Rock v. Arkansas

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ON THE night of July 2, 1983, Frank Rock refused to let his wife Vickie leave their small apartment to get a hamburger. When the police arrived later that evening, they found Frank Rock on the floor, with a bullet wound in his chest. From the evidence the jury heard, Vickie Rock’s guilt seemed apparent. She was convicted of manslaughter, and received the maximum sentence.

However, a complete reading of the record reveals a drastically different set of facts. Vickie Rock recalled after the shooting that although her thumb was on the hammer of the gun at the moment of discharge, her finger had not been on the trigger. She further recalled that the gun had discharged unexpectedly when her husband grabbed her arm in an ensuing scuffle. These recollections led to an examination of the gun by an expert who corroborated her recollections by concluding that the gun was defective and prone to discharge when hit or dropped. Though the testimony offered by the gun expert was later admitted at trial, vital portions of Vickie Rock’s testimony were not permitted to reach the jury. This critical testimony was ruled inadmissible because her recollections occurred after her memory was refreshed through hypnosis. The Arkansas Supreme Court affirmed Rock’s conviction, and established a per se rule excluding all posthypnotic testimony.

Upon review of Vickie Rock’s case, the United States Supreme Court declared that “restrictions of a defendant’s right to testify may not be arbitrary or disproportionate to the purposes they are designed to serve” and held that Arkansas’ per se exclusion of the defendant’s posthypnotic testimony “infringes impermissibly on the right of a de-
fendant to testify on his or her own behalf." In so holding, the Court reaffirmed that constitutional principles must be considered in the formulation and application of state evidentiary rules. The holding also suggests general guidelines for courts confronted with the problem of posthypnotic testimony.

Courts have traditionally prohibited witnesses from testifying while hypnotized. Courts differ, however, in their treatment of testimony elicited following memory refreshment by hypnosis. Four approaches have been developed concerning the admissibility of posthypnotic testimony. One older approach is unconditional admissibility, under which the facts and circumstances surrounding hypnotic sessions are considered to go toward the reliability—not the admissibility—of posthypnotic testimony. A more recent solution, aimed predominantly at correcting the deficiencies of the admissibility approach, is one of conditional admissibility. Here, posthypnotic testimony is admissible insofar as certain procedural requirements surrounding the hypnotic sessions are met—requirements aimed quite specifically at increasing the reliability of a witness' performance under hypnosis. The third approach, per se inadmissibility, assumes at the outset the inherent unreliability of memory refreshment via hypnosis, and prevents witnesses from testifying to any events recalled after the hypnotic session. A still newer approach, modeled after the spirit if not the letter of the Federal Rules of Evidence, requires admissibility to be decided on a case-by-case basis, by weighing the probative value of the evidence against its prejudicial effect.

This Note first will briefly review the more common approaches to the problem of admissibility. The author argues that per se inadmissibility is unduly restrictive, ignores the benefits of hypnosis, and denies

10. *Id.* at 2714-15.
13. See cases cited *infra* notes 73-87 and accompanying text.
14. The most notorious of the "per se inadmissibility" cases is People v. Shirley, 31 Cal. 3d 18, 723 P.2d 1354, 181 Cal. Rptr. 243, *cert. denied*, 459 U.S. 860 (1982). Shirley and cases holding similarly are discussed *infra* notes 105-14, and in accompanying text.
15. *Fed. R. Evid.* 403. Cases tracking the logic of Rule 403 are discussed *infra* notes 136-48, and in accompanying text.
the use of potentially crucial evidence.16 This Note will then explore
the Rock decision, which declared unconstitutional Arkansas’ applica-
tion of a per se approach as it pertained solely to the defendant’s testi-
mony. Analysis of the constitutional issues which the Court suggests
should play a role in determining admissibility seems to imply that per
se exclusion may likewise have unconstitutional implications when ap-
plied to a defendant’s witnesses as well. Finally, the author suggests
that the constitutional considerations identified by the Court favor a
case-by-case balancing approach as the most effective solution to the
problem, with the accused’s constitutional rights playing an integral
role in the calculus.

I. THE ADMISSIBILITY OF POSTHYPNOTIC TESTIMONY

Judges confronted with witnesses who have been hypnotized are
forced to consider the influences of hypnosis upon the trial court’s
truth-seeking function. The dilemma presented by a hypnotically in-
fluenced witness demands some understanding of how such a witness
differs from other witnesses. This section presents some basic observa-
tions concerning the effects of memory refreshment by hypnosis, and
reviews the approaches courts have developed for systematically con-
fronting the problems created by the practice.

A. Inherent Problems Versus Effective Uses

Hypnosis remains an inexact and mysterious science. Disagreement
still exists over such basics as a suitable definition for the phenome-
non.17 As the Supreme Court recognized in Rock,18 the Council on
Scientific Affairs of the American Medical Association admits that
there is “no single, generally accepted theory of hypnosis, nor is there

16. The status afforded posthypnotic testimony at trial may be determinative of whether
hypnosis may be used during investigations. A number of courts and commentators, in opting
for a per se exclusionary rule, have noted that due to the unreliability of posthypnotic testimony
and its “hardening” effects upon the memory of witnesses, the hypnotic procedure substantially
reduces the effectiveness of cross-examination. Several courts have declared witnesses to be com-
pletely incompetent to testify after having undergone hypnosis. See People v. Shirley, 31 Cal. 3d
18, 723 P.2d 1354, 181 Cal. Rptr. 243, cert. denied, 459 U.S. 860 (1982), discussed infra notes
105-14 and accompanying text. In these and like jurisdictions, investigators who choose to sub-
ject witnesses to hypnotic procedures are forced to “gamble” that the benefits of these proce-
dures will be worth the price—since any information recalled after the hypnotic session will be
declared inadmissible.

17. P. GIANNELLI & E. IMWINKELRIED, supra note 11, § 12-2, at 346; L. TAYLOR, supra note
11, at 4. See also Sies & Wester, supra note 12, at 79-81.

consensus about a single definition." Researchers also disagree over the effects of hypnosis on later memory recall. Although more modern studies confirm that in many cases hypnosis is frequently responsible for producing more detailed recall, the primary question of reliability remains. Subjects may, consciously or unconsciously, produce false memories. This section explores the various factors which contribute to the fallibility of hypnosis as a memory enhancing device.

Because the hypnotic state is one of heightened suggestibility, the subject becomes highly susceptible to cues provided, intentionally or unintentionally, by the hypnotist. In addition, pressures placed on the subject by the desire to recall, by hypnotic suggestion, or by questions aimed at eliciting past events may cause the subject to confabulate, or fill in gaps in memory with events that may never have occurred. One expert explained that hypnosis "may jog the subject's memory and produce some increased recall, but it will also cause him to fill in details that are plausible but consist of memories or fantasies from other times." In addition, the subject may deceive even an experienced hypnotist by feigning the hypnotic state, thus introducing the possibility of willful manipulation of the hypnotic session.

The inherent unreliability of posthypnotic testimony can create serious constitutional problems when the technique is used by the prosecution as a basis for suspect identification. In Stovall v. Denno, the Supreme Court recognized that a defendant could be denied due process when identification procedures were "unnecessarily suggestive and conducive to irreparable mistaken identification." This standard was

23. Diamond, Inherent Problems in the Use of Pretrial Hypnosis on a Prospective Witness, 68 CALIF. L. REV. 313 (1980). Professor Diamond notes: The suggestive instructions and cues provided to the subject need not be, and often are not, verbal. The attitude, demeanor, and expectations of the hypnotist, his tone of voice, and his body language may all communicate suggestive messages to the subject. Especially powerful as an agent of suggestion is the context and purpose of the hypnotic session. Most hypnotic subjects aim to please.

Id. at 333.
25. Id.
27. Id. at 302.
narrowed in later cases to preclude identification procedures which produced a "substantial likelihood of misidentification,"28 and still later, in *Manson v. Brathwaite*, to reach only those procedures which carried "a very substantial likelihood of irreparable misidentification."29 These constitutional standards were articulated based upon identifications generally and are not limited to identifications associated with hypnosis. Although the Court has invoked this reasoning to hold identification procedures invalid on only one occasion,30 the circuit courts have developed analogous exclusionary principles in cases involving suspect identification through posthypnotic testimony.

In *United States v. Valdez,*31 the court took note of a general lack of corroboration for the victim's posthypnotic testimony, and held that the principles set forth in *Manson* "require[d] the exclusion of an uncorroborated personal identification, made only after hypnosis, of a person clearly singled out for suspicion."32 Thus, when hypnosis is used as an identification tool in a criminal prosecution, the constitutional rights of the defendant must be protected. Constitutional requirements seem to demand at least some corroborating evidence of the reliability of the identification procedure.

The problem of unreliability is compounded because memory refreshment by hypnosis tends to increase the witness' confidence in the truth of the information he or she reveals.33 This effect, referred to as memory "hardening,"34 creates special barriers to the court's truth-seeking ability. The hypnotic procedure "can bolster a witness whose credibility would easily have been destroyed by cross-examination but who now becomes quite impervious to such efforts, repeating one particular version of his story with great conviction."35 In this way, the witness is made highly resistant to cross-examination. This raises yet another constitutional problem, this time with the confrontation clause of the sixth amendment.36 As one commentator notes:

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31. 722 F.2d 1196 (5th Cir. 1984).
32. *Id.* at 1203.
34. See Note, *supra* note 20, at 928.
36. The sixth amendment grants the accused the "right . . . to be confronted with the witnesses against him." U.S. CONST. amend. VI.
This false confidence may interfere with the jury's proper function in evaluating the demeanor of a witness. Arguably, a defendant faced with such a witness is denied his sixth amendment right to confront his accusers because the witness' original memory is lost forever. The defendant must now face a "new" witness whose natural recollection may have been altered by suggestion or confabulation, but who nonetheless has a firm conviction as to its truth.\textsuperscript{37}

The Fourth Circuit considered this sixth amendment argument in two recent cases. In \textit{Harker v. Maryland},\textsuperscript{38} the court found that cautionary instructions apprising the jury of the potential dangers of hypnosis, cross-examination and "full exploration of the hypnotic event"\textsuperscript{39} sufficiently alleviated the constitutional problem. Likewise, in \textit{McQueen v. Garrison},\textsuperscript{40} the court found the corroborating evidence presented sufficient to establish the reliability of the witness' testimony and defeat the constitutional challenge.\textsuperscript{41}

Even more recently, the United States Supreme Court rejected an argument that a simple loss of recollection creates a confrontation clause violation when loss of recollection is so complete as to interfere with effective cross-examination. In \textit{United States v. Owens},\textsuperscript{42} the Court reiterated that the confrontation clause only guarantees "an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish."\textsuperscript{43} Justice Scalia, writing for the Court, continued that the requirements of the clause would be satisfied if, on cross-examination, "the defendant has the opportunity to bring out such matters as

\begin{itemize}
  \item \textsuperscript{38} 800 F.2d 437 (4th Cir. 1986).
  \item \textsuperscript{39} Id at 443.
  \item \textsuperscript{40} 814 F.2d 951 (4th Cir.), \textit{cert. denied}, 108 S. Ct. 332 (1987).
  \item \textsuperscript{41} Id. The court somewhat apologetically stated, "[n]o appellate court has gone . . . so far as to judge whether hypnotically enhanced testimony was free of the dangers associated with hypnosis solely from a review of the witness' testimony." \textit{Id.} at 960. Nonetheless, the court proceeded to do just that, stating:
    [The witness'] responses generally were not the automatic responses of a preconditioned mental process . . . .
    [The witness] exhibited reasoned judgment in these responses and her disagreements with questioning counsel appear to be from independent reasoning . . . . In short, her general testimony presents the appearance that she testified independent of possible suggestion from the hypnotist and that her memory had not "hardened."

\textit{Id.} at 960-61.
  \item \textsuperscript{42} 108 S. Ct. 838 (1988).
  \item \textsuperscript{43} Id. at 842 (quoting \textit{Kentucky v. Stincer}, 107 S. Ct. 2658, 2664 (1987); \textit{Delaware v. Fensterer}, 474 U.S. 15, 20 (1985)).
\end{itemize}
the witness's bias, his lack of care and attentiveness, his poor eyesight, and even (what is often a prime objective of cross-examination) the very fact that he has a bad memory." Owens should not prove dispositive of this point in the hypnosis cases, however, for aside from problems of unreliability, the memory hardening effects of hypnosis may block this crucial inquiry into the veracity of a witness's testimony.

The inherent unreliability of posthypnotic testimony, combined with its potential interference with cross-examination, provides states with a legitimate interest in regulating or restricting the admissibility of such testimony. Many states accomplish this end by applying the rule developed in Frye v. United States, which normally controls the admissibility of unreliable scientific evidence such as polygraph results, truth serum interviews, blood typing, voiceprint analysis, and the like.

The Frye rule has been widely criticized. McCormick commented that "[g]eneral scientific acceptance is a proper condition for taking judicial notice of scientific facts, but not a criterion for the admissibility of scientific evidence." McCormick on Evidence § 203 (2d ed. 1972). Some argue that the test has been superseded, at least in the federal courts, by the more lenient standards of the Federal Rules of Evidence. See 22 C. Wright & K. Graham, Federal Practice and Procedure § 5168 (1978). A number of federal courts have followed this reasoning. E.g., United States v. Downing, 753 F.2d 1224, 1237 (3d Cir. 1985); United States v. Williams, 583 F.2d 1194, 1198 (2d Cir. 1978), cert. denied, 439 U.S. 1117 (1979); United States v. Bailer, 519 F.2d 463, 466 (4th Cir.), cert. denied, 423 U.S. 1019 (1975). This reasoning has also been adopted by some states which have adopted rules identical to the relevant federal provisions. See, e.g., State v. Williams, 388 A.2d 500, 503-04 (Me. 1978).

Even if Frye remains applicable to scientific evidence, other commentators suggest that it should not be applied to hypnosis. One writer's observations are worth quoting at length:

First, technically the test is not directly applicable because it is concerned with the admissibility of expert opinion deduced from the results of a scientific technique, such as a lie detector test, and not with the admissibility of eyewitness testimony. Second, the Frye test often is interpreted as requiring that scientific techniques used to gather evidence be infallible. It seems unjustified to apply such a strict standard to hypnotically influenced testimony when other kinds of eyewitness testimony, also frequently unreliable, are not similarly scrutinized. . . . Third, because the Frye test focuses on the general reliability of hypnosis, it obscures the equally important question whether the technique is reliable in a given case. . . . A final problem with the Frye test is that reliability should not be the sole criterion for admissibility. Even when testimony is reliable, the benefits of admitting it may not outweigh the danger that the trier of fact will attach undue weight to it.


The Supreme Court in Rock was not required to address the applicability of the Frye standard.
Despite acknowledged difficulties, a number of factors continue to weigh in favor of the use of hypnosis as a device for refreshing memory. Recent research reveals that a number of problems associated with posthypnotic-recall are not unique to the hypnotic process. Posthypnotic unreliability and the effects of memory hardening are magnified because the reliability and accuracy of eyewitness recall itself is inherently suspect, a finding replicated in several contexts since the earliest studies. Like their hypnotized counterparts, unhypnotized witnesses are also highly susceptible to the effects of suggestion and confabulation. In efforts to fill incomplete or fragmentary memories, witnesses have often been found to fabricate parts of a story to make it appear more plausible. Further, similar motivations can cause a witness' confidence in such a memory to improve with time.

Compounding these difficulties are the effects of post-event questioning. Even the most innocuous questions may produce profound changes in the recall of the ordinary, unhypnotized witness. In addition, pretrial preparation procedures have been recognized as producing effects identical to posthypnotic memory hardening.

Here, advocates often attempt to reshape a witness' testimony to fit to posthypnotic testimony, since the Arkansas Supreme Court held that it would have excluded Rock's testimony either under Frye or under more conventional evidentiary approaches. Rock v. State, 288 Ark. 566, 570, 708 S.W.2d 78, 80 (1986), vacated, 107 S. Ct. 2704 (1987). However, the holding of the Supreme Court has the effect of preventing the Frye standard from being invoked to create a per se rule of exclusion where such a rule would prevent the defendant from testifying on his or her own behalf. More generally, the Court's decision in Rock can also be seen to suggest that a more lenient case-by-case determination is preferable to a per se rule. See infra notes 192-96 and accompanying text.

47. See Note, supra note 20, at 932-33 ("Both the desire to please and confabulation, therefore, are not problems unique to the hypnotized subject."); Comment, Hypnosis—Should the Courts Snap Out of It? A Closer Look at the Critical Issues, 44 OHIO ST. L.J. 1053, 1068-71 (1983); Note, Hypnotically Aided Testimony: The Abandonment of Frye, 2 REV. OF LITIGATION 231, 235-38 (1982).

48. A broad overview of the relevant research can be found in L. TAYLOR, supra note 11, § 3-1, at 84-104.


50. Id.

51. See L. TAYLOR, supra note 11, § 3-2, at 110. The author provides an overview of the studies performed by Elizabeth Loftus and others in the early 1970's, which tended to show that even slight differences in the ways questions were posed produced large differences in the accuracy of the information recalled. For example, asking the question "How fast were the cars traveling when they smashed into each other?" produced significantly higher estimates of speed than the question "How fast were the cars traveling when they hit each other?" Id. In another experiment, asking, "Did you see the broken headlight?" produced a higher number of affirmative responses than asking, "Did you see a broken headlight?" Loftus, Reconstructing Memory, The Incredible Eyewitness, PSYCHOLOGY TODAY, Dec. 1974, at 118.

52. See Note, supra note 20, at 933.
the needs of a particular case. Repeated rehearsal results, in many cases, in a substitution of the attorney’s words for those of the witness, and further, it “increases the likelihood that the witness’ story will become frozen in a fixed pattern.” In short, the problems presented by posthypnotic testimony are arguably identical to those present in ordinary eyewitness recall, though to a different degree, since the effects of hypnosis may compound an already unreliable eyewitness account. These factors should be considered in determining whether to exclude posthypnotic testimony, and if so, to what extent.

Accepting all its problems, the use of hypnosis for purposes of memory enhancement has been instrumental in uncovering leads and producing identifications. Experts describe hypnosis as “an efficient and effective tool that is essential in saving valuable time, trimming costs, and providing new leads in difficult cases.” A Los Angeles Police Department study reveals that in a sampling of sixty-seven criminal investigations in which hypnotism was involved, new information believed otherwise unobtainable through ordinary interview procedures was uncovered in seventy-seven percent of these cases. In addition, hypnotic techniques have led to significant and somewhat remarkable breakthroughs in several highly publicized cases. Such results have led to the increased use of hypnosis by law enforcement agencies, many of which now provide special training in hypnotic induction techniques.

54. Id. at 555-56. The author noted that repeated pretrial contact: substantially increase[s] the risk of testimonial distortion through the substitution of the attorney’s suggestions for the witness’s perceptions. Once such a substitution has taken place there is virtually no hope of retrieving the original perceptions. Second, they may boost a witness’s confidence in the accuracy of proffered testimony without actually improving accuracy.

Id. (citations omitted).
55. L. TAYLOR, supra note 11, at 80.
57. Id.
58. One highly publicized example is the use of hypnosis in the “Cowchilla kidnapping” case, the largest mass kidnapping in the history of the United States. Twenty-six students and a bus driver were abducted by three masked gunmen, driven a hundred miles away, and buried underground. After his escape, and after memory refreshment by hypnosis, the bus driver was able to recall all but one of the numbers on the gunmen’s license plate. L. TAYLOR, supra note 11, at 81-82.
B. Judicial Approaches to Hypnotically Influenced Testimony

The popularity of hypnosis as an investigative tool, coupled with the somewhat erratic ways in which the state courts deal with the question of admissibility, creates special problems for prosecutor and defense counsel alike. They are frequently forced to gamble that crucial testimony will be excluded, in whole or part. After two decades of consideration, state courts have fashioned fundamentally conflicting ways of treating the problem. These approaches range from unconditional admissibility to unconditional inadmissibility, with compromise positions advocating case-by-case analysis. What follows is a brief overview of the four most prevalent approaches.

1. The Admissibility Approach: Harding v. State

Perhaps the earliest systematic approach was developed by the Maryland court in Harding v. State. The court in Harding treated post-hypnotic testimony not as the product of a scientific technique, but as ordinary eyewitness testimony, refreshed in a way similar to showing the witness a written memorandum. As such, it was unconditionally admissible. The court reasoned that since the witness was reciting facts from the witness stand from present recollection, the testimony should be admitted. The court also noted that the witness' testimony was corroborated by the existence of external evidence, and that the jury was specially instructed that the testimony should be given no more weight than normal recall.

A number of courts quickly followed the Harding approach. The Harding admissibility standard was adopted by several federal circuits including the Ninth, initially for civil, then for criminal cases, and the Fifth.
Despite Harding's initial popularity, courts and commentators began to take note of some of the problems inherent in the unconditional admissibility of posthypnotic testimony. One of the greatest concerns was that the assessment of reliability was left entirely to jurors, who might grant undue weight to posthypnotic testimony due to the "aura of reliability" surrounding the technique. While this could be corrected to some degree with cautionary instructions, commentators also noted that "[i]n allowing the testimony of all previously hypnotized witnesses to reach the trier of fact, the court does not bar evidence made unreliable by undue suggestiveness." Additionally, the approach offered no incentive to law enforcement officials and agencies to follow procedures which minimized the danger of unreliable recall. Such concerns eventually resulted in the express overruling of Harding. In an attempt to remedy these weaknesses, yet retain the potentially valuable information uncovered through hypnosis, some courts have looked toward regulating and standardizing the procedure.


In United States v. Adams, the Ninth Circuit strongly recommended the adoption of minimal procedural safeguards in order to reduce the likelihood of admitting testimony unduly influenced by the suggestiveness of the hypnotist. The court recommended retaining a complete record of the hypnotic interview, preferably on audio or video credibility, but not admissibility," the court strongly recommended the adoption of procedural safeguards to help insure reliability. Id. See also Note, supra note 60, at 790-91, wherein the author observes:

With near unanimity in the decade following Harding, courts admitted hypnotically adduced testimony on a per se basis on the theory that the traditional adversarial devices such as cross-examination of the witness, judicial discretion regarding expert qualifications, expert testimony on the effects of hypnosis upon memory recall, and the availability of limiting instructions to the jury allowed the trier of fact to accord proper weight to the testimony offered as evidence at trial.

*Id.* (footnotes omitted).

68. Connolly v. Farmer, 484 F.2d 456 (5th Cir. 1973). The Fifth Circuit now seems to favor a balancing approach to the problem. See Wicker v. McCotter, 783 F.2d 487 (5th Cir. 1986); United States v. Valdez, 722 F.2d 1196, 1701 (5th Cir. 1984). See infra notes 136-43 and accompanying text for discussions of these cases.

69. See Note, supra note 20, at 939.

70. Sies & Wester, supra note 12, at 117.

71. Id. at 118.


73. 581 F.2d 193 (9th Cir.), cert. denied, 439 U.S. 1006 (1978).
eotape, and suggested that the session be conducted by a qualified hypnotist. In 1981, the Supreme Court of New Jersey took the suggestion to heart, and in State v. Hurd affirmed various rules of conditional admissibility based on compliance with specific procedural safeguards.

The court in Hurd first required a determination that the memory loss at issue was appropriate for the use of hypnosis. Once that determination was made, the court then looked to ensure that procedural safeguards were followed. The court adopted the following six procedural safeguards, which were based upon the expert testimony of Dr. Martin Orne:

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 may have 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 post-hypnotic interview.

74. Id. at 199 nn.12-13.
76. Id. at 545-46, 432 A.2d at 96-97.
77. Id.
78. Ironically, Dr. Orne is perhaps the most vocal proponent of making posthypnotic testimony inadmissible per se. His admonishments are cited and relied upon by most courts adopting the per se approach. See, e.g., State v. Mack, 292 N.W.2d 764 (Minn. 1980); People v. Shirley, 31 Cal. 3d 18, 62-66 & nn.43-51, 723 P.2d 1354, 1381-83 & nn.43-51, 181 Cal Rptr. 243, 270-72 & nn. 43-51, cert. denied, 459 U.S. 860 (1982). See generally Orne, supra note 21.
79. Hurd, 86 N.J. at 533, 432 A.2d at 90-91.
The Supreme Court of New Jersey adopted these standards through a unique application of the Frye test. Rather than requiring that hypnosis be generally accepted as a reliable means of achieving absolutely accurate recall, the court settled on a less stringent interpretation of the Frye standard. Recognizing that even normal eyewitness recall is "often historically inaccurate," the court ruled that "testimony enhanced through hypnosis is admissible in a criminal trial if the trial court finds that the use of hypnosis in the particular case was reasonably likely to result in recall comparable in accuracy to normal human memory." Further, in order to provide a standard of reliability, the court adopted the safeguards developed in the lower court, and placed the burden of establishing compliance upon the proponent of the evidence.

Since Hurd, a number of courts have adopted various formulations and combinations of procedural safeguards, while applying or refusing to apply the Frye standard in its various forms. Though varied and perhaps confusing, these solutions share a number of common assumptions. Among them are "an aversion to the exclusion of relevant evidence, a recognition of the risks of hypnotically refreshed testimony, and a belief that procedural safeguards . . . can minimize or negate those risks." These approaches are not without their flaws, however. One commentator declares that the reliability of posthypnotic testimony cannot be guaranteed, even with the use of procedural safeguards. The Hurd standard is also difficult to apply. Courts have experienced difficulty comparing recollections of a witness once hypnotized to what would be the recollections of an "ordinary" witness. In addition, courts look skeptically at the administrative difficulties created by a case-by-case approach. These and similar concerns have prompted courts to seek a general rule regarding admissibility, one which results, somewhat ironically, in complete inadmissibility.

80. For a general discussion of the more traditional applications of the Frye standard, see supra note 46.
81. Hurd, 86 N.J. at 537, 432 A.2d at 92.
82. Id. at 543, 432 A.2d at 95.
83. Id. at 546-47, 432 A.2d at 97. See also Sies & Wester, supra note 12, at 101.
84. See Sies & Wester, supra note 12, at 102-13 & nn.156-64.
85. Id. at 103.
86. Diamond, supra note 23, at 314.

Today the view among most states is one of inadmissibility.\(^8\) Courts adopting this approach liken posthypnotic testimony to the product of a scientific experiment, rather than to an identification procedure, or to memoranda used to refresh a witness' memory.\(^9\) The appropriate test of admissibility, they therefore hold, is the same used for other forms of scientific evidence, i.e., the *Frye* rule. Again, the *Frye* rule requires not that the technique prove reliable in a particular case, but that it gain general acceptance in the scientific community.\(^9\)

The inadmissibility approach appears to be a reaction to modern theories of memory which hold that the process of retrieval is a constructive, as opposed to a reproductive process.\(^9\) It is the prospect of hypnosis actively altering recollection, then, that provides the theoretical motivation behind per se exclusion, and the application of the *Frye* standard to eyewitness recall. One commentator summarizes the reasoning of these courts:

> The recognition that hypnosis is not merely a retrieval mechanism for lost memories, but is an active agent in the reconstruction of memory has led to a rejection of the *Harding* and *Hurd* approaches on several grounds. Courts have recognized that the technique of hypnosis is scientific and the testimony of the witness is the direct product of the technique. Because the testimony is therefore only as reliable as the hypnotic process that produced it, both the testimony and the scientific procedure must be judged by the same legal standard of *Frye v. United States*. Consequently, because hypnosis does not merely retrieve memories, but also produces them, the *Frye* test for admissibility can only be met if the scientific technique, hypnosis, and its product, memory, are both reliably accurate.\(^9\)

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91. For a detailed discussion of the *Frye* rule and its applicability to posthypnotic testimony, see *supra* note 46.

92. *See* People v. Shirley, 31 Cal. 3d 18, 57-62, 723 P.2d 1354, 1378-79, 181 Cal. Rptr. 243, 266-70, *cert. denied*, 459 U.S. 860 (1982). Years ago, Sir Frederick Bartlett concluded that "the first notion to get rid of is that memory is primarily or literally reduplicative, or reproductive. . . . In fact, if we consider evidence rather than presupposition, remembering appears to be far more decisively an affair of construction rather than one of mere reproduction." F. BARTLETT, REMEMBERING 204-05 (1932). This early conclusion has been reaffirmed time and again by modern experiments, led by the pioneering efforts of Elizabeth Loftus. *See supra* note 51 and accompanying text.

POSTHYPNOTIC TESTIMONY

State v. Mack\textsuperscript{94} is the case credited with leading this bold departure from Harding and a rule of unconditional admissibility.\textsuperscript{95} In considering the issue of admissibility, the court in Mack heard the extensive testimony of several experts, including Dr. Orne. The complexity of considering such testimony formed the basis for the court’s conclusion that “a case-by-case decision on the admissibility question would be prohibitively expensive.”\textsuperscript{96} The court looked to the Frye rule for assistance in developing a per se approach. Though realizing that the testimony of previously hypnotized witnesses was not strictly analogous to more conventional applications of Frye in determining the reliability of various forms of mechanical testing, the court concluded that “the Frye rule is equally applicable in this context, where the best expert testimony indicates that no expert can determine whether memory retrieved by hypnosis, or any part of that memory, is truth, falsehood, or confabulation.”\textsuperscript{97} Emphasizing the unreliability of the technique, the suspicious circumstances surrounding its application, and a complete lack of corroboration of the victim’s testimony, the court held it inadmissible in a criminal proceeding.\textsuperscript{98}

In the year-and-a-half following the Mack decision, five states adopted per se inadmissibility.\textsuperscript{99} All of these courts used some form of the Frye test, and all found posthypnotic testimony inadmissible per se, “effectively render[ing] the witness incompetent” to testify.\textsuperscript{100}

The initial per se rule was one of complete incompetency, which held the witness’ testimony inadmissible “from the time of the hypnotic session forward.”\textsuperscript{101} This rule proved unduly harsh, however, as it required state officials to choose between preserving the testimony of the witness for use at trial, or taking immediate advantage of hypnosis in order to gain additional investigative information.\textsuperscript{102} In an attempt to lessen the severity of the per se approach, courts in several states adopting the rule modified their opinions to allow witnesses to

\textsuperscript{94} 292 N.W.2d 764 (Minn. 1980).
\textsuperscript{95} See Sies & Wester, supra note 12, at 104; Note, supra note 60, at 800.
\textsuperscript{96} Mack, 292 N.W.2d at 766.
\textsuperscript{97} Id. at 768.
\textsuperscript{98} Id. at 772.
\textsuperscript{100} Sies & Wester, supra note 12, at 105-06.
\textsuperscript{102} See id. at 232 n.1, 624 P.2d at 1280 n.1.
testify regarding information recalled prior to hypnosis. California remains the only jurisdiction which continues to preclude the admission of all posthypnotic testimony, including testimony consistent with a witness’ prehypnotic recollections.

The case which created California’s harsh approach is People v. Shirley. The ruling in Shirley permits a witness, once hypnotized, to testify only to matters “wholly unrelated to the events that were the subject of the hypnotic session.” Though criminal defendants were originally held to this rule, a necessary exception for them was created three months after the issuance of the original Shirley opinion. The exemption was created only for the defendant (not for the defendant’s witnesses) in order to “avoid impairing the fundamental right of an accused to testify in his own behalf.”

The Shirley approach has been harshly criticized. The Shirley rule is overinclusive in that it renders even prehypnotic recall inadmissible, even in the event that it is corroborated by independent evidence. Further, its application of the Frye test has been criticized as a self-serving rationalization invoked for the purposes of justifying the court’s conclusions regarding admissibility. Application of the Frye test by the court in Shirley requires that the technique of hypnosis be “almost infallible” as a means for producing “historically accurate memory.” This application fails to recognize, as the court recognized in Hurd, that even normal eyewitness recall can be unreliable, and probably could not pass Shirley’s stringent standards. Instead, the proper standard should consider, as stated in Hurd, “whether hypnosis is generally accepted as a ‘reliable means of restoring memory comparable to normal recall.’”

Even in its more lenient forms, the per se approach has been roundly criticized. While applying Frye in order to develop a per se

103. Sies & Wester, supra note 12, at 108.
104. P. Gianelli & E. Imwinkelried, supra note 11, § 12-4, at 357.
106. Id. at 67, 723 P.2d at 1384, 181 Cal. Rptr. at 273.
107. Id.
108. Id. (citations omitted). See also Note, supra note 60, at 807.
109. People v. Williams, 132 Cal. App. 3d 920, 926, 183 Cal. Rptr. 498, 500-01 (1982) (Gardner, J., concurring) (“Shirley is really more of a polemic than an opinion. As a polemic it makes interesting reading.”); Sies & Wester, supra note 12, at 103 (per se rule of inadmissibility is a “draconian device”).
110. See Shirley, 31 Cal. 3d at 75, 723 P.2d at 1389, 181 Cal. Rptr. at 278 (Kaus, J., concurring and dissenting).
111. See Note, supra note 60, at 809-11.
112. Id.
113. Sies & Wester, supra note 12, at 112.
114. Id. at 111 (quoting State v. Hurd, 86 N.J. 525, 528, 432 A.2d 86, 92 (1981)).
rule leaves determinations of reliability to experts rather than jurors,\textsuperscript{115} it does so "without more carefully considering the varied contexts in which hypnosis may take place and the many factors which may affect both the potential danger and the potential utility of hypnosis in a particular instance."\textsuperscript{116}

Courts originally settled upon a per se approach for the purpose of promoting consistency of decision. Application of the \textit{Frye} standard, however, has not produced uniformity. Inconsistency exists in both application and result,\textsuperscript{117} prompting critics to implicate the \textit{Frye} standard "as a label to justify [judges'] own views about the reliability of particular forensic techniques."\textsuperscript{118} Thus commentators plead loudly for a principled alternative:

A better approach would require judges to cease hiding behind the mask of the \textit{Frye} reliability test and openly expose and clearly articulate their true reasons for rejecting hypnotically refreshed testimony so that their concerns may be adequately debated and evaluated. Such debate is foreclosed and justice is impaired by the expedient employment of an inappropriate standard that may result in an automatic and overly broad exclusion of relevant evidence.\textsuperscript{119}

4. \textit{The Balancing Approach: Probative and Prejudicial Value}

One emerging approach, the seeming favorite of writers on the subject,\textsuperscript{120} embraces one of the broad policies\textsuperscript{121} embodied in the Federal

\textsuperscript{115} Note, \textit{supra} note 20, at 945.
\textsuperscript{116} \textit{Shirley}, 31 Cal. 3d at 74, 723 P.2d at 1388, 181 Cal. Rptr. at 277-78 (Kaus, J., concurring and dissenting).
\textsuperscript{117} Sies & Wester, \textit{supra} note 12, at 116.
\textsuperscript{119} Sies & Wester, \textit{supra} note 12, at 116 (footnote omitted).
\textsuperscript{121} Whether the Federal Rules effectively supplanted the \textit{Frye} standard in the federal courts and in states adopting identical or similar rules is unsettled. The Supreme Court in \textit{Rock} was not compelled to address the issue since the Supreme Court of Arkansas declared that Rock's testimony would have been inadmissible under either the \textit{Frye} standard or under more traditional evidentiary approaches. \textit{See infra} note 163 and accompanying text.

Other federal courts faced with the confrontation between \textit{Frye} and the Federal Rules have found delicate ways around it. \textit{See}, e.g., Sprynczynatyk \textit{v. General Motors Corp.}, 771 F.2d 1112, 1122 (8th Cir. 1985), \textit{cert. denied}, 473 U.S. 1046 (1986); United States \textit{v. Valdez}, 722 F.2d 1196, 1200-01 (5th Cir. 1984). However, some earlier decisions suggest that the applicability of \textit{Frye} is greatly limited following the enactment of the Federal Rules. \textit{See}, e.g., United States \textit{v. Williams}, 583 F.2d 1194, 1197-98, 1200 & n.11 (2d Cir. 1978); \textit{cert. denied}, 439 U.S. 1117 (1979).
Rules of Evidence.122 "Modern evidence law favors admissibility" by, for example, eliminating outmoded doctrines of exclusion and incompetency, and by expanding the definition of relevancy.123 However, some important restrictions remain. Sometimes described as "the cornerstone' of the Federal Rules,"124 Rule 403 enunciates one fundamental restriction:

Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time. Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.125

The rationale of the balancing approach is straightforward. It begins with Rule 601, the general competency provision, which holds every person "competent to be a witness," except as otherwise provided in the Federal Rules, or, where applicable, by relevant state law.126 It is then left for the judge to apply Rule 403 as needed to promote accuracy of the proceeding and fairness to the parties.127 One obvious advantage is that the standard is necessarily applied on a case-by-case basis, effectively avoiding any injustice done by a per se

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122. The three "entrenched" positions, the admissibility approach, the procedural safeguards approach, and per se exclusion only implicitly recognize the relevance of various federal rules which seem to justify, or at least permit their respective conclusions. One commentator explains:

The credibility position implicitly applies Federal Rule of Evidence 104(e) and allows the jury to hear evidence relevant to weight or credibility. Federal Rule of Evidence 104(b) applies to relevancy conditional on fulfillment of a fact, and the procedural safeguards position follows this rule. Under this position, the judge makes a preliminary finding whether the foundation evidence—here the required procedures—supports a finding of relevance. Following this finding, the jury makes the final conclusion on the issue of relevancy.

The general acceptance position [the per se approach], on the other hand, considers hypnotically refreshed testimony as either a question of witness qualification or of admissibility of evidence. The court essentially decides the question, therefore, under Rule 104(a). . . . Although courts do not refer specifically to the rules of evidence when invoking any of these three positions, courts have followed the theories underlying the rules.

Note, supra note 20, at 948 n.186.


125. FED. R. EVID. 403.

126. FED. R. EVID. 601.

127. See Gold, supra note 123, at 499.
Another advantage is the flexibility inherent in the approach. The rule allows the court to place on the same "scale" such diverse factors as the circumstances of the hypnotic procedure itself, the relevancy and importance of the testimony, and external indicia of reliability such as the quantity and quality of corroborative evidence.

The flexibility of the rule is apparent from its wording. It permits the exclusion of evidence when the probative value of that evidence is "substantially outweighed by the danger of unfair prejudice." While traditionally construed to hold inadmissible, for example, evidence of prejudicial characteristics of an individual defendant, or photographic evidence which tends to elicit a juror's emotional rather than rational faculties, the standard naturally encompasses the unfairly prejudicial effects created in the minds of jurors confronted with a hypnotically refreshed witness. Likewise, the clause requiring the scrutiny of evidence tending to mislead the jury, including evidence which is "seductively persuasive," provides a natural context in which to consider the alleged aura of credibility surrounding the hypnotic process.

While the balancing approach seems preferable to per se approaches by virtue of its flexibility, this same flexibility is also its major weakness. Lacking concrete guidelines, the approach suffers from a lack of uniform application. For this reason, courts have tended to create in application a hybrid approach, demanding compliance with procedural safeguards from the Hurd line of cases, and considering the degree of compliance with these factors as one criterion in toward estimating potential prejudicial effect. Toward this end, courts have

128. See Note, supra note 20, at 951.
129. FED. R. EVID. 403.
131. Id. at 239.
132. Id. at 242.
133. Earliest studies tended to show that results of unreliable scientific techniques, more specifically, polygraph tests, had an unduly prejudicial effect on jurors if admitted into evidence. Later studies discredited the conclusions drawn from the earlier studies, showing that juries maintained an ability to critically evaluate such evidence. For an excellent review of the relevant research, see Note, The Frye Doctrine and Relevancy Approach Controversy: An Empirical Evaluation, 74 GEO. L.J. 1769 (1986).
134. Note, supra note 20, at 952.
created a two prong analysis, where the first prong tests reliability by 
evaluating compliance with the guidelines, and the second prong bal-
ances probative value against prejudicial effect.\textsuperscript{135} These cases also re-
veal several factors which can assist in achieving a consistent and fair 
approach to the problem.

A number of these considerations have taken root in the federal 
circuits. In \textit{United States v. Valdez},\textsuperscript{136} the Fifth Circuit reversed the 
conviction of a defendant charged with extortion, after he had been 
identified by a Texas Ranger following hypnotic memory refreshment. 
The court articulated the balancing rule, stating "[w]e therefore exam-
ine whether the probative value of this hypnotically influenced testi-
mony was outweighed by the dangers of unfair prejudice, jury 
confusion, or jury misapprehension,"\textsuperscript{137} but did not follow it. Instead, 
the court retreated to the equivalent of a per se rule, declaring that 
when, as in the case before it, a hypnotized subject identifies a person 
for the first time after learning that the individual is under suspicion, 
the subject's testimony would be inadmissible "whatever procedural 
safeguards were used to attempt to sanitize the hypnotic session."\textsuperscript{138}

The Fifth Circuit continued to refine its balancing approach.\textsuperscript{139} In 
\textit{Wicker v. McCotter},\textsuperscript{140} the court applied the balancing rule,\textsuperscript{141} and up-
held a lower court decision admitting posthypnotic testimony. The 
court compared the witness' posthypnotic testimony to her written 
statement given before the hypnotic session, and found that they 
"corresponded substantially."\textsuperscript{142} In rejecting the defendant's charge 
of error, the court also noted "substantial independent evidence" of 
the witness' refreshed testimony and its agreement with testimony of an 
unhypnotized witness.\textsuperscript{143}

\begin{itemize}
\item\textsuperscript{135} This is precisely the conclusion reached by commentators as well. \textit{See} Sies & Wester, \textit{supra} note 12, at 120-21; Note, \textit{supra} note 20, at 952-61.
\item\textsuperscript{136} 722 F.2d 1196 (5th Cir. 1984).
\item\textsuperscript{137} \textit{Id.} at 1201.
\item\textsuperscript{138} \textit{Id.} at 1203.
\item\textsuperscript{139} \textit{But see} United States v. Harrelson, 754 F.2d 1153 (5th Cir.), \textit{cert. denied}, 474 U.S. 908 (1985). Here the court did not expressly adopt the balancing approach, instead distinguishing the case \textit{sub judice} from "the exclusionary rule formulated in Valdez" on particular facts. The court in \textit{Harrelson} characterized procedural irregularities in \textit{Valdez} as "unduly suggestive," but found that in the instant case, the hypnosis was conducted with "care and circumspection." \textit{Id.} at 1180.
\item\textsuperscript{140} 783 F.2d 487 (5th Cir.), \textit{cert. denied} , 106 S. Ct. 3310 (1986).
\item\textsuperscript{141} "The admissibility of [posthypnotic] testimony is to be evaluated on a case by case basis. The probative value of the testimony is to be weighed against its possible prejudicial effect." \textit{Id.} at 492.
\item\textsuperscript{142} \textit{Id.}
\item\textsuperscript{143} \textit{Id.}
\end{itemize}
The Seventh Circuit applied a near equivalent of the Rule 403 balancing test in determining whether admission of posthypnotic testimony affected "a substantial right of the party" in accord with Rule 103(a). In one recent case, the Seventh Circuit affirmed a ruling admitting the posthypnotic testimony of a witness largely because "the [trial] court found that the attempt to enhance [the witness'] memory was, quite simply, unsuccessful." Under similar circumstances, the court held likewise after considering 1) the "strength of proof" other than the testimony of the hypnotized witnesses, 2) the lack of effect of hypnosis on a witness revealing particularly important information, 3) the apparent failure of the hypnotic procedure to enhance the witnesses' memory, 4) the testimony consistent with prehypnotic statements, and 5) the probability of reaching the same verdict had the witness been limited to prehypnotic recall.

A number of factors are considered under the balancing approach, including, but not limited to, relative compliance with procedural safeguards, the value of corroborative evidence (including corroborative testimony by nonhypnotized witnesses), and the degree to which posthypnotic differs from prehypnotic recall. Further, the balancing approach can well accommodate the criminal defendant's constitutional rights. This last consideration is particularly important in light of the reasoning of the Rock decision.

II. ROCK V. ARKANSAS

Vickie Rock was charged with manslaughter for her role in the death of her husband. While preparing her defense, Rock was unable to recall important details surrounding the shooting incident. Consequently her defense counsel arranged for Rock to undergo memory refreshment by hypnosis. Rock twice underwent hypnosis with a licensed neuropsychologist, Dr. Bettye Back, who initially interviewed the defendant for one hour prior to the first hypnotic session. Though Dr. Back tape recorded the hypnotic sessions, she

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144. FED. R. EVID. 103(a).
146. Id. at 704. Though the court did not explicitly follow a balancing rule, it seemed to require one in holding that the district court "did not abuse its discretion in admitting the [witness'] testimony." Id. at 705.
148. Id. at 223.
150. Id.
took only handwritten notes of the prehypnotic interview. Rock did not recall any additional information while under hypnosis. After the hypnotic interview, however, she did recall that just prior to the shooting her finger had not been on the trigger of the gun, and that the gun had discharged when her husband grabbed her arm. Her testimony was later corroborated by a gun expert, who testified that the weapon was defective and prone to discharge when hit or dropped.

The prosecution, upon learning of the hypnotic sessions, filed a motion to exclude the defendant's testimony. A separate pretrial hearing was held on the issue of admissibility, and the prosecution's motion was granted. The defendant was ordered to testify only to "matters remembered and stated to the examiner prior to being placed under hypnosis." At the trial the defendant was examined directly from a copy of Dr. Back's notes, and was held closely to their contents. The defendant was neither permitted to relate to the jury facts recalled after hypnosis, nor those previously recalled but not recorded by Dr. Back.

Vickie Rock was convicted of manslaughter, sentenced to ten years in prison, and fined $10,000.

A. The Supreme Court of Arkansas: Rock v. State

Before the Arkansas Supreme Court on appeal, the appellant argued that the posthypnotic testimony should have been admitted and

151. Id. This point would later prove crucial, as the trial court would hold the defendant's posthypnotic testimony inadmissible. Insofar as her testimony pertained to the events surrounding the shooting, Rock was only permitted to testify as to the information recorded during this prehypnotic interview. Id. at 2707.
152. Id.
153. Id.
154. Id.
155. Id.
156. Id.
157. Id. The complete pretrial order is reprinted in the opinion of the Supreme Court. The pertinent provisions read:

Defendant cannot be prevented by the Court from testifying at her trial on criminal charges under the Arkansas Constitution, but testimony of matters recalled by Defendant due to hypnosis will be excluded because of inherent unreliability and the effect of hypnosis in eliminating any meaningful cross-examination on those matters. Defendant may testify to matters remembered and stated to the examiner prior to being placed under hypnosis. Testimony resulting from posthypnotic suggestion will be excluded.

Id. at 2707 n.3.
158. Id. at 2707.
that the trial court's order was unduly restrictive.\textsuperscript{160} In addition, the appellant argued that excluding her posthypnotic testimony violated her constitutional right to testify in her own behalf.\textsuperscript{161}

The Arkansas Supreme Court recognized that the "more recent trend is toward exclusion of such testimony"\textsuperscript{162} and adopted per se exclusion. Interestingly, in reaching its decision, the court neither established the \textit{Frye} test nor the traditional balancing approach as a basis for its rule of per se inadmissibility. The court stated, "[s]ome critics contend that \textit{Frye} is too strict and will exclude helpful and probative evidence. We do not have to resolve that issue in this case, as we would find the hypnotically refreshed testimony inadmissible by either the \textit{Frye} test, or some form of it, or by traditional evidentiary concepts."\textsuperscript{163}

Committing itself to neither standard, the court proceeded to apply both. The court first found, citing \textit{Shirley} and its progeny, and the usual expert sources, that hypnosis "has not gained general acceptance as a means of ascertaining truth in the field of forensic law."\textsuperscript{164} The court also concluded, alluding to the balancing approach, that "[m]uch more could be said on the subject of hypnotically induced recollection, but we are satisfied from the more recent cases and the views of experts, that the dangers of admitting this kind of testimony outweigh whatever probative value it may have."\textsuperscript{165} This statement shows that the court severely misconstrued the balancing test. In stating this conclusion as a general rule, the court failed to recognize that the balancing approach demands case-by-case consideration of the circumstances surrounding the hypnotic session and the probative value of the individual witness' excluded testimony.\textsuperscript{166} By ignoring these details and instead using the language of the balancing approach only to

\textsuperscript{160.} Id. at 568, 708 S.W.2d at 79.
\textsuperscript{161.} Id. at 578, 708 S.W.2d at 84.
\textsuperscript{162.} Id. at 569, 708 S.W.2d at 80.
\textsuperscript{163.} Id. (citation omitted).
\textsuperscript{164.} Id. at 570, 708 S.W.2d at 80.
\textsuperscript{165.} Id. at 573, 708 S.W.2d at 81.
\textsuperscript{166.} In \textit{Rock}, application of the balancing approach would have required an estimation of the probative value of the defendant's testimony and of the possible prejudicial effect of the testimony on the jurors, and, of course, a weighing of their relative values. In the \textit{Rock} case, the probative value of the testimony should have rated very high, because Rock's later testimony was independently corroborated by the gun expert, who testified that the gun was prone to discharge when hit or dropped. As for the prejudicial effect of the defendant's testimony, while the trial court acknowledged that Dr. Back's procedure did not fully comport with the guidelines established in \textit{Hurd}, the court did not pursue further analysis. See \textit{Rock}, 288 Ark. at 573-74, 708 S.W.2d at 81-82. As was later noted by the Supreme Court, however, certain minimal procedural requirements had been met. See infra note 195 and accompanying text.
justify its per se rule, the court failed to recognize the principle advantage of the balancing approach—its flexibility.

Responding to the claim that the trial court’s limitations of the defendant’s testimony were too restrictive, the court once again borrowed from the foundation laid by Shirley. The court noted that the California Supreme Court had held a witness incompetent to testify “on matters dealt with while under hypnosis” because the “likelihood of contamination was deemed so pronounced.”167 In so noting, the court justified placing the burden “on [the] appellant to establish a reliable record of the testimony. She cannot now claim error because the court restricted her to the record she offered.”168

The court likewise dismissed the Constitutional challenge in short order. Appellant Rock argued that restrictions placed on her testimony by the pretrial order effectively violated her right to testify on her own behalf,169 relying primarily on Chambers v. Mississippi.170 In Chambers, the defendant was charged with the murder of a policeman, despite the fact that another man had repeatedly confessed his guilt to friends and to Chambers’ counsel.171 Testimony regarding these confessions was ultimately excluded through a strict application of various state evidentiary rules, and news of the confessions never reached the jury. Justice Powell, writing for the Supreme Court, reversed the Mississippi Supreme Court, holding, in an oft-quoted passage:

[t]he testimony rejected by the trial court have bore persuasive assurances of trustworthiness. . . . That testimony was also critical to Chambers’ defense. In these circumstances, where constitutional rights directly affecting the ascertainment of guilt are implicated, the

167. Rock, 288 Ark. at 576, 708 S.W.2d at 83.
168. Id. at 577, 708 S.W.2d at 84.
169. Id. at 578, 708 S.W.2d at 84. While the Petitioner did not provide explicit sources for this right in her argument, the Supreme Court would later find support for such a right in the fourteenth amendment’s guarantee of due process, the compulsory process clause of the sixth amendment, and the fifth amendment’s guarantee against compelled testimony. Rock v. Arkansas, 107 S. Ct. 2704, 2709-11 (1987).
171. See Chambers, 410 U.S. at 289.
172. Id. at 295-303. Chambers was prohibited from introducing the testimony of acquaintances and counsel who were privy to the confessions by application of state hearsay rules. He was likewise prohibited from cross-examining the confessor by the state “voucher” rule which prohibited the cross-examination of any witness not properly “adverse” to the defendant. Id.
hearsay rule may not be applied mechanistically to defeat the ends of justice.\textsuperscript{173}

The Supreme Court of Arkansas rejected the argument that the exclusion of Rock’s testimony was a similarly unconstitutional application of state evidentiary law. Although the court recognized the right to testify on one’s own behalf as “fundamental,” the court declared that the right still remains “subject to the rules of procedure and evidence, such as hearsay, or other instances of evidentiary exclusion.”\textsuperscript{174} In distinguishing \textit{Rock} from \textit{Chambers}, the court cited \textit{Greenfield v. Robinson},\textsuperscript{175} a federal district court case which rejected a similar challenge to the exclusion of the defendant’s hypnotic testimony. The court also cited \textit{State v. Atwood},\textsuperscript{176} a state appellate court opinion, which rejected a similar challenge by refusing to “‘accept evidence of uncertain value . . . that is otherwise completely uncorroborated.’”\textsuperscript{177}

The United States Supreme Court granted certiorari.\textsuperscript{178} The petitioner’s brief first presented the argument that the exclusionary order placed an unconstitutional restriction on Vickie Rock’s right to testify in her own defense. The argument stressed the importance of the excluded testimony, and established that defense counsel could not have been put on notice that the defendant’s testimony may have been excluded, since no rule of evidence, and no Arkansas decision addressed the possibility of excluding such testimony.\textsuperscript{179}

\textsuperscript{173} Id. at 302.
\textsuperscript{175} Id. (citing Greenfield v. Robinson, 413 F. Supp. 1113, 1120 (W.D. Va. 1976)).
\textsuperscript{177} Id. at 279, 479 A.2d at 264 (quoting Greenfield v. Robinson, 413 F. Supp. 1113, 1120 (W.D. Va. 1976)). The Supreme Court of Arkansas justified its holding similarly as follows: 

\textit{Chambers} primarily found a hearsay exception for evidence offered by the defense because of reliability. The \textit{Greenfield} court pointed out it was excluding the hypnotically induced testimony for the very reason that it was unreliable, after reviewing expert opinion on the issue[.] . . .

We think the same reasoning applies here. Appellant’s testimony was restricted only by what, in effect, are standard rules of evidence. The probative value of the proffered testimony is questionable, as we have seen, but in any case, it is substantially outweighed by the other considerations discussed.

. . .

We think the trial court took the proper course in its ruling and any prejudice or deprivation caused to appellant in this case was minimal and resulted from her own actions and not by any erroneous ruling of the court. We can find no violation of her constitutional rights.

\textit{Rock}, 288 Ark. at 578-80, 708 S.W.2d at 85-86.

\textsuperscript{178} 107 S. Ct. 430 (1986).
The petitioner distinguished her case from the cases "relied upon most heavily" by the Supreme Court of Arkansas. The holding in Atwood, the petitioner argued, was based on a misunderstanding of the Greenfield case, in which the defendant sought to testify while either under the effects of hypnosis, or alternatively, to have statements recorded during the hypnotic session admitted into evidence. The cited cases were distinguishable because Vickie Rock sought only to testify following memory refreshment by hypnosis.

Most importantly, the petitioner effectively distinguished People v. Shirley in noting that the Shirley holding and its per se rule pertain only to a prospective witness, not to a defendant. In one of the major articles upon which the Shirley holding was based, the author, noted professor of both law and psychiatry Bernard L. Diamond, expressly withheld comment on the legal issue of the exclusion of a defendant's posthypnotic testimony. Most strikingly, the petitioner noted that the court in Shirley expressly limited its per se exclusionary rule as follows:

Second, when it is the defendant himself—not merely a defense witness—who submits to pre-trial hypnosis, the experience will not render his testimony inadmissible if he elects to take the stand. In that case, the rule we adopt herein is subject to a necessary exception to avoid impairing the fundamental right of an accused to testify in his own behalf.

The Supreme Court's opinion in Rock reaffirms that this is a necessary exception, and establishes a solid foundation for the defendant's right to testify.

**B. The United States Supreme Court: Rock v. Arkansas**

The United States Supreme Court vacated the judgment of the Supreme Court of Arkansas, and remanded the case to that court for further proceedings. Justice Blackmun, writing for the 5-4 majority, grounded the opinion on the defendant's "right to testify in her

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180. See id. at 11.
182. Brief for Petitioner at 9.
183. Id. (citing Diamond, supra note 23, at 315 n.7).
184. Brief for Petitioner at 10 (quoting Shirley, 31 Cal. 3d at 67, 723 P.2d at 1384, 181 Cal. Rptr. at 273).
own behalf.' In fact, the holding in *Rock* represents the most explicit formulation to date of this amorphous right to testify. The Court's decision seems to suggest that constitutional considerations can and should play a part in what was seemingly considered to be a purely empirical problem of reliability. This section discusses the components of the right to testify, and the implications of the Court's constitutional analysis.

In its opinion, the Court briefly explored the legitimate interests of the state in maintaining the reliability of a defendant's testimony, weighed this interest against the constitutional harm done the defendant through an application of the state's evidentiary rule, and concluded that the interests of the state were outweighed by the defendant's right to testify. In identifying the legitimate interests of the state in excluding posthypnotic testimony, the Court observed the general lack of scientific and legal agreement over the various benefits and liabilities posed by hypnosis. Despite its recognition as a valid therapeutic technique, the Court noted the lack of consensus over a suitable definition for hypnosis, and the similar absence of a generally accepted scientific theory to explain the phenomenon. The Court rejected the "popular" notion that hypnosis guarantees only accurate recall, and instead concluded that memory refreshment by hypnosis, when it has any effect at all, appears to prompt "an increase in both correct and incorrect recollections.'

The Court likewise identified the three primary difficulties surrounding hypnotically refreshed testimony: the witness' heightened level of suggestibility, the tendency to confabulate in order to make responses more complete and coherent, and memory hardening—a witness' increased confidence in the truth of the information recalled. The Court also observed, however, that hypnotic memory refreshment has "been credited as instrumental in obtaining investigative leads or identifications," information which has frequently been corroborated by independent evidence.

Considering both the benefits and liabilities of hypnotic refreshment, the Court rejected per se exclusion of the defendant's posthypnotic testimony. Per se exclusion was unwarranted because less

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187. *Id.* at 2708.
188. *Id.* at 2713 (citing COUNCIL REPORT, REFRESHING RECOLLECTION, supra note 19, at 1918-19).
189. *Id.* (citing COUNCIL REPORT, REFRESHING RECOLLECTION, supra note 19, at 1921).
190. *Id.* The court cited the findings of both Dr. Orne and Dr. Diamond. See Orne, Hypnotically Induced Testimony, in EYEWITNESS TESTIMONY, PSYCHOLOGICAL PERSPECTIVES 171 (G. Wells & E. Loftus eds. 1985); Diamond, supra note 23, at 333-42.
191. *Id.* at 2713-14.
restrictive means existed not to guarantee, but to reduce the likelihood of unreliable testimony being admitted into evidence. The Court endorsed the safeguards adopted in various jurisdictions judicially\(^\text{192}\) and statutorily.\(^\text{193}\) Justice Blackmun’s opinion also acknowledged the continued, though perhaps reduced value of cross-examination to assess the reliability of a witness’ testimony and the undisputed guarantee of reliability which can be supplied by corroborating evidence. Further, the decision endorsed the use of both expert testimony and cautionary instructions in apprising the jury of possible unfairly prejudicial effects of admitting posthypnotic testimony.\(^\text{194}\)

In light of these considerations, the Court discussed the harshness of a per se rule as it applied to the defendant in this case. The Court noted the corroborating evidence supplied by the gun expert, who testified as to the defective condition of the weapon, and how that testimony tended to confirm facts the defendant only later remembered about the shooting. In addition, though Dr. Back’s hypnotic procedures did not rise to the level of the procedural safeguards required by the court in \textit{Hurd}, the tape recordings of Rock’s hypnotic sessions at least provided the trial court with assurances that Dr. Back avoided suggestive or leading questions.\(^\text{195}\) The Court concluded that “circumstances present an argument for admissibility of petitioner’s testimony in this particular case, an argument that must be considered by the trial court.”\(^\text{196}\)

The Court justified balancing the legitimate state interest in insuring the reliability of testimony, and the means by which it was achieved, against the constitutional rights of the defendant by invoking reasoning from \textit{Washington v. Texas}\(^\text{197}\) and \textit{Chambers v. Mississippi}.\(^\text{198}\) These cases not only established the Court’s power to assure the constitutionality of state evidentiary rules and procedures, but provided


\(^{194}\) Rock, 107 S. Ct. at 2714.

\(^{195}\) \textit{Id.} The Court took note of the findings of the trial court, which were contained in the pretrial order barring admission of facts recalled after the hypnotic session:

- Dr. Back was professionally qualified to administer hypnosis. She was objective in the application of the technique and did not suggest by leading questions the responses expected to be made by Defendant. She was employed on an independent, professional basis. She made written notes of facts related to her by Defendant during the prehypnotic interview. She did employ posthypnotic suggestion with Defendant. No one else was present during any phase of the hypnosis sessions except Dr. Back and Defendant.

\(^{196}\) \textit{Id.} at 2707 n.3.

\(^{197}\) \textit{Id.} at 2710 (citing \textit{Washington v. Texas}, 388 U.S. 14 (1967)).

\(^{198}\) \textit{Id.} at 2711 (citing \textit{Chambers v. Mississippi}, 410 U.S. 284 (1973)).
powerful support for the right the Court would make explicit in the *Rock* opinion—the defendant’s right to testify. In *Washington*, the Court struck down a state statute which prevented co-defendants from being introduced as witnesses for one another. Though the statute was aimed primarily at insuring the reliability of testimony by preventing cooperating co-defendants from reciprocally testifying to the other’s innocence, the Court found that the statute impermissibly infringed upon the defendant’s sixth amendment right to “make the testimony of a defendant’s witnesses admissible on his behalf in court.” Thus, in *Washington*, state evidentiary rules could not intrude upon the defendant’s sixth amendment rights.

In *Chambers v. Mississippi*, the strict application of that state’s hearsay and “voucher” rules combined to prove similarly offensive to the defendant’s fourteenth amendment right to due process. The rules worked together to effectively exclude testimony concerning confessions of the alleged true murderer, despite corroboration by additional evidence in the case. The Court established that while the defendant’s rights to confront and cross-examine witnesses are “not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process,” the various rules concerned there could “not be applied mechanistically to defeat the ends of justice.” In *Chambers*, the Court noted, the state failed to demonstrate that the “testimony ... would be unreliable, and thus the defendant should have been able to introduce the exculpatory testimony.” The Supreme Court applied these principles in considering the effect of Arkansas’ per se rule on Rock’s case:

In this case, the application of that rule had a significant adverse effect on petitioner’s ability to testify. It virtually prevented her from describing any of the events that occurred on the day of the shooting, despite corroboration of many of those events by other witnesses. Even more importantly, under the court’s rule petitioner was not permitted to describe the actual shooting except in the words contained in Doctor Back’s notes. The expert’s description of the gun’s tendency to misfire would have taken on greater significance if the jury had heard petitioner testify that she did not have her finger on the trigger and that the gun went off when her husband hit her

199. See infra notes 214-66 and accompanying text.
201. *Id.* at 22.
203. *Id.* at 295.
204. *Id.* at 302.
In establishing its *per se* rule, the Arkansas Supreme Court simply followed the approach taken by a number of States that have decided that hypnotically enhanced testimony should be excluded at trial on the ground that it tends to be unreliable. Other States that have adopted an exclusionary rule, however, have done so for the testimony of *witnesses*, not for the testimony of a *defendant*. The Arkansas Supreme Court failed to perform the constitutional analysis that is necessary when a defendant's right to testify is at stake.

Thus, the Court concluded that while the states are permitted to establish guidelines to assist trial courts in determining when posthypnotic testimony is so unreliable as to justify exclusion,

[a] State’s legitimate interest in barring unreliable evidence does not extend to *per se* exclusions that may be reliable in an individual case. Wholesale inadmissibility of a defendant’s testimony is an arbitrary restriction on the right to testify in the absence of clear evidence by the State repudiating the validity of all posthypnosis recollections.

Justice Rehnquist dissented and three others joined. The dissenters found that the very same factors which the majority held to provide support for the right to testify also justified Arkansas’ rule excluding posthypnotic testimony. Rehnquist noted that the defendant’s right to testify is intended to facilitate the truth-seeking function of the criminal trial, yet, “advancement of the truth-seeking function of Rock’s trial was the sole motivation behind limiting her testimony.” He also pointed out that in all the cases cited by the majority recognizing a defendant’s right to testify, an underlying corollary is always that “an individual’s right to present evidence is subject always to reasonable restrictions.”

206. *Id.* at 2712 (footnotes omitted) (emphasis in original). Here the Court effectively distinguished the *per se* rule in *Rock* from the currently permissible rule in *Shirley* and other cases adopting the *per se* exclusionary approach, by noting their express exemptions for testimony of the defendant. *See id.* at 2712 n.15. The Court expressly refused to rule on whether a *per se* rule as applied to a defendant’s *witnesses* could withstand similar constitutional scrutiny. The Court remarked, “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.” *Id.*

207. *Id.* at 2714.

208. *Id.* at 2715.

209. *Id.* The Chief Justice failed to note, however, the undeniable truth-seeking function assumed in this case by corroborating evidence.

imposed by the State of Arkansas to be a reasonable one, from which the defendant should not be "relieve[d] . . . from compliance." 211 While noting that the solution imposed by the majority may be "equally sensible" as the exclusionary rule chosen by the Supreme Court of Arkansas, the Chief Justice, in closing, expressed some concern over potentially serious administrative difficulties posed in "requiring the matter to be considered res nova by every single trial judge in every single case." 212

Despite its broad wording, the ruling of the Court is deceptively narrow insofar as it pertains only to a state’s per se exclusion of a defendant’s posthypnotic testimony. 213 However, the various factors which are explicitly held to comprise the defendant’s “right to testify” can also protect the defendant’s right to compulsory process under the sixth amendment, and the defendant’s broad right to present a defense under the fourteenth amendment—both of which have been held to include the right of the defendant to call witnesses in his or her own favor. Further, the reasoning invoked in Rock militating against the per se exclusion of relevant portions of the defendant’s testimony seems to suggest a general disfavor of any per se approach pending greater scientific understanding of the issues involved. Thus, the factors invoked in Rock, both explicit and implicit, could be invoked to preclude the state from excluding, on a per se basis, the posthypnotic testimony of a defendant’s witnesses as well. This argument is developed in the following section.

III. THE DEFENDANT’S RIGHT TO TESTIFY

While the defendant’s right to testify in his or her own behalf was previously recognized in dicta by the Supreme Court, 214 and raised to the level of constitutional right by a number of the circuit courts of appeal, 215 Rock is the first case in which the Court explicitly delineated

211. Rock, 107 S. Ct. at 2716.
212. Id.
213. See supra note 206.
214. Rieger, Client Perjury: A Proposed Resolution of the Constitutional and Ethical Issues, 70 Minn. L. Rev. 121, 131 (1985) ("[T]he Supreme Court has acknowledged the existence of a constitutional right to testify in a number of cases, but always in dicta.").
215. United States v. Curtis, 742 F.2d 1070, 1076 (7th Cir. 1984), cert. denied, 475 U.S. 1064 (1986); Whiteside v. Scurr, 744 F.2d 1323, 1329-30 (8th Cir. 1984) ("[C]riminal defendants have the constitutional right to testify which . . . is implicit in the fifth and fourteenth amendment’s due process guarantee of a fair adversarial process and in the sixth amendment’s guarantee of the right to meet and confront accusations, to be present and to present evidence and witnesses on one’s behalf, including the right to present oneself as a witness"), rev’d, Nix v. Whiteside, 475 U.S. 157 (1986); United States v. Bifield, 702 F.2d 342, 349 (2d Cir.), cert. denied, 461 U.S. 931 (1983); Alicea v. Gagnon, 675 F.2d 913, 920-23 (7th Cir. 1982); United States ex rel. Wilcox v. Johnson, 555 F.2d 115, 118-19 (3d Cir. 1977).
the defendant’s constitutional right to testify in a criminal trial.\textsuperscript{216} The right to testify does not appear in the Bill of Rights.\textsuperscript{217} Neither did such a right exist at the time the Constitution and the Bill of Rights were framed.\textsuperscript{218} The right is a stronger version of the defendant’s historically developed “right to be heard.”\textsuperscript{219} The right to be heard, unlike the right to testify, bears an extensive history. At the time of the Constitution’s conception, accepted procedural rules appeared to preclude the defendant from being heard at all, because of the defendant’s interest in the outcome of the trial.\textsuperscript{220} In 1864, Maine became the first state to pass a general competency statute,\textsuperscript{221} followed by a majority of states in the twenty years that followed.\textsuperscript{222} By contrast, the right to testify has developed from constitutional roots a mere thirty years old. Differences between the defendant’s right to be heard and the right to testify were illustrated by the Supreme Court in \textit{Ferguson v. Georgia}.\textsuperscript{223}

\textit{Ferguson} marked the culmination of the historic transition from a rule of defendant’s incompetency to one of competency.\textsuperscript{224} In \textit{Ferguson} the Court considered the constitutionality of a Georgia rule which prohibited the defendant from offering sworn testimony to the jury. The statute was the last remaining barrier to the defendant’s competency existing in the fifty states.\textsuperscript{225} Though the statute was struck down on other grounds,\textsuperscript{226} the decision had the practical effect of es-

\begin{footnotes}
\begin{itemize}
\item[216. ] See Rieger, supra note 214, at 128 (“[T]he Supreme Court has never squarely held that a criminal defendant has a constitutional right to testify”).
\item[217. ] See Bradley, Havens, Jenkins, and Salvucci, and the Defendant’s “Right” to Testify, 18 AM. CRIM. L. REV. 419, 420 (1981).
\item[219. ] The primary difference is that the right to testify includes the right to present a sworn statement to the jury, and to be cross-examined accordingly. See Ferguson v. Georgia, 365 U.S. 570 (1961).
\item[221. ] See Me. Pub. Laws ch. 280 (1864).
\item[224. ] Rock, 107 S. Ct. at 2708.
\item[225. ] Id. (citing Ferguson, 365 U.S. at 577 & n.6, 596-98).
\item[226. ] Justice Brennan, writing for the majority, struck down the statute as a violation of the defendant's right to counsel. This despite separate opinions by Justices Frankfurter and Clark, urging a ruling on grounds of the defendant's right to testify. See Ferguson, 365 U.S. at 599 (Frankfurter, J., concurring); Id. at 602 (Clark, J., concurring). See also Clinton, supra note 170, at 760-63.
\end{itemize}
\end{footnotes}
tablishing the defendant's competency throughout this country's courts.227

After Ferguson, the Court began to speak in terms of a defendant's right to testify, acknowledging the existence of such a right on several occasions, but always in dicta.228 In Harris v. New York, the Court stated "every criminal defendant is privileged to testify in his own defense, or to refuse to do so."229 In Brooks v. Tennessee,230 the Court struck down a statute requiring the defendant to complete his testimony before any testimony for the defense could be heard, reasoning that such a requirement violates the defendant's right against self-incrimination. In so concluding, the Court stated: "Whether the defendant is to testify is an important tactical decision as well as a matter of constitutional right."231 The Court likewise declared in Faretta v. California that the right to testify is "essential to due process of law."232 More recently still, in Nix v. Whiteside,233 the Court stated that although it had "never explicitly held that a criminal defendant has a due process right to testify in his own behalf, cases in several circuits have so held, and the right has long been assumed."234

In Rock, the right has finally received its first explicit formulation. "At this point in the development of the adversary system, it cannot be doubted that a defendant in a criminal case has the right to take the witness stand and to testify in his or her own defense."235 The Court stressed the importance of the testimony of the defendant,236 and identified the foundation of the right in the fourteenth, the sixth, and the fifth amendments.

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227. Apparently reading Ferguson as declaring the statute's defendant incompetency provisions unconstitutional, the Georgia Legislature amended the statute, providing the defendant with an option of either testifying or giving an unsworn statement. See Ga. Code Ann. § 38-415 (1974). See also Clinton, supra note 170, at 759 n.237. As noted by the Court, defendants had been competent to testify in the federal courts since 1878, by virtue of a general competency statute. See Act of March 16, 1878, ch. 37, 20 Stat. 30 (1878) (codified as amended at 18 U.S.C. § 3481 (1982)).

228. See supra note 214.


231. Id. at 612.


236. "'In sum, decades ago the considered consensus of the English-speaking world came to be that there was no rational justification for prohibiting the sworn testimony of the accused, who above all others may be in a position to meet the prosecution's case.'" Id. (quoting Ferguson v. Georgia, 365 U.S. 570, 582 (1961)).
The Court noted favorably what had previously been relegated to a footnote in *Faretta v. California*, making the right to testify "essential to due process of law in a fair adversary process." The Court flatly stated that "the Fourteenth Amendment's guarantee that no one shall be deprived of liberty without due process of law include[s] a right to be heard and to offer testimony."  

The Court also found support for such a right in the compulsory process clause of the sixth amendment, which "grants a defendant the right to call 'witnesses in his favor.'" The Court extended the scope of this right, apparently following the lead of several circuit courts, to testimony offered by the defendant. The Court stated:

Logically included in the accused's right to call witnesses . . . is a right to testify himself, should he decide it is in his favor to do so. In fact, the most important witness for the defense in many criminal cases is the defendant himself. . . . Like the truthfulness of other witnesses, the defendant's veracity, which was the concern behind the original common-law rule, can be tested adequately by cross-examination.

The Court in *Rock* also likened the right to testify to the right of self-representation. In *Faretta v. California*, the Court upheld the right of self-representation as implicit in the natural reading of the sixth amendment. Here, the Court reasoned that even more important than the right to represent one's self is "an accused's right to present his own version of events in his own words." The defendant's ability to control his own defense, the Court held, is "incomplete" absent the ability to present himself as witness. Finally, the Court held that the defendant's right to testify is a "necessary corol-

237. *Id.* at 2709 (quoting *Faretta v. California*, 422 U.S. 806, 819 n.15 (1975)).
238. *Id.* at 2709.
239. The compulsory process clause guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor." U.S. Const. amend. VI. The right applies to the states through incorporation via the fourteenth amendment. Washington v. Texas, 388 U.S. 14, 17-19 (1967).
241. See United States v. Bifield, 702 F.2d 342, 349 (2d Cir.) *cert. denied*, 461 U.S. 931 (1983) ("Logically included within the right to call any witness is the accused's right to testify himself should he possess evidence in favor of the defense"). See also Wright v. Estelle, 572 F.2d 1071, 1076 (5th Cir.) (Godbold, J., dissenting), *cert. denied*, 439 U.S. 1004 (1978).
245. *Id.*
lary to the Fifth Amendment’s guarantee against compelled testimony.\footnote{246}{Id. (citing Harris v. New York, 401 U.S. 222 (1971)). The Court in Rock noted that in Harris, a majority of the Court subscribed to the principle that a defendant is guaranteed the right to “remain silent unless he chooses to speak in the unfettered exercise of his own will.” Id. (quoting Malloy v. Hogan, 378 U.S. 1, 8 (1964)). In Harris the court held that testimony illegally obtained, despite being inadmissible on its own, nevertheless could be used to impeach the defendant’s direct testimony at trial. 401 U.S at 225-26.}

The right to testify, so formulated and now made explicit, is a broad one. It seems far broader, and carries far broader implications, than the holding on the specific facts of Rock would permit. Nevertheless, extrapolating from the reasoning provided, and from the various factors now held to comprise the fundamental right to testify, the right may provide support for a more general right to present a defense.\footnote{247}{See generally Clinton, supra note 170.} Likewise, its sixth amendment foundations might imply that the testimony of a defendant’s witnesses may likewise be held resistant to exclusion on a mere per se basis.

Because the holding in Rock was expressly limited to protecting only the testimony of the defendant from arbitrary rules of per se exclusion, a holding which consequently limits the scope of its immediate implementation, a number of broad questions remain concerning the future treatment of the admissibility problem.\footnote{248}{See Steward, Hypnotized Witnesses, Loaded Jurors, A.B.A. J., Oct. 1987, at 54, 56.} The most pressing question concerns whether the defendant’s right to call witnesses in his or her behalf following their hypnotic memory refreshment outweighs the state’s interest promoted by per se exclusion. The Court’s treatment of the sixth amendment’s compulsory process clause, as it pertains to a defendant’s right to testify, may prove suggestive in providing an answer.

The compulsory process clause was originally framed in narrow terms, for a narrow purpose.\footnote{249}{Westen, supra note 170, at 76-77.} The clause provides the defendant a right to “compulsory process for obtaining witnesses in his favor.”\footnote{250}{U.S. Const. amend. VI.} On its face, the language of the amendment only guarantees that some form of process remain available, saying nothing of the right of a defendant, or a defendant’s witness to testify. The narrow wording of the clause was not accidental. When James Madison drafted the amendment, he had access to a number of proposals from the states after which he could model the wording of the right. They ranged from Virginia’s recommendation that the defendant be guaranteed the right “to call for evidence in his favor,” to the narrower recommen-
dations from the state of New York, suggesting that the defendant be given "the means of producing his Witnesses." Madison's version is seen as a neutral compromise, respecting the demands of the states, without favoring the language of any one in particular. Madison's version was accepted by Congress and ratified by the states with little debate, and with no substantive alteration.

Through the years, the compulsory process clause remained largely dormant. Prior to the Supreme Court's first attempt to construe it in 1967, the clause was mentioned only five times by the Court—three times in declining to construe it, and twice in dictum. The clause received its first meaningful interpretation in Washington v. Texas, where, in the process of becoming a right fundamental to due process (and thereby applicable to the states through the fourteenth amendment), the right was expanded considerably beyond its plain wording.

In Washington, a defense witness' crucial testimony was excluded "not because the State refused to compel his attendance, but because a state statute made his testimony inadmissible whether he was present in the courtroom or not." Thus, the Court was required to address whether the clause guarantees a defendant the right to place his witness on the stand, in addition to compelling his presence in court. The Court responded affirmatively: "[t]he Framers of the Constitution did not intend to commit the futile act of giving to a defendant the right to secure the attendance of witnesses whose testimony he had no right to use." It is clear that the Court left behind the plain wording of the sixth amendment, and arguably the intent of the framers in extending its guarantees to insure a defendant the right to

251. See Westen, supra note 170, at 96.
252. Id. at 97, 98.
253. See id. at 98 & n.115. During the 2 1/2 year debate on the Bill of Rights, the compulsory process clause was mentioned only once—when the suggestion that the clause include the right to a continuance was rejected as superfluous. Id. Madison's original draft provided the defendant with the right to "a compulsory process . . . ." The lone alteration was the deletion of the indefinite article. Id.
254. Id. at 108.
255. 388 U.S. 14 (1967). For a summary of the facts and holding, see supra notes 200-01 and accompanying text.
256. Id. at 17-18.
257. Id. at 19.
258. Id.
259. Id at 23.
260. Westen argues, however, that Madison's phrasing of the clause was not intended to limit its scope to the narrow right to only compel the presence of witnesses at trial. See Westen, supra note 170, at 99.
"make the testimony of a defendant's witnesses admissible on his behalf in court."\textsuperscript{261}

The decision in \textit{Rock} can be seen as a second phase in this extension of the logic of the compulsory process clause. In \textit{Rock}, the Court accepted unquestioningly the \textit{Washington} interpretation in acknowledging that the Clause guaranteed the defendant "the right to call 'witnesses in his favor.'"\textsuperscript{262} The Court then made an unprecedented leap in recognizing the defendant himself as a witness for the purposes of the sixth amendment.\textsuperscript{263} Though this line of reasoning was suggested by a handful of the circuit courts, it received extremely harsh criticism from commentators. In response to one such circuit court opinion, Carol Rieger writes:

the Second Circuit has stated that, "'[l]ogically included within the right to call any witness is the accused's right to testify himself should he possess evidence in favor of the defense.'" This statement does not withstand scrutiny, however, because the defendant is the one witness to whom the compulsory process clause would not apply, since it is not necessary for the defendant to subpoena himself. Furthermore, since criminal defendants were incompetent to give sworn testimony on their own behalf at the time the sixth amendment was enacted, it is clear that defendants were not intended to be included under the compulsory process clause. . . . Finally, Congress's enactment of a specific statute making defendants competent to testify demonstrates that legislators one hundred years ago did not believe the sixth amendment provided this right. Thus, the compulsory process clause provides little support for the right to testify.\textsuperscript{264}

Writing in \textit{Rock}, Justice Blackmun was surely aware of these criticisms. He acknowledged the function and purpose of Congress' competency statute in the opinion itself.\textsuperscript{265} Therefore, the extension of the compulsory process clause to protect a defendant's right to testify is an express rejection of these criticisms and an express statement of the intention of the Court to expand the scope of the amendment's provisions.

To extend the scope of the amendment to pertain to a defendant, while denying like benefits of such an extention to a defendant's witnesses—a purpose plainly more consistent with the purpose of the

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\bibitem{262} \textit{Rock}, 107 S. Ct. at 2709 (quoting Washington v. Texas, 388 U.S. 14, 17-19 (1967)).
\bibitem{263} \textit{Id.}
\bibitem{264} Rieger, \textit{supra} note 214, at 137 (footnotes omitted).
\bibitem{265} \textit{Rock}, 107 S. Ct. at 2708.
\end{thebibliography}
amendment and its interpretation in *Washington*—is absurd. The conclusion drawn in *Rock*, 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," must therefore be extended to apply to *per se* exclusions of the testimony of witnesses called by the defendant as well.

IV. Conclusion

*Rock* will surely be perceived as a significant step in the further constitutionalization of the rights of the defendant. Not only does the opinion serve both to make explicit the right of the criminal defendant to testify and to make this right fundamental to due process, but it can be read as making a broader statement regarding a defendant’s rights in general. It is a logical companion to cases like *Washington v. Texas* and *Chambers v. Mississippi*, which likewise represent the proposition that state evidentiary rules or rulings cannot operate in arbitrary ways at the expense of the criminal defendant. States are required to evaluate whether the interests served by a particular rule justify the limitations imposed. In *Rock*, the state’s interest in maintaining the reliability of testimony for the purpose of advancing the truth-seeking function of state trial proceedings did not warrant the *per se* exclusion of a defendant’s posthypnotic testimony, testimony which "may be reliable in an individual case."

Given, however, that the defendant’s right to testify is grounded in the very same holdings, the very same logic, and the very same language as that which guarantees the defendant the broad right to present a defense, including a right to call witnesses in his favor, these latter rights must also be balanced against a state’s exclusionary interests. Such an analysis should reveal that the same reasoning used by the Court in *Rock* to strike down Arkansas’ *per se* exclusion of a defendant’s posthypnotic testimony should be extended to preclude similar exclusions of the testimony of a defendant’s witnesses as well. This holds particularly true given the existence of a less drastic means of accomplishing state ends, through the use of the modern balancing approach to the admissibility of posthypnotic testimony.

266. *Id.* at 2714.
267. This is particularly crucial given the timing of the opinion. Justice Powell provided the majority with its fifth vote just months prior to his retirement in 1987. It is possible that *Rock* will remain one of the last explicit statements of a defendant’s rights for some time to follow.
Rock also provides practical guidance in addressing the problem of admissibility. The Court was particularly concerned by the way in which Arkansas’ per se rule of exclusion operated to the detriment of any defendant who was hypnotized, without regard to the reasons for hypnotic assistance, the circumstances under which it took place, or any independent verification of the results it produced. The Court demanded, in simplest terms, that the defendant’s posthypnotic testimony not be excluded absent a showing that the defendant’s testimony was unreliable in the particular case. The solution suggested by the Court’s decision requires case-by-case consideration, the careful balancing of a host of circumstances surrounding the hypnotic session, and consideration of corroborating evidence which may be made available at trial. In addition, the Rock decision seems to require that the fundamental constitutional rights of the parties involved be incorporated into this calculus.

Only one of the traditional approaches to the admissibility of posthypnotic testimony is sufficiently flexible to accommodate these considerations. A careful, case-by-case balancing approach is required, particularly since, as demonstrated in Rock, constitutional rights are implicated.

There are significant dangers associated with permitting unreliable testimony to implicate a defendant in a crime. Due process and confrontation clause problems arise when unreliable identification techniques are used to implicate the defendant absent external indicia of reliability. A constitutionally valid balancing approach requires the presence of such external indicia of reliability before posthypnotic testimony may be used by the prosecution in a criminal case. A number of factors may be held to supply necessary, but never sufficient conditions upon which to base judgments of reliability, including compliance with procedural safeguards, the presence of corroborating evidence or testimony of non-hypnotized witnesses, and the degree to which posthypnotic differs from prehypnotic recall.

However, when the admission of exculpatory posthypnotic testimony is sought by the defendant, the constitutional problems created by the possible admission of unreliable testimony are supplanted by the affirmative rights of the defendant to testify on his or her own behalf, or to present witnesses to do the same. Here, constitutional considerations militate towards admissibility, absent a showing of unreliability, in order to prevent infringement upon the fundamental rights of the defendant.

271. See supra notes 26-30 and accompanying text.
Both sets of concerns can be addressed through the implementation of the balancing approach, incorporating the constitutional considerations outlined here. The respective constitutional rights of the defendant require that in all cases the burdens of establishing admission or exclusion of posthypnotic testimony rest with the prosecution. When admission of posthypnotic testimony is sought against the defendant, the burden must rest with the prosecution to show the existence of sufficient external indicia of reliability, to insure that the probative value of the testimony exceeds its prejudicial effects. When admission of posthypnotic testimony is sought by the defendant or by witnesses testifying on the defendant’s behalf, the burden must similarly rest with the prosecution to show unreliability such that the prejudicial effect of the testimony greatly exceeds its probative value.

In addition, natural checks exist within the system which regulate the use and inhibit the abuse of posthypnotic testimony. With reliability always a primary consideration, it remains in the best interest of both prosecution and defense to promote reliability through compliance with procedural safeguards like those enumerated in Hurd.272 The excessive use of posthypnotic testimony by the defense is regulated by the wide range of tools which remain available to the prosecution to show its potential unreliability. These tools include requests for cautionary instructions, the availability of expert testimony as to the adverse effects of memory refreshment by hypnosis, and, as always, cross-examination.

Out of the constitutional concerns illustrated in Rock, and from cases raising the dangers of admitting unreliable means of identification can emerge constitutionally valid solutions to the problem of posthypnotic testimony. A balancing approach, applied with an eye toward judicially or legislatively established procedural standards can secure some increased degree of reliability, while retaining necessary judicial discretion in a necessarily difficult area.

Stevan D. Mitchell

272. See supra text accompanying note 79.