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HYPNOSIS and THE LAW

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An aura of the occult surrounds the mention of hypnosis. As a result, hypnotism is rarely used in court. Although tainted by its sideshow reputation, hypnosis, when applied properly, can substantially aid both the investigation and litigation stages of law enforcement.

Suggestibility is a naturally occurring aspect of the mind. The conscious mind acts as a filter to the numerous suggestions attacking the subconscious. Upon removal of this filter, the subconscious mind becomes infinitely more susceptible to suggestion. The basic theory of hypnotism is that it removes the conscious filter thereby heightening the power of suggestion and opening a door to the tightly guarded subconscious.

Assuming, arguendo, that hypnosis removes the conscious shield around the subconscious mind, does the theory make a difference to the legal community?

The two most important aspects of hypnosis are motivation to accept suggestion, and the ability to disassociate. Suggestibility is the potential for directing the subconscious and communicating with it. Disassociation is the ability to separate oneself from one's surroundings, thereby freeing the subconscious mind from the reality of a situation.

These two attributes of hypnosis, disassociation and suggestability, when used in conjunction, can mentally transport a hypnotized individual to the scene of the incident under investigation. However, the skill of the hypnotist conducting the interview is crucial because, on occasion, the subject may become confused. All such interviews should be videotaped and attorneys for both the defense and the state or victim should be present. Often emotion and anxiety cloud an event creating a type of amnesia concerning certain facts. Suggestability may allow the hypnotist to provoke any particular incident the mind may remember. Disassociation removes the trauma from the situation and helps clarify the facts, removing at least partially the block of amnesia. Such a proper hypnotic process has enabled an accurate eyewitness recall of names, places, facial characteristics, and even license plate numbers that were otherwise irretrievable.[1]

Clear reporting of a particular incident can prove beneficial to both sides in the legal arena. The prosecutor needs to know what happened, and the defense attorney needs to know his client's true relationship to the crime, so that he can prepare a winning defense. Hypnosis also serves to remove the tension of a witness reporting the facts while on the witness stand. Anxiety can sometimes make an innocent party appear guilty.

Hypnosis can be used in conjunction with the polygraph. The polygraph, or lie-detector, relies on autonomic responses from the central nervous system. Such responses are not always reliable. For example, there is a chance of a false reaction due to anxiety over the test itself. Hypnosis can be used to relax an individual and remove any fears concerning the test itself from the subject's autonomic response. The hypnotized subject might then feel more confident that truthful answers could more easily be distinguished from false ones.

Hypnosis has serious limitations that prevent its everyday use. These limitations can be placed in two different categories. First, there are limitations inherent in the hypnotic process, and second, there are difficulties inherent within the legal system which prevent the use of any new investigative aid, along with the significant legal questions that its use may bring before the court. This combination has effectively stymied this potentially beneficial tool.

One fallacy inherent in the hypnotic process is that a subject has to be in a very deep state of hypnosis in order for hypnosis to be productive.

[1] D. Schafer and R. Rubio, *Hypnosis to Aid the Recall of Witnesses*, 26 International Journal of Clinical and Experimental Hypnosis 81 (1978); Switzer. *Hypnosis — New Medical Skills*, 169 Vogue 288, 289 (1979).

Another fallacy is that a hypnotized subject lacks the will to resist. Tests have shown that a subject can lie or distort the truth even while in the deepest hypnotic trance. The natural instinct for self-preservation is so powerful that some individuals can subconsciously lie. If a conscious mind is capable of creating elaborate, logical, but untruthful scenarios, there is no reason why the subconscious mind should lack this talent.

A problem inherent in the hypnotic process is that hypnosis may be faked by the unscrupulous individual. A skilled hypnotist should be able to expose the malingerer by use of a few simple tests, but what of a professional imposter? Simple tests such as sticking a needle in the flesh and placing a flame under a palm to check for reflexes will undoubtedly reveal someone with little experience with hypnosis. The problem will arise when it is to an individual's advantage to circumvent the hypnotist. Such a situation will arise constantly in legal cases. Then the potential subject may try everything from drugs to prior hypnotic treatment to appear under a hypnotic trance. If a hypnotized subject can enter his hypnotic statements into evidence, it is feared that the mere fact that the subject was hypnotized will give added credence to the statements.

Perhaps the major reason for regulations concerning hypnotism is the fear that inexperienced individuals will tamper with the human mind. In an effort to resolve these deficiencies, two major societies have been established: (a) The American Society for Clinical Hypnosis, and (b) the Society for Clinical and Experimental Hypnosis. Membership is limited to physicians, psychiatrists and dentists having training in hypnosis. Hypnotists must be certified by these societies to be considered as expert witnesses.

The unpopular image of hypnotism that prevented its acceptance by the AMA until 1958 is reflected in the hostile reception it has received in the courts.

The last eighty years have seen a quixotic change in the popularity of hypnotic litigation. Between 1894 and 1915 there was a great deal of litigation concerning hypnotism. Almost every one of the cases focused on the sinister aspects of hypnosis. Most of these cases were claims that the defendant had been under the influence of hypnotism and therefore lacked the will to resist. A few cases made the hypnotist the defendant. The hypnotist was usually accused of seducing the ingenue.

One case focusing on the sinister aspects of hypnosis was the Spurgeon Young case[2], in which a seventeen year old died, allegedly from a hypnotic practice. He suffered organic impairment which was thought to result directly or indirectly from physical or emotional disturbances, or derangement of nerve function, due to a hypnotic practice. It is now known that since hypnosis does not resemble sleep, no waking process is necessary, and that most people who refuse to regain a conscious state are doing so of their own volition.

Other cases brought up significant issues, such as the admissibility of exculpatory statements made while under the influence of hypnosis. In *People v. Eubank,* 117 Cal. 652, 49 P. 1049 (1897), the court, when confronted with the issue of whether exculpatory hypno-induced testimony should be admitted, merely answered that the law does not recognize hypnotism. This simplistic procedure resulted in only one case being litigated in America between 1915 and 1950.[3]

In 1950, hypnosis was once again reviewed as a litigable issue in American courts. At first, the cases followed the *Eubank* decision in determining the relationship of hypnosis and the law. *State v. Pusch,* 77 N.D. 860, 46 N.W. 2d 508 (1950), stated that no case could be found permitting hypno-induced exculpatory evidence.

Then, in 1958, the A.M.A.'s approval of hypnotism ushered in a new era of judicial leniency. In *Cornell v. Superior Court,* 52 Cal 2d 99, 338 P. 2d 447 (1959), the right to representation by counsel was held to include the right to have a hypnotic interview. In thise case hypnotism was used to overcome the effects of amnesia. The California Supreme Court found that an attorney, with the consent of his client, is entitled to conduct a hypnotic examination with the aid of a hypnotist, to learn facts that may be of assistance in preparing for the defense of the crime charged, whether or not the evidence so secured would be admissible.

The important factor in this case was the court's acceptance of hypnotism as a medical technique on a par with psychiatry.

Cornell, however, was not consistently followed in its home state of California. In *People v. Pusch,* 56 Cal. 2d 868, 366 P. 2d 314, 16 Cal. Rptr. 898 (1961), the entry of a physician's testimony concerning the mental state of the defendant was forbidden. Although there are significant legal differences between this case and *Cornell,* the reason for the exclusion was that hypno-therapy influenced the report. The court ruled that a proper basis was not established concerning the reliability of a tool still lacking recognition in the field of psychiatry. The opinion was not aided by the fact that hypnosis had been obtained with the aid of sodium pentathal, and that this case was the physician's first appearance as an expert witness.

A legal landmark occurred in the unreported case of *State v. Nebb,* No. 39, 540 Ohio C.P., Franklin Co., May 28, 1962. Here, an individual was allowed to testify under hypnosis.

The facts of the *Nebb* case, above, are relatively simple. Arthur Nebb had arrived at the home of his estranged wife, Bernice, and found her in the company of another man. He went to his residence to get a witness, since a contested divorce action was pending. He returned to his wife's home ahead of the witness, and, in the interim, shot his wife and her visitor. Bernice recovered from her wounds, but the man died.

It was imperative to determine Mr. Nebb's intent in order to establish whether to convict him of first degree murder or manslaughter.

This was the first time that a prosecuting attorney allowed a defendant to be hypnotized without objection, and actually participated in the interrogation.

During the hypnotic interrogation, Mr. Nebb modified his story several times, and made both inculpatory and exculpatory statements concerning the event. The entire interrogation took place outside the jury's presence. Immediately afterward, the prosecutor reduced the charge to manslaughter, resulting in a guilty plea. The case was not able to set a legal precedent, however, since the hypnotic issue was not reached.

[2] The case is reported in Note, 31 Am. L. Rev. 440 (1897); See also *Hypnotism and the Law,* 14 Vand. L. Rev. 1509, 1522 (1961).
[3] That case was *Louis v. State,* 24 Ala. 120, 130 So. 904 (1930).

Afterwards, the hypnotic issue was raised by the press.[4] Questions arose as to the way Mr. Nebb responded during the hypnotic trance. According to an unnamed hypnotist who had spoken to a local reporter, hypnotized individuals usually speak in the present tense, while Mr. Nebb spoke mostly in the past tense. There was no judicial determination that the entire experiment was admissible, that any statements made under hypnosis were reliable, or that any pretrial statements of Mr. Nebb were reliable. The case, instead of creating a favorable swing toward the use of hypnosis in litigation, illuminated many serious legal difficulties surrounding its use. Mr. Nebb's guilty plea ended the court's opportunity to discuss the legal issues which plague hypnosis.

One major issue which relates to the difficulties inherent in the legal system is the hearsay evidence problem. The witness is unable to recall the evidence without the aid of a third party, the hypnotist. The hypnotist must intervene or there is no retrieval of the evidence. The issue is whether the hypnotist is acting as an interpreter or a secondary source. The fear exists that the hypnotist could alter the hypnotic memory, and that the subconscious mind could easily be influenced by an unethical, or overeager hypnotist who may suggest too much to the subject, becoming more of a detriment than a benefit.

A possible solution to the hearsay dilemma is to make hypnosis analogous to "present recollection refreshed." In this practice, although a particular document is not allowed into evidence, the witness may refer to the document and his refreshed testimony is admissible.

Maryland, along with a growing number of states, allows hypnotic evidence presented by an eyewitness or victim to be admitted, and any discussion concerning the evidence will be limited to relevancy.[5] Hypnotic testimony is generally allowed whenever there is cross examination.

However, many courts do not allow hypnotic statements into the courtroom because of their inherent unreliability. The majority of courts think hynposis must gain the reliability of a scientific experiment, (i.e., chemical tests, fingerprints) before it will be judged reliable.

A minority would allow case by case recognition of relevancy of evidence rather than exclusion of all evidence merely because some of it may be unreliable. The reliability hurdle is not impossible to surmount. The jury is often arbiter of other statements which are highly suspect but routinely entered into evidence. The jury is often solely responsible for determining which of several conflicting views is the correct one. The hypnotist could be viewed as just another expert open to cross-examination and rebuttal.

The reliability problem is not the only legal difficulty with hypnosis. Another problem is the constitutional right against self-incrimination. The question arises whether a prosecutor should have notice of the hypnosis.

Once notice becomes a requirement, the defendant might find himself in the awkward position of revealing to the prosecutor inculpatory statements made under hypnosis. The defendant may not even wish the prosecution to hear or discover exculpatory statements, as they might reveal other crimes or thwart more effective defenses. Thus there is a conflict between the defendant's right to avoid self-incrimination and his eagerness to enter exculpatory evidence into the record.

A potential solution may be the use of a counterexpert by the prosecution to rebut the defendant's expert. However, they may place an unfair burden on the prosecution since the defendant's expert will be able to testify about the actual hypnotic episode, while the prosecution will be forced to use hypothetical questions in the rebuttal. The jury is likely to attach more weight to an actual fact situation than to similar hypothetical situations missing certain ingredients.

Another way to prevent the self-incrimination dilemma is to state that since the admission of hypnotic testimony is a privilege that the defendant requests, the defendant could be said to waive all rights against self-incrimination concerning the hypnotic interview. Once again there remains the cruel choice of waiving fifth amendment rights

[4] Columbus Dispatch, June 17, 1962, § A, at 33, col. 1; at 35, col. 5.
[5] Harding v. State, 5 Md. App. 230, 246 A.2d 302 (1968).

or forever being prevented from using the hypnotic evidence. This dilemma rests once again on the prosecutor's being present at the interview. The issue is whether the prosecutor's presence assures credibility of the interview or is merely destructive of any defense. There may be a plausable alternative to both dilemmas:

> Permit the accused a private initial interrogation. If the result is inculpatory, let his attorney handle the matter as he would handle any other type of inculpatory information uncovered during his course of investigation.[6]

The inculpatory statement would be prevented from becoming public knowledge, but the exculpatory statements would be treated differently.

> If the result is exculpatory, require, as a condition of admissibility, that the prosecutor be given access to the defendant's expert and that the prosecutor be given an opportunity to interrogate the defendant with the assistance of the prosecution's own expert.[7]

A third problem arises when a hypnotic interview is undergone without the defendant being completely informed of his rights. The prosecution may be tempted to apply hypnosis to confused suspects before fully explaining alternatives. A Miranda type rule could eliminate this problem. The suspect would be quickly advised of his rights and then required to sign an acknowledgement of such notice. Any such interview with a fully informed suspect which bore inculpatory fruit would then be treated in the same manner as an acceptable confession. Once again, a recording should be made to prevent undue hypnotic suggestion being used to trap a suspect.

In summary, hypnosis has an unflattering heritage that prevents its popular acceptance by the courts, yet it can prove beneficial in a variety of ways. Proper application will at least provide leads to other caches of admissible evidence. The unbiased *witness* and *victim* are now able, more than ever, to enter their hypno-induced testimony. The difficulty lies with entering the hypno-induced statements of the defendant. However, this article has attempted to show that the legal arguments preventing such evidence being admitted are not insurmountable. The courts appear more reluctant to deny admission due to tradition than any basic rationale concerning hypnosis being unreliable. Courts are traditionally cautious in accepting new philosophies, but in specific instances the allowance of hypnotic testimony is far more rational than its denial. It is hoped that hypnosis will once again by tested by the courts, and a fresh potential source of evidence will be available to the attorney.

[6] The inculpatory statements should, therefore, be protected from disclosure by the expert to the prosecutor. Protection might be based on the attorney-client privilege. See McCormick, Evidence §100 (1954).
[7] 25 Ohio Law Journal 1, 35 (1964).