir. 1985)).

96. *See id.* (quoting *Downing*, 753 F.2d at 1238).

In the years following *Daubert*, the lower courts frequently struggled with two particular issues. First, even though FRE 702 speaks of "scientific, technical, or other specialized knowledge,"[97] many courts that otherwise adopted *Daubert*, limited its application to only scientific expert testimony and evidence.[98] Second, notwithstanding the qualifiers that the Court put on its *Daubert* list of reliability factors, some courts applied these as if they were exclusive and mandatory factors that must be satisfied before expert testimony or other scientific evidence was admissible.[99] In an effort to address these concerns and bring clarity to the field, the Supreme Court revisited the issue in its March 1999 opinion of *Kumho Tire Co. v. Carmichael.*[100]

On the question of *Daubert*'s reach, the *Kumho Tire* opinion stated that *Daubert*'s general holding that discussed "the trial judge's [ ] 'gatekeeping' obligation—applies not only to testimony based on 'scientific' knowledge, but also to testimony based on 'technical' and 'other specialized' knowledge."[101] *Daubert*'s fixation on the issue of scientific testimony had been driven by its facts,[102] but the plain language of FRE 702 does not draw a distinction among expert testimony based upon scientific, technical, or other specialized knowledge.[103]

Turning to the confusion regarding *Daubert*'s reliability factors, the Court in *Kumho Tire* reiterated *Daubert*'s declaration in favor of flexibility by stating that "*Daubert*'s list of specific factors neither necessarily nor exclusively applies to all experts or in every case."[104] Instead, the Court noted that trial courts are granted the same broad latitude when they decide how to determine reliability as they enjoy in respect to their ultimate reliability determination.[105] The Court pointed out that "there are many different kinds of experts, and many different kinds of expertise,"[106] and thus, "'[t]he factors identified in *Daubert* may or may not be pertinent in assessing reliability, depending on the

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97. FED. R. EVID. 702.

98. 2 MICHAEL H. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 702.5, at 464–65 (5th ed. 2001) [hereinafter GRAHAM, HANDBOOK]; *see* Michael H. Graham, *The Daubert Dilemma: At Last a Viable Solution?*, 179 F.R.D 1, 5–6 (1998) [hereinafter Graham, *Daubert Dilemma*]; Patricia A. Krebs & Bryan J. De Tray, Kumho Tire Co. v. Carmichael: *A Flexible Approach to Analyzing Expert Testimony Under* Daubert, 34 TORT & INS. L.J. 989, 991–92 (1999).

99. GRAHAM, HANDBOOK, *supra* note 98, § 702.5, at 464; *see* Graham, *Daubert Dilemma*, *supra* note 98, at 5–6.

100. 526 U.S. 137 (1999).

101. *Id.* at 141.

102. *See id.* at 147–48.

103. *Id.* at 147–48. The Court also said that a distinction should not be drawn between scientific knowledge and technical or other specialized knowledge because it would "prove difficult, if not impossible, for judges to administer evidentiary rules under which a gatekeeping obligation depended upon" drawing such a distinction, because "no clear line . . . divides the one from the others." *Id.* at 148.

104. *Id.* at 141.

105. *Id.* at 142.

106. *Id.* at 150.

nature of the issue, the expert's particular expertise, and the subject of his testimony.'"[107] The *Kumho Tire* majority opinion said that the Court could "neither rule out, nor rule in, for all cases and for all time the applicability of the factors mentioned in *Daubert*, . . . [because] [t]oo much depends upon the particular circumstances of the particular case at issue."[108] The Court took pains, however, to reiterate that the underlying objective was to ensure the relevancy and reliability of expert testimony and scientific evidence, which means that trial judges must be diligent in meeting *Daubert*'s basic gatekeeping requirement, whatever factors prove ultimately to be decisive.[109]

It is clear that if *Daubert* stands for anything, it stands for the proposition that scientific evidence must be reliable to be admissible. For purposes of the present discussion, this brings us to the question of whether hypnotically refreshed testimony should be subject to a *Daubert*-inspired reliability screening in those jurisdictions that follow its guidance. If it should, then we must go further and decide what that screening should look like, and then determine whether hypnotically refreshed testimony is up to the test. These issues are the focus of the next Part of this Article.

IV. Hypnotically Refreshed Testimony and the *Daubert* Test

The issue, for our purposes, becomes the effect, if any, that *Daubert* should have on the admissibility of hypnotically refreshed testimony. In other words, assuming that a case is brought in the federal court system where the dictates of *Daubert* are binding or in a state that has adopted *Daubert* and rejected either of the *per se* approaches to hypnotically refreshed testimony, should that testimony be required to pass through a *Daubert*-inspired reliability gate before it gets to the fact-finder? Furthermore, if it must pass through that gate, then what should it look like?

The short response to the first question could be to say no and to simply cite to a 1995 U.S. Second Circuit Court of Appeals opinion called *Borawick v. Shay*.[110] In that case, the court of appeals held that the challenged hypnotically refreshed testimony was not subject to the rigors of *Daubert* because the issue did not concern the admissibility of data derived from scientific techniques or expert opinions; rather, the issue was whether Borawick was a competent lay witness.[111] Therefore, the court held that the earlier discussed "totality of the

107. *Id.* (quoting Brief of Amicus Curiae United States, at 19, Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999) (No. 97-1709)).
108. *Id.*
109. *Id.* at 152.
110. 68 F.3d 597 (2d Cir. 1995).
111. *Id.* at 610; *cf.* Mersch v. City of Dallas, 207 F.3d 732, 735–36 (5th Cir. 2000) (holding, without mentioning the *Daubert* opinion, that the totality of the circum-

circumstances" test was the appropriate test for the occasion.[112] Even though the *Borawick* court held that *Daubert* did not provide direct guidance, it said that its decision was informed by the principles underlying that earlier Supreme Court opinion, and it noted that nothing in *Daubert* was inconsistent with its outlined approach.[113] This last comment from the court drew a parallel between the purpose of its "totality of the circumstances" test and *Daubert*'s search for evidentiary reliability.[114]

Commentators have offered support for *Borawick*'s refusal to apply the *Daubert* gatekeeping function to hypnotically refreshed testimony on a few grounds. First, *Borawick*'s straightforward assertion that hypnotically refreshed testimony is an issue of lay witness competency and not an issue of scientific evidence has been endorsed.[115] Second, a more practical concern has been advanced, claiming that "[t]rials would grind to a halt under the weight of *Daubert* if the courts were obligated to treat as scientific evidence all lay testimony that could be considered, in the broadest sense, the product of some scientific process."[116]

Notwithstanding the outcome in *Borawick* and the arguments that have been advanced in support of its conclusion, for reasons of history, common sense, and policy, a lawyer who finds herself in a *Daubert* jurisdiction involved in a criminal case that includes hypnotically refreshed testimony should be prepared to support the admissibility of that testimony in terms that fit within *Daubert*'s framework. As a matter of history, a large number of courts have treated the admissibility of hypnotically refreshed testimony as a matter to be regulated by the rules governing the admissibility of scientific evidence or testimony.[117] This is, of course, part of the same evidentiary paradigm that *Daubert* is intended to control. Furthermore, in keeping with this

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stances test was the test of choice for determining the admissibility of post-hypnotic testimony in civil or criminal cases).

112. *Borawick*, 68 F.3d at 607.

113. *Id.* at 610.

114. *See id.*

115. *See* G. Michael Fenner, *The* Daubert *Handbook: The Case, Its Essential Dilemma, and Its Progeny*, 29 CREIGHTON L. REV. 939, 979 (1996); 27 WRIGHT & GOLD, *supra* note 23, § 6011, at 139.

116. 29 WRIGHT & GOLD, *supra* note 23, § 6266, at 284 (1997).

117. *See, e.g.*, Burral v. State, 724 A.2d 65, 71 (Md. 1999) (noting that the turn away from hypnotically refreshed testimony that took place in the late 1970s and early 1980s was the result of a "recognition that hypnosis was . . . a scientific technique that should be subjected to the *Frye* standard"); State v. Collins, 464 A.2d 1028, 1032–33 (Md. 1983) ("The majority of courts which have considered hypnosis as it affects testimony of a witness have applied the test laid down in *Frye* . . . ."); State v. Weston, 475 N.E.2d 805, 809–10 (Ohio Ct. App. 1984) ("Given the mysterious and unfamiliar nature of hypnosis and its significant potential for abuse, a number of courts have approached the problem of hypnotically refreshed testimony as courts have historically dealt with other novel scientific methods or procedures: through application of the test set forth in *Frye* . . . .") (citing Frye v. United States, 293 F. 1013 (D.C. Cir. 1923)).

historical treatment of the issue, many courts continue to label hypnotically refreshed testimony as scientific evidence subject to the rules that those jurisdictions employ in screening that type of evidence,[118] with a number of courts explicitly rejecting a *Borawick*-like approach of making hypnotically refreshed testimony immune from a scientific reliability screening.[119]

Common sense also compels the conclusion that hypnotically refreshed testimony should be subject to the rigors of *Daubert* in those jurisdictions that have adopted its test. Lay witness testimony that has been refreshed by hypnosis is as much a form of scientific evidence as is testimony that explains the results of DNA testing. This conclusion does not require that "scientific evidence" be defined in an overly broad fashion, as the former testimony flows directly from, and indeed owes its existence to, the scientific discipline that is psychology,[120] just as the latter testimony flows directly from and owes its existence to the scientific discipline that is genetics. But for the direct application of psychology through a hypnotic session, the hypnotically refreshed lay witness would not be in possession of the information that he or she is being called upon to relate to the court. To treat hypnotically

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118. *See supra* note 31 and accompanying text.

119. *See, e.g.*, State v. Tuttle, 780 P.2d 1203, 1210–11 (Utah 1989) (citing cases from a number of jurisdictions that have so held); *cf.* State v. Medrano, 86 S.W.3d 369, 373 (Tex. App.—El Paso 2002, pet. filed) (noting that the Texas approach to hypnotically refreshed testimony falls somewhere between a *Frye* approach and a *Daubert*-inspired inquiry, in recognition of the fact that such testimony "cannot be logically dissociated from the underlying scientific technique" that is hypnosis). *See generally* Abdur Rahman v. Bell, 999 F. Supp. 1073, 1087 n.18 (M.D. Tenn. 1998), *aff'd in part, vacated in part on other grounds by* 226 F.3d 696 (6th Cir. 2000) (holding that audio-taped statements made by a convicted murderer while under hypnosis were not admissible because they failed to satisfy the requirements of *Daubert*); Rowland v. Commonwealth, 901 S.W.2d 871, 873 (Ky. 1995) (noting that the intermediate appellate court had "concluded that it would be inappropriate to adopt a *per se* rule excluding hypnotically refreshed testimony in light of *Daubert*" and the fact that Kentucky's rule of evidence regulating the admission of expert testimony was the same as FRE 702); State v. Smith, 809 So. 2d 556, 567 (La. Ct. App. 2002) (Downing, J., dissenting in part & concurring in part) ("The trial court should perform a gate keeping function as required by *Daubert* and ascertain if hypnosis is solid science that is not susceptible to suggestion before allowing such evidence to be introduced."); Breding v. State, 584 N.W.2d 493, 501–02 (N.D. 1998) (Meschke, J., concurring) (calling on hypnotically refreshed testimony to be subjected to a *Daubert*-inspired reliability screening).

120. *See, e.g.*, People v. Zayas, 546 N.E.2d 513, 518 (Ill. 1989) ("[H]ypnosis is a technique which elicits scientific evidence and cannot properly be distinguished from other forms of scientific evidence simply because the subject provides the testimony rather than the 'scientist.'"); Polk v. State, 427 A.2d 1041, 1048 (Md. Ct. Spec. App. 1981) ("The technique of hypnosis is scientific, but the testimony itself of the witness is the end product of the administration of the technique. The induced recall of the witness is dependent upon, and cannot be disassociated from, the underlying scientific method."); *Tuttle*, 780 P.2d at 1211 ("The policy of . . . threshold reliability tests [like *Frye*] applies to hypnotically enhanced testimony just as much as it applies to the testimony of experts because even if the one actually testifying is a lay witness, the hypnotically enhanced testimony given by the witness is the product of scientific intervention.").

refreshed testimony differently from DNA evidence is to perpetuate an approach in our courts that tends to judge the admissibility of evidence derived from the so-called "hard" sciences (*e.g.*, chemistry and physics) more stringently than evidence derived from the application of the so-called "soft" sciences (*e.g.*, psychology and sociology).[121]

Like history and common sense, policy concerns also support a *Daubert* screening of hypnotically refreshed testimony in *Daubert* jurisdictions. First, efficiency would be enhanced by such a holding. Instead of having two or more tests to screen this scientific evidence, *Daubert* offers a single test of admissibility. To the extent it is claimed that this is too rigid an approach, one only needs to recall the Supreme Court's admonition in *Daubert* and *Kumho Tire* that the process is meant to be flexible, taking into account the specifics of the case and the form of the evidence being offered.[122] Second, insisting that hypnotically refreshed testimony meet *Daubert*'s requirements would enhance the reliability of the process, because the linchpin to admissibility under *Daubert* is evidentiary reliability.[123] Third, coherence would be enhanced and confusion reduced by bringing hypnotically refreshed testimony under *Daubert* in those jurisdictions that have embraced its guidance. Again, the fixation on evidentiary reliability would generally serve both of these ends. Additionally, requiring this testimony to meet the rigors of a *Daubert*-inspired test as a precursor to its admission into evidence would avoid a potentially incongruous result. If hypnotically refreshed testimony was allowed to be heard without a *Daubert* screening, but then was attacked on the ground that the use of hypnosis rendered that testimony unreliable, then the opportunity would present itself for a court to deny a defense of that testimony by a psychologist on the ground that this expert testimony could not meet the requirements of *Daubert*. If a psychologist were to take the witness stand to offer testimony in support of admitting hypnotically refreshed testimony under attack, she may explicitly, and would at least implicitly, invoke the mantle of science—*i.e.*, psychology—and thus, an inquiry into the scientific validity of the reasoning and methodology underlying that expert's testimony would be

121. *See* David McCord, *Syndromes, Profiles and Other Mental Exotica: A New Approach to the Admissibility of Nontraditional Psychological Evidence in Criminal Cases*, 66 OR. L. REV. 19, 29–30 (1987).

122. *See* Kumho Tire Co. v. Carmichael, 526 U.S. 137, 141 (1999) ("[A]s the Court stated in *Daubert*, the test of reliability is 'flexible,' and *Daubert's* list of specific factors neither necessarily nor exclusively applies to all experts or in every case."); Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 594 (1993) ("The inquiry envisioned by Rule 702 is, we emphasize, a flexible one.").

123. *See Daubert*, 509 U.S. at 594–95 ("[The] overarching subject is the scientific validity—and thus the evidentiary relevance and reliability—of the principles that underlie a proposed submission. The focus, of course, must be solely on principles and methodology, not on the conclusions that they generate."); *see also Kumho Tire*, 526 U.S. at 141 ("In *Daubert* . . . this Court . . . pointed out that [scientific expert] testimony is admissible only if it is both relevant and reliable.").

appropriate and logical.[124] However, it is conceivable that a court would conclude that the expert's testimony does not satisfy *Daubert*'s requirements, and thus, a court would deny the expert the opportunity to be heard by the fact-finder even though the court had already admitted the lay witness's testimony under challenge.[125] The far better practice would be to require the hypnotically derived testimony to survive a *Daubert* screening as a condition of its admissibility.

The possibility that hypnotically refreshed testimony will have to pass through a *Daubert* constructed gate before it makes its way to the fact-finder brings us to the second question: *i.e.*, what should that reliability gate look like for this testimony in particular? Even though the Supreme Court in both *Daubert* and *Kumho Tire* went out of its way to stress the flexibility of its reliability screening process,[126] a defense of hypnotically refreshed testimony would be well-served to articulate that defense in terms reflective of *Daubert*'s factors. Therefore, the issues would be: whether the validity of hypnosis can be, and has been, tested; whether research results on hypnosis have been subjected to peer review and publication; whether, in respect to hypnosis, there is a high known or potential rate of error; whether there are standards controlling its use; and whether hypnosis enjoys general acceptance within the relevant scientific community.

A key, if not the key, to answering the second question is to pin down exactly what is being asked of hypnosis in the context of criminal cases. As mentioned earlier, a significant variation between many of those jurisdictions holding that hypnotically refreshed testimony is *per se* inadmissible versus those remaining open to its admissibility is that different things are expected of hypnosis in different jurisdictions. In the *per se* inadmissible jurisdictions, the inquiry has predominately focused on the ability of hypnosis to revive historically accurate recall.[127] On the other hand, in those jurisdictions that admit the evidence at least part of the time, the issue has often been cast in terms of the ability of hypnosis to overcome amnesia and restore the memory of a witness.[128] This same debate will come up in a *Daubert* screening of hypnotically refreshed testimony because of that Court's

124. *See* Daniel W. Shuman & Bruce D. Sales, *The Admissibility of Expert Testimony Based upon Clinical Judgment and Scientific Research*, 4 PSYCHOL. PUB. POL'Y & L. 1226, 1249 (1998).

125. *See generally* Rowland v. Commonwealth, 901 S.W.2d 871, 872 (Ky. 1995). The court described a ruling by the trial court that refused to suppress witness testimony that had been hypnotically refreshed, but that gave the defense leave to cross-examine that witness about the fact that she had been placed under hypnosis prior to trial. That trial court ruling also included the proviso that if the defense brought up the issue of hypnosis, the prosecution would be allowed to introduce additional testimony to explain and defend the practice. *Id.*

126. *See supra* note 122.

127. *See supra* note 31 and accompanying text.

128. *See supra* notes 48–49 and accompanying text.

adherence to the relevance requirement in FRE 702.[129] That is, the testimony must "'assist the trier of fact to understand the evidence or to determine a fact in issue.'"[130] The *Daubert* opinion said that this condition goes primarily to relevance or "fit;"[131] which means that there has to be a connection between the scientific knowledge offered and the contested issue in the case.

The easier position to defend is the one that revolves around the ability of hypnosis to overcome amnesia and restore the memory of a witness,[132] because hypnosis is frequently used in the clinical setting for just this reason.[133] One who plans to offer hypnotically refreshed testimony in a criminal case, however, should not count on a court framing the issue this way. Whether or not hypnosis is a proper clinical technique to use with patients that are having memory problems would seem to be beside the point when the issue is, for example, whether or not the defendant raped the victim. The primary function of a criminal trial is to uncover the truth about a pending allegation of misconduct, and the successful accomplishment of this goal depends upon objectively accurate testimony.[134] Therefore, an advocate who is called upon to defend hypnotically refreshed testimony is well-advised, in keeping with *Daubert*'s insistence on "fit," to be prepared to address the ability of hypnosis to achieve historically accurate recall.

The first *Daubert* reliability factor, put in terms relevant to our present inquiry, would ask whether the ability of hypnosis to extract historically accurate recall can be and has been tested. Indeed, numerous studies of both the quantity and quality of recall facilitated by hypnosis have been carried out. For example, Professors Jane Dywan and Kenneth Bowers tested the ability of hypnosis to help subjects recall line drawings that they were shown a week prior to being

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129. *See* Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 591 (1993).

130. *Id.* (quoting FED. R. EVID. 702).

131. *Id.* (citing Starrs, *supra* note 84, at 258).

132. *See* Frankel & Covino, *supra* note 11, at 346–48; Scheflin et al., *supra* note 2, at 481.

133. *See* Frankel & Covino, *supra* note 11, at 346–48; *see also* ROBERT G. MEYER, PRACTICAL CLINICAL HYPNOSIS 347 (1992) ("Most clinicians and laypersons believe that the use of hypnosis will aid in the production of recall."); Yapko, *supra* note 7, at 166 (noting that over 97% of the respondents agreed with the statement that "[h]ypnosis is a worthwhile psychotherapy tool").

134. *See* Shaw, *supra* note 8, at 15.

> [I]ncreased recall as a result of hypnosis is useful as testimony in a trial only if the newly retrieved memories are veridical. If a large percentage of these memories are inaccurate, then they are worse than useless; a jury might reach the wrong verdict in reliance upon them. Thus, if a party in a criminal trial wishes to have a previously hypnotized witness testify, the court must determine the extent that the witness will be testifying to accurate memories, not to pseudomemories created by suggestion or confabulation.

Id.

hypnotized.[135] These researchers found that subjects who were highly hypnotizable recalled more than twice the number of new items as the controls when they were put under hypnosis; however, they also made almost three times as many new errors as the controls, whose recall was facilitated only by task-motivated conditions.[136] Similarly, Professors Glenn S. Sanders and William L. Simmons tested the effect of hypnosis on the ability of subjects to recall the particulars of a twenty-second film depicting a pickpocketing incident.[137] These researchers divided their subjects into two groups, one that would undergo hypnosis and one that would not, and showed both groups the same film.[138] A week later, in connection with viewing a videotape of a line-up related to the robbery and answering ten specific questions about the event, both groups were invited to "'re-play' the incident on an internal, mental TV screen, complete with slow-down and speed-up features, stop-action and zoom-in," with one group viewing the line-up and answering the questions while under hypnosis.[139] Sanders and Simmons reported that the subjects who were under hypnosis at the time of viewing the line-up tape and responding to questions about that tape made more errors than those who were not hypnotized during these same exercises, due largely to the tendency of the hypnotized subjects to choose a decoy in the line-up who was wearing the distinctive jacket that the pickpocket wore in the original film.[140]

While the studies just mentioned claimed that hypnosis invites some level of recall error, they did not, in any significant way, seek to uncover the cause behind their conclusion. As the reader may recall, in the *Hurd* case, three explanations were given for why hypnotically refreshed testimony may produce recall error: a hypnotized person is extremely vulnerable to suggestions from intentional or inadvertent cues; a person under hypnosis is susceptible to a loss of critical judgment, in that he is more willing to speculate and will respond to questions with a confidence he would not have as a waking person; and the hypnotic experience can cause a person to confound memories evoked under hypnosis with prior recall.[141] Given that the first of these explanations would entail the injection of external stimuli into the hypnotic session, which is something that can be controlled and tested, there have been a number of studies that have looked specifically at the ability of a hypnotist to suggest or implant a false memory into a hypnotized subject's recall.

135. Jane Dywan & Kenneth Bowers, *The Use of Hypnosis to Enhance Recall*, 222 SCI. 184, 184 (1983).
136. *Id.* at 184–85.
137. Glenn S. Sanders & William L. Simmons, *Use of Hypnosis to Enhance Eyewitness Accuracy: Does It Work?*, 68 J. APPLIED PSYCHOL. 70, 72 (1983).
138. *Id.*
139. *Id.* at 72–73.
140. *Id.* at 73–74.
141. State v. Hurd, 432 A.2d 86, 93 (N.J. 1981).

Jean-Roch Laurence and Campbell Perry of Concordia University in Montreal, Canada, suggested to hypnotized subjects, all of whom were highly hypnotizable, that one night during the previous week their sleep had been disturbed by a loud sound.[142] After the hypnotic session was terminated, thirteen of twenty-seven subjects persisted in their belief, in contrast to their pre-hypnosis reports, that some sleep-disturbing sound had occurred.[143] In fact, all thirteen of the subjects maintained this erroneous belief even after being told that the hypnotist had suggested the sounds to them while they were under hypnosis.[144]

Laurence and Perry, along with Louise Labelle and Robert Nadon, repeated the sleep disturbance experiment a few years after the original effort.[145] While under hypnosis, sixteen (one low, eight moderately-highly, and seven highly hypnotizable) of thirty-two subjects responded positively when asked whether, on a particular night in question, they heard a loud noise that may have sounded like a car backfiring or a door slamming.[146] After the hypnotic session was terminated, eleven of these sixteen subjects continued to maintain that the suggested noise actually happened.[147] This final group was made up entirely of highly and moderately-highly hypnotizable subjects.[148]

The studies referenced in the previous paragraphs, and others like them,[149] have been subjected, as *Daubert*'s second factor would require, to the scrutiny of peer review, with two general conclusions being reached. First, the studies show a tendency for hypnosis in the experimental setting to facilitate greater recall of meaningful material, but the price paid for this greater quantity of information is more incorrect recall and an increased sense of confidence in that recall.[150]

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142. Jean-Roch Laurence & Campbell Perry, *Hypnotically Created Memory Among Highly Hypnotizable Subjects*, 222 SCI. 523, 523 (1983). After being hypnotized, the subjects were first asked to choose one night of the previous week and describe, in detail, their activities of that night. *Id.* Once it had been ascertained that a subject had no specific memories of awakening or of dreams occurring during the specified night, the subject was then instructed to relive that night and asked whether he or she had heard a loud noise that had awakened him or her. *Id.*

143. *Id.* at 524. Six of these thirteen subjects were unequivocal in their certainty, while the remaining seven came to the conclusion on the basis of a reconstruction of events. *Id.*

144. *Id.*

145. Louise Labelle et al., *Hypnotizability, Preference for an Imagic Cognitive Style, and Memory Creation in Hypnosis*, 99 J. ABNORMAL PSYCHOL. 222, 224 (1990).

146. *Id.* at 224–25. Of the thirty-two total subjects, eight were classified as low hypnotizable, thirteen were classified as moderately highly hypnotizable, in the high range of this group, and eleven were designated as highly hypnotizable. *Id.* at 225.

147. *Id.* at 225.

148. *Id.*

149. *See, e.g.*, BROWN ET AL., *supra* note 1, at 323–35 (providing an extensive review of the hypnotic pseudomemory research); Labelle et al., *supra* note 143, at 223.

150. *See* Council on Sci. Affairs, Am. Med. Assoc., *Scientific Status of Refreshing Recollection by the Use of Hypnosis*, 253 JAMA 1918, 1921 (1985) [hereinafter AMA]; Frankel & Covino, *supra* note 11, at 356; Kanovitz, *supra* note 3, at 1224–25;

Second, research has shown that experimental subjects can be influenced by a hypnotist to believe that they experienced something that was merely suggested to them, with the highly hypnotizable subjects being most at risk.[151] These conclusions, however, have not escaped criticism.

Many within the behavioral science community have warned against making too much out of research like that discussed above, because they perceive a "strained analogy between the laboratory and the forensic setting."[152] Specifically, one claim is that these studies generally focus only on the short-term effects of hypnosis on memory, whereas the forensic setting is much more concerned with the long-term impact on recall because of the time that it takes court cases to move through the system.[153] The argument is that it has not been shown that the contaminating effects, if any, of hypnosis on memory will retain strength over such a long period of time.[154] Moreover, the point is made that many of the studies that support the above criticisms of hypnosis included within their design demand characteristics like forced-choice responses and compelled guessing that increased the amount of inaccurate information reported by subjects.[155] Critics also challenge the conclusions drawn from the research on the ground that the laboratory cannot adequately replicate the role and impact that emotion and content play in the use of hypnosis to extract memories grounded in real-world traumatic experiences.[156] This criticism goes hand-in-hand with another, which argues that there is great disparity between the motivational factors at work in an experimental effort (*e.g.*, a college student volunteering to serve as a research sub-

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McConkey, *supra* note 8, at 2; MEYER, *supra* note 133, at 348–50; Peter W. Sheehan & Kevin M. McConkey, *Forensic Hypnosis: The Application of Ethical Guidelines*, *in* HANDBOOK OF CLINICAL HYPNOSIS 719, 720–21 (Judith W. Rhue et al. eds., 1993).

151. *See* Frankel & Covino, *supra* note 11, at 356; Kanovitz, *supra* note 3, at 1230–31, 1236; Labelle et al., *supra* note 145, at 223; McConkey, *supra* note 8, at 2.

152. *See, e.g.*, BROWN ET AL., *supra* note 1, at 335–41; Scheflin et al., *supra* note 2, at 483–85; *see also* AMA, *supra* note 150, at 1920 ("Generalization from the laboratory to the real world depends on the degree to which the laboratory situation accurately represents the field situation.").

153. Scheflin et al., *supra* note 2, at 484; *see* BROWN ET AL., *supra* note 1, at 337.

154. Scheflin et al., *supra* note 2, at 484.

155. *See* BROWN ET AL., *supra* note 1, at 335–37; HAMMOND ET AL., CLINICAL HYPNOSIS AND MEMORY: GUIDELINES FOR CLINICIANS AND FOR FORENSIC HYPNOSIS 19 (1995).

156. HAMMOND ET AL., *supra* note 155, at 12–13; Scheflin et al., *supra* note 2, at 484–85; *see also* BROWN ET AL., *supra* note 1, at 322.

> [H]ypnosis is especially more likely to assist someone in recalling personally meaningful, affect-laden events, than nonmeaningful information about which the person is indifferent. For instance, hypnotically enhanced recall is more likely to occur in someone where emotional trauma has created a block to his/her ability to recall a memory (due to the state-dependent nature of some memories and the manner in which a trained professional may reinstate the encoding context and mood through hypnosis).

Id.

ject) and those at work in a criminal forensic setting (*e.g.*, a witness or victim undergoing hypnosis in order to retrieve memories that may lead to the conviction of an alleged wrongdoer).[157] Shifting the focus slightly, critics of the experimental studies also claim that an important variable in the success of hypnosis is a trusting and caring relationship between the hypnotist and the subject, and this is something that is rarely, if ever, replicated in the laboratory setting.[158]

Another avenue of peer commentary attempts to bolster the acceptability of hypnotically refreshed testimony by comparing it to recall generated in other ways.[159] The claim here is that hypnosis is not necessarily more contaminating to recall than any other memory retrieval effort, because the dangers of confabulation and memory hardening are not unique to, nor exacerbated by, hypnosis.[160] In other words, the argument is that hypnosis does not render one more likely to experience either of these detrimental outcomes when compared with recall generated by other means. This view perceives suggestion on the part of those in control of the hypnotic session as the relevant, externally generated threat to the reliability of a hypnotically refreshed memory, and thus claims that as long as that danger is abated the testimony should be admitted.[161]

The "no more contaminating than" argument of the previous paragraph would appear to have relevance within a *Daubert* screening exercise. This is because it addresses the critical question of whether hypnosis can generate historically accurate recall.[162] Adherents of this position acknowledge the possibility of error, but they claim that this possibility can be eliminated, or at least kept to an acceptable limit, so long as proper procedures are followed in carrying out the hypnotic session.[163] This mention of the possibility of error and controlling the

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157. *See* BROWN ET AL., *supra* note 1, at 313; HAMMOND ET AL., *supra* note 155, at 12; Scheflin et al., *supra* note 2, at 485.

158. *See* Brown et al., *supra* note 1, at 317.

159. *See* HAMMOND ET AL., *supra* note 155, at 18–23; Scheflin et al., *supra* note 2, at 488–89.

160. *See* HAMMOND ET AL., *supra* note 155, at 22; Scheflin et al., *supra* note 2, at 486, 488.

161. HAMMOND ET AL., *supra* note 155, at 22–23; *see* Scheflin et al., *supra* note 2, at 488–89; *see also* BROWN ET AL., *supra* note 1, at 322 ("Memory is not fully accurate no matter what method someone uses to examine the past, and it may be influenced by suggestions offered in a waking or hypnotic state.").

162. *See supra* note 134 and accompanying text.

163. *See* HAMMOND ET AL., *supra* note 155, at 22–23; *see also* Scheflin et al., *supra* note 2, at 489.

> Fundamental fairness demands that each case be heard on its own merits, at least at a preliminary hearing where the quality of the evidence can be judicially assessed. The per se rule prohibits posthypnotic memories from being admitted into evidence even though it can be shown that the hypnosis procedures were scrupulously neutral and that the memories can be independently corroborated as true.

Id.

same through the implementation of selected procedures takes us to the third and fourth *Daubert* screening factors: *i.e.*, what is the error rate of hypnotically refreshed testimony, and how, if at all, do we eliminate or at least control that error rate?

Putting *Daubert*'s error rate inquiry into terms that are relevant to the present effort, the issue is one of determining the rate at which hypnosis generates historically inaccurate recall. The general findings from the previously mentioned research, regarding the tendency of hypnosis to increase the amount of inaccurate recall and the fact that memories can be contaminated through suggestion during hypnosis establish that hypnosis does produce some memories.[164] In light of this, the question becomes one of trying to determine the error rate, and this proves to be a very difficult task. The simple fact is that with hypnotically recalled memories, one cannot necessarily tell what memories are true from what memories are false.[165] One of the possible explanations for this, as demonstrated in the experimental research, is that subjects who recall details under hypnosis tend to experience an increase in their confidence in those details, to the extent that the story they now tell will appear to be compelling, even though it may not be true.[166] Even keeping in mind that all memory suffers from a similar problem, albeit in a generally somewhat weakened form, this turn of events is troublesome for supporters of hypnotically refreshed testimony because, as the proponents of the evidence, they have the burden of proving its reliability, which can be a near, if not absolute, impossibility in regard to all of the details recalled. Therefore, the only hope for the proponents of hypnotically refreshed testimony is to encourage courts to take each case on its own merits, rather than rejecting such testimony out-of-hand. This, of course, is the approach that the *Hurd* and "totality-of-the-circumstances" jurisdictions have taken towards this testimony, and it is an inquiry that has its place in a *Daubert*-inspired reliability test.

Given that there is an error rate associated with hypnotically refreshed recall and given that this error rate will fluctuate from case-to-case, the question becomes how can one control the hypnotic session so as to eliminate or reduce the error rate and increase the likelihood of extracting historically accurate memories. This question, in turn, brings us to the fourth step in a *Daubert* test of the reliability of hypnotically refreshed testimony—a step that requires focusing attention on the standards that are available for controlling the use of hypnosis. This step is reminiscent of the common-law *Hurd* and "totality of the circumstances" approaches to dealing with hypnotically refreshed restimony. Although neither of those two approaches would be insuf-

164. *See supra* notes 150–51 and accompanying text.
165. *See* AMA, *supra* note 150, at 1922; Frankel & Covino, *supra* note 11, at 356–57; MEYER, *supra* note 133, at 343; Yapko, *supra* note 7, at 169.
166. *See supra* note 150 and accompanying text.

ficient, in and of themselves, to determine the admissibility of some challenged hypnotically refreshed testimony in a *Daubert* jurisdiction, they can serve as guides when applying *Daubert*'s fourth reliability factor to that type of testimony.

As we saw in Part II of this article, the *Hurd* and "totality-of-the-circumstances" jurisdictions have fashioned a list of practices that are specifically aimed at controlling or eliminating contaminating influences from the hypnotic session.[167] These practices were originally developed by behavioral scientists, and these researchers and commentators have continued to agree that these requirements are necessary to enhance the reliability of hypnotically refreshed testimony.[168]

In addition to generally vouching for the *Hurd* and "totality-of-the-circumstances" reliability-enhancing practices, behavioral science researchers and commentators have consistently spoken to other requirements that should be included as part of good hypnotic technique. There is a strong consensus in this community in favor of assessing the hypnotizability of a subject who is going to be put into a trance.[169] Hypnotizability is a stable and measurable trait,[170] and those with higher levels of hypnotizability have been found to be better able to use vivid mental imagery as a means of enhancing and expanding their recall.[171] Because hypnotizability correlates positively with suggestibility and the suspension of critical judgment, the more hypnotizable a subject is, the greater the risk that the accuracy of his or her recall will be compromised.[172] Therefore, the failure to test for hypnotizability could be a definitive block to the admissibility of any hypnotically refreshed testimony. On the other hand, if the hypnotizability of a witness whose hypnotically refreshed testimony is under consideration has been measured, then, generally speaking, a finding that the witness falls in the highly hypnotizable range would be a factor weighing against the reliability of the testimony, whereas the fact that the witness falls in the moderate or low hypnotizable range would be a factor in favor of admitting the testimony.[173]

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167. *See supra* notes 65, 73–74 and accompanying text.

168. *See* MEYER, *supra* note 133, at 352–56; Helmut Relinger & Thomas Stern, *Guidelines for Forensic Hypnosis*, 1983 J. OF PSYCHIATRY & L. 69, 70–73; Sheehan & McConkey, *supra* note 150, at 725–28.

169. *See* Scheflin et al., *supra* note 2, at 485–86; Sheehan & McConkey, *supra* note 150, at 726.

170. *E.g.*, Scheflin et al., *supra* note 2, at 478.

171. *See* Frankel & Covino, *supra* note 11, at 347.

172. *See* Scheflin et al., *supra* note 2, at 486; *see also* Frankel & Covino, *supra* note 11, at 350 ("[The hypnotizability] of the person . . . seems to be an important influence on a subject's ability to distort memory.").

173. *See* Scheflin et al., *supra* note 2, at 486. *But cf.* BROWN ET AL., *supra* note 1, at 339.

> [L]aboratory research confirms that *the great majority of hypnotized people, including persons who are highly hypnotizable, do not seem to generally mistake hypnotically suggested fantasies for real events*, as alleged by those per-

In addition to putting a great deal of emphasis on the hypnotizability issue, behavioral science researchers and commentators have also highlighted two other practices that are designed to protect the integrity of hypnotically refreshed testimony. The first of these is the need to make sure that a witness, whose testimony has allegedly been refreshed under hypnosis, was in fact hypnotized.[174] Because hypnosis is a condition that can be faked with some success,[175] and because this issue has on occasion caught the attention of the courts,[176] an advocate of a particular piece of hypnotically refreshed testimony should be prepared to discuss whether that danger is present in any particular case. The best practice would be one that, as a matter of routine, administers one or more tests during the hypnotic session to determine if the subject is actually in a trance.[177]

Another reliability enhancing practice highlighted by the scientific community is the need to avoid the "television technique" of hypnosis. This technique, which has been widely used by police departments in the past, involves telling hypnotized subjects that their memories are analogous to a videotape, complete with freeze-frame, pause, and reverse, and that hypnosis can help them provide additional details of which they are not aware.[178] Unfortunately, this particular hypnosis strategy has the effect of encouraging subjects to guess and be creative in the absence of actual memories, and it causes subjects to develop an artificial sense of certainty about the veracity of their memory.[179]

> petuating the most recent in the long line of myths about hypnosis. Instead, available studies substantiate that when subjects are encouraged to provide honest and candid descriptions, pseudomemory reports appears to be minimized . . . .

Id.

174. *See, e.g.*, MEYER, *supra* note 133, at 354; Sheehan & McConkey, *supra* note 150, at 727.

175. Sheehan & McConkey, *supra* note 150, at 727; *see* MEYER, *supra* note 133, at 354; Martin T. Orne, *The Construct of Hypnosis: Implications of the Definition for Research and Practice, in* CONCEPTUAL AND INVESTIGATIVE APPROACHES TO HYPNOSIS AND HYPNOTIC PHENOMENA 14, 24 (William E. Edmonston, ed., 1977); *see also* Scheflin et al., *supra* note 2, at 479 ("[A] number of reports have emerged illustrating . . . feigned stories elicited under hypnosis . . . ." (citations omitted)).

176. *See, e.g.*, Jay M. Zitter, Annotation, *Sufficiency of Evidence That Witness in Criminal Case Was Hypnotized, for Purposes of Determining Admissibility of Testimony Given Under Hypnosis or of Hypnotically Enhanced Testimony*, 16 A.L.R.5th 841, 845–46 (1993).

177. *See* MEYER, *supra* note 133, at 354 ("A suggestion for anesthesia of the subject's hand and subsequent application of a hemostat to demonstrate trance is one technique that can be performed. It is difficult for a simulator to tolerate this test because of the degree of discomfort evoked by this stimulus." (citation omitted)); *see also* Sheehan & McConkey, *supra* note 150, at 727 ("The real problem is that criteria need to be developed and applied that discriminate with a reasonable degree of confidence between deeply hypnotized clients and simulators.").

178. Scheflin et al., *supra* note 2, at 481–82; *see* MEYER, *supra* note 133, at 348, 355.

179. MEYER, *supra* note 133, at 355; Scheflin et al., *supra* note 2, at 482; *see also* Shaw, *supra* note 8, at 14–15 ("Age regression techniques and 'video recorder' metaphors often used to enhance memory in criminal cases are methods which psycholo-

It is here, within *Daubert*'s fourth factor, that a defender of hypnotically refreshed testimony would want to focus a reviewing court's attention in order to maximize the likelihood of the testimony being admitted. The defender cannot afford to rest solely on the science, because as we have seen, the science would leave the court at the point of an uncertain error rate attaching to the testimony.[180] Instead, relying upon the fact that the Supreme Court in both *Daubert* and *Kumho Tire* stressed the flexibility of its reliability screening,[181] the defender would need to convince the court that the standards available for controlling the use of hypnosis can eliminate, or least heavily mitigate, the error rate. In other words, the proponent must prove that because care was taken in extracting the hypnotically refreshed testimony in question, it is sufficiently reliable so as to justify its admission into evidence.

In order to be in a strong position to carry this burden, the proponent of the evidence will have to demonstrate strict compliance with the standards that the courts and the scientific community have identified as critical to the reliability of the outcome. The ultimate goal is to end up with hypnotically refreshed testimony that is as free as possible of contaminating influences. Keeping in mind all of the specific details discussed about good hypnotic practice in this Article, some general guidelines have emerged that can serve as markers of good practice in the forensic use of hypnosis. First, in order to increase the likelihood of an unassailable outcome, the hypnotist should be an independent, qualified psychiatrist or psychologist.[182] Second, the use of hypnosis must be appropriate for the kind of memory loss encountered. Generally speaking, hypnosis is a more useful tool when it is used to overcome a memory block that can be traced to a highly emotional event.[183] Third, the subject must be an appropriate candidate for the use of hypnosis. This requirement covers the issue of hypnotizability, which has already been discussed,[184] and it includes the need

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gists have found are virtually guaranteed to induce confabulation." (footnote omitted)).

180. *See supra* notes 150–51 and accompanying text.

181. *See supra* note 122.

182. *See* MEYER, *supra* note 133, at 352 ("The expert [hypnotist] should be an independent practitioner who has no vested interest in the outcome of the case."); Sheehan & McConkey, *supra* note 150, at 723.

183. *See supra* note 60 and accompanying text; Sheehan & McConkey, *supra* note 150, at 726; *see also* Scheflin et al., *supra* note 2, at 481.

> Traumatic amnesias may be reversible using hypnosis, usually accompanied by the experience of strong emotion. Indeed, the greater accessibility of these memories when the emotion can be experienced . . . by hypnosis is explained by the theory of state-dependent memory. [P]eople are better able to remember the content of material when they are in the same emotional state while trying to recall it that they were in when the material was learned.

Id. (citations omitted).

184. *See supra* notes 167–71 and accompanying text.

to be sensitive to the different motivating factors that various subjects (*e.g.*, witness, victim, or suspect) may bring to the hypnotic session.[185] Fourth, as already mentioned, the totality of the hypnotic session must be controlled so as to eliminate suggestive influences.[186] Fifth, the best practice would be to ensure that there is a detailed record, preferably a videotape record, of the entire hypnotic process that can be reviewed independently by the court.[187] Given the point at which the science rests regarding the reliability of hypnotically refreshed testimony, a court will need to see that those things that present a danger to reliability have not been allowed to impact the hypnotically refreshed testimony offered.

The fifth and final *Daubert* factor requires a *Frye*-type inquiry, which asks whether hypnosis as a means of extracting historically accurate recall enjoys general acceptance within the behavioral science community. As mentioned earlier, the *Daubert* Court did not intend a return to the dominance of *Frye*, but it did believe that widespread acceptance, or rejection, can be an important factor in ruling particular evidence admissible or not.[188] In the context of hypnotically refreshed testimony, the picture is not all that clear when it comes to its status within the behavioral science community. There are those who, focusing largely upon the empirical data, have concluded that hypnosis is as yet an unproven technique when it comes to the recovery of true memory.[189] At the same time, however, there are many who maintain that when proper guidelines are followed, hypnosis can be effective in retrieving otherwise unavailable, accurate information.[190]

In the end, the *Frye* debate over hypnotically refreshed testimony comes to the same point as did the analysis of the previous four *Daubert* factors. Whether one looks with favor upon hypnotically refreshed testimony depends upon the extent to which one is strictly wedded to experimental research results versus the extent to which one will be willing to place faith in good technique. A court that insists upon it being scientifically proven that hypnosis produces either only historically accurate recall or the ability to tell the difference between accurate and inaccurate recall is not going to be receptive to hypnotically refreshed testimony. On the other hand, a view that recognizes the limitations of the technique as established by the science,

185. *See* Scheflin et al., *supra* note 2, at 485; Sheehan & McConkey, *supra* note 150, at 725–26.

186. *See supra* notes 166–77 and accompanying text; *see also* MEYER, *supra* note 133, at 354 ("Whether hypnosis causes confabulation can depend on the manner in which the questions are asked.").

187. *See* MEYER, *supra* note 133, at 352; *see also* Sheehan & McConkey, *supra* note 150, at 723 (reporting that two learned societies devoted to hypnosis have called for all forensic hypnosis sessions to be recorded on videotape).

188. *See supra* note 96 and accompanying text.

189. *See, e.g.*, Frankel & Covino, *supra* note 11, at 355–57.

190. *See, e.g.*, HAMMOND ET AL., *supra* note 155, at 22–23.

but that still holds that it can produce sufficiently reliable testimony if done properly, will accept its admission into court. As already stated, the latter view is more in keeping with the Supreme Court's call in *Daubert* and *Kumho Tire* for a more liberal and flexible standard of admissibility for scientific evidence that is grounded in the principles of relevance and reliability.[191]

V. CONCLUSION

> Experts wishing to practice competently in a well-conducted *Daubert/Kumho* hearing will find the new environment a spur to improving their testimony about complex science issues. By contrast, careless experts in *Daubert/Kumho* cross-examinations may reveal culpable technical and ethical errors. It is up to experts to uphold the highest standards of their respective professions, disclose fully and fairly the bases for their opinions, rely to the greatest extent possible on solid scientific findings, explain in understandable terms the uncertainties in their opinions, and be frank about the degree to which their theories and methods meet, or fail to meet, *Daubert* requirements.[192]

Taking the general guidance of this quote and specifically applying it to a defense of hypnotically refreshed testimony in a *Daubert* jurisdiction, one can see rather clearly the path that must be followed if that defense is going to succeed. Rather than running away from research results that call the reliability of hypnotically refreshed testimony into question, an advocate of this testimony must be prepared to speak intelligently about that research, its strengths, and its limitations. It is not going to be enough to simply say that the research does not have applicability in the forensic setting, because this leaves the proponent with a blank slate in the face of bearing the burden to support the admissibility of the testimony. The advocate is going to have to speak candidly to the court about the possibility of inaccurate testimony flowing from the hypnotic session, but then, while highlighting *Daubert*'s intended flexibility, stress that the likelihood of that inaccuracy has been severely diminished by the use of techniques specifically aimed at eliminating, or at least mitigating, the possibility of suggestive influences. Of course, this assumes that the practices for controlling hypnosis were indeed employed to such a rigorous degree, and, as we have seen, that is no small task.

191. *See supra* note 122.

192. William M. Grove & R. Christopher Barden, *Protecting the Integrity of the Legal System: The Admissibility of Testimony from Mental Health Experts Under* Daubert/Kumho *Analyses*, 5 PSYCHOL. PUB. POL'Y & L. 224, 238 (1999).