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NOTES

HYPNOSIS IN COURT: A MEMORY AID FOR WITNESSES

When a witness states that he cannot remember, or he gives testimony that seems false or inaccurate, the examining attorney may request permission to use memoranda,[1] business records,[2] or similar aids[3] to refresh the witness' recollection. Although the use of such aids is discretionary with the court,[4] permission is usually granted when their usefulness in a given situation can be shown.[5] Moreover, since the use of such aids may often provide the only means of access to relevant facts retained within the witness' memory, the court should confine attacks to the weight of the

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1 *E.g.*, Adamaitis v. Hesser, 56 Ill. App. 2d 349, 206 N.E.2d 311 (1965) (doctor's report); State v. Bindhammer, 44 N.J. 372, 209 A.2d 124 (1965) (confession). It is not necessary that the writing so used be itself admissible as evidence. Adamaitis v. Hesser, *supra* at 314.

2 United States v. Riccardi, 174 F.2d 883 (3d Cir.), *cert. denied*, 337 U.S. 941 (1949).

3 *Compare* Thompson v. United States, 342 F.2d 137 (5th Cir.), *cert. denied*, 381 U.S. 926 (1965), *with* United States v. Rappy, 157 F.2d 964 (2d. Cir.), *cert. denied*, 329 U.S. 806 (1947); see 3 WIGMORE, EVIDENCE §§ 759, 764 (3d ed. 1940); Linn & Wein, *Present Recollection Revived—What It Consists Of And How It Should Be Applied*, 1957 TRIAL LAW. GUIDE 337.

4 MCCORMICK, EVIDENCE § 9 (1954); 3 WIGMORE, *op. cit. supra* note 3, § 765.

5 See MCCORMICK, *op. cit. supra* note 4, § 9; 3 WIGMORE, *op. cit. supra* note 3, §§ 725, 755, 994; see also Redmount, *The Psychological Basis of Evidence Practices: Memory*, 50 J. CRIM. L., C. & P. S. 249 (1959); *Evidence—Past Recollection Record—Present Recollection Revised*, 63 W. VA. L. REV. 73, 76 (1960). See Linn & Wein, *supra* note 3, at 349 for the steps in laying the foundation to refresh a witness' memory, which are as follows:

> 1. Establish the fact that the witness has exhausted his present recollection as to the transaction that he is to testify about. 2. Evoke testimony to the effect that the witness has had personal knowledge of the transaction about which his memory is to be revived. 3. Indicate that there is some device which will refresh the present recollection of the witness. 4. If any objection is raised, indicate to the court at this point that the device is being used only as a stimulus to evoke present recollection and not as admissible evidence of past recollection recorded. 5. Allow opposing counsel to inspect the device being used to stimulate present recollection before handing it to your witness. 6. Allow the witness to examine the memorandum. 7. Establish that the witness' present recollection has now been revived by this memorandum. 8. Have the witness testify independent of the memorandum.

Some states seem to limit by implication the type device that may be used to refresh present memory. For example, in Georgia, GA. CODE ANN. § 38-1707 (1935) provides:

> A witness may refresh and assist his memory by the use of any *written* instrument or memorandum, provided he finally shall speak from his own recollection thus refreshed, or shall be willing to swear positively from the paper. (Emphasis added.)

Query whether § 38-1707 excludes the use of all memory-aids not mentioned therein, or whether trial judges retain the discretionary power to allow or refuse memory-aids as they see fit. *Cf.* Smith v. The Morning News, Inc., 99 Ga. App. 547, 548-49, 109 S.E.2d 639, 641-42 (1959) (refusing use of X-rays as memory-aids reversible error). See GREEN, EVIDENCE § 130 (1957).

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resulting testimony rather than to its admissibility.[6] Further, cross-examination is a sufficient safeguard against false or inconsistent testimony, while the court can prohibit, in the unusual situation, the use of memory-aids when prejudice is likely to result therefrom.[7]

The psychological basis for the use of memory-aids is the association theory. According to this theory, the memory of fact A can be brought to the conscious mind by the recollection of fact B, which is associated in memory with fact A by temporal or circumstantial coincidence, or some similar link.[8] For example, in Proust's *Remembrance of Things Past,* the narrator recalls myriad childhood experiences when he takes a sip of tea with cake crumbs, one of the narrator's favorite drinks as a child. Similar impelled recollections are a matter of everyday human experiences. But since the appropriate stimulus to the associated recollections sought is usually not known, the courts have been liberal in allowing the use of a wide variety of memory-aids.[9] Naturally, the more relevant the aid is to the witness' memories of past facts, the greater the chance that the desired recollection will be spurred to the foreground of consciousness.

The purpose of this Note is to analyze the use of hypnosis as a memory-aid for a witness in court. The case of *State v. Nebb*[10] will be referred to frequently during this analysis as presenting one of the few examples of in-court hypnosis (the subject in this case being the defendant). The advantages and disadvantages of courtroom hypnosis will be weighed, and

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6 See Morgan, *The Relation Between Hearsay and Preserved Memory,* 40 HARV. L. REV. 712, 718 (1927); *cf.* Linn & Wein, *supra* note 3, at 342; Richardson, *Evidence: Present Recollection Revived and Past Recollection Recorded,* 12 OKLA. L. REV. 165, 167 (1959).

7 See 3 WIGMORE, *op. cit supra* note 3, § 762.

8 MCCORMICK, *op. cit. supra* note 4, § 9; ROBINSON, ASSOCIATION THEORY TODAY 71 (1964); Gardner, *The Perception and Memory of Witnesses,* 18 CORNELL L.Q. 391, 392 (1933). This concept could be open to criticism on the ground that the unrecollected memories, in being brought to the surface, may be greatly affected by the impelling memories, especially if the latter are false. See Sperling, *The Information Available in Brief Visual Presentation,* 74 PSYCHOLOGICAL MONOGRAPHS, No. 11, pp. 1, 26 (1960). The reliability of even the basic perceptions of the witness has been questioned because he tends to reflect "not so much the objective qualities of what has been seen and heard as the expectations or preconceptions that the observer brings to the event and his 'transactions,' or interactions, with others who may have been involved." Marshall, *Evidence, Psychology, and the Trial: Some Challenges to Law,* 63 COLUM. L. REV. 197 (1963). Furthermore, the witness' recollection of a given event may be altered by influences upon him subsequent to the event. *Id.* at 199; see Niederland, *Memory and Repression,* 13 A.P.A.J. 619, 623 (1965).

9 *E.g.,* Henowitz v. Rockville Sav. Bank, 118 Conn. 527, 173 Atl. 221, 222 (1934); Commonwealth v. McDermott, 255 Mass. 575, 152 N.E. 704 (1926); see Jewett v. United States, 15 F.2d 955, 956 (9th Cir. 1926) (dictum). The range of memory-aids allowed in Georgia are indicated by the following cases: Smith v. The Morning News, Inc., 99 Ga. App. 547, 109 S.E.2d 639 (1959) (x-ray photographs); Smith v. City of Atlanta, 22 Ga. App. 511, 96 S.E. 334 (1918) (plat blueprint); Burrey v. Ball, 24 Ga. 505 (1857) (deposition).

10 No. 39540, Ohio C. P., Franklin Co., June 8, 1962.

possible standards for the admission of hypnosis will be discussed, as well as the qualifications for the hypnotist and the proper use of hypnotic examination. A suggested procedure for laying the foundation for the use of hypnosis in the courtroom will be outlined, and alternative methods of hypnotic questioning will be considered.

I. Hypnosis Defined

Hypnosis has been a controversial subject throughout its long history. Although used in one form or another as early as the Eighteenth Century, it has yet to be exactly defined by medical science. The American Medical Association, in a 1958 report recognizing hypnosis as a useful medical tool, accepted the definition arrived at several years earlier by the British Medical Association. This report defined hypnosis as

> . . . a temporary condition of altered attention in the subject which may be induced by another person and in which a variety of phenomena may appear spontaneously or in response to verbal or other stimuli. These phenomena include alterations in consciousness and memory, increased susceptibility to suggestion, and the production in the subject of responses and ideas unfamiliar to him in his usual state of mind. Further, phenomena such as anesthesia, paralysis, and the rigidity of muscles and vaso-motor changes can be produced and removed in the hypnotic state.[11]

Despite the acceptance of hypnosis as a distinct state, there are at least two noted researchers in psychology who have implied that there may be no such distinct state and that behavior under hypnosis cannot be distinguished from the phenomena of suggestibility and daydreaming encountered in the normal waking state.[12] One of these researchers has suggested that many of the startling results attributed to hypnosis can be explained by the conscious desire of those who voluntarily submit to hypnosis to satisfy the hypnotist by acting as they believe a hypnotized person acts.[13] In effect, the "hypnotized" subject is merely playing a role for the benefit of the hypnotist. However, while this concept of "role-playing" may explain some actions of a hypnotized subject and may be supported by the supposed

[11] 168 A.M.A.J. 186 (1958).

[12] Barber & Calverley, *Empirical Evidence for, a Theory of "Hypnotic" Behavior: Effects of Pretest Instructions of Response to Primary Suggestions*, 14 Psychological Record 457 (1964); Sarbin, *Contributions to Role-Taking Theory: I. Hypnotic Behavior*, in Hypnosis in Perspective 147, 154-57 (Moss ed. 1965). See Austin, Perry & Sutcliffe, *Can Somnambulists Successfully Simulate Hypnotic Behavior Without Becoming Entranced?*, 11 Int'l. J. of Clin. & Exp. Hypnosis 175, 185 (1963). The authors conclude that hypnotic behavior could be simulated by subjects without any emotional difficulties or feelings of guilt concerning their deception.

[13] Sarbin, *supra* note 12, at 168.

hypersuggestibility of those under hypnosis,[14] the theory apparently fails to explain the anaesthetic effects of a hypnotized patient undergoing surgery. It is highly unlikely that a patient undergoing a painful operation would simulate an anaesthetic condition just to satisfy the hypnotist.

Despite the difficulties of definition, it would seem clear that hypnosis stimulates a hypersensitive reaction to internal and external factors, and results in the ability to control body reactions to a higher degree than in the normal waking state. A difference of opinion exists, however, as to the degree of conscious control a hypnotized subject actually has over his situation. Some researchers contend that the subject has very little conscious control and will therefore be unable to lie in response to questions asked by the hypnotist.[15] The hypnotist in *State v. Nebb* so testified when examined.[16] Other researchers have indicated a belief in a high degree of conscious control by the subject which, when combined with the subject's hypersuggestibility, tends to make questionable the reliability of answers given under hypnosis.[17] Nevertheless, it would seem likely that the actual conscious control of the hypnotized subject depends largely upon the individual differences of each subject and the depth of his trance.[18]

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14 See HULL, HYPNOSIS AND SUGGESTIBILITY 391 (1933); Hilgard, *Hypnosis*, in 14 ANNUAL REVIEW OF PSYCHOLOGY 157, 160 (Fransworth ed. 1965).

15 *Compare* TEITELBAUM, HYPNOSIS INDUCTION TECHNICS 155-56 (1965), *with* Levin, *Hypnotism in the Law*, 1964 INS. L.J. 97, 102; see Hilgard, *Lawfulness Within Hypnotic Phenomena*, in HYPNOSIS: CURRENT PROBLEMS 1 (Estabrooks ed. 1962). Hilgard offers the following possible explanation:

> Gill and Brenman (1959) solve the problem theoretically by positing an over-all ego within which a regressed subsystem is set up. The over-all ego maintains its non-hypnotic reality-oriented relationship to the hypnotist; only the subsystem is under the control of the hypnotist.

Id. at 11. See also Allen, *Hypnotism and its Legal Import*, 12 CAN. B. REV. 14 (1934), where the author suggested a similar explanation when he stated:

> It seems that beyond the suggestive relation between the hypnotizer and the hypnotized there stands also an ego ideal which serves the ends of the total personality and exercises a continuous control over the relations between the suggestor and the suggestee.

Id. at 18. *But see* Wells, *Expectancy versus Performance in Hypnosis*, in MODERN HYPNOSIS 292 (Kuhn ed. 1958). Wells concludes that the subject under hypnosis cannot resist the hypnotist's commands.

16 Transcript of Proceedings, p. 9, State v. Nebb, Ohio C.P., Franklin Co., June 8, 1962 [hereinafter cited as transcript].

17 Fisher, *Problems of Interpretation & Controls in Hypnotic Research*, in HYPNOSIS: CURRENT PROBLEMS 109, 114 (Estabrooks ed. 1962); Sarbin, *supra* note 12.

18 See Pana & Cooper, *Prediction of Susceptibility to Hypnosis*, 1964 PSYCHOLOGICAL REPORTS 251; Wolberg, *The Efficacy of Suggestion in Clinical Situations*, in HYPNOSIS: CURRENT PROBLEMS 127, 130-35 (Estabrooks ed. 1962). For analysis of specific differences, see London, *Hypnosis in Children: An Experimental Approach*, in HYPNOSIS IN PERSPECTIVE 86 (Moss ed. 1965) (age factor); Melei & Hilgard, *Attitudes Toward Hypnosis, Self-Predictions, and Hypnotic Susceptibility*, 12 INT'L J. OF CLIN. & EXP. HYPNOSIS 99 (1964) (sex,

II. Hypnosis as an Aid to Recall

While hypnosis has been gaining increased notice in legal circles as an effective basis for psychiatric testimony concerning the mental state of parties involved in court actions,[19] there has been little exploration into the possibility of using hypnosis in the courtroom itself. Arguments can be made that hypnosis is too dramatic to be carried on in the courtroom and might unduly influence both judge and jury; and that the difficulties of examination and cross-examination are too great in comparison to the resulting informative value of hypnotic testimony. However, the experience contained in the proceedings of *State v. Nebb* indicates that a re-examination of these arguments is necessary, for as the court recognized in that case,

> . . . if we don't allow such voir dire examination as this we'll never make any progress, we'll never determine what can accurately be submitted and safely be submitted to a jury.[20]

Recent experimentation and study in the field of hypnosis encourages a closer look at the possibilities of hypnosis in the courtroom. There are two primary advantages to be gained in allowing hypnosis as a memory-aid in court. First, there is clear evidence that hypnotic testimony can be much more reliable and accurate than testimony given in the normal waking state.[21] Second, conducting hypnosis in the courtroom permits the judge (or other fact-finding agency) to determine for himself the merit of testimony or opinions given by the witness or hypnotist.[22]

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act of volunteering); Sternlicht & Wanderer, *Hypnotic Susceptibility and Mental Deficiency*, 11 Int'l J. of Clin. & Exp. Hypnosis 104, 109 (1963) (intelligence factor). Actually, the depth of trance obtainable probably depends upon the individual differences herein mentioned. Unfortunately, to make comparative studies of the results of older experiments on this subject is often difficult, if not impossible, because of the failure of hypnotists to use similar controls. Correlation of their conclusions or exact duplication of their testing conditions is beyond attainment. However, recent emphasis by experimental hypnotists upon the development and use of uniform control techniques promises to lead to more meaningful and exact analyses of the relationship between depth of trance achievable and individual differences. This, in turn, can lead to improved research on the relationship between suggestibility and depth of trance. Increased knowledge concerning the causes of both varying degrees of depth of trance and suggestibility in particular types of subjects would enable a court or attorney to more intelligently determine the reliability of testimony gained from a witness, with his particular individual characteristics, in a predetermined depth of hypnotic trance.

19 People v. Modesto, 59 Cal.2d 722, 382 P.2d 33, 31 Cal. Rptr. 225 (1963), *overruled on other grounds*, 60 Cal.2d 631, 388 P.2d 44, 36 Cal. Rptr. 212 (1964); Cornell v. Superior Ct., 52 Cal.2d 99, 338 P.2d 447, 449 (1959); see Diamond & Louisell, *The Psychiatrist as an Expert Witness: Some Ruminations and Speculations*, 63 Mich. L. Rev. 1335 (1965).

20 Transcript, *supra* note 16, at 23.

21 See Bryan, Legal Aspects of Hypnosis 196 (1962); Reiff & Scheerer, Memory and Hypnotic Age Regression 34 (1959); White, *A Preface to the Theory of Hypnotism*, in Hypnosis in Perspective 118, 121 (Moss ed. 1965).

22 Teitelbaum, *op. cit. supra* note 15, at 153.

It has been recognized that a person does not completely forget a past occurrence,[23] even though the memory may not be subject to recall by the conscious mind. These memories can be tapped either by the conscious mind through the use of free-association techniques (the approach utilized by an attorney when he gives a conventional aid, such as a memorandum, to a witness to refresh his present memory), or by the subconscious mind through the use of hypnotic techniques. While both techniques must ultimately deal with the subconscious mind, the first technique—that of free association—often meets the difficulty of repression or distortion of past memories by the subject's conscious mind. As Messieurs Reiff and Scheerer outlined in a recent work, memories recorded in the subconscious mind may be changed or distorted by the conscious mind to fit the changing needs of the person as he grows older: "The inference is therefore that for remembrance either the memory traces proper change considerably or the present personality brings them into consciousness in a changed form, *e.g.*, by representing the past in terms of present interests, functions and needs."[24] An example of such a distortion of a past fact is the innocent recollection of past details of an automobile accident in such a way that the responsibility of a friend or loved-one for the mishap is obviated and shifted to another party. The law has clearly recognized the possibility of such distortion in its reduction of the weight to be given testimony which may be self-serving or which tends to benefit friends.[25] However, because of the influence of present surroundings and present needs, this process is a universal one and always occurs to some extent whenever a person tries to remember a past event.[26]

It must be noted, however, that this distortion is not the result of intentional lying by the witness. The most sincere, honest person will not be able to remember a past event exactly the way it happened, though the degree of distortion varies depending upon the individual. Hypnosis can be used in two ways in an attempt to bypass this distortion or even to avoid the repression of past facts by the conscious mind. First, the hypnotized witness may be instructed to remember the occasion, but to remain mentally in the present.[27] Assuming that under hypnosis the conscious mind is not operating to a high degree, conscious distortion should be avoided. However, there is a possibility that the subconscious mind also distorts with the

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23 See REIFF & SCHEERER, *op. cit. supra* note 21, at 38; Baron, *Levels of Insight and Ego Functioning in Relation to Hypnoanalysis*, 8 INT'L. J. OF CLIN. & EXP. HYPNOSIS 141, 142 (1960).

24 REIFF & SCHEERER, *op. cit. supra* note 21, at 39-40.

25 *E.g.*, Monger v. Monger, 390 S.W.2d 815 (Tex. Civ. App. 1965) (dead man's statute); see *In re* Lynagh's Estate, 177 So.2d 256 (Fla. App. 1965).

26 See BARTLETT, REMEMBERING 16 (1964); REIFF & SCHEERER, *op. cit. supra* note 21, 38-39; Redmount, *supra* note 5.

27 REIFF & SCHEERER, *op. cit. supra* note 21, at 34-35.

passage of time, and that the mere verbalizing of the past event under hypnosis may lead to subconscious distortion. The second possible way to avoid distortion is to instruct the hypnotized witness to regress mentally to the time of the occurrence and relate the event as it develops.[28]

> Hypnotic age regression is also a special case of resurrection of memory traces. It makes possible a reinstatement of the forgotten personal past . . . here the reference point is no longer the actual present but that point in the autobiographic past to which the subject has been regressed.[29]

Through the use of this process of regression, the examining hypnotist is able to obtain a detailed picture of the event free from the personal conscious and subconscious distortions when a witness testifies in the mental present. Naturally, the testimony of a witness, even when regressed, will be subject to the inaccuracies of observation or the influence of personal needs and desires existing at the time of the event.[30] Moreover, hypnotic regression can only claim to reveal what was seen at the time; it cannot supply missing elements or correct what was seen. However, the fact that the process can eliminate the distortions in memory caused by the passage of time and the physical and mental development of the witness makes such testimony inherently more reliable than testimony obtained from the conscious mind, or even testimony obtained by the use of the method first described.

III. Legal History of Hypnosis

While there is little case law on the use of hypnosis in the legal process, a definite impression emerges that the courts have been suspicious of its use. In one case, *Austin v. Baker*,[31] the court's major objection to the introduction of prior hypnosis in an action for seduction was that counsel failed to lay a proper foundation for this testimony. As the court stated:

> There was no attempt to explain how by hypnotic influence the witness could be rendered unconscious of the various alleged acts of intercourse had with the defendant, or made to forget in the morning the occurrences of the night before, or how, if there had been the loss of memory as testified to, it could by means of hypnotism be restored.[32]

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[28] Reiff & Scheerer, *op. cit. supra* note 21, at 52; Lecron, *Uncovering of Early Memories by Ideomotor Responses to Questioning*, 11 Int'l J. of Clin. & Exp. Hypnosis 137 (1963). *But cf.* Sutcliffe, *"Credulous" and "Sceptical" Views of Hypnotic Phenomena*, 8 Int'l J. of Clin. & Exp. Hypnosis 73, 93 (1960).

[29] Reiff & Scheerer, *op. cit. supra* note 21, at 52.

[30] Bartlett, *op. cit. supra* note 26, at 31; Gardner, *supra* note 8, at 400; Marshall, *supra* note 8, at 197.

[31] 110 App. Div. 510, 96 N.Y.S. 814 (1906).

[32] *Id.* at 818.

The court went on to observe that the witness did not "know, except as she [had] been told, how she was informed of the occurrences to which she testified. She [did] not even know that she was hypnotized."[33] Thus, the court held that the witness' testimony was hearsay, "knowledge not of her own, but acquired."[34] While this holding is conceptually correct, its use as precedent is desirable only if the court goes on to allow hypnosis of the witness in the courtroom if desired by the witness and his counsel. Otherwise, the court deprives itself and the jury of relevant testimony. It is suggested that if the court in the instant case was not prepared to allow hypnosis of the witness in the courtroom, it nevertheless should have admitted her testimony as given and allowed the jury to judge its reliability on the basis of the appearance of the witness and the probability of her story. In the usual situation, however, the problem presented by this case will not arise, since the hypnotist, rather than the hypnotized, will be testifying to the out-of-court hypnosis.

Two cases, one Canadian[35] and one American,[36] have dealt with the admissibility of confessions obtained from a defendant after extensive questioning and after a hypnotist had talked with the defendant. In both cases, it was held that the government's inability to show that the confession was voluntarily obtained, and not coerced from the defendant while under hypnosis, rendered the confession, and any subsequent confessions directly resulting from the hypnosis, inadmissible. In the latter case, the United States Supreme Court said that the attempt to use such confessions violated due process when the confession was extracted from a defendant unprotected by counsel. It would seem, therefore, that the courts were concerned with the use of hypnosis to extract incriminating statements from subjects who were without even the protection of their conscious minds. However, the courtroom use of hypnosis on willing witnesses merely as a memory-aid will not normally involve the self-incrimination problem met in these cases. Only one case has squarely held that hypnotic testimony should not be considered by a court.

In *State v. Pusch*,[37] decided in 1950, the defendant attempted to qualify his hypnotist in order that he could testify to statements given by the defendant under hypnosis which were indicative of his innocence. The lower court rejected all such evidence, and the appellate court agreed saying,

> No case has been cited by either party relating to the admissibility of the evidence proffered and no case has been found. We think that the

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33 *Ibid.*

34 *Ibid.*

35 Rex v. Booher, 4 Dom. L. Rep. 795 (1928).

36 Leyra v. Denno, 347 U.S. 556 (1954).

37 77 N.D. 860, 46 N.W.2d 508 (1950).

evidence was clearly inadmissible and that no error was committed in sustaining the objection.[38]

Apparently the court did not believe that testimony about hypnotic statements could serve any legitimate purpose; however, it must be remembered that this case was decided prior to medical and psychological acceptance of hypnosis.

Since the acceptance of hypnosis as a valid branch of medical science in 1958, there have been at least three cases recognizing that hypnosis may have a place in the legal process. In *Cornell v. Superior Court*,[39] it was held that a lower court had abused its discretion in not permitting the accused to use the services of an experienced hypnotist prior to trial to help the accused remember his whereabouts at a critical time. After recognizing the value of hypnosis as a memory-aid, the California Supreme Court went on to assert that "there is no substantial legal difference between the right to use a hypnotist in an attempt to probe into the client's subconscious recollection and the use of a psychiatrist to determine sanity."[40] However, it also recognized that "admissibility of any evidence that may be secured during such an examination is not the question here presented."[41] This question was presented to the same court, however, in 1963 in *People v. Modesto*.[42] Here it was held that the refusal of the lower court to instruct on manslaughter was error, in view of evidence of defendant's intoxication and the testimony of defendant's psychiatrist as to his intent at the time acts occurred. In a detailed opinion the court, through Justice Traynor, explained that:

> It was error . . . to exclude Dr. Zonnis' proffered explanation of hypnotic techniques as they are used in a psychiatric examination as a basis for her expert opinion . . . .
>
> Although the tape recording of defendant's statements while under hypnosis might properly have been excluded in the exercise of the trial court's discretion to weigh its probative value as part of the basis for the expert's opinion against the risk that the jury might improperly consider it as independent proof of the facts recited therein, the record shows that the trial court did not exercise this discretion, but erroneously concluded that People v. Busch . . . required exclusion of the evidence. In the Busch case we held that the trial court did not err in excluding an expert's opinion based in part upon an hypnotic examination on the ground that no proper foundation had been laid to

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38 *Id.* at 522.

39 52 Cal.2d 99, 338 P.2d 447 (1959).

40 *Id.* at 449.

41 *Ibid.*

42 People v. Modesto, 59 Cal.2d 722, 382 P.2d 33, 31 Cal. Rptr. 225 (1963), *overruled on other grounds*, 60 Cal.2d 631, 388 P.2d 44, 36 Cal. Rptr. 212 (1964).

> show the reliability of hypnosis as an analytical tool or that the expert was qualified in its use for that purpose. In the present case, however, Dr. Zonnis was qualified as an expert psychiatrist. The defense offered to prove that hypnosis is an accepted analytical tool in the psychiatric profession in determining a person's state of mind, and Dr. Zonnis was allowed to state her opinion based in part on the hypnotic examinations. Under these circumstances, there is nothing in the Busch case that would preclude introducing in evidence all of the data on which she based her opinion.[43]

The court went on to hold that a tape-recording of the psychiatrist's interview with the defendant prior to the trial, while the latter was under hypnosis, was admissible. It must be carefully noted that the court did not preclude the trial judge from disallowing the admission of hypnotic testimony on the basis of his normal discretion, but rather held that as a matter of law such testimony was *not* inadmissible. Thus, where the trial judge has reason to suspect the reliability of such testimony, he would be able to prevent it from being admitted as evidence.

Finally, in 1962, hypnotic testimony was allowed to be given in the courtroom in the case of *State v. Nebb*. Here, the defendant was accused of murdering a woman before several eyewitnesses. A part of his defense was that he had shot under the delusion that he was shooting his wife. His testimony under hypnosis greatly impressed the prosecuting attorney and the murder charge was subsequently changed to a charge of manslaughter, to which the defendant then pleaded guilty.

IV. The Standard of Accuracy

Assuming hypnosis may be of use in the courtroom, what standards must it meet to satisfy the courts that testimony produced under its influence has evidentiary value? One standard which could be used is that which apparently is advocated for the use of lie detector analyses, and truth serum reports, *i.e.*, the method used must have been accepted in the medical and psychological professions and be capable of being proven 100 percent accurate.[44]

Hypnosis has been accepted by both the American Medical Association and the American Psychological Association as a legitimate psychiatric method of inquiry.[45] And in *State v. Nebb,* the hypnotist testified that the statements made by a person under hypnosis would, with "reasonable med-

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[43] *Id.* at —, 382 P.2d at 39-40.

[44] See Dugan v. Commonwealth, 333 S.W.2d 755, 757 (Ky. 1960). See also McCormick, *op. cit. supra* note 4, § 170; Teitelbaum, *op. cit. supra* note 15, at 154; Kaplan, *The Lie Detector: An Analysis of Its Place in the Law of Evidence*, 10 Wayne L. Rev. 381, 385-86 (1964). *But cf.* People v. Jones, 42 Cal.2d 219, 266 P.2d 38 (1954).

[45] Moss, Hypnosis in Perspective 57-58 (1965); 168 A.M.A.J. 186 (1958).

ical certainty,"[46] be truthful and correct. He further stated that, except for certain mental disorders, the use of hypnosis would find the facts.[47] Still later, he said the statements made by the defendant while in a hypnotic trance were factual.[48] Despite this hypnotist's optimism, however, 100 per-cent accuracy has yet to be scientifically demonstrated.[49] Thus, under this standard it is doubtful that hypnosis could meet the required tests.

However, there are policy reasons which indicate so strict a standard should not be required. First, hypnotic testimony in the court is procedurally similar to conventional testimony; the judge and jury may view the witness while he is testifying: a careful explanation of the possible dangers of suggestibility can be given by the hypnotist; examination and cross-examination can be carried on; and the witness can be instructed to behave as he normally would behave. Moreover, since psychiatric opinions of a person's mental condition are generally admissible, what valid objection can be raised to substantive testimony within a witness' own knowledge? Assuming that the witness can be shown to be in a suitable hypnotic state, the only ground for objection is that suggestibility and imagination are not completely curtailed. However, if the examiner is strictly confined by the court to direct questions, the influence of these elements on the resulting testimony should be minimal. Statements given by a hypnotized witness in response to proper examination should be as reliable as the testimony invoked by conventional memory-aids in comparable situations.[50]

Medicine is an inexact science. Medical testimony is, in essence, a calculated opinion based on evidence obtained through approved methods of investigation. To require a showing of greater accuracy than the science is capable of producing is unreasonable. Thus, upon a showing that hypnosis is approved by the medical profession, that the method of examination to be used is likewise acceptable to the profession and designed to minimize inaccuracy, and that the results produced will have reasonable medical accuracy, the courts should not hesitate to allow such testimony if invoked by a qualified hypnotist.

V. Advantages and Disadvantages of the Use of Hypnosis in Court

The use of hypnosis in the courtroom, rather than restricting its use to pre-trial hearings or other out-of-court proceedings, has the advantage of allowing the judge or other fact-finding agency to observe the questioning and all control tests used by the hypnotist in determining the depth of the

46 Transcript, *supra* note 16, at 8.

47 *Id.* at 9.

48 *Id.* at 11.

49 See Teitelbaum, *op. cit. supra* note 15, at 154.

50 See Thompson v. United States, 342 F.2d 137, 139-40 (5th Cir.), *cert. denied*, 381 U.S. 926 (1965).

witness' trance. When the witness is instructed by the hypnotist to respond under hypnosis as he normally would when answering questions, the fact-finding agency has the added benefit of observing the witness' gestures, tone of voice, expression and other reactions not otherwise available to it through the testimony or affidavit of the hypnotist concerning an out-of-court examination. The law recognizes the dangers of hearsay evidence;[51] it should also recognize that the hypnotic testimony of a witness in some instances—when he is a fit subject for hypnosis, when the facts he knows cannot be gained from available physical evidence of unquestionable accuracy, or when amnesia or shock prevents more conventional questioning of the witness—is more reliable than the hypnotist's testimony about the witness' out-of-court statements, or even the conscious testimony of the witness himself.

Furthermore, a careful explanation of the limitations of hypnosis, and strict control of the questioning process by the court to prevent unnecessary dramatic flourishes would help prevent the witness' hypnosis from achieving undue influence in the eyes of the fact-finding agency. In an analogous situation, the demonstration of injuries to the jury has raised the problem of undue influence. And in this situation trial judges have been able to control undue influence by their wide judicial discretion. However, they have not denied the demonstrations entirely.[52] They have recognized the informative value which these demonstrations may have when properly presented. It is submitted that hypnotic testimony, like this visual device, also has an informative value and should therefore be admitted when properly presented.

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[51] For instances in which the court has found testimony to be hearsay, see, *e.g.*, Attaway v. Morris, 110 Ga. App. 873, 140 S.E.2d 214 (1965); Northern Trust Co. v. Moscatelli, 54 Ill. App. 2d 316, 203 N.E.2d 447 (1964); Union Elec. Co. v. Mount, 386 S.W.2d 126 (Mo. App. 1964). Textual discussion of hearsay can be found in FRYER, LAW OF EVIDENCE AND TRIAL 744-975 (1957); MORGAN, BASIC PROBLEMS OF EVIDENCE 243-372 (1962); 5 WIGMORE, EVIDENCE §§ 1361-1426 (3d ed. 1940). Professor McCormick defines hearsay as

> testimony in court or written evidence, of a statement made out of court, such statement being offered as an assertion to show the truth of matters asserted therein, and thus resting for its value upon the credibility of the out-of-court asserter.

MCCORMICK, *op. cit. supra* note 4, § 225. He goes on to state that the "principal reasons for the exclusion of hearsay [are] namely the want of the normal safeguards of oath, confrontation and cross-examination for the credibility of the out-of-court declarant." *Ibid.*

[52] *E.g.*, Russell v. Coffman, 237 Ark. 778, 376 S.W.2d 269 (1964) (exhibition of severed, preserved kneecap to jury); Darling v. Charleston Community Memorial Hosp., 50 Ill. App.2d 253, 200 N.E.2d 149 (1964) (exhibition of stump of amputated leg to jury); Hanberry v. Fitzgerald, 72 N.M. 383, 384 P.2d 256 (1963) (exhibition of ulcerated ankle to jury); Morris v. Stanford, 58 Ga. App. 726, 199 S.E. 773 (1938) (exhibition of child to jury in seduction case); see Christensen v. Powell, 236 Ore. 480, 389 P.2d 456 (1964). In *Christensen* the court stated: "There is nothing wrong with demonstrative evidence *per se*. It should, however, demonstrate something material to the case." *Id.* at 457.

The primary theoretical disadvantage in the courtroom use of hypnosis is the enhanced susceptibility to suggestion of the witness while under hypnosis.[53] One recent experiment indicated that variations in the examiner's tone of voice alone produced significant variations in suggestibility while the subjects were under hypnosis.[54] Furthermore, it has been found that attitudes of the subject toward the experimental situation of hypnosis tend to influence the responsiveness of the subject to suggestions given him while under hypnosis.[55] Several researchers have commented that persons are usually more easily hypnotized when the methods of induction used are the same as, or similar to, what they expected would be used; however, at the same time they will not be subject to hypnosis through methods which they do not associate with hypnosis.[56] This would seem to indicate a need for a willing expectation on the part of the person to be hypnotized before successful hypnosis can result. Recent research seems to indicate that the sex of the hypnotist has very little effect on the performance of subjects under hypnosis[57] and that even the degree of experience of the hypnotist may be irrelevant to subject performance in standardized research situations.[58] This latter research may indicate that the difference in results achieved by hypnotists in the past on similar experiments was due to a failure to achieve standardized conditions such as room conditions, hypnotic induction techniques, trance depth of subject and instructions by the hypnotist.

Nevertheless, the presence of a suggestibility higher than normal in a hypnotized subject seems to be a generally accepted fact among hypnotists. Such a high degree of suggestibility could tend to undercut the reliability of testimony given by a hypnotized witness by the possibility that the witness may be testifying to what he thinks the questioner wants to hear, rather than what he remembers of the actual event. Because the witness may act naturally while he gives his testimony, the hypersuggestibility present may be overlooked by the judge or fact-finding agency. In fact, granted the presence of a very high degree of suggestibility, it may be debatable whether the testimony of a particular witness under hypnosis is even more reliable or accurate than his testimony in the conventional state.

VI. Proper Courtroom Use of Hypnosis

It seems that hypnotic testimony, if allowed in the courtroom subject to the protections available to opposing counsel, would be preferrable to

53 Hull, *op. cit. supra* note 14, at 391; Hilgard, *supra* note 14, at 158.

54 See Barber & Calverley, *Effect of E's Tone of Voice on "Hypnotic-Like" Suggestibility*, in 15 Psychological Reports 139-44 (1964).

55 Kuhner, *Hypnosis Without Hypnosis*, 10 Int'l. J. of Clin. & Exp. Hypnosis 93 (1962).

56 Marcuse, Hypnosis 60 (1959); Moss, *op. cit. supra* note 45, at 18-19.

57 Hilgard, *supra* note 15, at 25.

58 Levitt & Overley, *Experience of the Hypnotist as a Factor in Hypnotic Behavior*, 13 Int'l. J. of Clin. & Exp. Hypnosis 34 (1965).

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the testimony of the hypnotist supported by tapes or written notes. It is not the hypnotist's testimony which should be subject to attack, but rather the witness' reactions. But, if the court does not desire the use of courtroom hypnosis, the judge may order an out-of-court session and then allow the witness to testify in a conscious state concerning that session. However, the witness' testimony in this situation would probably be hearsay and his portrayal of the facts could be subject to distortion. His statements would concern matters not retained in his conscious experience, but extracted from his subconscious under hypnosis and related to him in his normal state. And although it is conceivable that the whole set of memories recalled under hypnosis may be invoked to the witness' conscious memory by the repetition of his story, it is very possible that he will not consciously remember the experiences, but recall only what he was told about the hypnotic revelations. Moreover, the testimony would be unreliable because the degree of the witness' suggestibility under hypnosis and the depth of his hypnotic state are not demonstrable in the court. It is in this respect that hypnosis as a memory-aid differs from the more conventional recall aids. For example, an attorney may find it advisable to jar his witness' memory with written material prior to trial to avoid any loss of witness credibility in the eyes of the fact-finder. However, if an attorney desires to utilize hypnosis only prior to trial, he may be forced to use hypnosis in the courtroom to prove facts substantiated only by the witness' original hypnotic testimony. Thus, the attorney could be prevented from using the witness' conscious testimony as a secondary means of proof for the hypnotic testimony.

Another problem that may be encountered is that hypnosis may not always be available for use because of particular characteristics of the proposed subject. For example, the witness may be resistant to hypnosis and difficult, if not impossible, to hypnotize. However, many past cases of unsuccessful hypnosis can be explained today as the failure to use a variety of hypnotic techniques upon the subject.[59] Later research indicates that many subjects have preconceived ideas about hypnotic techniques and tend to resist hypnosis by any other method. In fact, determination of the "right" method of induction for the particular subject seems crucial. One way to avoid the subject's conscious preconceptions is to have him concentrate on something other than the words of the hypnotist during the induction period.[60] One researcher has been able to hypnotize persons while in their natural surroundings concentrating on another project even though the subjects had no prior hypnotic experience.[61] Recent estimates are that ninety percent of all subjects can be lightly hypnotized, whereas fifty to

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59 TEITELBAUM, *op. cit. supra* note 15, at 30.

60 TEITELBAUM, *op. cit. supra* note 15, at 15.

61 McCord, *Trance Induction Under Unusual Circumstances*, 13 INT'L. J. OF CLIN. & EXP. HYPNOSIS 96 (1965).

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fifty-five per cent can be deeply entranced.[62] Of course, the depth of the trance to which the witness is susceptible is of prime concern to the attorney in establishing his witness' credibility. Obviously, the deeper the trance, the less conscious control the subject will have over his actions.

VII. Tests for Detecting Susceptibility to Hypnosis

Several tests have been created to determine a proposed subject's susceptibility to hypnosis. The primary tests are the Stanford Hypnotic Susceptibility Scale, used for general screening purposes, and the Standard Profile Scales of Hypnotic Susceptibility, used to determine specific factors associated with the individual differences in hypnotic susceptibility.[63] By administering one of these tests to a witness, the hypnotist should be able to determine whether the witness will make a good hypnotic subject. Of course, the hypnotist can simply attempt to hypnotize the witness and determine from control tests, such as paralysis of major or minor muscles, or suggested lack of sensitivity to pain or control of bleeding, the susceptibility of the witness to hypnosis and the potential depth of the trance.[64] A further use for these control tests may be to determine whether the witness is in a hypnotic trance at all. Despite the doubts of some researchers, it would appear that attempts in the waking state to pretend or simulate lack of sensitivity to pain with regard to bleeding, heart rate, muscle control and other physiological measurements have not been as successful as the control hypnotically possible.[65] These control tests, or a satisfactory substitution, should be required of the hypnotist prior to the courtroom examination of a prospective witness. In *State v. Nebb*, the hypnotist tested the defendant witness by causing sensation of feeling to appear and

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[62] Marcuse, *op. cit. supra* note 56, at 78; Teitelbaum, *Personal Injury Law and Hypnotism*, 1963 Med. Trial Tech. Q. 95, 96; 1955 Brit. Med. J. 190 (April 23, Supp. 1); see Teitelbaum, Hypnosis Induction Technics (1965), where the author observes that "to obtain recall, where the subject speaks in the past tense while remembering, the medium depth only is required, while the subject must be in the somnambulistic depth in order to actually re-experience a prior event." *Id.* at 155. This means that the added advantage of recall under hypnotic regression as opposed to ordinary hypnotic recall with reference to present time would be available for only certain witnesses. However, an increased understanding among hypnotists that it is important to standardize induction techniques and room conditions so that maximum advantage can be taken of other hypnotists' results has led to greater success in hypnotizing subjects to necessary trance depths with specified induction technics.

[63] Marcuse, *op. cit. supra* note 56, at 84; Hilgard, *supra* note 14, at 168; see Barber, *Measuring "Hypnotic-Like" Suggestibility With and Without "Hypnotic Induction"; Psychometric Properties, Norms, and Variables Influencing Response to the Barber Suggestibility Scale*, 16 Psychological Reports 809 (1965). Barber gives still another test.

[64] Marcuse, *op. cit. supra* note 56, at 69.

[65] See Wells, *Ability to Resist Artificially Induced Dissociation*, in Modern Hypnosis 75, 77 (Kuhn ed. 1958); Wells, *supra* note 15; *cf.* Austin, Perry & Sutcliffe, *supra* note 12, at 185.

disappear in his arms before questioning began,[66] but apparently he did not test the defendant at any other time during the questioning period. It would seem more thorough to use a control test upon the witness at various times throughout his testimony to prevent the witness from gaining consciousness and substituting present memories for his subconscious ones. One suggested control test would involve the suggestion of a lack of feeling in one arm, the subsequent placing of pins in that arm, the suggestion to the witness that he will be able to control any bleeding in that arm, and the withdrawal of the pins—one by one—from the arm as the questioning of the witness proceeds.[67] As long as there is no bleeding as the pins are removed, the court can be assured that the witness is actually under hypnosis while he is testifying. If the court or counsel wishes to be assured that the witness is not only under hypnosis, but at a certain trance depth, the hypnotist could be required to use a control test adequate for that purpose.

VIII. Questioning the Hypnotized Witness

An attorney-hypnotist has outlined how a proper foundation may be laid for the use of hypnosis prior to trial.[68] His suggestions seem equally applicable to courtroom hypnosis. First, he advises that the examiner obtain a knowledge of the objective evidence and thoroughly examine the subject before hypnosis to ascertain "his background, his recollection of the matter in point, his knowledge of hypnosis and any [prior] hypnotic experiences . . . ."[69] Second, the hypnotist should prepare a written list of questions, avoiding leading or suggestive questions, to be asked the witness under hypnosis. Third, the induction of the subject should follow a standard procedure and should include control tests showing that the subject is in a trance and the depth of this trance. Fourth, the hypnotized subject should be thoroughly examined by the hypnotist to determine if he has ever been hypnotized and if there has been any pre-hypnotic suggestions with regard to telling the truth and the issues involved in the present case. Fifth, conditional reflexes should be implanted to signal the telling of an untruth, and the subject should be motivated through suggestion to tell the complete truth in response to the questions that will be asked of him. Sixth, if counsel decides that this same witness will testify under hypnosis in court, copies of all records and a list of questions used should be given to the opposing attorney along with the opportunity by the latter to examine the witness on these points under hypnosis. Finally, copies of the records of these activities should be submitted to the court. If a foundation

66 Transcript, *supra* note 16, at 24-51.

67 Bryan, *op. cit. supra* note 21, at 246.

68 Teitelbaum, Hypnosis Induction Technics 154-56 (1965).

69 *Id.* at 154.

is being laid to refresh a witness' present memory about past facts, it may be necessary to show that the witness does not remember the facts in question independent of hypnosis, or at least is not sure of the facts in question. Of course, it will also be necessary to obtain written permission from the witness allowing the hypnotic examination. While there may be other considerations in a particular case, the above outline provides a good working model of the proper procedure.

There is the additional problem of whether the hypnotist should be the sole examiner and medium for the attorneys, or whether counsel should also be allowed to question the hypnotized witness. In *State v. Nebb*, the court allowed counsel to examine the defendant under hypnosis,[70] but it also allowed the hypnotist to ask questions whenever it appeared that the defendant was having difficulty understanding the attorneys' questions.[71] The questioning procedure used in this case has been criticized by one reviewer who implied that this procedure was inherently suggestive.[72] However, it is interesting to note that at one point during the prosecutor's examination, the defendant stuck to his declaration that he had dropped the "murder" weapon at the scene of the crime, despite the prosecuting attorney's implication to the contrary.[73] This persistence could indicate that the problems of suggestibility have been overemphasized.[74]

If the hypnotist alone is allowed to question the witness, each party should be permitted to provide the examiner with a list of questions he desires to have asked. There are indications that the hypnotist cannot blot out the presence of the attorneys from the mind of the witness while under hypnosis. If this is true, no additional risk is involved in permitting the attorneys to verbally communicate their questions to the hypnotist as he carries on his examination. Because of his special training, the hypnotist may be able to ask more objective questions of the witness so as to preclude as much suggestiveness through external factors as possible. Even so, it would appear that the attorney, because of his legal background and court experience, would be able to tactically arrange his questions and phrase them to better penetrate to the substance of the witness' testimony. Hence, the questioning of the hypnotized witness by the respective attorneys, with appropriate limitations prescribed by the hypnotist and the court is suggested. Perhaps the technique used in *State v. Nebb* could be employed, *i.e.*, permitting the attorneys to do the questioning, but as difficulties arise, the questioning may be assumed by the hypnotist. Whichever alternative

70 Transcript, *supra* note 16, at 40.

71 *Id.* at 31-37.

72 TEITELBAUM, *op. cit. supra* note 68, 150.

73 Transcript, *supra* note 16, at 40.

74 See Wells, *Experiments in Waking Hypnosis for Instructional Purposes*, in HYPNOSIS IN PERSPECTIVE 85 (Moss ed. 1965).

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is chosen, it must be remembered that unless the attorney and the hypnotist be one and the same person, close cooperation between the two will be required to take full advantage of the special talents of each.

IX. Qualification Standards for the Hypnotist

Before hypnosis is permitted in a courtroom, some qualification standards for the hypnotist must be established. Hypnosis is a relatively easy technique to learn, but the skillful use of it to reduce suggestibility to a minimum, to insure no damage to the subject's personality and to enable the subject to remember the facts accurately and completely calls for excellent training. In a report by the American Medical Association's Council in 1962 certain standards for the teaching of hypnosis were established.[75] These standards were in general agreement with those formulated by the American Psychological Association a few years earlier. This report emphasized four basic prerequisites for a qualified hypnotist. First, before an individual may become a trainee, he should be generally examined about his "background and previous training, motivation, and his own mental and emotional health and stability." Second, the training should be based upon an understanding of "symptom-formation, the doctor-patient relationship, and the nature of unconscious mental processes." Third, the trainee should take actual responsibility for carefully selected case-material under the strict individual supervision of a fully qualified hypnotist and psychiatrist. Finally, the training should be the responsibility of medical schools and teaching hospitals. The ideal education would be a good undergraduate program which has many points in common with a more specialized post-graduate program for psychiatrists and a post-graduate program designed for non-psychiatrists.[76] The course structure should call for a minimum of 144 hours of instruction, with a preferred length of one-half to a full day per week over nine to twelve months. The size of the class should be small, and particular emphasis should be placed upon the use of seminars, case conferences and group discussions of required reading assignments. It was also suggested that "patients should be selected and assigned to provide a well-rounded experience in relation to the type practice of the trainee . . . . [and] a complete . . . case report . . . required on each . . . [subject]."[77] A suggested model course of instruction included the following:

> History of psychiatry, history of hypnosis in relation to psychiatry and medicine, basic psychiatry: general, nosology, psychotherapy, psychodynamics, symptom formation, treatment in psychiatry, and psychosomatic medicine, hypnosis in relation to various forms of treatment,

[75] Council on Mental Health, *Training in Medical Hypnosis*, 180 A.M.A.J. 693 (1962).
[76] *Id.* at 696.
[77] *Ibid.*

techniques of hypnosis, the hypnotic relations and dangers of hypnosis, indications and contra-indications, uses and potential abuses of hypnosis, specific applications and modifications of hypnosis, medicolegal aspects of hypnotherapy, the physiology of hypnosis, research aspects of hypnosis, sociocultural aspects of hypnosis.[78]

The Society for Clinical and Experimental Hypnosis has established its own standard for its members, which includes at least two years of practice or publication in an acceptable journal.[79] An attorney trained in hypnotism has suggested that a hypnotist should be "necessarily . . . qualified in induction technics and in approved questioning technics and he should therefore be qualified in both law and hypnotism."[80]

From these recommendations, it can be seen that a courtroom hypnotist should have an understanding of the general principles of psychiatry with special emphasis upon subconscious mental processes, a knowledge of approved questioning procedure, and excellent training in hypnosis, either through completion of an accredited course of instruction or through extensive experience and publication in the field of hypnosis. The American Psychological Association's Council of Representatives has made a start in recognizing those persons who have experience in hypnosis by listing Diplomats of the American Board of Examiners in Psychological Hypnosis in the A.P.A.'s *Directory*.[81]

However, the standards of competency recognized above are designed primarily with an eye toward the problems of medical or psychiatric practice, rather than the particular needs of the law. Therefore, court or statutory regulation of the qualifications for hypnotists would be an excellent way to provide for the law's demands. At present, there are few statutory regulations applicable to hypnotists,[82] and those generally seek to regulate stage hypnotism,[83] the hypnosis of minors,[84] or the medical use of hypnotism.[85] What is needed are statutes which recognize the necessity for knowledge of psychiatry, hypnotism and legal interrogative experience. Such statutes could borrow from the standards of the American Psychological Association and could add requirements for some legal training. If the legislature fails to act, the courts could do their part by establishing certain

78 *Id.* at 697.

79 MARCUSE, *op. cit. supra* note 56, at 34.

80 Teitelbaum, *supra* note 62, at 97.

81 Moss, Logan & Lynch, *Present Status of Psychological Research and Training in Hypnosis: A Developing Professional Problem*, in HYPNOSIS IN PERSPECTIVE 169, 178 (Moss ed. 1965).

82 Brennan, *Statutory Regulation of Hypnosis*, 14 CLEV.-MAR. L. REV. 112 (1965).

83 *E.g.*, NEB. REV. STAT. § 28-1111 (1964); ORE. REV. STAT. § 167-705 (1961); S.D. CODE § 13.3502 (1939).

84 *E.g.*, S.D. CODE § 13.3501 (1939).

85 *E.g.*, FLA. STAT. ANN. § 205.41 (1958); MASS. GEN. LAWS ANN. ch. 112, § 6 (1958).

standards of their own. The court in *State v. Nebb* allowed a hypnotist with formal training and nine years experience to question the hypnotized defendant.[86] However, legislative regulation would probably be better than individual court action because a state legislature has better means for determining the proper standards and a state statute would establish a uniform rule for all courts within the state.[87]

X. Procedures for Appointment of Hypnotist

Assuming the availability of qualified hypnotists, there remains the question of the procedures to be used in appointing one or more hypnotists for a particular case. Should there be one hypnotist appointed by the court to act as the court's representative; or should each party be allowed to appoint his own hypnotist; or should both parties be required to agree to the use of a single hypnotist; or should there be a court-appointed hypnotist with the option available to opposing counsel to alternatively select one of the other two possibilities?

The utilization of a court-appointed hypnotist provides several advantages. First, it would be easier for the court to insure high qualifications and experience case after case. Another advantage is that indigent parties would be able to obtain the services of a hypnotist at no expense. Thirdly, the use of one hypnotist by the court would enable it to build a backlog of experience and data based on at least one constant—the hypnotist

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86 Transcript, *supra* note 16, at 9.

87 Although the discussion at present concerns only the use of hypnotism in the courtroom, proper state regulation need not be this limited. For example, as testimony by psychiatrists about the mental state of parties to a court action becomes accepted by the courts, there will be a need for the rules of evidence to be able to deal with the admission of that part of the psychiatrist's testimony which may be based upon hypnotic analysis. As the American Medical Association and the American Psychological Association put more and more effort into teaching hypnosis and its increasing use throughout the country, more and more interest will be generated in the possibilities of hypnosis, and medical professors will begin to depend upon hypnosis for an ever-widening variety of purposes. The more purposes discovered for its use, the greater the likelihood that hypnosis will impinge with greater and greater frequency upon the law. Proper state regulations can cope with this increasing use of hypnosis, as well as facilitate the proper use of hypnosis to insure greater reliability. See Barber, *Antisocial and Criminal Acts Induced by "Hypnosis": A Review of Experimental and Clinical Findings*, in HYPNOSIS IN PERSPECTIVE 100, 107 (Moss ed. 1965), for a demonstration of the use of hypnosis for criminal purposes. See also IDAHO CODE § 18-201(5) (1947). Can hypnosis be used to "fabricate" witnesses who could be induced to remember false or nonexistent facts implanted in their minds? Teitelbaum, while recognizing the problem, asserts that a qualified hypnotist, through careful questioning of the witness under hypnosis, can detect such tampering. Teitelbaum, *supra* note 62, at 96-100. Query whether witnesses should be examined by a court-appointed hypnotist (when possible), prior to their testifying, for the sole purpose of detecting whether their memories have been tampered with by prior hypnosis.

himself—which could prove, at least in the initial stages, the effectiveness of hypnosis in the legal process. The proper functioning of a court-appointed hypnotist might be suggested by the operation of an analogous program by a Los Angeles court which has utilized a trained police lie-detector operator for use in paternity cases when agreed upon by both parties.[88] On the other hand, several problems might be created by allowing only a court-appointed hypnotist. His extraction of evidence, which would be of use to one side or the other, could violate our theory of adversarial proceedings. Perhaps this objection could be obviated by allowing the opposing attorneys to submit their questions to the hypnotist for his use on the hypnotized witness. Another objection might be that one hypnotist is not as adept as another at administering a particular induction technique since unlike the lie-detector test, which can utilize a certain type questionnaire for a variety of subjects,[89] hypnosis must often utilize a particular induction technique which, in part, depends upon the personality and expectations of the subject. Still another difference could be that in any particular case the personal idiosyncrasies of either the hypnotist or the witness might make it more desirable for a hypnotist other than the court hypnotist to examine the witness.[90] Thus, in a given case, one or more hypnotists might be more desirable than the court-appointed hypnotist.

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88 See Pfaff, *The Polygraph: An Invaluable Judicial Aid,* 50 A.B.A.J. 1130 (1964).

89 See *Hearings Before a Subcommittee of the House Committee on Government Operations,* 88th Cong., 2d Sess., pt. 1, at 22, 24 (1964); *cf.* Inbau & Reid, *The Lie-Detector Technique: A Reliable and Valuable Investigative Aid,* 50 A.B.A.J. 470, 471-72 (1964); Kleinfeld, *The Detection of Deception—A Resume,* 8 FED. B. J. 153, 166-67 (1947).

90 See MODEL CODE OF EVIDENCE rules 402-10 (1942). Rule 403, providing for the appointment of experts, states:

> In an action in which the judge determines that expert evidence will be of substantial assistance, he may, of his own motion or at the request of a party, at any time during the pendency of the action
>
> (a) order the parties
>
> (i) to show cause why expert witnesses should not be appointed to give evidence in the action, and
>
> (ii) to submit nominations for their appointment and objections to proposed appointments, and
>
> (b) appoint one or more expert witnesses of his own selection to give evidence in the action except that, if the parties agree as to the experts to be appointed, he shall appoint only those designated in the agreement.

While rule 403 pertains to the giving of expert testimony, it would seem that the procedure outlined could be applied to the appointment of a trained hypnotist. Note that this rule allows the parties to limit the number of experts to be considered by the court for appointment. This provides the parties protection against arbitrary selection by the court. Also, the parties have an opportunity to present objections to having any experts appointed. Compare UNIFORM EXPERT TESTIMONY ACT §§ 1-2, 4 (1937) (no requirement for hearing to determine need for expert).

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If each party could use his own hypnotist, this would enable the particular hypnotist to obtain maximum results from witnesses in a specific case. It would also encourage the use of each hypnotist as a check on the other to insure maximum satisfaction of controls and questioning procedure through timely advice to their respective attorneys, who could then object to the questionable practice involved. However, such a procedure could conceivably lead to a wastage of time and effort by producing stalemates or disagreements between the hypnotists on points which neither the attorneys nor the court would be qualified to decide. Also, the question of whether an indigent was being denied due process if he had no hypnotist, while the other party did have one, could be involved. Of course, this latter argument could be met by the court through its appointment of a hypnotist to the indigent at the expense of the state or county or city. However, this in turn might create a further problem in that a hypnotist, at present, is not considered an officer of the court in the same manner as an attorney, and therefore is not directly subordinate to a court's requests. Perhaps some arrangement could be made with local groups or organizations of hypnotists established under proper state licensing or qualification statutes.

The third possibility, that of having both parties agree to the use of a single hypnotist for a specific case, is advantageous because it allows the parties to choose the most suitable hypnotist for their trial, and thus tends to prevent some of the difficulties which could arise with the above mentioned suggestions. The difficulty with this approach, however, may be that of maintaining the adversarial system. It is clear that the hypnotist could be subjected to loyalty pressures because he was retained by both parties. Such pressures might induce the hypnotist to unconsciously suggest answers desired by one side to the hypnotized witness.

The fourth alternative would be to have a court-appointed hypnotist, but also to allow the parties to use hypnotists of their own choosing or to agree upon the use of a single hypnotist. This alternative tends to establish a flexible system which allows the use of a hypnotist or hypnotists in the manner most desired by the parties and consonant with due process. It is presumed that if the court-appointed hypnotist is well-qualified, the parties will tend to accept him;[91] but the freedom of choice is left entirely with them. And the fact that the parties could choose their own hypnotists may tend to insure the selection of a highly-qualified court hypnotist.

The practicality of these alternatives would depend upon the demands for a trained hypnotist. It has been suggested by several authorities that many aspects of the law, such as personal injury cases, psychiatric testimony, and examination of shock and amnesia patients, could use the services of

91 See Pfaff, *supra* note 88, at 1131.

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a trained hypnotist.[92] Perhaps a trial program in one court could help determine the wisdom of these alternatives.

XI. Comparison of Hypnosis with Lie Detectors and Truth Drugs

The use of hypnotic testimony in court has been grouped by several authorities with other types of similar testimony, such as a lie-detector operator's testimony and a subject's testimony gained while under the influence of "truth" drugs.[93] Since none of these other forms of testimony has been admitted in court over the protest of one of the parties, it has been concluded by many of these authorities that hypnotic testimony should be similarly excluded.[94] The main attack upon the use of hypnosis has been its effectiveness as a truth finder. Critics have pointed out that there is no proof that testimony given by a person under hypnosis is 100 percent true.[95] While the necessity of this standard might be challenged even in the case of confessions (the primary use of the lie-detector), other grounds exist for distinguishing its use for that purpose from its use on other witnesses. The former situation usually concerns the determination of the validity of a confession, which alone may be instrumental in convicting a person in a criminal proceeding. Normally, however, the courts would be concerned with facts, in both civil and criminal proceedings, which would not have the near-conclusive effect of a confession. Furthermore, these facts may not be known to only the hypnotized witness, but may be checked for veracity against the testimony of other witnesses.

While there are similarities between hypnotic testimony and testimony gained from lie detectors and truth drugs, there are also many differences. For example, a lie detector measures the involuntary physical reactions of the subject while he is completely conscious of the questioning.[96] Thus, while the hypnotist tests for involuntary mental responses and seeks to exclude the conscious mind, the lie-detector operator is after mechanically recorded traces of the body itself. Moreover, the hypnotist can question his witness in court before the judge and jury; the lie-detector operator, however, must depend heavily on his experience and training to provide a meaningful analysis of the recordings of his machine, and without this background, the average judge or jury would be unable to interpret the results. In fact, it has been noted that even an operator who was trained

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92 Bryan, *op. cit. supra* note 21, at 196; Teitelbaum, *supra* note 62, at 96.

93 Wigmore, Principles of Judicial Proof § 243 (2d ed. 1931); see McCormick, Evidence § 175 (1954).

94 See Wigmore, *op. cit. supra* note 93.

95 Allen, *Hypnotism and its Legal Import*, 12 Can. B. Rev. 14, 18 (1934); Levin, *Hypnosis in the Law*, 1964 Ins. L. J. 97, 102.

96 See *Hearings Before a Subcommittee of the House Committee on Government Operations*, *supra* note 89, at 33; Laymon, *Lie Detectors—Detection By Deception*, 10 S.D.L. Rev. 1, 14 (1965); Kleinfeld, *supra* note 89, at 166.

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in a different school might not be able to interpret another operator's results.[97] Thus, with hypnosis the judge or jury may make their determinations as to reliability and accuracy directly from the witness who experienced the facts in dispute, while the judge or jury must depend upon the testimony of the lie-detector operator, indeed a second-hand source.

There are a variety of truth drugs, the more common being scopolamine, sodium amytal and pentothal.[98] One method of use consists of injections of the drug at specified time intervals until the subject relaxes, becomes drowsy and falls asleep. The subject is allowed to sleep a short time and then aroused. He is then questioned while recovering from the effects of the drug. Questioning of the subject must be done carefully because the drug greatly increases the subject's suggestibility and tends to confuse his conscious mind. Thus, if the questions asked are not brief, there is the danger that the subject will have forgotten the first part of the question before the last part is given to him.[99] The key to the use of truth drugs is that a subject under the drug's influence will be unable to recall lies he may have previously told, and is therefore unable to prevent a consistently false story.[100] In short, it is more effortless for his confused, conscious mind to tell the truth. Although it is thought that the use of truth drugs impinges upon the conscious mind, it has been observed by one researcher that he was able to draw from the subject information of which the subject was apparently not aware. The researcher concluded that the drug enabled him to "delve . . . into the unconscious mind and bring hidden data to light."[101] While the use of truth drugs to question the conscious mind might be said to be subject to the unconscious distortion of past facts extant in the normal, waking testimony of a witness, the use of such drugs in questioning the subconscious mind would be quite similar to the use of hypnosis. Hypnosis can be quicker to apply than truth serums and might tend to produce more natural reactions by the witness as he answers questions. Furthermore, under hypnosis many witnesses could be regressed mentally to the time when they observed the facts in issue, and thus distortion caused by the passage of time or subsequent events could be avoided. It is not claimed that this regression can result from the influence of truth drugs. Hence, while both hypnosis and truth drugs can lead to examination of the subconscious mind, the administrative ease and the

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97 *Hearings Before a Subcommittee of the House Committee on Government Operations*, *supra* note 89, at 23-24.

98 See Muehlberger, *Interrogation Under Drug Influence: The So-Called "Truth Serum" Technique*, 42 J. CRIM. L., C. & P.S. 513, 520-22 (1951); *Expert Psychiatric Testimony Based on "Truth Serum" Examinations*, 1957 ILL. L. F. 138, 139.

99 Muehlberger, *supra* note 98, at 516-17.

100 *Id.* at 517.

101 *Id.* at 518.

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increased theoretical absence of distortion would seem to make hypnosis a preferable means of questioning.

XIII. Conclusion

Hypnosis has now been accepted by the American Medical Association as a valid medical technique; and, as the later cases indicate, some courts are not unaware of the potential uses of hypnosis in the legal process. Admittedly, the ramifications of the hypnotic state are not fully understood at the present time. The thesis of this Note, however, has been that enough is known to warrant more widespread use of hypnosis in the courtroom. The validity of this thesis stands or falls upon the resolution of two questions: (1) Can greater reliability be gained through hypnotic testimony despite the danger of increased suggestibility of the hypnotized witness? and (2) What is the value of courtroom hypnosis in relation to pre-trial hypnosis?

Hypnotic regression experiments have suggested that hypnotic testimony can be more accurate than traditional testimony. The case of *State v. Nebbs* indicates that suggestibility may not be as great a danger as has been theoretically assumed in some quarters. Furthermore, it would appear that the elimination or adequate judicial control of such forensic tactics as leading questions, "badgering," "shotgun questioning" and suggestive commentary would minimize the possibility of heightened suggestibility in a hypnotized witness. Thus, by careful supervision of the control tests and questioning procedure, a court should be able to protect the reliability of the testimony.

The greatest value of courtroom hypnosis (rather than pre-trial hypnosis) is that it permits the fact-finding agency to *directly* evaluate the testimony of the *witness who observed the facts involved in the case.* Indeed, with the use of proper hypnotic induction, the witness will testify with all natural intonation, inflection, gestures and expressions that he would ordinarily exhibit under traditional circumstances. This, in turn, can provide the fact-finding agency with a more accurate presentation of evidence upon which to base its decisions.

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