

Admissibility of Hypnotic Statements: Is the Law of Evidence Susceptible?

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I. INTRODUCTION

Hypnosis in modern theory has eluded precise definition. Nevertheless, the practice of hypnosis, whether by auto-suggestion or through the exertion of influence by one upon another, is as "old as human history and is nearly as wide-spread as the race itself."¹ In their primitive forms, hypnotic phenomena were seen in "sooth-saying, magic, healing by laying on of hands, and various forms of witchcraft and priestcraft."² Today hypnosis has become a powerful medical technique that is useful as an anesthetic, in the treatment of various forms of mental illness, and in the treatment of amnesia.

Hypnotic phenomena are common in everyday experiences, albeit rarely recognized as such. Examples include the lulling of an infant to sleep, advertising, and involvement with a spell-binding orator, a skillful advocate, or a good entertainer.³ Although each of these occurrences involves the superconcentrated state of mind that results in an increased susceptibility to suggestion that is typical of the hypnotic state, these occasions of indirect susceptibility are distinguishable from an induced hypnotic state. Under direct susceptibility, a person might respond fleetingly to a variety of suggestive stimuli, whereas in induced hypnosis, the suggestible state is purposefully created to permit the subject to be guided by the hypnotist. Under the influence of indirect suggestion, the subject is generally unaware of his unusually responsive condition, and therefore, may succumb to harmful suggestions. In induced hypnosis, however, the subject is aware of his vulnerability and remains capable of protecting himself from harmful suggestion.⁴

The modern era of hypnotism may be traced to 18th century Vienna, where Dr. Franz Anton Mesmer, convinced that a type of "animal magnetism" emanated from the hands of the hypnotist like electric current, ensconced groups of patients around a "baquet," a

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1. Ladd, *Legal Aspects of Hypnotism*, 11 YALE L.J. 173, 174 (1902).

2. *Id.*

3. See H. ARONS, HYPNOSIS IN CRIMINAL INVESTIGATIONS 16-20 (1967); Note, *Hypnosis as a Defense Tactic*, 1 TOL. L. REV. 691 (1969).

4. H. ARONS, *supra* note 3, at 14.

large circular tub of cold water filled with glass and iron filings, as a prelude to therapy. Iron rods protruding from the tub were touched to the afflicted parts of the patients' anatomy. As music pervaded the darkened treatment room, Mesmer appeared in flowing silken robes, and magnetized the tub by a touch of his hand, inducing "convulsive crises" in the patients.⁵

A vast amount of trained observation and experiment has focused upon hypnotic phenomena since the age of Mesmer. Particularly noteworthy is the late 18th century experimentation with psychological phenomena, and the World War II research in the treatment of "war neurosis."⁶ This interest culminated in 1958 after an extensive two-year study in endorsement of hypnotic techniques by the Council on Mental Health of the American Medical Association.⁷

Unfortunately, concomitant legal acknowledgment of the validity of hypnosis as a scientific technique has not been forthcoming. Some courts⁸ hearken back to the outmoded rigidity of the 19th century pronouncement that "the law of the United States does not recognize hypnotism."⁹ As long as hypnosis, however, continues increasingly to affect society as a therapeutic technique and as a phenomena of human conduct,¹⁰ courts cannot continue to retreat from its recognition. The courts must analytically appraise its merit and sanction innovative uses for hypnosis in judicial proceedings where appropriate.

This article attempts to dispel the fears of the legal community and to encourage the recognition of hypnosis as a valuable tool in the legal process. It describes the phenomenon of hypnosis in scientific terms, focusing on what it can and cannot do. Using this information as a background, the article then discusses the existing case law with regard to the admissibility of evidence adduced through hypnotic

5. G. ULETT & D. PETERSON, *APPLIED HYPNOSIS AND POSITIVE SUGGESTION* 7-8 (1965).

6. See H. CRASILNECK & J. HALL, *CLINICAL HYPNOSIS: PRINCIPLES AND APPLICATIONS* 5-11 (1975). This work contains a historical account of men and milestones significant in the development of hypnosis.

7. Council on Mental Health, *Medical Use of Hypnosis*, 168 J.A.M.A. 186, 187 (1958). The British Medical Association had officially endorsed hypnosis as a therapeutic technique in 1955. D. CHEEK & L. LECRON, *CLINICAL HYPNOTHERAPY* 19 (1968).

8. See, e.g., *State v. Pusch*, 77 N.D. 860, 46 N.W.2d 508 (1950) (evidence adduced under hypnosis deemed inadmissible simply because no jurisdiction had ruled it admissible); *Greenfield v. Commonwealth*, 214 Va. 710, 204 S.E.2d 414 (1974) (hypnotic evidence not admissible because self-serving and unreliable).

9. *People v. Ebanks*, 117 Cal. 652, 665, 49 P. 1049, 1053 (1897).

10. Hypnosis research is currently progressing at an ever-increasing rate, encompassing topics such as preconscious and unconscious processes, self-hypnosis, new clinical applications of hypnosis, and the personality of the hypnotist. A 1971 study noted that 295 independent research projects were being conducted at the time. Fromm, *Quo Vadis Hypnosis? Predictions of Future Trends in Hypnosis Research*, in *HYPNOSIS RESEARCH DEVELOPMENTS AND PERSPECTIVES* 575-86 (E. Fromm & R. Shor eds. 1972) [hereinafter cited as Fromm & Shor].

techniques and proposes expanded use of hypnotically induced testimony in the light of evolving evidence doctrine.

II. HYPNOSIS AS A SCIENCE

A. *The Hypnotic Process*

[T]here are the hereditary models which conceive of hypnosis as an inherited characteristic that reflects a phylogenetic and regressive group of qualities and traits. . . . There is a physiological model which conceives of hypnosis as a product of . . . the brain, such as areas of inhibition and areas of excitation, or the action of the reticular activating system. There is an internal environmental model which deals with the exchanges and interchanges of biochemical substances in the neural system throughout the brain. There is a learning model that conceives of hypnosis as a form of learning, like conditioning. There is a cultural social model which explains hypnosis in terms of contagious suggestibility and role-playing. There is a developmental motivational model which deals with various interpersonal and intrapsychic dimensions, such as dissociation and ontogenetic regression to earlier modes of thinking, feeling and behavior, involving an anachronistic revival of the child-parent relationship and related transference phenomena.¹¹

When a subject capable of entering deep hypnosis agrees to do so, it is possible for him, within what appears to be a few moments, to drastically alter his appearance, behavior, mannerisms, and responsiveness to the hypnotist. The remarkable range of alterations in behavior and memory that can be induced in most subjects has long intrigued and puzzled laypersons and professionals alike. Not surprisingly, the sheer drama of the phenomenon has resulted in innumerable claims regarding its potential benefit or harm, the methods through which it might be utilized to alter or improve mental functioning, and the danger that it might be abused in order to facilitate the process of one individual obtaining a fearful degree of control over another.¹² The study of hypnosis as a scientific phenomenon has not attained an advanced state of scientific development despite its widespread use and impact. In terms of clinical skill and practical application, much is known regarding the occurrence of hypnosis, but the art of its application still far outstrips its scientific elucidation.¹³

11. M. KLINE & L. WOLBERG, *THE NATURE OF HYPNOSIS: CONTEMPORARY THEORETICAL APPROACHES* 6 (1962).

12. Orne, *On the Simulating Subject as a Quasi-Control Group in Hypnosis Research: What, Why, and How*, in Fromm and Shor, *supra* note 10, at 399.

13. Fromm & Shor, *Underlying Theoretical Issues: An Introduction*, in Fromm & Shor, *supra* note 10, at 3-4.

Regardless of its acceptance by the American and British medical associations, hypnosis, like the specialty of psychiatry, lacks the property of quantification by units of measure that characterizes the physical sciences, and thus lacks appeal to the physician who fancies himself an applied scientist and who is prone to disregard as nonexistent or worthless those phenomena incapable of measurement by physical scales. Consequently, many physicians suffer

Although the definition of hypnosis is far from precise, it may be described as an alteration in consciousness and concentration,¹⁴ in which the subject manifests a heightened degree of suggestibility,¹⁵ while awareness is maintained.¹⁶

The phenomena observed in the hypnotized subject are believed to arise from the same influence of mind upon body that forms the basis for psychosomatic medicine. On the sensory side, belief affects perception; on the side of mentation, it affects orientation, memory, mood, use of mental mechanisms, ideation, and prejudice, upon all of which are based insight, judgment, and decision; and, finally, on the motor side, belief affects overt physical and physiological behavior.¹⁷

Suggestibility, the main element of the hypnotic state, may be characterized by the manner in which a subject responds to suggestions. Heuristically, hypnosis is that state or condition in which suggestions or cues from the hypnotist will elicit responses.

Hypnotic phenomena can operationally be distinguished from nonhypnotic responses only when suggestions are given that require the [subject] to distort his perception or memory. Accordingly, the hypnotized individual can be identified only by his ability to respond to suitable suggestions by appropriately altering any or all modalities of perception and memory.¹⁸

"There is an alteration of reality. If hallucinations are suggested, they seem real."¹⁹ Sexual fantasies are common, particularly in persons harboring repressed desires for sexual activity.²⁰ "The subject tends to relax spontaneously to a greater degree than possible voluntarily"; listlessness or lethargy is a prime sensation.²¹ Other generally recurring physical manifestations of hypnosis include flut-

ridicule at the hands of their colleagues in their utilization of hypnosis. This rejection might also be traced to the aura of "mysticism" which surrounds the lore of hypnosis.

14. Sheehan, *Hypnosis and the Manipulation of "Imagination,"* in Fromm & Shor, *supra* note 10, at 297.

15. G. ULETT & D. PETERSON, *supra* note 5, at 13.

16. D. CHEEK & L. LECRON, *supra* note 7, at 13. Another intriguing enunciation of the hypnotic process, premised on the psychological fusion of hypnotist and subject, is found in Kubie & Margolin, *The Process of Hypnotism and the Nature of the Hypnotic State*, in *THE NATURE OF HYPNOSIS* 217 (R. Shor & M. Orne eds. 1965).

17. G. ULETT & D. PETERSON, *supra* note 5, at 1-2.

18. Orne, *On the Simulating Subject as a Quasi-Control Group in Hypnosis Research: What, Why and How* in Fromm & Shor, *supra* note 10, at 400. One of the characteristics of the hypnotized person is an extraordinary degree of motivation to play the role of a hypnotized individual and carry out the requests of the hypnotist. See also Hartland, *An Alleged Case of Criminal Assault upon a Married Woman Under Hypnosis*, 16 *AM. J. CLINICAL HYPNOSIS* 188 (1974), where the author states that the heightened suggestibility that occurs is not the essence of the hypnotic state; rather, the hypnotic state is intimately intertwined with the relationship existing between the hypnotist and his subject, to whom hypnosis is generally a meaningful emotional experience.

19. D. CHEEK & L. LECRON, *supra* note 7, at 13.

20. W. BRYAN, *LEGAL ASPECTS OF HYPNOSIS* 157 (1962).

21. D. CHEEK & L. LECRON, *supra* note 7, at 13. Note, however, that some subjects remain in a rigid form of catalepsy during hypnosis. *Id.*

tering of the eyelids, which ceases as the subject is induced into a deepening of the trance, and, at least during the first induction, an increase in heartbeat and in the rate of breathing. This reaction is explained as a function of apprehension during the experience of a new sensation on the part of the subject.

The skilled operator utilizes induction techniques that render the transition from the working, conscious state to the hypnotic trance as gentle as possible. Conforming the induction to the subject's expectations arouses less anxiety, as does a setting of quiet relaxation, free from interruptions such as the telephone.

Rapport is the initial consideration. In the usual professional setting, this is often taken for granted, being conferred by the reputation of the therapist, the recommendations of a referring physician, and the appearance of a well-ordered and appropriate office setting. A few inquiries as to the patient's previous knowledge of hypnosis, fears, or expectations, may allay otherwise unexpressed anxieties and will strengthen the rapport between patient and therapist.

Before induction is begun, the therapist should explain the stages of hypnosis to the patient, assuring him that he may well remember everything that is said, for he is unlikely in the initial session to enter the deeper stages where spontaneous amnesia might occur. The therapist informs the patient that, contrary to popular thought, hypnosis is not like anesthesia. No one will "bludgeon" him into unconsciousness, nor is it a case of the therapist's "stronger" mind controlling his "weaker" one. It is a cooperative effort in which the therapist aids him by means of specialized knowledge and technique, to achieve a purpose which both have agreed upon as valid and worthwhile.²²

B. Hypnotic State

The hypnotic state may be separable into six depths, or levels, of trance.²³ Each level is distinguishable by a set of characteristic mental and physical acts that the subject is capable of performing at that level. The characteristic acts become more difficult to fake as the depth of the trance increases. In the first and second stages, the so-called "hypnoidal" stage or light trance, only localized catalepsies are demonstrated. For example, if the operator suggests that the subject will be unable to open his eyes, the subject will be unable to open his eyes. At this stage the subject experiences physical relaxation, often accompanied by fluttering of the eyelids, deep and slow breathing, and a progressive deepening of muscular lethargy. In the third and fourth stages, the so-called "medium" trance, the subject experiences various degrees of analgesia: though the sense of touch is retained,

22. H. CRASILNECK & J. HALL, *supra* note 6, at 46.

23. H. ARONS, *supra* note 3, at 137. Ability to ascertain the depth is essential, since certain information-eliciting techniques and verification procedures are dependent upon the stage of trance depth achieved by the subject. *Id.*

the subject feels no pain. Also in the fourth stage the subject will be incapable of remembering that which the operator suggests he will be unable to remember. In the fifth stage, a "deep" or "heavy" trance, the subject is capable of positive hallucinations upon suggestion and experiences neither touch nor pain. Finally, in the sixth stage of hypnosis, the subject is capable of negative hallucination: upon suggestion he is unable to perceive objects that are actually present.²⁴ It must be noted, however, that not all subjects are capable of achieving the deeper trance levels.

Hypnosis can be a crucial factor in the trial context where it is used to stimulate the recall on the part of a potential witness who claims amnesia for an event in question. For the purposes of this article three types of amnesia are important. *Congrade* amnesia involves total loss of recall of the event itself. *Retrograde* amnesia occurs when recall of events preceding the incident is impaired. *Anterograde* amnesia involves failure to recollect events occurring after the incident.²⁵

The most significant of the various hypnotic phenomena that are useful in restoring impaired memories are posthypnotic suggestion, age regression, and hypermnesia.²⁶ Posthypnotic suggestion involves compulsive enactment, subsequent to awakening, of suggestions supplied by the hypnotist during the trance. Posthypnotic suggestions are more likely to be performed where conscious reasoning by the subject is circumvented, as when the hypnotist implants an additional suggestion for amnesia regarding the suggestion relating to posthypnotic behavior. Illogical and bizarre behavior might be executed when amnesia for the suggestion is present. The subject tends to execute the suggestion literally,²⁷ and generally rationalizes an ex-

24. *Id.* See also H. CRASILNECK & J. HALL, *supra* note 6, 52-54; A. WEITZENHOEHLER, *HYPNOTISM* 9-11 (1963).

25. Milos, *Hypnotic Exploration of Amnesia After Cerebral Injuries*, 23 *INT'L J. CLINICAL & EXPERIMENTAL HYPNOSIS* 103 (1975).

26. See D. CHEEK & L. LECRON, *supra* note 7, at 47-54. Other intriguing phenomena, less pertinent in a legal sense include:

(1) Time distortion, whereby a subject, while in a deep trance mentally speeds the passage of time, "distorting it so that involved mental processes can be accomplished in a remarkably short time." *Id.* at 55-56;

(2) Hypnotic anesthesia whereby all perception of pain is dulled. *Id.* at 46-47.

(3) Hypnotic control of organic body functions, in which bodily changes such as acceleration or slowing of heartbeat, control of blood circulation as in bleeding, and lowering or elevating of body temperature and blood pressure may occur, apparently through the exertion of control over the autonomic nervous system. It should be noted, however, that concrete proof of this phenomenon remains to be established. *Id.* at 57.

27. Cheek and LeCron report a case in which, during a demonstration of hallucination of the sense of smell, a subject was told in deep hypnosis that he would "smell only perfume." This hallucination persisted when, upon his awakening from the trance, the subject reacted neutrally to ammonia. The hypnotist, however, neglected to remove the hallucination, so that the subject subsequently lost his ability to smell anything but perfume until the suggestion was removed. D. CHEEK & L. LECRON, *supra* note 7, at 48-49. See also H. CRASILNECK & J. HALL, *supra* note 6, at 47-48.

planation to account for such behavior.²⁸ Thus, the operator should frame "suggestions which are clear, accurate, and discretely limited to the purpose intended."²⁹ Inconsistent or confusing suggestions, which raise conflicts and anxiety in the subject, must be assiduously avoided.³⁰ The subject, however, may unconsciously refuse posthypnotic suggestion,³¹ or simply fail to respond. Clinicians observe that "[i]n hypnoidal, light, and medium stages of trance the subject may be aware of outside sounds and may recall all suggestions given."³² Such recollection is not characteristic of the deeper, somnambulistic stages, where the hypnotized person experiences posthypnotic amnesia, anesthesia, and analgesia, and "immediate self-reflective awareness is absent, as in sleep."³³

The efficacy of posthypnotic suggestion may be particularly crucial in the trial context, when the motivation for hypnotic induction is generally the stimulation of recall on the part of a potential witness who claims amnesia for the event in question. Recent studies demonstrate, however, that the ability of a hypnotized subject to respond positively to a posthypnotic suggestion for total recollection is not coterminous with hypnotic susceptibility itself. Thus, a person may successfully undergo hypnosis and be regressed to the point in time that is at issue, and in that state may vividly and convincingly recount the occurrence itself as well as surrounding circumstances. A posthypnotic suggestion, however, that attempts to blunt the impact of the pre-existing amnesia may prove fruitless, and the sub-

28. A young woman told during hypnosis in a demonstration context that she would, upon awakening, remove a shoe and place it atop a table adjacent to a vase of flowers, executed this suggestion posthypnotically. In response to an inquiry regarding her motives for this peculiar act, the woman explained that she had recently purchased a shoe-shaped vase, and had intended to experiment with flower arrangements for it. D. CHEEK & L. LECRON, *supra* note 7, at 47-48.

29. H. CRASILNECK & J. HALL, *supra* note 6, at 47. For example, Crasilneck and Hall describe a case wherein "a patient burned over 80% of his body was in severe negative nitrogen balance and rapidly losing weight." *Id.* An inexperienced therapist implanted the posthypnotic suggestion that he would be ravenous upon awakening, consuming "anything and everything" offered to him. Soon after awakening, the patient devoured an entire box of candy bars that a friend had brought him as a gift. "He consequently developed severe diarrhea, temporarily losing all the additional weight he had acquired." *Id.* at 48.

30. One neophyte therapist reported a case involving the treatment of plantar warts through hypnosis. In implanting the posthypnotic suggestion, the therapist erroneously mentioned the wrong foot, suggesting that the warts would diminish from the foot that was actually free of warts. "Although this inconsistency did not awaken the patient, when she was brought out of the trance, she had a hoarseness, apparently a hysterical symptom expressing both the desire to speak, to tell the therapist of his mistake, and the inability to do so because of the need to remain in the trance state." *Id.* at 47.

31. Susceptibility to suggestion and unconscious refusal is discussed in the text accompanying notes 38-59 *infra*.

32. H. CRASILNECK & J. HALL, *supra* note 6, at 53-54.

33. *Id.* at 54.

ject upon awakening may not be capable of recalling the events and perceptions detailed during his trance.³⁴

Age regression, one of the most intriguing and invaluable of hypnotic phenomena, may be either complete or partial in form. Both types of regression differ markedly from mere memory recall in that the subject actually relives an experience, psychologically and sensually.

Complete regression, also termed revivification, necessitates induction into a deep trance. A subject is told through suggestion that he is of a certain prior age, or he is regressed to a specific time or experience. He then manifests behavior characteristic of the suggested age, as though all time and development subsequent to the suggested age is obscured.³⁵ The subject, who is disoriented regarding where he is, will view the hypnotist as an anachronism.

In partial regression, by contrast, only a light trance is required, and the subject remains aware of where he is and of the identity of the operator. The suggested age or experience is relived, but perceived and understood with an adult viewpoint. Either form of regression induces a cathartic abreaction and discharge of the emotion sustained during the suggested age.³⁶

Hypermnesia is a function of the scientific premise that although all experience is stored in the memory wholly and in detail, conscious recall is restricted to a miniscule portion of total memory. These submerged memories might be tapped through regression. It is also possible to retrieve unremembered memories merely by suggesting their recall to a subject under hypnosis. Subjectively unimportant and minor details are not subject to recall through hypermnesia, and no cathartic abreaction is experienced by the subject.³⁷

C. *Susceptibility to Hypnotic Suggestion*

Hypnotic "susceptibility" must be distinguished from hypnotic "depth." Susceptibility refers to the subject's degree of responsive-

34. See Coe, *The Elusive Nature of Completing an Uncompleted Posthypnotic Suggestion*, 18 AM. J. CLINICAL HYPNOSIS 263 (1976); Coe, *A Further Evaluation of Responses to an Uncompleted Post-hypnotic Suggestion*, 15 AM. J. CLINICAL HYPNOSIS 223 (1973); Milos, *supra* note 25.

35. Verbal abilities, intelligence quotient, muscle coordination, and reflexes manifested are equivalent to those characteristic of behavior at the suggested age. For example, a subject regressed to the age of six will print childishly and misspell; a subject unaware of the existence of the Babinski reflex will display it when the sole of the foot is stroked upon regression to the age of three or four months. D. CHEEK & L. LECRON, *supra* note 7, at 50.

36. An interesting phenomenon of partial regression to a very early age occurs in that the subject reports statements made by persons present at the particular incident. Cheek and LeCron indicate that such reports may involve fantasy, but suggest that words uttered register in the subconscious mind as sounds, as though a tape recording were made. Although the sounds lack meaning at a very early age, they are interpreted when language is learned, and may then affect the individual. *Id.* at 52-53.

37. *Id.* at 54.

ness to the administered hypnotic suggestion; depth refers to the momentary state of the subject in a hypothesized dimensional level.³⁸ Contrary to prevalent myth,³⁹ the consensus of most scientists and physicians engaged in the research or the practice of hypnotic techniques is that the overwhelming majority of persons are "hypnotizable,"⁴⁰ or susceptible to hypnotic suggestion even on the first try. The exceptions are not strong-willed individuals—who generally are better subjects⁴¹—but rather very young children and flighty adults, both of whom are incapable of maintaining the requisite degree of concentration for any period of time.⁴²

Several tests are commonly used during the pre-induction phase in order to assess susceptibility. In the "postural sway" test the operator places himself either behind or in front of the subject, and while his hands are firmly planted on the subject's shoulders, he suggests to the subject that he is induced to sway either toward or away from the operator. A positive result indicates suggestibility.⁴³ The "hand levitation" test seeks to elicit the sensation that the individual's hand is becoming lighter and drifting upward.⁴⁴ The "hand clasping" test involves instructing the subject to clasp his hands together as though they were firmly interlocked. A positive test for susceptibility is noted when the subject is unable, absent a signal from the operator, to unclasp his hands, or does so only with great difficulty.⁴⁵ The "eye-

38. Tart, *Measuring the Depth of an Altered State of Consciousness, with Particular Reference to Self-Report Scales of Hypnotic Depth*, in Fromm & Shor, *supra* note 10, at 451. In 1959, the first of a series of "susceptibility scales," measuring potential suggestibility of a subject, were published. Research indicates that these scales are highly reliable and internally consistent. Cooper, *Hypnotic Amnesia*, in Fromm & Shor, *supra* note 10, at 217.

39. See, e.g., *Hypnotism Comes of Age*, 43 READER'S DIGEST 11, 14 (1943), condensed from Miller, LIBERTY MAGAZINE, Sept. 25, 1943, wherein it was stated: "[Y]ou cannot be hypnotized if you do not wish to be. Full cooperation is necessary. If you mistrust the operator, you simply remain wide awake. . . . While in a trance, you will never do or say anything which you would consider indecent or harmful." (Emphasis added).

40. It has been claimed that 90% of all persons are hypnotizable on first encounter, and nearly 100% offer no resistance at subsequent attempts. Only one person in eight, however, is capable of consistently attaining the deepest of trances. D. CHEEK & L. LECRON, *supra* note 7, at 20. See Hilgard, *Evidence for a Developmental-Interactive Theory of Hypnotic Susceptibility*, in Fromm & Shor, *supra* note 10, at 389.

41. D. CHEEK & L. LECRON, *supra* note 7, at 7. Cheek and LeCron also emphasize, as previously noted, that no loss of consciousness occurs, even when the subject is suspended in the deepest of trances. "The formally hypnotized subject is just as fully aware as persons in spontaneously occurring hypnotic-like states of daydreaming, shock and disorientation." *Id.*

42. Ladd, *supra* note 1, at 175. Successful hypnosis requires that the subject focus his concentration, and block all irrelevant stimuli. G. ULETT & D. PETERSON, *supra* note 5, at 13. Clinicians respond negatively to the inquiry whether a person might be trained to be a generally more responsive hypnotic subject. E. HILGARD & J. HILGARD, *HYPNOSIS IN THE RELIEF OF PAIN* 9 (1975).

43. H. CRASILNECK & J. HALL, *supra* note 6, at 43-44.

44. *Id.* at 44.

45. *Id.*

roll" test involves the subject's ability to simultaneously look upward while closing the eyelids, indicating hypnotizability.⁴⁶

Clinical studies demonstrate no perceptible difference between the sexes in terms of hypnotizability; similarly, no one race has been found to be more susceptible than another.⁴⁷ Educated adults who studied an area of liberal arts in college and children between the ages of six and twelve are the most susceptible to hypnotic suggestion. Thus, it has been theorized that hypnotizability is enhanced through a capacity for imaginative and adventuresome involvement. Originating early in life, this capacity has been nurtured and remained functional in adulthood through continuous involvement in activities such as reading, poetry, drama and religion.⁴⁸ Common traits of persons highly susceptible to hypnotic induction are summarized as follows: (1) curiosity linked with a penchant for the extraordinary and unique; (2) the ability to accept and value the hypnotist-operator as a guide and teacher; and (3) the ability to direct and focus concentrated attention.⁴⁹

Two pertinent inquiries with obvious legal import remain: first, whether the will of the subject may be overborne through unrelenting suggestion and manipulation on the part of the hypnotist; and second, whether a subject remains capable of fabricating or dissembling under hypnosis, and if so, whether such attempts to depart from veracity might be detected by the hypnotist.

In response to the former inquiry most clinicians and practitioners say that the hypnotist is unable to manipulate the subject's will.⁵⁰ Expressions of the will that originate from the individual character

46. Spiegel, *An Eye-Roll Test for Hypnotizability*, 15 AM. J. CLINICAL HYPNOSIS 25 (1972).

47. D. CHEEK & L. LeCRON, *supra* note 7, at 21. However, clinicians have observed a marked decline in hypnotizability in persons 85 years of age or older. Berg & Melin, *Hypnotic Susceptibility in Old Age: Some Data from Residential Homes for Old People*, 23 INT'L J. CLINICAL & EXPERIMENTAL HYPNOSIS 184 (1975).

48. Diamond & Taft, *The Role Played by Ego Permissiveness and Imagery in Hypnotic Responsivity*, 23 INT'L J. CLINICAL & EXPERIMENTAL HYPNOSIS 130 (1975).

It must be noted that bursts of imagination are not incompatible with concentrated control. For example, a poet might give expression to deep emotion while conforming to restrictions imposed by the selected meter. Hilgard, *Evidence for a Developmental-Interactive Theory of Hypnotic Susceptibility*, in Fromm & Shor, *supra* note 10, at 388-90. By contrast, in terms of gauging the effect of competitiveness upon hypnotizability, it was found that competitive athletes in the team sports such as baseball, football, and basketball proved less susceptible to hypnotic suggestion than athletes who preferred individual skill sports such as boating, skiing, riding and swimming. *Id.* at 393.

49. Hilgard, *Imaginative Involvement: Some Characteristics of the Highly Hypnotizable and the Non-Hypnotizable*, 22 INT'L J. CLINICAL & EXPERIMENTAL HYPNOSIS 138 (1974). Interestingly, Hilgard posits an association between severe childhood discipline and subsequent susceptibility. *Id.* at 139. See generally Orne, *The Nature of Hypnosis: Artifact and Essence*, 58 J. ABNORMAL SOC. PSYCH. 277 (1959); Reyher & Wilson, *The Induction of Hypnosis: Indirect v. Direct Methods and the Role of Anxiety*, 15 AM. J. CLINICAL HYPNOSIS 229 (1973); Spiegel, *The Grade 5 Syndrome: The Highly Hypnotizable Person*, 22 INT'L J. CLINICAL & EXPERIMENTAL HYPNOSIS 303 (1974).

50. See, e.g., D. CHEEK & L. LeCRON, *supra* note 7, at 7.

of the subject retain the deepest of psychological interests for him. If a suggestion from the hypnotist is counter to some latent, but more powerful idea or suggestion already dominating the unconscious, it may be refused. It must be recalled that hypnosis is, in actuality, a cooperative interaction between two persons, one of whom—the subject—permits himself to experience the situation in terms selected by the hypnotist. Any attempt on the part of the operator to abuse the situation severs the contact, allowing the subject to spontaneously terminate the trance. Habit and education remain crucial factors.⁵¹

The hypnotist, however, may induce a subject to accept a suggestion based upon a false premise; the subject would then reason deductively and respond as though the premise were true, although he would refuse a direct suggestion to the same effect. For example, a subject induced to steal a watch would refuse; if suggested to him that the watch was indeed his own possession, however, the subject would accept and retain it.⁵²

In response to the second inquiry, the consensus of informed opinion is that a subject under hypnosis can deceive if sufficiently motivated to do so.⁵³ At least three variables are relevant. The subject may feign induction into the hypnotic state, a truly hypnotized, cooperative subject may commingle fantasy with fact, and the truly hypnotized subject may deliberately dissemble where his interests dictate that such is the most propitious course of action.

It is not possible reliably to distinguish hypnotized from simulating subjects in all cases; however, the skillful hypnotist cautiously integrates safeguards against simulation into his induction techniques. For example, the concept of hypnotic depth designates the range of phenomena that can be experienced. Analgesia is experienced by the subject only after a medium trance level has been attained, so that a reflex response to a pin prick by a subject feigning a deep trance

51. Allen, *Hypnotism and its Legal Import*, 12 CAN. B. REV. 14, 17 (1934); H. CRASILENECK & J. HALL, *supra* note 6, at 312-13.

52. Allen, *supra* note 51, at 17-18. Allen concludes that a subject will not accept every hypnotic suggestion unqualifiedly:

[I]t is a fundamental error to believe that the hypnotized is under a complete dependence on the hypnotist. This dependence is a relative one, and is encumbered by all sorts of conditions. Suggestion means a sort of tournament between the dynamisms of two brains; the one gains the mastery over the other up to a certain point, but only under the condition that it deals adroitly and delicately with the other, that it stimulates and uses its inclinations skillfully, and above all things, that it does not make its dealings go against the grain. 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 suggester and the suggestee. The hypnotized is not merely a tool in the hands of the operator, but on the contrary his will is liable to manifest itself at odd and unexpected places, depending on the personality of the particular subject.

Id. at 18 (footnotes omitted).

53. See, e.g., Levitt & Chapman, *Hypnosis as a Research Method*, in Fromm & Shor, *supra* note 10, at 109.

indicates simulation.⁵⁴ Similarly, a deep hypnosis is ascertainable where the subject manifests a spontaneous tolerance of incongruity. A subject requested to touch a hallucinated person might spontaneously describe a peculiarly rubbery feeling, as though he were able to feel through the hallucinated person, or a subject told to hallucinate a person sitting in a chair might report his ability to view the person, while the outline of the chair remains visible through the hallucination. The reliability of these tests are naturally limited as they rely solely on reports by the subject of his internal subjective state. Hopefully, "[a]s physiological correlates of hypnosis can be defined, the question may become clearer."⁵⁵

The degree of reliability attributable to the behavior of the truly hypnotized, cooperative individual is most difficult to ascertain, even for the skilled hypnotist. The hypnotic state induces communication with the unconscious mind of the subject and a combination of delusion, fantasy and reality may be harbored therein.⁵⁶ The very suggestibility of the subject, which permits induction into hypnosis, also provides interpretive difficulties. The hypnotized subject may respond to implicit stimuli unintentionally emanating from the hypnotist, and unrecognized by him.⁵⁷ The desire to please the hypnotist may induce the subject to mirror the attitude detected in the hypnotist's questions and his behavior.⁵⁸ A further complicating factor involves the subject's own beliefs and expectations regarding the appropriate behavior for hypnotized individuals.⁵⁹ In conclusion, then, if the hypnotist is unaware of the source of the response, or is not cognizant of its significance to the subject, any conclusions drawn regarding the reliability or veracity of the response might be inaccurate and misleading.

D. *Medical and Scientific Utilization of Hypnosis*

The medicine and voodoo practitioners of primitive society are thought to have used hypnosis to cure, to frighten, or simply to demonstrate their awesome powers. As recently as seventy-five years ago hypnotism was viewed as a bizarre, almost demonic, form of

54. H. ARONS, *supra* note 3, at 138-41.

55. H. CRASILNECK & J. HALL, *supra* note 6, at 29.

56. Brum, *Retrograde Amnesia In A Murder Suspect*, 10 AM. J. CLINICAL HYPNOSIS 209 (1968).

57. L. LECRON, *A Study of Age Regression under Hypnosis*, in EXPERIMENTAL HYPNOSIS 70-75 (1954).

58. For example, a subject might confess to a crime if the hypnotist's questions unintentionally implied guilt.

59. For example, subjects who were led to believe in an experiment that unilateral catalepsy of the hand is a hallmark of hypnosis tended to display this item of behavior when subsequently hypnotized. Orne, *On the Simulating Subject as a Quasi-Control Group in Hypnosis Research: What, Why and How* in Fromm & Shor, *supra* note 10, at 403. See also E. Greenleaf, *Defining Hypnosis During Hypnotherapy*, 22 INT'L J. CLINICAL & EXPERIMENTAL HYPNOSIS 120 (1974).

entertainment. Svengali-like, the hypnotist claimed uncanny powers tantamount to wizardry, and freely wielded his skills for the price of an admission to his stage work.⁶⁰

Advances in scientific research have removed hypnotism from the realm of carnival diversion. Hypnosis is now primarily valuable for psychotherapeutic purposes, evidenced by its widespread use in psychiatric cases, where it has proven itself an invaluable tool for exploration of causes, modifications of attitudes, and diminution of symptoms.⁶¹ It has been labelled a psychic analgesic with real value in the control of pain.⁶² Moreover, its value in removing preoperative as well as postoperative anxiety and complications is a generally accepted fact, demonstrated by widespread use in obstetrics,⁶³ surgery,⁶⁴ dentistry,⁶⁵ and in the broad field of psychosomatic disorders.⁶⁶

III. HYPNOSIS AND THE LEGAL PROCESS

In contrast to its rapid advancement and use in modern medical science, the law has accorded hypnosis scant recognition. Case law is meager⁶⁷ and often devoid of legal reasoning or analysis. Only recently have a few jurisdictions overcome their resistance and commenced the process of inquiry and re-evaluation that hypnosis, as a developing phenomenon of human conduct, necessitates.

A. Hypnosis as an Investigatory Tool

Age regression and other hypnotic techniques are not unfamiliar to police who use them to retrieve forgotten information from witnesses to crime,⁶⁸ such as the license number of an automobile used by a

60. W. BRYAN, *supra* note 20, at ix.

61. See H. CRASILNECK & J. HALL, *supra* note 6, at 223-47.

62. See generally *id.* at 71-78.

63. See generally D. CHEEK & L. LECRON, *supra* note 7, at 123-36; H. CRASILNECK & J. HALL, *supra* note 6, at 253-63.

64. See generally D. CHEEK & L. LECRON, *supra* note 7, at 153-72; H. CRASILNECK & J. HALL, *supra* note 6, at 91-105.

65. See generally D. CHEEK & L. LECRON, *supra* note 7, at 212-21; H. CRASILNECK & J. HALL, *supra* note 6, at 295-302.

66. See generally H. CRASILNECK & J. HALL, *supra* note 6, at 117-41. Hypnosis is also utilized in certain investigations of various physiological systems, primarily the cardio-vascular, the gastrointestinal, and the sensory, but including also renal, respiratory and endocrine systems. The general procedure involves using the trance to create an artificial state in the subject so that appropriate physiological measurements can be made. Levitt & Chapman, *Hypnosis as a Research Method*, in Fromm & Shor, *supra* note 10, at 110. As a research technique, hypnosis is employed in the study of areas such as emotions, psychopathology, defense mechanisms, dreams, physiological processes, and test validation. The most frequent use of hypnosis in research is in the artificial induction of emotional and psychopathological states. *Id.* at 112.

67. In the period between 1915-1950, only one reported American case involved any aspect of hypnosis.

68. See H. ARONS, *supra* note 3, at 34-48. Such use presupposes the consent of all individuals involved.

criminal. A dramatic demonstration of the utility of hypnosis as an investigatory device recently achieved national attention. A busload of 26 California school children was waylaid by three armed masked men in a white van. The driver and children were buried in an underground ditch, from which they later escaped. The bus driver underwent hypnosis in an effort to recall details that would aid in identifying the abductors, and subsequently was able to recall all but one digit of the license plate number of the white van, leading to the kidnappers' apprehension.⁶⁹

An attorney, consulted by an accused who claims total loss of recollection, might desire to avail himself of hypnosis in order to elicit pertinent facts from his client to enable the attorney to prepare a defense. Under these circumstances, the attorney in *Cornell v. Superior Court of San Diego*⁷⁰ sought a writ of mandamus to compel the court and sheriff to permit him with the aid of a hypnotist to examine his incarcerated client, who was charged with murder and unable to recall the events of the evening in question due to intoxication. The writ was granted, the court holding that an accused's right to effective consultation with his attorney encompassed the right to consult with the aid of a hypnotist. The court said 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."⁷¹

The use of hypnosis as an investigatory tool falls within discovery procedures and does not in itself raise the question of the admissibility of statements elicited thereby. Therefore, use of hypnotic examination by the defense as a detective device for the exaction of clues or relevant facts should be accorded judicial recognition in all similar cases.⁷²

69. *Time*, Sept. 13, 1976, at 56. The article further states: "The Los Angeles Police Force trains selected officers in hypnotic techniques and has formed a special hypnosis unit, the Svengali Squad. The Israeli National Police Force extensively utilizes hypnosis, particularly in investigating terrorist activities." *Id.*

70. 52 Cal. 2d 99, 338 P.2d 447 (1959).

71. *Id.* at 103, 338 P.2d at 449. The facts elicited during the subsequent hypnotic interrogation led to the formulation of the defense theory that the defendant had picked up the victim in a bar, and while both were exceedingly intoxicated, drove to a secluded spot with the victim, and promptly passed out. The victim left the auto, but tripped in her drunken state and fell behind the defendant's car. Upon awakening, defendant assumed that the victim had deserted him and inadvertently backed his car over her sleeping body. The defendant was convicted of second degree manslaughter, rather than murder. The expert who conducted the hypnotic examination concluded that defendant "was convicted not of homicide, but of being drunk and running around on his wife." W. BRYAN, *supra* note 20, at 59-62.

72. The holding of *State ex rel. Sheppard v. Koblentz*, 174 Ohio St. 120, 187 N.E.2d 40 (1962), wherein F. Lee Bailey attempted to compel permission to examine his client, Dr. Sam Sheppard, with the aid of hypnotist, is *contra* to *Cornell*. The Ohio court, in refusing to compel such examination as encompassed within the right to consultation with one's attorney, did not even cite *Cornell*. Perhaps the fact that the *Cornell* examination was a pretrial request, whereas Sheppard's conviction had already been affirmed by the highest court of Ohio, serves to distinguish the two cases.

B. Hypnosis As an Inquisitional Device

In criminal cases, fifth and fourteenth amendment objections impede introduction by the prosecution of hypno-induced statements of the defendant, as well as their fruits.⁷³ Confessions obtained under conditions analogous to hypnosis—during sleep,⁷⁴ by a clairvoyant,⁷⁵ or under narco-synthesis⁷⁶—have been excluded because they were found violative of due process and of the privilege against self-incrimination. Even statements elicited from a defendant under hypnosis which tend to exculpate him from guilt have been excluded, although judicial reasoning therefor has proven somewhat less than intellectually satisfying.⁷⁷

Two cases involving analogous circumstances amply illustrate the constitutional obstacles with which the practice of eliciting confessions from a defendant through use of hypnosis is fraught. In a Canadian case, *Rex v. Booher*,⁷⁸ the defendant was suspected of murder, but the murder weapon, a gun, could not be found. The Crown employed Dr. Langsner, an individual who claimed to be capable of obtaining information by extraordinary means, to interrogate the defendant. Subsequent to his first session with the defendant, the doctor travelled to the scene of the murder and located the missing rifle. After several subsequent visits to the defendant, the doctor informed the detectives that a confession was anticipated. Within a few minutes, the defendant indeed confessed. The court held this confession inadmissible on the ground that the Crown had failed to discharge the onus placed upon it to establish that the defendant was not under the influence of hypnotic suggestion administered by Dr. Langsner.

*People v. Leyra*⁷⁹ involved a claim that a state-employed psychiatrist had, while purportedly examining the defendant, hypnotized him and coerced the defendant to confess to the murders of his elderly mother and father.

73. A proposal sponsored by the Dutch authorities at the turn of the century would have permitted police to interrogate murder suspects under hypnotic influence in order to glean clues. Any statements made by the suspects would have been inadmissible, but this taint would not extend to derivative evidence. This scheme was subsequently abandoned. *Hypnotism and the Law*, 95 LAW TIMES 500 (1893); see also 23 WASH. L. REP. 534, 535 (1895).

74. *People v. Robinson*, 19 Cal. 41, 42 (1861).

75. *State v. Strong*, 83 N.J.L. 177, 187, 83 A. 506, 510 (1912).

76. *Townsend v. Sain*, 372 U.S. 293 (1963); *People v. Johnson*, 32 Cal. App. 3d 988, 109 Cal. Rptr. 118 (1973); *People v. Heirens*, 4 Ill. 2d 131, 122 N.E.2d 231 (1954) (dictum).

77. *People v. Ebanks*, 117 Cal. 652, 49 P. 1049 (1897) (American legal system does not recognize hypnosis); *State v. Pusch*, 77 N.D. 860, 46 N.W.2d 508 (1950) (statements made under hypnosis inadmissible because no jurisdiction had yet deemed such statements admissible).

78. 4 D.L.R. 795 (1928), reported in S. Levy, *Hypnosis and Legal Immutability*, 46 J. CRIM. L.C. & P.S. 333, 342 (1955).

79. 302 N.Y. 353, 98 N.E.2d 553 (1951).

The New York Court of Appeals reversed⁸⁰ the conviction and the defendant was retried. Confessions made to other persons, subsequent to the interview with the doctor, were admitted, and the defendant was convicted. This conviction was upheld,⁸¹ and the defendant brought an action for habeas corpus that was denied.⁸² The United States Supreme Court reversed the court of appeals,⁸³ although not confronting the issue of hypnotism, on the ground that all statements by the defendant uttered subsequent to the "psychiatric treatment" were involuntary and mentally coerced.⁸⁴

C. Hypnosis and the Trial Process

Until very recently, the impact of hypnosis upon the law of evidence was miniscule; the phenomenon was judicially ignored because it was reputed to be merely a device for ascertaining truth and detecting deception. The rationale underlying this virtually unqualified rejection of evidence elicited or developed through the use of hypnosis parallels the reasons behind the exclusion of evidence obtained through the use of the polygraph⁸⁵ and narcoanalysis (truth serum);⁸⁶ that is, lack of reliability and lack of scientific acceptance. No scientific practice or experiment can be incorporated into the

80. *Id.* at 366-67, 98 N.E.2d at 561.

81. 304 N.Y. 468, 108 N.E.2d 673 (1952).

82. *Leyra v. Denno*, 208 F.2d 605 (2d Cir.), *rev'd*, 347 U.S. 556 (1954).

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

84.

First, an already physically and emotionally exhausted suspect's ability to resist interrogation was broken to *almost trance-like submission* by the use of the arts of a highly skilled psychiatrist [with considerable knowledge of hypnosis]. Then the confession petitioner began making to the psychiatrist was filled in and perfected by additional statements given in rapid succession to a police officer, a trusted friend, and two state prosecutors. We hold that use of confessions extracted in such a manner from a lone defendant unprotected by counsel is not consistent with due process of law as required by our Constitution.

Id. at 561 (emphasis added).

85. *United States v. Alexander*, 526 F.2d 161 (8th Cir. 1975); *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923); *People v. Leone*, 25 N.Y.2d 511, 255 N.E.2d 696, 307 N.Y.S. 2d 430 (1969). *But see* *State v. Dorsey*, 88 N.M. 184, 539 P.2d 204 (1975).

Polygraph results are generally admitted upon stipulation of the parties. *State v. Valdez*, 91 Ariz. 274, 371 P.2d 894 (1962); *Codie v. State*, 313 So.2d 754 (Fla. 1975); *People v. Oswald*, 26 Ill. App. 3d 224, 324 N.E.2d 666 (1975) (dictum). Courts have also permitted consideration of results as an aid in the determination of certain motions. *People v. Barbara*, 255 N.W.2d 171 (Mich. 1977). *See also* Skolnick, *Scientific Theory and Scientific Evidence: An Analysis of Lie Detection*, 70 YALE L.J. 694 (1961); Tarlow, *Admissibility of Polygraph Evidence in 1975: An Aid in Determining Credibility in a Perjury Plagued System*, 26 HASTINGS L.J. 917 (1975); Note, *The Emergence of the Polygraph at Trial*, 73 COLUM. L. REV. 1120 (1973); Note, *Polygraphy: Short Circuit to Truth?*, 29 U. FLA. L. REV. 286 (1977).

86. *People v. McNichol*, 100 Cal. App. 544, 224 P.2d 21 (1950); *People v. Harper*, 111 Ill. App. 2d 204, 250 N.E.2d (1969); *Orange v. Commonwealth*, 191 Va. 423, 61 S.E.2d 267 (1950). *See also* Geis, *In Scopolamine Veritas*, 50 J. CRIM. L.C. & P.S. 347 (1959); Moenssens, *Narco-analysis in Law Enforcement*, 52 J. CRIM. L.C. & P.S. 453 (1961); Muchlberger, *Interrogation Under Drug Influence*, 42 J. CRIM. L.C. & P.S. 513 (1951).

process of proof unless demonstrated to be scientifically sound enough to command general approval of its reliability by experts practicing in the pertinent scientific branch. Most authorities agree that a general rule of reliability of the veracity of statements elicited during hypnosis cannot be formulated.⁸⁷

The foundation of this judicial hostility is the fear that the trier of fact will accord uncritical and absolute reliability to a scientific device without consideration of its flaws in ascertaining veracity. Jurors are continually called upon to evaluate credibility, based on their common experience, but it is not within jurors' common experience to assess the reliability of scientific practices or devices.

Psychologists, who have been scrutinizing the various phenomena of testimony since the turn of the century, maintain that psychological expertise is necessary during the course of a trial to aid the trier of fact in assessing credibility of witnesses.⁸⁸ It is contended that the expert is equipped to evaluate any individual person's perceptual and mnemonic accuracy under specified conditions, as well as to appraise the effect of certain clinical conditions—such as psychosis, mental deficiency, drug addiction, alcoholism, personality disorders and certain forms of psychoneurosis—on testimonial capacity.⁸⁹ Experts are also equipped to judge whether testimonial lapses are attributable to deliberate fabrication or to normal malfunctioning of the witness' faculties.

The law has traditionally minimized the effectiveness of experts who seek to estimate the reliability of a witness' testimony. Courts generally refuse to admit the proffered testimony of a witness-psychologist, and in so doing dramatically reinforce the assumption that the device of cross-examination adequately serves to "detect wilfully false testimony . . . [and to bring] to light errors of perception, defects of memory and deficiencies of narration."⁹⁰

87. See, e.g., Ladd, *supra* note 1, at 187-88.

88. See S. FREUD, *Psycholanalysis and the Ascertainment of Truth in Court of Law*, in 2 COLLECTED PAPERS 13 (1906), cited in Slovenko, *Witnesses, Psychiatry and the Credibility of Testimony*, 19 U. FLA. L. REV. 1, 6-7 (1966); A. TRANKEL, *RELIABILITY OF EVIDENCE* 67-165 (1972).

89. See, e.g., Buckout, *Psychology and Eyewitness Identification*, 2 LAW & PSYCH. REV. 75, 90-91 (1976) [hereinafter cited as *Psychology and Eyewitness Identification*]; Buckout, *Eyewitness-Testimony*, 15 JURIMETRICS J. 171, 186 (1975) [hereinafter cited as *Eyewitness Testimony*]; Marshall, Marquis & Oskamp, *Effects of Kind of Questions and Atmosphere of Interrogation on Accuracy and Completeness of Testimony*, 84 HARV. L. REV. 1620 (1971); Saxe, *Psychiatry, Psychoanalysis, and Credibility of Witnesses*, 45 NOTRE DAME LAW. 238, 238-40 (1970); Slovenko, *supra* note 88, at 5-16. Weinstein, *Some Difficulties in Devising Rules for Determining Truth in Judicial Trials*, 66 COLUM L. REV. 223 (1966).

90. Morgan, *The Relation Between Hearsay and Preserved Memory*, 40 HARV. L. REV. 712 (1927). See, e.g., *United States v. Amaral*, 488 F.2d 1148 (9th Cir. 1973); *State v. Driver*, 88 W. Va. 479, 107 S.E. 189 (1921). But see *United States v. Hiss*, 88 F. Supp. 559 (S.D.N.Y. 1950); *State v. Redmond*, 75 Wash. 2d 62, 448 P.2d 938 (1968).

Psychologists counter this assumption regarding the efficacy of cross-examination by noting that the method of interrogation used may cause the witness to feel attacked and abused. This kind of interrogation may force the witness to defend his perception and memory of the event and elicit defense mechanisms that make the witness appear more assertive and confident than the accuracy of his testimony may warrant. To avoid such excessive and unwarranted reliance on cross-examination, courts should be rather liberal in evaluating the probative value of expert testimony relating to the credibility of a witness.

Conceptual bars to judicial recognition of hypnosis as a valid evidentiary technique evolve from the courts' negative assessment of hypnotic processes as a reliable indicator of veracity. Unfortunately, hypnosis has become linked in the minds of courts⁹¹ and commentators⁹² with the polygraph and narcoanalysis as a technique for mechanically ascertaining the truth of the witness' testimony. Requiring hypnosis to perform a truth-determinant function, however, distorts the scientific process and aborts its potential benefit to litigation. The value of hypnosis lies in its scientifically-established reliability as a device for retrieving relevant testimony previously forgotten or psychologically suppressed, *regardless* of the factual truth or falsity of that testimony.

Factual accuracy of testimony is not an inflexible requirement for admissibility. Psychologists concur in their estimation that eye-witness testimony is often factually inaccurate and unreliable, being riddled with fantasy, prejudice, misperception, and bias.⁹³ Yet such testimony is routinely admitted for jurors' consideration because it is insulated to some degree from the dangers of ambiguity, erroneous recall, flawed perception, and prevarication by the enforcement of procedural safeguards, such as opportunity for cross-examination. Regarding hypnosis as merely a device that aids the procurement of testimony and offers no guarantees concerning its factual accuracy would permit the development of concomitant procedural safeguards. Thus, the admissibility of relevant testimony that might be otherwise unattainable would be assured, while the integrity of the judicial process would be unimpaired.

91. See, e.g., *People v. Harper*, 111 Ill. App. 2d 204, 250 N.E.2d 5 (1969); *Greenfield v. Commonwealth*, 214 Va. 710, 204 S.E.2d 414 (1974).

92. See, e.g., Herman, *The Use of Hypno-Induced Statements in Criminal Cases*, 25 OHIO ST. L.J. 1 (1964); Note, *Hypnosis, Truth Drugs, and the Polygraph: An Analysis of Their Use and Acceptance by the Courts*, 21 U. FLA. L. REV. 541 (1969).

93. See, e.g., *Eyewitness Testimony*, *supra* note 89; Loftus, *Reconstructing Memory: The Incredible Eyewitness*, 15 JURIMETRICS J. 188 (1975); Stewart, *Perception, Memory, and Hearsay: A Criticism of Present Law and the Proposed Federal Rules of Evidence*, 1970 UTAH L. REV. 1.

IV. THE USE OF HYPNOSIS TO STIMULATE THE RECOLLECTION OF WITNESSES

A recurring problem posed in litigation is the situation in which a witness suffers a lapse of memory while testifying.⁹⁴ After some initial confusion,⁹⁵ the common law eventually recognized that the proponent of the witness might utilize a panoply of techniques in an attempt to revive his witness' faltering recollection.⁹⁶ The most common methods for stimulating recollection involve the process of association, propounding leading questions, or offering the witness a memorandum to peruse.⁹⁷ It is hoped that the question or the memorandum will spur the witness' recollection, thereby enabling him to testify from his own memory.⁹⁸

This process is not entirely free from evidentiary dangers. The major risk is that the witness' memory is not actually revived. Instead, he simply may agree with his attorney's leading questions or with the data contained in the memorandum. A secondary problem, not as well recognized, is that the witness may sincerely assert that he "remembers" without actually recalling the incident.⁹⁹ Nevertheless, courts liberally permit a witness' memory to be refreshed because two procedural safeguards exist. First, the trial judge retains authority to determine, as a preliminary question, whether the witness' recollection is actually refreshed, and to decline permission for use of a refresher if the value of the question or memorandum or other object is overbalanced by the danger of undue suggestion. Second, the adverse party is entitled to inspect any aid utilized to stimulate the wit-

94. See generally MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 9, at 14-19 (2d ed. 1972) [hereinafter cited MCCORMICK]; 3 J. WIGMORE, EVIDENCE §§ 758-63 (Chadbourn rev. ed. 1970).

95. There was a period of confusion when the courts tended to require the same safeguards used in admitting a memorandum of the witness' past recollection and using the memorandum to refresh the witness' present recollection. These are now always recognized as two distinct phenomena. Maguire and Quick, *Testimony, Memory and Memoranda*, 3 How. L.J. 1 (1957). Compare FED. R. EVID. 612 with FED. R. EVID. 803(5).

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

97. In theory anything that actually refreshes a witness' memory may be used. Some courts have waxed poetic, declaring that the refresher could be "a song, or a face, or a newspaper item," *Jewitt v. United States*, 15 F.2d 955, 956 (9th Cir. 1926) or "the creaking of a hinge, the whistling of a tune, the smell of seaweed, the sight of an old photograph, the taste of nutmeg, the touch of a piece of canvas." *Fanelli v. United States Gypsum Co.*, 141 F.2d 216, 217 (2d Cir. 1944).

98. This universally recognized psychological phenomena is called the law of association and involves principles of contiguity and similarity. See the still-fascinating discussion in Hutchins & Slesinger, *Some Observations on the Law of Evidence—Memory*, 41 HARV. L. REV. 860 (1928).

99. "[T]he genuineness of the feeling [of remembering] is no guaranty of the correctness of the image recalled." MCCORMICK, *supra* note 94, § 9 at 16. See Hutchins & Slesinger, *supra* note 98. The problems of memory and perception are extensively discussed in the psychological literature. See, e.g., A. RICHARDSON, *MENTAL IMAGERY* (1969); J. ADAMS, *HUMAN MEMORY* (1967).

ness' memory, as well as to base his cross-examination of the witness on that aid.¹⁰⁰

Courts that have had occasion to discuss the question have generally proven amenable to permitting the testimony of a witness whose amnesia for the event at issue has been dispelled through pretrial use of hypnosis.¹⁰¹ The fact that the testimony is retrieved through the hypnotic process has been deemed a factor pertinent to the credibility of the witness, to be evaluated by the trier of fact, rather than a question of admissibility of the evidence, so long as certain factors are present: (1) the witness relates the facts surrounding the occurrence from present memory; (2) the operator details the induction technique employed and verifies its reliability; and (3) the opponent is afforded, through cross-examination, the opportunity to probe the reliability of the present memory as well as the procedures used to evoke it. Implicit in this procedure is the notion that a memory restored by the device of hypnosis is equal in validity to a memory revived through the use of any recognized technique, such as subjecting the witness to leading questions or requesting him to peruse a particular document, and is therefore indistinguishable from the latter in legal effect.

100. See FED. R. EVID. 612.

101. *Kline v. Ford Motor Co., Inc.*, 523 F.2d 1067 (9th Cir. 1975); *Wyller v. Fairchild Hiller Corp.*, 503 F.2d 506 (9th Cir. 1974); *Harding v. State*, 5 Md. App. 230, 246 A.2d 302, cert. denied, 395 U.S. 949 (1968); *State v. Brom*, 8 Or. App. 598, 494 P.2d 434 (1972); *State v. Jorgensen*, 8 Or. App. 1, 492 P.2d 312 (1972). *Contra*, *Austin v. Barker*, 110 App. Div. 510, 96 N.Y.S. 814 (1906).

Kline, *Wyller*, and *Harding* involved witnesses whose pretrial amnesia was a consequence of the trauma attendant to the occurrence that formed the basis for the litigation. In *Kline* and *Wyller*, the witnesses were victims of an automobile and helicopter crash, respectively; the prosecutrix in *Harding* had been shot, raped and abandoned on a lonely road. *Brom* and *Jorgensen* were companion cases in which the defendants were convicted, with the aid of two key witnesses, of the murder of two young persons. One witness, although not present during the murders, had accompanied the defendants during most of the evening on which the homicides occurred, and suffered a loss of memory as a result of the subsequent traumatic events. The second witness, who testified that one defendant had made statements in her presence that implicated him in the homicides, had suffered from mental problems both prior to and during the trial.

The facts of *Austin*, a civil action for seduction, clarify the court's refusal to credit the testimony of the refreshed witness. The sole evidence of defendant's involvement with plaintiff's daughter was the daughter's testimony that, due to defendant's hypnotic influence over her, she remembered nothing regarding acts of intercourse until some weeks after she delivered a healthy offspring. Her memory of defendant's sexual advances was allegedly revived during a visit by her father's attorney, although no evidence regarding the procedures or techniques used by the attorney to awaken the witness' memory was adduced. Moreover, two expert witnesses called by plaintiff expressed skepticism that the girl could have been so readily induced to blot from her memory the acts of intercourse, particularly since she stated during her testimony that her contact with defendant constituted her first sexual experience. In these circumstances, particularly in the absence of a trained and experienced operator capable of elucidating the procedures used to restore the lost memory, the court's reversal of a verdict for plaintiff due to insufficient evidence is tenable.

A. *Perception and Memory of Witnesses in the Trial Context Generally*

The reason for permitting a witness plagued by erratic recollection to jog his memory while on the stand is that "certain stimuli start a chain of associations which, apparently, have been completely forgotten."¹⁰² The external stimulant enables the witness to recall instantaneously the facts surrounding the occurrence in question, and to testify accordingly from his present memory of those facts. The objective accuracy of this testimony, as that of any witness' testimony, assuming that the witness is not impelled to fabricate, is dependent upon a number of factors. The most significant of these include the witness' ability to precisely perceive, remember, and articulate the transaction in question. But the vagaries attendant to the exercise of these respective human faculties is well documented in both legal and scientific literature.¹⁰³ Despite the disproportionate concern evidenced by the law for calculated and deliberate falsification, many authorities identify unwitting distortions in perception, memory, and articulation as the primary source of testimonial conflict and flawed verdicts.¹⁰⁴

Perception and memory are the product of an intricate blend of neurological, psychological, and physiological processes. Both perception and memory are profoundly affected by behavioral and motivational factors that distort the raw data to be perceived and remembered.¹⁰⁵ Experimental psychologists concur in the conclusion

102. Hutchins & Slesinger, *supra* note 98, at 861. See A. TRANKEL, *supra* note 88, at 21-22.

103. See, e.g., T. OLSHEWSKY, *PROBLEMS IN THE PHILOSOPHY OF LANGUAGE* (1969); R. REIFF & M. SCHEERER, *MEMORY AND HYPNOTIC AGE REGRESSION* (1959); Gardner, *The Perception and Memory of Witnesses*, 18 CORNELL L.Q. 391 (1933); Kubie, *Implications for Legal Procedure of the Fallibility of Human Memory*, 108 U. PA. L. REV. 59 (1959); Levine & Tapp, *The Psychology of Criminal Identification: The Gap from Wade to Kirby*, 121 U. PA. L. REV. 1079 (1973); Lezak, *Some Psychological Limitations on Witness Reliability*, 20 WAYNE L. REV. 117 (1973); Marshall, *Evidence, Psychology, and the Trial: Some Challenges to the Law*, 63 COLUM. L. REV. 197 (1963); Redmount, *The Psychological Basis for Evidence Practices: Memory*, 50 J. CRIM. L.C. & P.S. 249 (1959).

104. A. TRANKEL, *supra* note 88, at 170-72; Kubie, *supra* note 103, at 59; Lezak, *supra* note 103, at 117-19; Levine & Tapp, *supra* note 103, at 1082; Marshall, *supra* note 103, at 197.

105. Human inability to comprehensively and categorically reconstruct events is poignantly noted by Carl Sandburg:

Do you solemnly swear before the ever-living God that the testimony you are about to give in this cause shall be the truth, the whole truth, and nothing but the truth?

No, I don't. I can tell you what I saw and what I heard and I'll swear to that by the ever-living God but the more I study about it the more sure I am that nobody but the ever-living God knows the whole truth and if you summoned Christ as a witness in this case what He would tell you would burn your insides with the pity and mystery of it.

C. SANDBURG, *THE PEOPLE*, YES 197 (1936).

Thucydides noted that the fallibility of human perception, memory, and articulation is reflected in "a want of coincidence between accounts of the same occurrences by different eye-witnesses, arising sometimes from imperfect memory, sometimes from undue partiality for one side or the other." THUCYDIDES, 1 COMPLETE WRITINGS 14 (Modern Library ed. 1951). Of course, the operation of perception and memory is also substantially influenced by physical factors, such as pathology, injury, particular organic body states, drugs, alcohol, youth and

that perception is largely dependent upon data previously in the mind of the perceiver, for unbeknownst to the individual, his interpretation of external stimuli is selectively limited to his prior experiences.¹⁰⁶

We see that which interests us and we become aware of details we have earlier learned to discern. This explains the profound difference we often find between descriptions of one and the same event, even though it was observed by the witnesses under equal external conditions. Already in the moment of perception the observations become colored by the observer's personal experiences; they are sifted from details the observer does not recognize and also in other ways formed by the individuality of the registering instrument.¹⁰⁷

Also operative is a "logical completion mechanism," that aids the perceiver to fill in with appropriate material the gaps that occur as a result of his arbitrary selection of signals from the universe of stimuli.¹⁰⁸ The perceiver strives to combine the fragments into chains of events that are logically acceptable and understandable, although the relation of these chains to the actual occurrence may be tenuous.¹⁰⁹ An illustration of this phenomenon is as follows. A taxi travelling a busy street was forced to make an emergency stop. The passenger observed that the car in front had abruptly stopped, and that an elderly man lay unconscious on the street. The passenger believed that the man had either fallen out or had been thrown out through the open door. In fact, however, the car in front had braked suddenly to avoid hitting the elderly man, who had wandered into the intersection. The unavoidable collision had knocked the man to the ground. The passenger had in actuality perceived only the unconscious man on the ground and the open door of the car. These fragmentary impressions were then integrated into a logical sequence that, although acceptable to the passenger, were unrelated to the actual occurrence.¹¹⁰

senility. Lezak, *supra* note 103, at 121-26; Stewart, *supra* note 93, at 9. Additionally, several recent studies indicate that women tend to absorb more physical information than do men, and may be more apt to code this information in terms of psychological inferences. Levine & Tapp, *supra* note 103, at 1102.

106. See, e.g., Gibson, *The Theory of Information Pickup*, in CONTEMPORARY THEORY AND RESEARCH IN VISUAL PERCEPTION 662 (R. Haber ed. 1968); Treisman & Geffen, *Selective Attention: Perception or Response?* in INFORMATION-PROCESSING APPROACHES TO VISUAL PERCEPTION 373 (R. Haber ed. 1969).

107. A. TRANKEL, *supra* note 88, at 17.

It has been demonstrated that training has some effect on perception, so that the trainee perceives more accurately that which he has been trained to perceive. A study comparing the ability of police to that of perceptually untrained persons to perceive details in pictures containing neutral details as well as crime-related elements—such as weapons, a person running, and a police car—showed the police to be superior in identifying crime-related details, but equal to the lay persons in perceiving neutral details. Lezak, *supra* note 103, at 127.

108. A. TRANKEL, *supra* note 88, at 18; Marshall, *supra* note 103, at 207-08.

109. A. TRANKEL, *supra* note 88, at 18.

110. *Id.* Professor Buckout reports studies wherein persons who were shown rough,

Attitudes, preferences, biases and expectations also influence the perceptual interpretation of data.¹¹¹ A classic experiment illustrates the influence of this factor. Observers were shown a display of playing cards for several seconds and asked to report the number of aces of spades in the display. Most observers reported only three, although the display contained five. Two of the aces of spades were colored red, and these remained unperceived by those who expected the more familiar color, black.¹¹²

Since one's memory of an event can be no more accurate than one's initial perception of it, memory necessarily evidences a highly idiosyncratic quality,¹¹³ and is influenced by the learning and the emotional processes.¹¹⁴ Memory, like perception, is a selective process in that an incident that is experienced is not merely filed into a memory bank to await future retrieval. Rather, at the time the event is recalled, it is reconstructed with the aid of the initial perception of the event, knowledge acquired prior to the event, inferences drawn subsequent to the event, and the emotional impact of the event.¹¹⁵ "Over a period of time, information from these sources may integrate, so that [an individual] becomes unable to specify how he knows some particular detail. To him, there is only a single memory."¹¹⁶

The distortions of memory images, which occur prior to this reconstruction process, are of several types. The phenomena of proactive and retroactive inhibition occur when an individual attempts to recall an incident that occurred as a link in a chain of similar events. The preceding events in the chain affect one's ability to accurately reconstruct subsequent events. This effect is called proactive inhibition. Similarly, retroactive inhibition influences one's ability to recount an event in view of subsequent observations and experiences.¹¹⁷ According to the classic formulation of retroactive inhibition, "forgetting is not so much a matter of the decay of old impressions and

incomplete triangles later reported that they had perceived symmetrical, equilateral triangles. *Eyewitness Testimony*, *supra* note 89, at 178.

111. A. TRANKEL, *supra* note 88, at 19-20.

112. *Psychology and Eyewitness Identification*, *supra* note 89, at 80. Professor Buckout catalogues additional factors that influence perception: the degree of significance attached to the event observed; the length of the observation period; and the degree of stress or fear that the observer is subjected to. *Id.* at 77-82.

113. Lezak, *supra* note 103, at 128; Redmount, *supra* note 103, at 259.

114. Marshall, *supra* note 103, at 211; Redmount, *supra* note 103, at 253.

115. Loftus, *Unconscious Transference in Eyewitness Identification*, 2 LAW & PSYCH REV. 93, 97 (1976).

116. *Id.* In retrieving information, the process of "recall" operates in addition to the aforementioned process of "reconstruction." Thus, an individual is able to match an answer, a figure, a face, or a scene to one of a presented set. Clinical studies tend to prove information retrieved through recall somewhat more accurate than that gained through reconstruction; however, neither type of memory produces a high degree of reliable information. Lezak, *supra* note 103, at 131-32; Marshall, Marquis, & Oskamp, *supra* note 89, at 1629.

117. A. TRANKEL, *supra* note 88, at 22.

associations as it is a matter of the interference, inhibition, or obliteration of the old by the new."¹¹⁸ The processes of leveling, sharpening, and assimilation produce memory images of occurrences that often consist of simplified versions of the original chain of events. Details and actors whose significance is deemed trivial are eliminated.¹¹⁹ The images focus on certain selected stimuli, and are replenished by material necessary to render the chain of events coherent and meaningful, regardless of whether such material is part of the initial perception.¹²⁰ Details are imported, transposed, and glossed in order to comport with expectation and experience.¹²¹

Articulation is the process by which the incident perceived and reconstructed is translated from mental image to communication. Distortion may occur in two ways. The use of words may prompt the narrator to verbally sketch in missing details, or the words used may fail to convey the degree of clarity or preciseness in which the narrator holds the image.¹²² In either case, the conversion from image to words may result in the integration of the image into the language used to describe it. In effect, what remains in the mind of the narrator is no longer the abstract image, but merely the label and the description attached to it during the process of verbalization.¹²³

The array of complexities inherent in the attempt to glean accurate information, while relying upon the functioning of errant human faculties, encourages support for the courts' responsiveness to testimony retrieved through pretrial hypnotic induction. A witness whose memory has been refreshed through hypnosis may be able to recount an observed event more fully and accurately than any other witness. For example, the process of revivification¹²⁴ permits the witness to re-experience an incident when the event initially occurred. Although the potential for perceptual blunders remains unaffected—for the re-

118. Redmount, *supra* note 103, at 253-54. A detailed experimental example, in which the subjects learned nonsense syllables for recall at a later time, is contained in Jenkins & Dallenbach, *Oblivescence During Sleep and Waking*, 35 AM. J. PSYCH. 605 (1924).

119. Leveling is described in G. ALLPORT & L. POSTMAN, *THE PSYCHOLOGY OF RUMOR* 80-81 (1947).

120. *Id.* at 86.

121. *Id.* at 100-04. Thus, things are perceived and remembered as they generally are, despite a contrary stimulus. For example, a Red Cross ambulance is recalled as carrying medical supplies rather than explosives. Stewart, *supra* note 93, at 21.

122. Hutchins & Slesinger, *supra* note 98, at 867. The classic example involves the statement, "it was raining that day and I wore my rubbers." Whether the narrator specifically recalls both facts, or recalls only one and infers the other from it, or infers both facts from third, unarticulated observation—e.g., the sidewalks were wet, or pedestrians carried open umbrellas—is not ascertainable from the statement. *Id.* See also Marshall, *supra* note 103, at 217.

123. "Once however, the image becomes words, it takes on all colors of the words, and becomes retroactively clear, sharply defined, and complete." Hutchins & Slesinger, *supra* note 98, at 867.

124. See text accompanying note 35 *supra*.

gressed witness may fail to discern certain details, may misinterpret others, and may persist in imprecise articulation¹²⁵—distortions that typically occur through the exercise of memory are precluded.¹²⁶ Where the processes of partial regression¹²⁷ or hypermnesia¹²⁸ are the hypnotic stimulant, the testimony of the witness whose recollection has been so revived presents no more potential for inaccuracy due to the disabilities of perception, memory, and articulation than that of any witness.

B. *Problems Peculiar to the Introduction of Hypno-Induced Statements*

The use of hypnotic processes to stimulate recollection also generates additional problems that may influence the reliability of the forthcoming testimony. These include: the prospect that the state of heightened suggestibility in which the hypnotized subject is suspended will produce distortion; the possibility that the hypnotized subject will deliberately fabricate; and the likelihood that the jury will accord undue significance to hypno-induced testimony.

1. *Suggestibility*

In any interrogation situation, the danger exists that the person under inquiry will attempt to conform the information he transmits to what he discerns to be the expectations of the questioner.¹²⁹ The degree of suggestibility to which any particular person will prove susceptible in an interrogation is dependent upon a number of factors.¹³⁰ Perhaps most significant is the level of respect that the questioned person maintains for authority figures generally, and courts

125. Language difficulties may be even more pronounced when the witness has been age regressed to a quite tender age, for the regressed witness may not be verbally equipped to articulate all that he perceives.

126. R. REIFF & M. SCHEERER, *supra* note 103, at 52-53.

127. *See* text accompanying note 36 *supra*.

128. *See* text accompanying note 37 *supra*.

129. Professor Trankel articulates the effect of preconceptions upon the questioning technique utilized by the interrogator. The questioner is generally thoroughly familiar with the pertinent facts, and has formulated a theory regarding the role of the interrogated person in the development of these facts. The examiner is therefore likely, whether deliberately or not, to premise his questions on his own assumptions regarding the subject of the inquiry. Thus, the examiner more readily picks up data which supports his own hypotheses than information which is in disagreement. The examiner is similarly influenced in his interpretation of the data elicited; that which contradicts his own theory is interpreted as lies or evasions, while he assimilates even neutral pieces of information that tend to be supportive. An additional factor is that an interrogation that confirms the interrogator's theory generates feelings of triumph, while discordant information engenders frustration and disappointment. The interrogator, therefore, maintains a personal interest in confirming the theories he initially settles on. A. TRANKEL, *supra* note 88, at 25-26.

130. *See* A. TRANKEL, *supra* note 88, at 26-27; *Psychology and Eyewitness Identification*, *supra* note 89, at 85-87; Marshall, *supra* note 103, at 213-14.

and police in particular.¹³¹ Also influential is the strength of one's desire to conform to the viewpoints and perceptions of the majority, and to appear reliable in one's own observations. The repetition and frequency of a suggestion, as well as bias or self-interest on the part of the interrogated person are also factors affecting susceptibility to suggestion.

The trial context is replete with confrontations between the interrogator and the interrogated, during which the suggestible person is subject to manipulation. Initial encounters with police, insurance agents, or one's own attorney may result in an unwitting alteration of the original memory. In these situations, the nature of the inquiry can predetermine the response. Once verbalization occurs, it may displace original sense impressions and memory, so that the witness subsequently bases his responses on the oral account, convinced that it originated in his own observations. It has been demonstrated, for example, that varying even one word in a single question can, dramatically and systematically, alter the initial account of an occurrence.¹³² Although cross-examination may dissipate the impact of the witness' suggestibility to some extent, this process of propounding leading questions in anticipation of a particular response also wields a suggestive power over testimony that is "well-nigh fatal."¹³³

131. The import of this factor may be tempered by an evaluation of whether the person under inquiry is "personality-oriented," or "content-oriented." The former depends upon cues from those in authority, from whom psychological support is derived; the latter rely on cues found in the "phenomena of the problems which they face." Marshall, *supra* note 103, at 214.

132. Professor Loftus reports an experiment wherein 100 students viewed a brief film depicting a multiple automobile accident, and then completed written questionnaires describing the occurrence. Each questionnaire contained three key items; half of the subjects were asked three questions beginning with the words *Did you see a*, as in "Did you see a broken headlight?" The remaining students were asked three identical questions, substituting the article *the*, as in "Did you see the broken headlight?" Professor Loftus reasoned that an examiner used the word *the* when he assumed the existence of the object and its familiarity to the person questioned. This assumption, not present when the neutral article *a* is used, might influence an examinee. Although all three crucial questions concerned items nonexistent in the film, a significantly higher proportion of subjects that were asked "Did you see *the* . . ." responded affirmatively.

In another experiment, Professor Loftus demonstrated that the substitution of one word for another could affect quantitative judgments. After viewing the same film, some subjects were asked to estimate the speed of cars when they "hit" one another. For others, "hit" was replaced by more descriptive verbs, such as "smashed" or "collided." The estimates varied markedly; those subjects responding to the more descriptive terms indicated much higher estimates of speed. Moreover, this group was more likely to recall that the film portrayed broken glass, although the film actually showed none. Loftus, *supra* note 93, at 190-92.

133. Stern, *The Psychology of Testimony*, 34 J. ABNORMAL & SOC. PSYCH. 3, 8 (1939). The Stern articles are cited by Marshall, Marquis & Oskamp, *supra* note 89, at 1621, who concluded, on the basis of their study, that cross-examination and a number of other courtroom practices function less well than is usually assumed.

Consider the potential for the tainting of a witness' testimony by undue suggestiveness that inheres in the method traditionally employed to refresh recollection. The perplexed witness is supplied with a memorandum that contains the unremembered information, or some other article that suggests it, and then is permitted to declare that his memory is wholly restored, often with respect to dates, precise quantities, or exact sums. Yet in all these instances, although the trial court retains power to exclude testimony influenced by inordinate

The dangers attributable to a witness' suggestibility are aggravated when the witness' memory is refreshed through pretrial hypnotic induction; the essence of which is the heightened suggestibility of the subject and the forming of a bond between the subject and the operator.¹³⁴ The subsequent opportunity for cross-examination at the trial is virtually ineffective as a means of assuring that no false suggestions have been implanted. The subject who accepts a posthypnotic suggestion to forget certain aspects of the hypnotic procedure will generally remain unaware of the source of crucial statements he makes while testifying.

In order to neutralize, to some degree, the risk that the memory of the witness has been tampered with during the process of refreshment, the operator who induced the trance must be required to lay a foundation as a prelude to introduction of the witness' testimony. After stating his qualifications,¹³⁵ the operator would explain the etiology of the amnesia suffered by the subject, and detail the procedures utilized to induce trance and to ascertain continuation of the desired hypnotic trance depth.¹³⁶ His opinion of the reliability of the technique as a device for retrieving forgotten information would be elicited, and be subject to probing cross-examination. The operator would also offer his opinion of whether the witness' recollection was actually restored during hypnosis. This procedure is analogous to permitting the opponent to inspect the memorandum or other article ordinarily used to stimulate a forgetful witness' memory, and to use the refresher as a basis for cross-examination of the refreshed witness. The opponent is thereby accorded an opportunity to probe the techniques by which the memory of the witness was revitalized and to cross-examine the hypnotist regarding the scientific validity of the

suggestiveness, courts generally deem the opportunity for cross-examination an adequate safeguard.

134. See note 18 and text accompanying notes 57-59 *supra*. The potential for improperly influencing a suggestible subject during the hypnotic process would be minimized by utilization of an impartial court-appointed hypnotist. See Note, *Hypnosis in Court: A Memory Aid for Witnesses*, 1 GA. L. REV. 268, 287-90 (1967). Federal law and most state statutes would accommodate such a procedure, see, e.g., FED. R. CIV. P. 35 and ILL. REV. STAT. ch. 38, § 115-6 (1973). Its adoption would assure that indigent litigants could obtain the services of a hypnotist, but we question the wisdom of limiting a party's choice of experts. Particularly during hypnotic induction, a relationship of absolute trust and confidence between operator and subject is vital to the success of the procedure. The subject may find it easier to relate to an operator selected by himself or his attorney. Moreover, the opportunity to select the operator allows the party to ascertain his competence, qualifications, and the effectiveness of the techniques he uses.

135. Standards regarding the degree of training or experience necessary to qualify a hypnotist as an expert are identical to those that ordinarily obtain for other disciplines. *Harding v. State*, 5 Md. App. 230, 246 A.2d 302, *cert. denied*, 395 U.S. 949 (1968). Although a hypnotist's credentials and experience might be found too minimal to permit his testimony to be considered by the jurors, see, e.g., *People v. Busch*, 56 Cal. 2d 868, 366 P.2d 314, 16 Cal. Rptr. 898 (1961) and *United States v. Miller*, 411 F.2d 825 (2d Cir. 1969), questions of qualification generally refer to the weight of the expert testimony.

136. See, e.g., W. BRYAN, *supra* note 20, at 246.

procedures utilized, as well as any basis for bias on the part of the operator. Requiring that the operator submit information authenticating the hypnotic processes through an adversarial examination reduces the potential that the refreshed witness' memory has been tainted by the implantation of impermissible suggestion, to no more than that which is ordinarily tolerated during pretrial witness preparation or interrogation sessions.¹³⁷

✓ 2. *Deliberate Fabrication*

In addition to being susceptible to the mingling of fact with fantasy and the commonplace distortion attendant to the exercise of perception and memory, subjects can deliberately deceive under hypnosis. Although procedures exist that serve as checks to assure that the subject remains in the trance state and relates "fact" as the subject has perceived it, even the most skilled operator cannot infallibly distinguish the truthful, hypnotized subject from the prevaricating, simulating one.¹³⁸ The concern that perjured testimony might be thereby encouraged is trivialized, however, in view of two considerations.

First, proper instruction of the jury regarding the nature and function of hypnosis eliminates the motive for dissembling while in a trance state. The jurors must be cautioned that hypnosis is merely an implement for reviving amnesiac witnesses, but is ineffective to compel them to utter "truth." Assessment of the credibility of each witness remains a jury function. Thus, it avails a witness nothing to fabricate his account of an occurrence during a hypnotic session, and then attempt to introduce the fact of induction to bolster his trial testimony. Hypnotic induction becomes superfluous to the witness bent on deception.

Second, the bias or self-interest of the hypnotized subject provides the same motive for distortion, or shading, of an account of an occurrence as generally exists in nonhypnotized witnesses. Cross-examination, fear of a perjury prosecution, and aspects of the trial environment such as the sanctity of the oath and the solemnity of the proceedings remain effective instruments for deterring falsity in both contexts.

3. *Undue Weight Accorded Hypno-Induced Testimony*

Courts have remained reluctant to permit, over the objection of a party, consideration by the trier of fact of oral testimony induced

137. See generally Levine & Tapp, *supra* note 103. That the perceptions and memories of many witnesses are altered through suggestion and coaching during pretrial preparation by the attorney offering the witness is well recognized. See, e.g., Marshall, *supra* note 103, at 213.

138. See generally text accompanying notes 53-56 *supra* and authorities cited therein. See also W. BRYAN, *supra* note 20, at 246.

through the aid of scientific processes. This skepticism is partially explained by the aversion of judges to injecting dehumanizing factors into the trial process by procuring oral testimony through the use of drugs, machines and trances. Also, courts are concerned that jurors might be preempted in their evaluation of credibility when evidence involving a scientific process is introduced to buttress the reliability of a witness. This danger is considered so serious that even cautionary instructions are deemed an inadequate safeguard. One court commented on this concern as follows:

When polygraph evidence is offered in evidence at trial, it is likely to be shrouded with an aura of near infallibility, akin to the ancient oracle of Delphi. During the course of laying the evidentiary foundation at trial, the polygraphist will present his own assessment of the test's reliability which will generally be well in excess of 90 percent. He will also present physical evidence, in the form of the polygram, to enable him to advert the jury's attention to various recorded physiological responses which tend to support his conclusion. Based upon the presentment of this particular form of scientific evidence, present-day jurors, despite their sophistication and increased educational levels and intellectual capacities, are still likely to give significant, if not conclusive, weight to a polygraphist's opinion as to whether the defendant is being truthful or deceitful in his response to a question bearing on a dispositive issue in a criminal case.¹³⁹

This concern is somewhat mitigated, however, when the fact that a witness has undergone hypnosis is introduced only as foundation evidence, which is a prelude to permitting the witness to testify from his own recollection.¹⁴⁰ The law has usually proceeded upon the theory that jurors are endowed with sophistication sufficient to enable them to discriminately choose the permissible use for a piece of evidence from among several impermissible uses. Forceful instruction regarding the proper role of hypnosis as a memory aid rather than as an indicator of truth should adequately safeguard the jury's ability to gauge credibility.¹⁴¹

139. *United States v. Alexander*, 526 F.2d 161, 168 (8th Cir. 1975).

140. The nature of hypnosis renders it the most efficacious procedure for retrieving forgotten data. The polygraph functions on the premise that a specific relationship exists between an emotional state and a contemporaneous autonomic discharge. Thus, the machine measures autonomic reactions in order to determine the truth of the response which triggered them. See authorities cited in note 85 *supra*. Narcoanalysis, on the other hand, is utilized to restore recollection and, as such, the testimony is admissible. See, e.g., *Sallee v. Ashlock*, 438 S.W.2d 538 (Ky. 1969); *Lemmon v. Denver and Rio Grande R.R.*, 9 Utah 2d 195, 341 P.2d 215 (1959). However, the procedure also bears directly upon the ascertainment of truth to a large extent, for the administration of drugs serves to depress the conscious mind of the subject, so that distorting or concealing facts involves too great an effort, and remembering previous accounts given of those facts is virtually impossible. See authorities cited in note 86 *supra*.

141. For example, the jury might be instructed as follows:

You have heard the testimony of a witness whose memory was restored when [s]he underwent hypnosis. You have also heard the testimony of the expert regarding the effectiveness of hypnosis as a means of restoring lost memories. The fact that a witness has been hypnotized does not bear in any way on his credibility, and does not entitle

One intriguing aspect of this problem remains: are there any circumstances in which the amnesiac witness should be hypnotized and subjected to interrogation in the courtroom? Although there exists some precedent for permitting in-court induction¹⁴² and testimony¹⁴³ of a witness suffering from amnesia, no significant benefit to the adversary system is to be gained from in-court hypnotic sessions. An exception may be when the witness suffers a lapse of memory on the witness stand. Induction should be permitted, out of the presence of the jury, to revive his remembrance through induction.

The prospect of a witness undergoing trance induction in the courtroom and testifying while hypnotized is fraught with the hazard that the jurors may become so mesmerized by the sheer drama of the spectacle that cautionary instructions would prove ineffectual.¹⁴⁴ Moreover, although questioning the witness while under hypnosis might expose the suggestibility problems inherent in hypnotic induction, thereby allowing a more cogent evaluation of this aspect by the jury, this gain is illusory. The attorney who is aware of the fact that his witness is plagued by either partial or total amnesia would certainly attempt to restore the memory prior to trial, rather than permit the witness to be hypnotized for the first time at trial in the presence of the jury. Once hypnosis is utilized before the trial, the

his testimony to any particular weight. The testimony of a witness who has been hypnotized must still be evaluated and weighed by you very carefully. You are the sole judges of the facts of this case, and that includes the reliability of each and every witness, and the weight to be placed on the testimony of each.

142. In *Regina v. Pitt*, 68 D.L.R.2d 513 (1967), the Supreme Court of British Columbia permitted a defendant accused of the attempted murder of her husband to undergo hypnosis in the presence of the jury so that the posthypnotic suggestion for her recall of the event could be implanted. The accused was permitted to testify only from her present recollection revived, not while in a hypnotic trance.

143. Possibly the most spectacular utilization of hypnosis to elicit testimony occurred in a bizarre unreported Ohio case, *State v. Nebb*, No. 39, 540 (Ohio C.P., Franklin County, May 28, 1962). The defendant, charged with murder, testified by stipulation while under a hypnotic trance in the courtroom. The jury had been previously excused, and the psychiatrist who induced the hypnosis in the defendant testified prior to the defendant in order to establish the reliability and veracity of the defendant's statements while under hypnosis, and his susceptibility to hypnotic techniques. The prosecutor, persuaded that defendant's account of the incident was credible, reduced the charge to manslaughter, to which the defendant entered a plea of guilty.

Some commentators speculated that the *Nebb* case might herald more extensive use of hypnotic techniques during trial, but despite a brief flurry of interest the case appears to be largely obscured. For extensive discussion of the case, see Herman, *The Use of Hypno-Induced Statements in Criminal Cases*, 25 OHIO ST. L.J. 1 (1964); Teitelbaum, *Admissibility of Hypnotically Adduced Evidence and the Arthur Nebb Case*, 8 ST. LOUIS L.J. 205 (1963).

144. This contention may attribute too little sophistication to modern juries, since there is some indication that jurors are capable of confining spectacular evidence to its proper context. For example, in a case where defendant was charged with first degree murder in the death of her six-day old baby from ingestion of a caustic substance, the defendant introduced the testimony of a psychiatrist whose opinion was that the defendant was incapable of murder. The court permitted a film of defendant during a hypnotic interview with the psychiatrist to be shown to the jurors for the limited purpose of aiding their evaluation of the basis for the expert's opinion. Despite the emotional content of the film, the jury returned a verdict of guilty to the charge of first degree murder. *Time*, April 12, 1968, at 57.

risk that improper suggestions have been implanted already exists, and must be combatted by thorough cross-examination of the operator.¹⁴⁵

The most consequential objection to in-court hypnosis and examination of witnesses is the potential for disruption of the adversary system. The hypnotic subject tends to perceive queries and suggestions literally. Questions must be concise, accurate, discretely limited in scope, and free from hostility and suggestion, in order to avoid confusing the subject or producing a hysterical reaction in him.¹⁴⁶ Such precise formulation of proper questions requires the skill of an operator, and would make a searching cross-examination next to impossible. Of course, it is possible that attorneys could communicate their inquiries to the hypnotist, who would pose them, after reformulation, to the subject. But such a procedure extracts too great a price from the adversary process, and returns far too little benefit.

In sum, the problems associated with the introduction of hypno-induced testimony bear on the weight to be accorded this type of evidence, as is the case with the problems of perception, memory and suggestibility of witnesses generally. Barring circumstances where these problems are so exaggerated as to become unwieldy, courts should continue to exercise their discretion to admit the testimony of witnesses whose flawed recollection of the occurrence at issue has been revitalized through pretrial hypnotic induction.

V. HYPNO-INDUCED STATEMENTS AS THE BASIS FOR EXPERT TESTIMONY

The courts have recognized to some extent the usefulness of hypnosis as an investigative technique and in diagnosis and therapy. However, they have rejected . . . statements made under hypnosis when offered by the subject in his own behalf and opinion as to mental state based on hypnotic examination.¹⁴⁷

This quotation reflects the traditional opinion of the legal profession on the usefulness of hypnosis, but the statement is too broad and encompassing. It is true that no court has, to date, accepted as substantive evidence statements made under hypnosis. However, most courts have begun to accept expert opinion based on such statements so long as the opinion does not purport to bolster the in-court testimony of the hypnotic subject. This is in line with a general broadening of what data an expert can base his opinion on.

Traditionally, an expert who lacks first-hand knowledge is allowed to testify only on the basis of hypothetical questions.¹⁴⁸ Many jurisdic-

145. See text accompanying notes 135-37 *supra*.

146. See notes 27-30 *supra* and accompanying text.

147. MCCORMICK, *supra* note 94, § 208 at 510.

148. *Id.* § 14 at 31.

tions require that the data used in the question be data that has been admitted or is admissible at trial.¹⁴⁹ If the expert's opinion is based on facts not in evidence, the opinion is valueless; if the trier of fact could not find the "facts" the expert used, it could not believe an opinion based on those "facts."¹⁵⁰ The main purpose of such a rule was to prevent the injection of hearsay and other unreliable information into the trial through the expert's opinion. The reasoning which supports this position is fallacious. Virtually all expert opinions are founded on knowledge that cannot be independently proved at trial.¹⁵¹ Indeed, a growing number of jurisdictions have concluded that the basis of an expert's opinion is not subject to the hearsay rule because it is not offered to prove the truth of the matter asserted; its sole function is to explain how the expert arrived at his opinion.¹⁵² This view, which is clearly the modern trend, is embodied in rule 703 of the Federal Rules of Evidence.¹⁵³

Objections to expert opinions predicated upon hypno-induced statements have been grounded on the self-serving character of these utterances and the supposed unreliability of hypnosis as a scientific phenomenon. This argument is mistaken because it misconstrues the nature of hypnosis and attempts to place it in the same category as the polygraph.¹⁵⁴ It has never been the purpose of hypnosis to act as a truth determinant. Its only function in treating amnesia is to obtain data in order to help cure the amnesia or underlying psychological problems. The use of the data by the psychotherapist does not depend upon the veracity of the data.¹⁵⁵ The same is true with any statement made by a patient to his psychiatrist. He predicates diagnosis and treatment upon such statements without regard to their

149. *Id.* § 15 at 34.

150. *See, e.g., Wild v. Bass*, 252 Miss. 615, 173 So. 2d 647 (1955); *Fidelity & Cas. Co. v. Hendrix*, 440 P.2d 735 (Okla. 1968).

151. Rheingold, *The Basis of Medical Testimony*, 15 VAND. L. REV. 473, 473 (1962); [A] doctor in testifying on the cause of a patient's condition, for example, might refer and rely upon what he had observed in examining the patient, upon what the patient has told him of his symptoms, and upon the results of medical tests performed upon the patient. He might add to this information which he has learned in medical school and in practice, information which he has learned in medical texts, and even material that has come to him as part of the ensuing litigation.

152. *See, e.g., Tierney v. Charles Nelson Co.*, 19 Cal. App. 2d 34, 64 P.2d 1150 (1937); 6 J. WIGMORE, EVIDENCE § 1700 (Chadbourn rev. ed. 1970).

153. FED. R. EVID. 703 provides that:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

See, e.g., People v. Ward, 61 Ill. 2d 559, 338 N.E.2d 171 (1975); Spector, *People v. Ward: Toward a Reconstruction of Expert Testimony in Illinois*, 26 DEPAUL L. REV. 284 (1977).

154. *See MCCORMICK, supra* note 94, § 208 at 510.

155. Orne, *The Potential Uses of Hypnosis in Interrogation*, in THE MANIPULATION OF HUMAN BEHAVIOR 195 (Biderman & Zimmer eds. 1961).

truthfulness or falsity. Yet practically all states will permit a psychiatrist to base an opinion on his patient's statements to him, although there is obviously no guarantee of the truthfulness of those statements.¹⁵⁶

The first major case approving the use of hypno-induced statements as part of the expert's basis for testimony is *People v. Modesto*.¹⁵⁷ The defendant had been convicted of the first degree murder of two children. His defense was that the killings were the result of unconscious action on his part and that he did not become aware of what he had done until after the children were dead. A psychiatrist testified that, in her opinion, the defendant did not intend to kill. Part of her opinion was based upon interviews with the defendant while he was hypnotized. While the psychiatrist was not precluded from using the statements in formulating her opinion, she was not allowed to explain to the fact-finder how hypnosis is used as an analytic tool to ascertain the defendant's mental state. The California Supreme Court noted that the trial court acted properly in allowing the expert to use the hypno-induced statements in arriving at her opinion.¹⁵⁸ It reversed the conviction, however, because the trial court erred in preventing the expert from explaining to the jury the hypnotic techniques upon which her opinion was based.

Modesto has generally been followed in later cases involving not only the use of statements made under hypnoanalysis,¹⁵⁹ but also

156. Some states will not permit a psychiatrist to base an opinion on the statements of the subject unless he is a "treating psychiatrist." See, e.g., *People v. Hester*, 39 Ill. 2d 489, 237 N.E.2d 466 (1968). The application of the treating/testifying physician dichotomy is incongruous when applied to psychiatrists. There seems to be little reliability in the statements of a paranoid whether or not made to a treating psychiatrist.

157. 59 Cal. 2d 722, 382 P.2d 33, 31 Cal. Rptr. 225 (1963).

158. A California case that seemed to point to a contrary conclusion, *People v. Busch*, 56 Cal. 2d 868, 366 P.2d 314, 16 Cal. Rptr. 898 (1961) was correctly distinguished. All that the *Busch* court held was that the expert was not a qualified hypnotist and therefore could not render an opinion based on hypno-induced statements.

159. For cases following *Modesto*, see *People v. Hiser*, 267 Cal. App. 2d 47, 72 Cal. Rptr. 906 (1968) (psychiatrist allowed to testify to defendant's mental state based in part on hypno-induced statements); *State v. Harris*, 241 Or. 500, 405 P.2d 492 (1965) (same); *State v. Pierce*, 263 S.C. 23, 207 S.E.2d 414 (1974) (hypnotist would be allowed to testify as to his knowledge of the defendant's mental state, but not admissible for truth of statements made to hypnotist). The only case that appears to hold to the contrary is *Greenfield v. Commonwealth*, 214 Va. 710, 204 S.E.2d 414 (1974). In that case the defendant claimed he was unconscious at the time the crime was committed. He was examined by a psychiatrist under hypnosis. The Virginia Supreme Court seemed to view the problem as one of whether the psychiatrist could testify to statements made to him and have those statements admissible substantively. Viewed in that light, the case stands with all other cases in refusing to admit the statements. The court, however, did agree with the McCORMICK quotation mentioned at the beginning of this section. In addition, an examination of part of the trial transcript makes it clear that the psychiatrist was not allowed to use those hypno-induced statements as part of the basis of his opinion. The trial transcript is condensed and reprinted in R. LEMPERS & S. SALTZBERG, *A MODERN APPROACH TO EVIDENCE* 944-69 (1977). However, contrary to the court's statement that it is following the vast majority of American jurisdictions, it is the only court that has refused to allow a qualified expert to use hypno-induced statements as the basis of his opinion.

statements made under narcoanalysis.¹⁶⁰ This case embodies the appropriate approach to the problem of hypno-induced statements in the basis of an expert opinion. It is impossible today to categorically declare that a "scientific" device produces either admissible or inadmissible evidence. Its use or non-use must depend upon the context in which it arises. The fact that certain "scientific" data is inadmissible substantively does not require the conclusion that it is unuseable, since experts must of necessity rely on data that cannot possibly be produced at trial.¹⁶¹ Regardless of its varying degrees of reliability, much of this information is useful to the expert. As an expert, he is quite capable of evaluating the data and using it or rejecting it, as appropriate, according to his discipline. Thus, if the data is of a type normally relied on, it is appropriately useable by an expert, even though not admissible into evidence.

The Federal Rules would allow an expert to base an opinion on hypno-induced statements.¹⁶² Hypnosis is a widely-recognized technique used in medical treatment of a wide range of different problems.¹⁶³ Under Federal Rule 703, if the judge finds that hypno-induced

160. There are considerably more cases involving narcoanalysis than hypnoanalysis. Narcoanalysis, like hypnosis, is a recognized psychiatric technique for treating certain types of mental disorders. The cases involving the use of statements taken under "truth serums" are fairly clear. If the statement is being used by the expert as part of the basis of his opinion on the defendant's mental state then the statements are useable by the expert. See *People v. Cartier*, 51 Cal. 2d 590, 335 P.2d 114 (1959); *State v. Chase*, 206 Kan. 352, 480 P.2d 62 (1971); *Sallee v. Ashlock*, 438 S.W.2d 538 (Ky. 1969); *Lemon v. Denver & R.G.R.R.*, 9 Utah 2d 195, 341 P.2d 215 (1959); *State v. White*, 60 Wash. 2d 551, 374 P.2d 942 (1962), *cert. denied*, 375 U.S. 883 (1963). The only case to the contrary is *People v. Ford*, 304 N.Y. 679, 107 N.E.2d 595 (1952), a memorandum order of the New York Court of Appeals. Indeed one state, in a rather schizoid fashion, has allowed a psychiatrist to base an opinion on statements made by the defendant while under narcoanalysis, but has excluded an opinion based on statements by a patient to a testifying psychiatrist. Compare *People v. Myers*, 35 Ill. 2d 311, 220 N.E.2d 297 (1966), *cert. denied*, 385 U.S. 1019 (1967) and *People v. Seipel*, 108 Ill. App. 2d 334, 247 N.E.2d 905 (1969) (opinion admissible) with *People v. Hester*, 39 Ill. 2d 489, 237 N.E.2d 466 (1968) (opinion inadmissible).

These cases must be distinguished from two other lines of cases. If the defendant is offering the statements made under narcoanalysis substantively, there are severe hearsay problems and all courts exclude the testimony. *E.g.*, *State v. Linn*, 93 Idaho 430, 462 P.2d 729 (1969). Also if the defendant offers the fact that he made statements under narcoanalysis that agree with his testimony at trial, courts exclude the testimony. Narcoanalysis is not exclusively designed as a truth determinant. When it is offered as such it is properly excludable for the same reason as polygraph results and all cases so hold. See, *e.g.*, *State v. Hemminger*, 210 Kan. 587, 502 P.2d 791 (1972); *Dugan v. Commonwealth*, 333 S.W.2d 755 (Ky. 1960); *State v. Taggart*, 14 Or. App. 408, 512 P.2d 1359 (1973).

Also distinguishable from the basis of opinion cases is *State v. Sinnott*, 24 N.J. 408, 132 A.2d 298 (1957). The expert opinion that rested on narcoanalysis was rejected. In that case, however, the defendant was charged with sodomy and the expert opinion was to the effect that he had no homosexual traits. Thus, the rejection of the expert opinion was premised on the general rule that expert opinion of character traits is inadmissible when character is being used circumstantially. The rejection of the expert opinion had nothing to do with narcoanalysis. On the character issue see, Curran, *Expert Psychiatric Evidence of Personality Traits*, 103 U. PA. L. REV. 999 (1955); Falknor & Steffan, *Evidence of Character: From the "Crucible of the Community" to the "Couch of the Psychiatrist"*, 102 U. PA. L. REV. 980 (1954).

161. See generally *Rheingold*, *supra* note 151.

162. See FED. R. EVID. 703, quoted at note 153 *supra*.

163. See notes 60-66 *supra* and accompanying text.

statements are generally used by psychiatrists and other medical personnel, the expert may use them in arriving at his opinion. It is hoped that many states will either adopt rule 703 or a local version of it. This rule enables the fact-finder to better evaluate the expert's opinion, in addition to allowing the expert broad use of his diagnostic techniques.

Assuming the expert is allowed to use hypno-induced statements as part of the basis for his opinion, the question still remains whether those statements are admissible. While all courts view such statements as inadmissible substantively, there is some indication that the evidence may be admitted for the purpose of showing how the expert arrived at his opinion.¹⁶⁴ Most courts that have considered the problem, however, recognize a discretion in the trial court to exclude the statements if the judge determines that the danger that the jury would be confused about whether they were to use the statements as substantive evidence outweighs the value of the statements for understanding the expert's opinion.¹⁶⁵ It is not surprising to find that in practically all cases the trial judge excludes the statements and the appellate court affirms the exclusion.¹⁶⁶

164. See *People v. Cartier*, 51 Cal. 2d 590, 600, 335 P.2d 114, 121 (1959). The court reversed a lower court determination excluding a tape of statements made by the defendant to the psychiatrist while under narcoanalysis. The court noted that since the statements were not offered for the truth of the matter asserted, they were not hearsay and therefore admissible. In *Lemon v. Denver & R.G.R.R.*, 9 Utah 2d 195, 341 P.2d 215 (1959), the psychiatrist was allowed to relate to the jury statements made to him while the plaintiff was under narcoanalysis. The court said:

It is recognized that there is danger that such statements may be taken as evidence of the matters stated and also that being related by the doctor may give them an aura of authenticity beyond that of the original declarant. But this danger is present in a great deal of evidence which is hearsay when used for one purpose and not hearsay when used for another. However, the hazards therein are outweighed by the psychiatrist's need and obligation to demonstrate the foundation for his opinion so that the jury may intelligently evaluate it and may be guarded against by proper admonition to the jury as to the limited purpose for which the evidence is received . . .

Id. at 201, 341 P.2d at 219.

165. See *State v. Harris*, 241 Or. 224, 405 P.2d 492 (1965); *State v. White*, 60 Wash.2d 551, 374 P.2d 942 (1962) *cert. denied*, 375 U.S. 883 (1963) (statements made during narcoanalysis). In California, the apparent thrust of *People v. Cartier*, 51 Cal. 2d 590, 335 P.2d 114 (1959), was limited in *People v. Modesto*, 59 Cal. 2d 722, 382 P.2d 33, 31 Cal. Repr. 223 (1963). *Cartier* seemed to hold that since the evidence was not hearsay it should have been admitted. In *Modesto* the court said that the trial judge had the power to exclude if the probative value of the evidence was outweighed by the risk that the jury might use the evidence substantively. Among the reasons for reversal in *Modesto* was the nonexercise of that discretion by the trial court.

166. See, e.g., *People v. Hiser*, 267 Cal. App. 2d 47, 72 Cal. Rptr. 906 (1968); *People v. Meyers*, 35 Ill. 2d 311, 220 N.E.2d 297 (1966), *cert. denied*, 385 U.S. 1019 (1967); *State v. Chase*, 206 Kan. 352, 480 P.2d 62 (1971).

It appears that the same result could be achieved under Federal Rule 705. That rule allows an expert to give an opinion without prior disclosure of the basis of the opinion unless the court requires it. The rule was designed to eliminate the needless and repetitious hypothetical question. It would seem by implication that if the court has the discretion to require that the basis be recited, it would also have the discretion to require that certain data not be recited. There is nothing in rule 705 to indicate that it is not subject to the judicial discretion set out in rule 403.

VI. HYPNO-INDUCED STATEMENTS OFFERED
AS SUBSTANTIVE PROOF

One important point seems to have emerged from the foregoing cases: statements made under hypnosis are excluded because of the hearsay rule. But the courts recognize the value of such statements to the expert and they allow such statements to form the basis of expert testimony. They are inadmissible substantively, not because of anything inherently connected with hypnosis, but because they are no more reliable than any other out of court statement that does not fit within an exception to the hearsay rule. Accordingly, the proposition that under certain circumstances hypno-induced statements should be admitted as exceptions to the hearsay rule will be examined.

Case 1

In June 1968, the patient, a 40-year old woman, was involved in an automobile accident, followed by a few minutes of unconsciousness. A medical examination performed 12 days after the accident revealed a concussion of the brain. Psychological and neurological examinations were within normal limits without fracture of the skull. The patient was unable to recall the accident itself, nor did she recall the events which occurred a few minutes before and after it.

In a deep state of hypnosis, the patient recalled the car approaching the one in which she was riding. During hypnosis it was suggested to the patient that afterwards she would be able to recall at least part of that which she was able to reveal while hypnotized. The result, however, was negative. A few weeks later the experiment was repeated and the result was the same¹⁶⁷

. . . .

Case [2]

In May 1972, the patient, a 21-year old woman, was involved in an automobile accident followed by slight unconsciousness which lasted approximately one half an hour. There was no fracture of the skull. Events for approximately 10 minutes preceding the accident were recalled by the patient afterwards. Anterograde amnesia lasted about 30 minutes.

One year after the accident the patient, while under deep hypnosis, was able to clearly recall the circumstances both preceding and following the accident. During hypnosis she recalled sitting next to the driver and seeing the tachometer register 120 kilometers per hour immediately before the accident. She also remembered the car suddenly turning to the right, the pain she felt in her back after being thrown from the car, and the group of people standing around her. Her transport by ambulance, the sound of its siren, and the measurement of her blood pressure and pulse in the hospital were also clearly remembered. Upon waking from hypnosis she recalled none of these things.¹⁶⁸

167. Milos, *supra* note 25, at 104. See also Coe, *A Further Evaluation of Responses to an Uncompleted Posthypnotic Suggestion*, 15 AM. J. CLINICAL HYPNOSIS 223 (1973).

168. Milos, *supra* note 25, at 106.

Case 2 is strikingly similar to *Kline v. Ford Motor Co.*¹⁶⁹ In this wrongful death suit against Ford Motor Company, the plaintiffs alleged design deficiencies in the acceleration and steering wheel lock mechanism. The driver of the car had died and the passenger was suffering from retrograde amnesia. The passenger underwent hypnosis and unlike Case 2, afterwards was able to testify that her memory was refreshed and that immediately before the accident the accelerator stuck and the car suddenly veered off the road. The appellate court reversed a trial court decision that refused to allow the passenger to testify from the hypnotically refreshed memory.

The plaintiffs in *Kline* were fortunate in that the posthypnotic suggestion to remember the events was completed. Had the passenger been one of the subjects mentioned in Cases 1 and 2 in which the posthypnotic suggestion went uncompleted, there would have been a failure of proof and the defendant would have prevailed. There is nothing to indicate that the data related during hypnosis varies in its reliability depending on whether the posthypnotic suggestion to remember is effective, which is impossible to predict. The statements related to the hypnotist in Case 2 and in *Kline* would have the same degree of reliability; yet, in one case there is testimony for the upcoming trial and in the other case there is not.

The notion that hypno-induced statements cannot be introduced substantively is based on the traditional reason that such statements are hearsay and fall within no recognized exception to the rule. Under this argument, the fact that the data was elicited by hypnosis is unimportant. The fact that hypnosis did not refresh the witness' memory is quite important.¹⁷⁰ Unless the witness' memory is refreshed, there is no opportunity to cross-examine the refreshed memory in order to illustrate defects of language, sincerity, memory, and perception. The technique of eliciting the data, however, is identical in both cases. It should also be noted that the feeling of remembering is no guarantee of the accuracy of the fact that is remembered.¹⁷¹ If the witness genuinely believes that he remembers certain information, a searching cross-examination is likely to be ineffective in showing the witness to be incorrect. There is no indication that a witness' hypnotically refreshed memory will recall data in addition to that

169. 523 F.2d 1067 (9th Cir. 1975).

170. The analogy to present recollection refreshed and past recollection recorded is obvious. We do not consider an objection going to the "unscientific nature" of hypnosis to be valid. The evidence is too overwhelming that it is a valid psychiatric technique. It is usable by an expert as the basis for an opinion. See text accompanying notes 147-66 *supra*. Also, the effect of the *Kline* case is to say that the technique is valid enough to be used to refresh a memory. It should be noted that the Ninth Circuit reversed the district court's ruling that the witness was incompetent to testify. This indicates that the trial judge had no discretion to admit or exclude.

171. McCORMICK, *supra* note 94, § 9 at 16.

brought out during the hypnotic session. Thus, the case for exclusion is not clearcut and modern evidentiary law provides some basis for asserting that statements made during hypnosis should be admissible even in the event of posthypnotic suggestion failure.¹⁷²

A. *Federal Rule 803(4)*¹⁷³

All jurisdictions admit as an exception to the hearsay rule some statements made to a physician for purposes of treatment,¹⁷⁴ although the scope of this exception varies widely from state to state. The reason for the exception is that there is considerable motive to be truthful to a physician since treatment may depend upon the accuracy of the patient's statements. Thus, statements made to a testifying physician are generally excluded because they lack this guarantee of trustworthiness. The federal rules have greatly expanded this traditional exception, with the result being an exception that would seem broad enough to admit statements made during hypnosis.

This expansion was accomplished by changing two key elements of the traditional exception. The first change was to eliminate the distinction between treating and testifying physicians. By incorporating the word "diagnosis" into the exception, the distinction has been obliterated, since even a testifying physician is asked to make a diagnosis of the patient's condition.

The advisory committee explained its rejection of the distinction by referring to the rule in most jurisdictions that allows the expert to state the reasons for his opinion. Under that rule the jury is instructed as to the purpose of the testimony. The committee regarded the ability of jurors to follow such instructions as dubious at best. Therefore they decided to eliminate the problem by making such statements admissible.

The committee commented that the treating/testifying dichotomy is inconsistent with rule 703, which enables experts to base an opinion on data not admissible in evidence, if it is of a kind ordinarily relied upon by experts in the field. At least one commentator has suggested that if data is useable by an expert under rule 703, it is also admissible under rule 803(4).¹⁷⁵ The theory is that the winnowing

172. The discussion that follows assumes a witness who is unable to testify from present memory. We do not argue, however, that such statements should only be admissible when the witness is unavailable. Our position is merely that there is greater need in those situations. If the evidence falls within any recognized exception it should be admissible.

173. FED. R. EVID. 803(4) admits as an exception to the hearsay rule: "Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof, insofar as reasonably pertinent to diagnosis and treatment."

174. See McCORMICK, *supra* note 94, § 292 at 690.

175. See 4 J. WEINSTEIN and M. BERGER, WEINSTEIN'S EVIDENCE § 803(4)[01] at 803-125 (1975) [hereinafter cited as WEINSTEIN].

of the data through the expert's examination of it assures its reliability. While this is an attractive theory, it must be noted that the committee did not specifically indicate that the use of any data by an expert under rule 703 necessarily mandates its admission under rule 803(4). Had this been the case there would be no reason to limit substantive admissibility of rule 703 material to the medical field. It would have been a logical extension of this rule to extend it to other areas of expertise, but the committee did not do so.

The second major change in the federal rule is to apply this exception to all statements made for the purpose of "medical" treatment or diagnosis, eliminating the traditional rule that restricted the exception to statements involving "bodily" condition.¹⁷⁶ It would seem, therefore, that statements made to psychiatrists for purposes of treating or diagnosing a patient's mental state would be admissible.

Although some commentators have said that psychiatrists are treated as physicians for purposes of the traditional exception,¹⁷⁷ there have been very few cases that have expressly admitted statements to a psychiatrist on the same basis as statements made to a physician.¹⁷⁸ A recent case, however, illustrates that the admission of such statements may become commonplace in jurisdictions that have adopted rule 803(4). In *United States v. Lechoco*,¹⁷⁹ the defendant, who was charged with kidnapping, claimed temporary insanity. Three psychiatrists testified on his behalf and related to the jury statements made to them by the defendant. In reversing the defendant's conviction, the court of appeals noted that on retrial the statements made by the defendant to the psychiatrists would be admissible under rule 803(4).¹⁸⁰

The psychiatrists did not treat the defendant, nor did the defendant testify in his own behalf. In effect, the court mandated the admission of "self-serving" statements made by a defendant after the crime had been committed, with the only guarantee of reliability being that they were made to a psychiatrist. Since the defendant did not testify, there was no way for the prosecution to cross-examine him. The court reasoned that extensive cross-examination of the

176. See UNIFORM RULES OF EVIDENCE § 63(12)(a) (1952). The presence of such a requirement in the Uniform Rules and its absence in the federal rules is a clear indication that the advisory committee intended to extend the exception to cases not involving only physical injuries.

177. McCORMICK, *supra* note 94, § 292 at 690 n.28.

178. For one such case where the court admitted the statements without discussing the difference between physicians and psychiatrists, see *Ritter v. Coca-Cola Co.*, 24 Wis.2d 157, 128 N.W.2d 439 (1964).

179. 542 F.2d 84 (D.C. Cir. 1976).

180. *Id.* at 89 n.6.

psychiatrists, coupled with the provisions of rule 806 on impeaching hearsay declarants, was sufficient.¹⁸¹

If *Lechoco* is to be accepted as an indication of the type of information admissible under rule 803(4), it seems clear that hypno-induced statements should also be admissible, for they fall within the precise terms of the rule. Amnesia is recognized as a medical problem that can be treated by various techniques including hypnosis. Moreover, amnesia is often recognized as symptomatic of other medical problems, the curing of which will facilitate treating the primary problem. Thus, if amnesia is the medical problem, statements made during hypnosis would be made to further treatment and diagnosis of the amnesia. In addition, statements such as those in Case 2, above, would reveal the external cause of the amnesia as provided by rule 803(4). The same result would follow where the defendant in a criminal case is claiming temporary insanity. Statements made during hypnotherapy would be helpful in diagnosing and treating the mental problem. The statements of the defendant to the hypnotist would be quite helpful in determining "general character and external source" of the claimed mental problem. The safeguards that the *Lechoco* court found sufficient would likewise protect the reliability of hypno-induced statements to the hypnotist.

B. *Common-Law Jurisdictions*

While state adoption of the Federal Rules of Evidence is proceeding apace, many jurisdictions will, no doubt, continue to adhere to their own common-law development. It is clear that the type of statements referred to at the beginning of this section would not fall under any common-law hearsay exception. Many jurisdictions, however, recognize some discretion in the trial court judge. So an analysis should be made of hypno-induced statements to determine whether they are the type of statements that should be excluded by the hearsay rule.

It has long been recognized that out of court statements are excluded by the hearsay rule because they are subject to four problems.

181. FED. R. EVID. 806 provides:

When a hearsay statement, or a statement defined in Rule 801(d)(2)(C), (D), or (E), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time inconsistent with his hearsay statement, is not subject to any requirement that he may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine him on the statement as if under cross-examination.

It should also be noted that the relevancy requirements of rules 401-03 are also applicable to rule 803(4), as they are to practically all the federal rules. Thus, a trial judge has the discretion to exclude statements falling under rule 803(4) if he finds that the probative value of the statement is exceeded by other problems.

These are: (1) the ambiguity of the language used by the declarant; (2) the sincerity of the declarant; (3) the possibility of faulty perception of the declarant; and (4) the possibility of faulty memory of the declarant.¹⁸² These "hearsay dangers" have been brilliantly schematized by Professor Tribe in a "testimonial triangle."¹⁸³ The problems of ambiguity and sincerity constitute the left side of the triangle, representing the problems associated with the inference of the declarant's belief from the declarant's statement. Problems of perception and memory are on the right side of the triangle, representing the difficulties of the inference of the existence of the event from the belief of the declarant.¹⁸⁴ While these "hearsay dangers," represented by the triangle, are present in all testimony, courts generally assume that cross-examination can alleviate most of these problems.

Over the years, courts and legislatures have created a number of exceptions to the hearsay rule. The statements that fall within these exceptions still manifest some of the hearsay dangers mentioned above. If it were required, in order for an out of court statement to be admissible, that it have no hearsay dangers associated with it, few, if any, statements would qualify. As Professor Tribe has pointed out, exceptions to the hearsay rule can be placed into three categories:¹⁸⁵ first, those statements that have an adequate procedural substitute for in-court cross-examination, for example, prior testimony; second, those statements where it is thought that a party has no right to cross-examine, such as, admissions of a party opponent; and third, those statements that seem to reduce the weakness in the triangle. Professor Tribe indicates that practically all the exceptions to the rule are such because they minimize the hearsay dangers of *one* of the two sides of the triangle. Thus, a declaration against interest can be thought of as a strong left leg exception because the dangers of ambiguity and sincerity are minimal. Strong right leg exceptions are exemplified by declarations of physical and mental sensations, which present few problems of perception and memory. Professor Tribe's conclusion from analyzing the various exceptions is that "one good leg is enough."¹⁸⁶ In other words, if a statement shows that either the problems of language and sincerity are few or that problems of perception and memory are few, then the statement should be admissible as an exception to the hearsay rule.

182. See, e.g., Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 HARV. L. REV. 177 (1948).

183. Tribe, *Triangulating Hearsay*, 87 HARV. L. REV. 957 (1974).

184. *Id.* at 959.

185. *Id.* at 961.

186. *Id.* at 966.

Statements made under hypnosis are usually statements describing certain events. These might include statements of a party involved in or a witness to an automobile accident, statements of a victim of a rape, or statements of a defendant describing the circumstances that give rise to the charges against him. As noted, most of these statements fall into no common-law exception. The question remains, however, whether a court, when presented with such a statement, could analyze it as one that *ought* to be an exception to the rule, even though falling into no recognized exception.¹⁸⁷

If Professor Tribe's analysis is correct, then it seems that many statements made under hypnosis should be admitted as strong right leg exceptions. If the statements are made when the hypnotic subject has been age-regressed, the hypnotist has taken him back to the scene of the accident and has asked him to relate what is occurring. The statement then is essentially an eyewitness account of the incident by a participant.¹⁸⁸ Since the subject is actually re-witnessing the incident, the description is given with no real "time" lapse. It would seem that under such circumstances the dangers of perception and memory would be minimized. Indeed, there is practically no memory problem at all because if the hypnotic has been aged-regressed and is actually experiencing the event, there is no time lag in a subjective sense. The perception would not, of course, be perfect. The reference point of the hypnotic to the event might be such as would indicate that there were some factors that could influence perception, for example, excitement and position.¹⁸⁹ These problems, however, could be commented on and attacked extrinsically by the opponent of the evidence.¹⁹⁰

These statements are, in a manner of speaking, equivalent to a present sense impression, which are statements that are made at or immediately after the perception of an event.¹⁹¹ Many jurisdictions have recognized such statements as an exception to the hearsay rule.¹⁹² This particular exception could be extended to cover this type of hypno-induced statement. It seems more reasonable, however, not to

187. For examples of such analysis by a court, see *Dallas County v. Commercial Union Assurance Co.*, 286 F.2d 388 (5th Cir. 1961); *United States v. Barbati*, 284 F. Supp. 409 (E.D.N.Y. 1968).

188. See, e.g., Reiser, *A Note on the Use of Hypnosis in a Police Recruit Training Problem*, 16 AM. J. CLINICAL HYPNOSIS 65 (1973).

189. This would be no more than the usual psychological problems associated with eyewitness testimony. See text accompanying notes 102-23 *supra*.

190. Indeed, this is what seems to be contemplated by federal rule 806. See note 181 *supra*.

191. FED. R. EVID. 803(1) provides that "[a] statement describing or explaining an event or condition made while the declarant was perceiving the event, or immediately thereafter" is not excluded by the hearsay rule. See *Houston Oxygen Co. v. Davis*, 139 Tex. 1, 161 S.W.2d 474 (1942).

192. See, e.g., *People v. Damen*, 28 Ill. 2d 464, 193 N.E.2d 25 (1963).

stretch any existing exception and instead recognize that, under Professor Tribe's analysis, such statements should be admissible.¹⁹³

One further question is whether the continued existence of the other two hearsay dangers should lead to a decision to exclude. In other words, are the problems of ambiguity and sincerity on the left side of the triangle so insurmountable that the evidence should be excluded regardless of the strong right leg? This should not prove insurmountable since the danger of ambiguity of language is present in any "right leg exception." This is particularly true when words are used to describe physical and mental sensations. In those situations, there is an inherent ambiguity in using any word to describe what is probably indescribable.

The danger of sincerity presents a larger problem. Courts are wary of admitting what they perceive to be "self-serving" statements of an interested party made after the event, particularly when the party is a criminal defendant.¹⁹⁴ Sincerity problems however, have been overlooked with other right leg exceptions. For example, statements of physical or mental sensations are admitted without regard to the possible "self-serving" nature of the testimony. Indeed, the possibility of a personal injury plaintiff faking pain is quite real. The sincerity problem has normally not proved decisive because statements of physical and mental sensations can only be obtained through utterances by the plaintiff. The same is true with hypnotic statements. The only way information can be obtained from an amnesiac is by the use of hypnosis. Thus, the need for the testimony outweighs the sincerity danger. Certainly the panoply of impeachment techniques are adequate to combat the sincerity problem.

Before hypno-induced statements are admitted, the proponent of the evidence should be required to lay a foundation, the adequacy of which would be determined by the judge as a preliminary question.¹⁹⁵ The proponent should call the hypnotist who conducted the examination and have the hypnotist testify to the validity of the hypnotic technique used, the depth of the trance, and those circumstantial factors that indicate that the hypnotic subject was actually age-regressed. The hypnotist should then be required to give his opinion as to genuineness of the age regression. If the judge finds that age regression occurred, he should admit the testimony.¹⁹⁶ Admittedly, this is not an easy decision for the judge to make, but it is

193. See *Dallas County v. Commercial Union Assurance Co.*, 286 F.2d 388 (5th Cir. 1961).

194. See, e.g., *State v. Baldwin*, 47 N.J. 379, 221 A.2d 199 (1966).

195. See FED. R. EVID. 104(a): "Preliminary questions concerning . . . the admissibility of evidence shall be determined by the court . . ."

196. If the trial judge wishes, he could, after excusing the jury, have the subject hypnotized in court. It is doubtful, however, whether a lay observation of the phenomena could add anything to the expert determination whether age regression actually occurred. See notes 142-46 *supra* and accompanying text.

probably no more difficult than other preliminary questions that must be decided by the trial judge.¹⁹⁷ Any further dispute concerning the validity of the hypnosis or the sincerity of the hypnotic should only go to the weight of the testimony.

C. *Constitutional Problems*

It is possible, in some situations, that a failure to admit hypno-induced statements could have constitutional ramifications. In *Chambers v. Mississippi*,¹⁹⁸ the Supreme Court held that the failure to allow the defendant to prove a declaration against penal interest, coupled with Mississippi's "voucher" rule for witnesses, prevented the defendant from presenting valuable information to the trial court. The defendant wished to show that one MacDonald had confessed to the crime for which Chambers was being tried. MacDonald had confessed to a number of people and there were circumstantial indicators of the reliability of his confession, but he subsequently retracted it. The defendant was unable to call the people MacDonald confessed to because Mississippi did not recognize declarations against penal interest. Also, he could not call MacDonald because he would have had to "vouch" for him and could not use his prior confession as an inconsistent statement. The Supreme Court held that this total failure to provide a way for the defendant to bring his story into court resulted in a denial of due process.¹⁹⁹ The Court appeared to focus on the fact that the statements seemed to be corroborated, an indication that they were reliable.²⁰⁰

Chambers suggests that when a criminal defendant possesses reliable information that is crucial to his case, due process may require that he be given the right to present this testimony, despite a contrary rule of evidence. It is not difficult to see that there could be situations where either the defendant or a crucial defense witness is suffering amnesia regarding the events leading up to the crime. If hypnosis helps to remove the block, the defendant or the witness may remember things crucial to the defense. One can envision a situation in which the defendant has received a blow from a third person rendering him unconscious. When he awakens, he discovers a corpse, but has no memory of the event.²⁰¹ Hypnosis may enable the defendant to

197. For example, in passing upon the basis of an expert's opinion under rule 703, the trial judge must determine if the data is of a type normally relied upon by experts in the field. In order for a statement to be admissible under rule 803(4), the statement must reasonably relate to diagnosis or treatment. In both of these situations the trial judge will be forced to rely heavily on the word of the expert.

198. 410 U.S. 284 (1973).

199. *Id.* at 303.

200. *Id.* at 300.

201. See W. BRYAN, *supra* note 20, at 75-152.

recreate the event and in the process provide information leading to his acquittal and the possible arrest of the actual perpetrator.

Chambers indicates that the prime test in deciding that MacDonald's statement should have been admitted was its reliability. That reliability was shown by circumstances corroborating MacDonald's statement. Thus, in order for a statement made under hypnosis to be admissible as a matter of due process, there would have to be some corroboration. Since *Chambers*, most courts have required a high degree of corroboration.

The operation of this corroboration requirement can be seen in the *Greenfield* cases.²⁰² The defendant, Greenfield, was charged with murder. The evidence showed that he left a restaurant with the victim and drove to a secluded area. The defendant was under the influence of heroin and a hallucinogenic drug at the time. Suddenly he blacked out. When he awoke he claimed he saw a person running from the car, the victim's body lying in a pool of blood on the driver's side of the car, and his own knife on the floor. The defendant remembered nothing about the incident and entered a plea of unconsciousness to the murder charge. He then underwent hypnosis in an attempt to revive his memory. The result of the hypnosis was that the defendant could describe many of the events that were previously forgotten, including a description of the person he had seen running from the car. Still, there was a blank spot in the defendant's memory covering the time of the murder. The psychiatrist who hypnotized the defendant was of the opinion that the continued existence of the blank spot indicated that the defendant was unconscious. The psychiatrist, however, was prohibited from testifying as to the detailed information on which he based his opinion and, in addition, was not allowed to repeat what the defendant had said to him under hypnosis.²⁰³

The Supreme Court of Virginia, in affirming the defendant's conviction, agreed with the exclusion of the hypnosis evidence. The court took the position that the evidence was unreliable, and indicated that even in those cases where hypnosis had been used to refresh a witness' memory, the testimony from the memory was admissible only because it was substantially corroborated by other testimony.²⁰⁴ Here, the court found the defendant's statement was clearly uncorroborated.

202. *Greenfield v. Commonwealth*, 214 Va. 710, 204 S.E.2d 414 (1974); *Greenfield v. Robinson*, 413 F. Supp. 1113 (W.D. Va. 1976).

203. *Greenfield v. Commonwealth*, 214 Va. 710, 713, 715, 204 S.E.2d 414, 417, 418 (1974).

204. *Id.* at 716, 204 S.E.2d at 419. The court was clearly wrong on this point. The citation to *Harding v. State*, 5 Md. App. 230, 246 A.2d 302, *cert. denied*, 395 U.S. 949 (1968), is misplaced. The Maryland court's reference to corroboration is with regard to the sufficiency of the evidence to convict and not to the admissibility of the hypnotically-induced revived memory of the chief prosecution witness.

The defendant filed a petition for a writ of habeas corpus,²⁰⁵ alleging that the failure to admit this evidence deprived him of due process under the *Chambers* case. The district court disagreed, holding that *Chambers* was inapplicable because of the lack of corroboration of the defendant's statement. The defendant argued that because there was no direct evidence of the incident, and since the only witness (himself) was suffering from a lack of memory, the statement should have been admitted. This argument was rejected, the court declaring:

[T]he defendant in *Chambers* had already taken some steps at trial towards demonstrating that this other man was in fact the murderer by attacking his alibi and by presenting an eyewitness who stated that it was this man and not the defendant who committed the crime. Further there was every reason to believe the man's written confession was reliable as it was corroborated orally.²⁰⁶

It is a strange constitutional doctrine that indicates that the more the defendant needs the evidence, the less he is entitled to it.

What the court failed to recognize is that there was some corroboration in *Greenfield*. First, the defendant's knife did not match the wounds inflicted upon the victim. Second, the description of the person the defendant stated under hypnosis that he had seen running from the scene was confirmed by another witness who said he saw somebody answering that description running from the area where the crime was committed.²⁰⁷ If the defendant's hypno-induced statement could have been admitted, the defendant might have been able to show that someone else committed the crime. The statement should have been admitted since the need was very great and the corroboration would seem sufficient.

It is doubtful that *Chambers* meant to set such a high standard of corroboration. It appears that the United States Supreme Court was simply listing those factors that showed corroboration, as opposed to making the existence of those factors a minimal requirement under due process. Some commentators have suggested that a lower standard is appropriate.²⁰⁸ The proper test should be whether a reasonable person could believe the statement to be true. Applied to statements made under hypnosis, the appropriate determination should be whether the hypnotic statement shows a reasonable relation to verifiable facts that occurred during the time of the claimed amnesia. If it does, and

205. *Greenfield v. Robinson*, 413 F. Supp. 1113 (W.D. Va. 1976).

206. *Id.* at 1120.

207. The trial transcript is excerpted and reprinted in R. LEMPERT & S. SALTZBURG, A MODERN APPROACH TO EVIDENCE 944-69 (1977).

208. 4 WEINSTEIN, *supra* note 175, § 804(b)[03] at 804-90.

if the evidence is crucial to the defendant's case, he should be allowed to present it through the testimony of the hypnotist. Failure to admit the statement could violate the due process standard of *Chambers*.

Thus, modern evidentiary practice indicates that there are methods by which some hypno-induced statements may be introduced substantively. They are admissible under rule 803(4) in the federal system. At common law they could be analyzed as an exception to the hearsay rule. Further, failure to so analyze such statements may, in certain cases, result in depriving the defendant of a fair trial.

VII. CONCLUSION

Hypnosis is not a panacea for the trial process. Neither, however, is it to be viewed with alarm or ridiculed as a side show. It is a medical technique, which, while still not susceptible to theoretical scientific formulation, has become part of everyday medical practice. It is useful in a large variety of situations, and has proved one of the best medical procedures for treating various forms of amnesia. As such, it may, under proper analysis, provide a useful method for obtaining otherwise inaccessible information for the fact-finder, which like any testimony is subject to inherent problems of memory and perception. It is recognized by many courts that hypnosis does not function as a truth-determinant. As a result hypnosis is now being used to refresh a witness' memory and as the basis of expert opinions. The next step is clearly the admissibility of some hypno-induced statements under certain safeguards. The necessary legal prelude is already proceeding apace.

