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# Hypnosis And The Law

by Paul A. Dorf

Hypnosis and the law have a rather tedious history. Courts all over the country consistently have held inadmissible statements of a defendant, made out of court, while under hypnosis. The rationale is not too difficult to comprehend. Critics of hypnosis as an investigative tool belittle its reliability. They will present cases in which evidence gained through hypnosis turned out to be unreliable. This reluctance to acceptance still may be fostered by antiquated notions. In short, hypnosis was once looked upon as a kind of vaudeville gag, or worse, as a demonic device to control a person's mind. And while reliability is a legitimate concern for hypnosis as an investigative tool, reliability should not preclude its total abandonment. More importantly, the issue of reliability alone should not feed the fires of a tainted perception of what hypnosis is and what it can accomplish.

Hypnosis has been defined both medically and judicially. Perhaps the most inclusive definition is one which is neither medical nor judicial: hypnosis is a sleep-like state that nevertheless permits a wide range of behavior response to stimulation.

## COCKTAIL CONVERSATION

Imagine yourself at one of those sobering cocktail parties. The food is cold, the drinks are warm, and the conversation concerns the social amenities of "Leave it to Beaver" reruns. What do you do? The answer is simple. Pick up a magazine and turn to the article on hypnosis and the law. For example, in *Time* magazine (9/13/76) there is an article describing the increase of hypnosis as an investigative tool. The article relates that the Los Angeles Police Department has worked with hypnosis since 1970. Noting its success, Psychologist Martin Reiser,

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er, head of the Los Angeles Police Department's behavioral sciences services, decided to set up a special hypnosis unit in 1975, the first one ever in the United States. The Captain of the police force who evaluated the work of the special unit found the results to be "utterly fantastic."

Another article in *Human Behavior* magazine, April, 1978, gives more details of Dr. Martin Reiser's exploits and his special unit's operational technique. In *U.S. News*, Vol. 85, dated 10/2/78, an article exclaims that the technique of hypnosis used for the recollection of crime witnesses was rarely used until a few years ago. Today it is being employed by more than 150 law enforcement agencies across the country and figures in perhaps 100 cases a year, mainly murders, kidnappings and rapes. The article concludes that hypnosis has been gaining acceptance despite strong opposition from defense attorneys and some medical experts. In 1972, the Israeli National Police Force established its own hypnosis unit. Its team of trained hypnotists has solved 25 cases and advanced the investigations in 60 more.

Even the *New York Times* has acknowledged hypnosis. In an article of a Sunday, August 19, 1979, edition, a big headline reads: "Cautious use of Investigative Hypnosis is Growing." The story quotes Dr. Martin T. Orne who illustrates why courts should be wary of accepting evidence obtained through hypnosis.

## THE MAIN COURSE

Although several cases featuring seduction abetted by hypnosis appeared earlier, the first known case in which hypnosis was used to develop evidence was the French prosecution of Gabriele Bompard, whose defense to a murder charge was that she had acted under an irresistible impulse implanted by the hypnotic suggestion of her lover. To prove her claim, she consented to be re-hypnotized and was examined while under hypnosis. Subsequently, the experts who had examined her decided adversely to her claim. The case is unreported but is discussed in Ladd, "Legal Aspects of Hypnotism," 11 Yale L.J. 173, 183, 187 (1902). The date of Bompard's case is unknown, but references to it appear as early as 1895.

The first known American case was *People v. Ebanks*, 117 Cal. 652, 49 P. 1049 (1897). In *Ebanks*, the defendant was charged with murder. After the alleged offense, the defendant was hypnotized and during hypnosis, he denied his guilt. The Supreme Court of California held that evidence of the defendant's statements made while he was in a hypnotic trance was inadmissible. Consequently, this edict developed into a "kind of precedent," i.e., the overwhelming weight of the cases hold that statements made by a defendant while under hypnosis

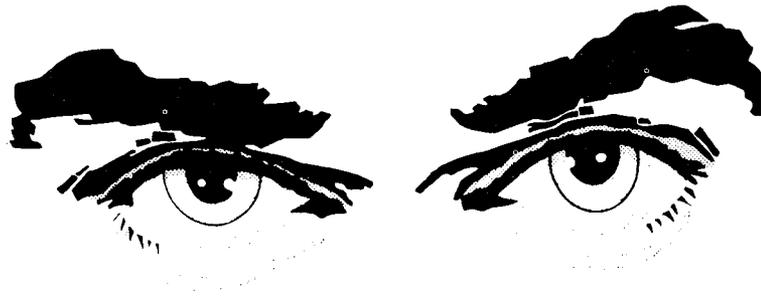
are inadmissible. This is true even if the statement was voluntary and was taken after the accused had willingly undergone hypnosis.

In recent years, however, hypnosis has won notable approval in New York, Michigan, California, Ohio, Pennsylvania, Maryland and British Columbia. California seems to be the forerunner in admitting hypnotically obtained evidence. The leading Maryland case is *Harding v. State*, 5 Md.App. 230, 246 A.2d 302 (1968). While under hypnosis the victim was able to recall events about her abduction, rape and shooting which she had previously been unable to recall. The *Harding* court, apparently trying to be forward-looking in its willingness to accept scientific methods of securing reliable evidence, assumed that: (1) because the victim stated that she was testifying from her own independent recollection which was subsequently refreshed by the hypnotic interlude, and (2) because the hypnotist stated that there were no suggestions, the witness was testifying from her original memory. The court therefore held that the evidence was both accurate and reliable.

In *Wyller v. Fairchild Hiller Corporation*, 503 F.2d 506 (9th Cir. 1974), the United States District Court for the District of Alaska allowed a helicopter passenger to testify regarding events surrounding the crash after he had been hypnotized in an effort to improve recollection. The theory behind the court's decision was that the witness was testifying from his present recollection, as refreshed by the hypnosis. Both the hypnotic procedure and the remembered facts were challenged by the defense. The court found that the issues raised by the defense went not to admissibility, but to the weight of the evidence and to the credibility of the witness. It was further found that the testimony of a previously hypnotized witness was not rendered "inherently untrustworthy" by virtue of hypnosis.

In *Kline v. Ford Motor Co., Inc.*, 523 F.2d 1067 (1975), the plaintiff, who suffered from retrograde amnesia from her injury, underwent hypnosis after her deposition but before the trial. She testified that the session of hypnosis revived her memory, and she testified to the events leading up to her accident. Ford Motor Company objected on the ground that the plaintiff was not competent as a witness to testify to facts recalled under hypnosis. The California court responded that competence refers to the condition of the witness at the time he or she is called to testify. The Court also could not accept the defendant's argument that plaintiff's testimony was rendered inherently untrustworthy by her having undergone hypnosis. The plaintiff testified from her present recollection, refreshed by treatments. Her credibility and the weight to be given such testimony were for the jury to determine.

The most recently reported case involving hypnosis is



*United States v. Adams*, 581 F.2d 193 (1978). The United States Court of Appeals for California succinctly summarized the law on hypnosis by noting that the fact of hypnosis affects credibility but not admissibility. Great care must be exercised to insure that statements after hypnosis are the product of the subject's own recollections, rather than of recall tainted by suggestions received while under hypnosis. Furthermore, the court concluded, the objection that in-court testimony of a witness who had earlier been subject to hypnosis is unreliable as a matter of law, rendering the witness legally incompetent to testify, is not sustainable.

The only case involving hypnosis that traveled as far as the Supreme Court is *Leyra v. Denno*, 347 U.S. 556 (1954). The Court did not actually confront the issue of hypnotism. Rather they stated that the manner of the defendant's confession, involuntarily and mentally coerced by a psychiatrist, was not consistent with constitutional notions of due process.

Probably the most spectacular use of hypnosis in developing evidence occurred in the unreported Ohio case of *State v. Nebb*, where by stipulation, the defendant was allowed to testify while in a hypnotic trance in the courtroom, although not in the presence of the jury. Persuaded that the defendant was telling the truth about the events surrounding the murder, the prosecution reduced the charges against him.

#### DESSERT

Hypnosis is not a "savior" for the trial process. Neither, however, should it be viewed with alarm or paranoia. It is a medical technique which is useful in a large variety of situations. Perhaps the attitude of the court in *Wyller, supra*, and *Kline, supra*, should be our beacon. Courts should pursue a more flexible case-by-case approach to the problem of admissibility of hypnotically induced evidence and abandon the old presumptions of inadmissibility. A hypnotized witness' credibility and reliability very well may be an issue for the jury to decide.