HYPNOSIS IN OUR LEGAL SYSTEM: THE STATUS OF ITS ACCEPTANCE IN THE TRIAL SETTING

INTRODUCTION

HYPNOSIS IS A METHOD of therapy which has been utilized by society for quite some time. Recently, it has gained popularity as a new device to be used in the trial setting. Although it is a legitimate method of therapy in the medical and psychological professions, in the hands of attorneys and the legal system it takes on a whole new life. This new life is plagued with questions of admissibility, reliability and suggestibility. This comment will examine these questions and the use of hypnosis in the various stages of trial. This paper will show that some courts hold such evidence to be per se inadmissible, whereas other courts hold it admissible if reliability is shown. The use of hypnosis in a limited setting appears to be the better approach.

I. HYPNOSIS IN GENERAL

Hypnosis has its roots with the Egyptians but gained notoriety through Friedrich Anton Mesmer (1735-1815). Mesmer took Paracelsus’ (1490-1541) theory that the body was influenced by a universal magnetic fluid and developed “mesmerism.” "Mesmerism" was developed into "neurypnology" then hypnotism by James Braid (1795-1860), and it achieved further prominence through the work of Jean Martin Charcot (1825-1893). It was from Charcot that Sigmund Freud learned the techniques of hypnotism and brought it to the Western world.

Hypnosis is a method of behavior study. It is defined as an altered state of consciousness involving extreme suggestibility. The procedure is intended to bring about a heightened state of selective attention during which the person focuses solely on the hypnotist’s suggestions and ignores irrelevant stimuli.

2 "Mesmerism" was the theory that everyone possessed a magnetic force which could be used to influence the magnetic force in other people and thus, effect cures. Id. at 50.
3 Neurypnology comes from the Greek "hypnos", which means to sleep. See P. Sheehan & C. Perry, Methodologies of Hypnosis 30 (1976).
5 J. Coleman, supra note 1, at 52.
6 Any attempt to practice hypnotism as a curative measure is deemed an illegal practice of medicine. See generally Annot., 85 A.L.R.2d 1128 (1962).
7 J. Coleman, supra note 1, at 666.
8 The procedure involves the use of verbal suggestion to produce a trance or dream-like state. The most common procedures (there are several techniques) involve: 1) setting the patient at ease; 2) having the patient focus on some stimulus (object or sound); and 3) telling the patient he is relaxed and should think of nothing but what the hypnotist says. See R. Silverman, Psychology 184-86 (2d ed. 1974).
9 J. Coleman, supra note 1, at 666.
Once the subject is in a trance the hypnotist can use several techniques to explore the person’s behavior. The two basic methods are age regression and posthypnotic suggestion. Age regression involves having the patient relive an earlier point in time. The subject will, for example, act, talk and think as if he were a six-year-old child. Posthypnotic suggestion entails the hypnotist making suggestions during the trance which are to be carried over to the conscious, waking state.

Despite the long and widespread use of hypnotism, there are several shortcomings involved with its use. Generally, people can be hypnotized to varying degrees. It is possible for hypnotized subjects to willfully lie, and it can have a greater effect on memory when highly emotional material is involved.

There are also problems associated with the two methods commonly employed, regression and suggestion. With regression, it is impossible for even a highly trained psychologist or psychiatrist to know when the patient is reliving an actual memory or confabulating. With suggestion, the problem lies in the patient’s tendency to accept the events suggested during hypnosis as actual facts. For instance, the patient will fill in any gaps in his or her memory with those suggested by the hypnotist. To further compound the problem, the patient may not be able to discriminate which of his or her memories occurred in hypnosis and which memories were from his or her previous normal waking state.

II. HYPSOSIS IN THE COURTROOM

In this section, attempts to admit a witness under hypnosis are discussed. Although some of the cases deal with pretrial use of hypnosis (the subject of the next section), the concern here is with attempts to admit actual hypnosis at trial. Likewise, the section on pretrial uses of hypnosis contains cases involving the admissibility of hypnotic statements. In that section, however, the main

R. Silverman, supra note 7, at 515. See also J. Coleman, supra note 1, at 666 for a discussion of other methods.

J. Coleman, supra note 1, at 666.

Id.


R. Silverman, supra note 8, at 186. See also Orne, supra note 13, at 315 where the use of hypnosis with interested parties in a law suit is discussed.

Orne, supra note 13, at 318.

Id. at 320.

It should be noted at the outset of this discussion that most of the cases dealing with hypnosis are criminal cases. Indeed, only three civil cases are reported: Connolly v. Farmer, 484 F.2d 456 (5th Cir. 1973); Wyller v. Fairchild Hiller Corp., 503 F.2d 506 (9th Cir. 1974); Kline v. Ford Motor Co., 523 F.2d 1067 (9th Cir. 1975). In the criminal cases some writers point out a distinction when the evidence is offered by the prosecution or the defense. See, Annot. 92 A.L.R.3d 442 (1979). However, the courts that have dealt with the issue of hypnosis in both criminal and civil settings have deemed the rules on admissibility applicable in both. See, e.g., United States v. Adams, 581 F.2d 193 (9th Cir. 1978), cert. denied, 439 U.S. 1006 (1978), and the courts addressing the prosecution-defense dichotomy have found the distinction artificial, See State v. Mack, 292 N.W.2d 764, 771 (Minn. 1980). Cases will not be differentiated on the basis of civil-criminal or the party offering the evidence. (The only exception to this is in section IV where the constitutional ramifications of hypnotic testimony for the criminal defendant are discussed).
concern is with hypnosis as a trial preparation technique. The overlap is evident and natural. The distinction drawn in the two sections is done in the hopes of clarity, not confusion.

In the early years of hypnosis the courts refused to recognize it. Therefore, it was an illegal defense for a defendant to assert that the influence of hypnotism caused him to perpetrate a crime. Nonetheless, the courts in the developing years of hypnosis admitted evidence that a witness had been hypnotized at some previous time. This evidence related to the credibility of the person since it tended to show that someone could influence the witness.

Despite the advancements over the years in hypnosis and the admissibility of such evidence in certain contexts, the courts do not allow a witness to testify on the stand while under hypnosis. It follows from the same rationale, therefore, that courts also do not allow demonstrations of hypnosis in the courtroom.

The refusal by courts to play tapes made of a witness while under hypnosis follows as well from the above rationale. There is, however, another reason to reject such recordings. Tapes of a hypnotized witness offered to prove truth violates hearsay rules. Thus, these self-serving statements will not be admitted as substantive evidence unless there is a necessity for them and a guarantee of their trustworthiness.

III. PRETRIAL USES OF HYPNOSIS

Hypnosis is used in preparing for litigation to aid a witness in recalling events pertaining to the trial issue. As has been noted, there are inherent shortcomings with hypnosis techniques. There are also obvious admissibility

1People v. Ebanks, 117 Cal. 652, 49 P. 1049 (1897).
2People v. Worthington, 105 Cal. 166, 38 P. 689 (1894) (a woman was not allowed to claim that she was under the influence of hypnotism when she killed her lover).
4See infra section III.
5See supra section I.
8E.g., Fed. R. Evid. 801(c) states: "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing offered in evidence to prove the truth of the matter asserted.'; Fed. R. Evid. 802 states: "Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.'
9State v. Harris, 241 Or. 224, 405 P.2d 492 (1965) (the fact that defendant made his hypnosis recording to a doctor while in search of help may indicate trustworthiness, but it was inadmissible). Although such recordings are not admissible to prove the truth of the matter asserted, they may be admissible as the basis of a doctor’s opinion concerning the patient. See infra section III.
10See supra section I.
problems concerning such evidence. The problem goes beyond whether a witness whose memory has been refreshed via hypnosis can testify at trial. Additional problems encountered are whether evidence of hypnosis in general, or the hypnotist’s opinion can be admitted. Several states have held that any evidence of a hypnotic nature is per se inadmissible, whereas several other jurisdictions have held such evidence to be admissible. In discussing admissibility, two issues are brought into focus. The first concerns the proper foundation which must be laid for hypnotic evidence. The second issue centers on the reliability of the particular hypnotic techniques used.

A. Statements Made Under Hypnosis

Statements made prior to trial while the witness is under hypnosis are generally not admissible to prove their truth. The reason for this is that they are hearsay and unreliable. By holding such statements to be hearsay the courts recognize that, “hypnosis is not a modality designed to determine truth from deception.” Therefore, even with assurances that the witness had no reason to lie, the statements are inadmissible. The courts find such statements to be analogous to those obtained by truth serum or lie detector tests. Hence, absent a stipulation by both sides, such evidence is inadmissible.

Despite the rejection of pretrial statements made under hypnosis which
are offered to prove the truth of the matter asserted, such statements may still be admissible. Some courts will allow the statements to come in as a basis for the hypnotist's opinion. 3 Other courts leave it to the discretion of the trial judge whether or not to admit such statements or merely hold such statements to be inadmissible. 4

B. The Hypnotist's Opinion

The hypnotist who administered the pretrial hypnosis to the witness may be called to testify. He may be asked to testify as to the witness' credibility or the witness' state of mind at the time of the alleged criminal act.

1. The Witness' Credibility

Assessing the credibility of the witness is a function usually reserved to the jury. Thus, allowing an expert to give testimony as to a witness' credibility may invade the province of the jury. However, as an Illinois court noted:

We do not agree . . . that the testimony of the hypnotist that the witness was telling the truth would invade the province of the jury. We have . . . determined that expert testimony in support of a witness' credibility is admissible . . . . This does not mean that expert testimony is conclusive: it is merely one more factor for the jury to consider in determining credibility. 40

As a result, allowing the hypnotist to testify as to the patient's reliability while under hypnosis is merely another piece of evidence for the jury to consider.

A Maryland court found such testimony to be a very important part of the case. 41 It heavily weighed the expert's opinion on the subject's credibility before allowing the hypnosis testimony into evidence. This certainly appears to be unreasonable in light of the problems associated with hypnotic statements. 42 Other courts have held such testimony inadmissible. 43

Courts employ another approach towards testimony on a witness' credibility under hypnosis. This approach is to not admit such evidence unless the witness' character is challenged. 44 Thus, unless and until an adverse party brings out the fact that the witness had been previously hypnotized, an expert cannot testify

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5State v. Harris, 241 Or. 224, 405 P.2d 492 (1965) (inadmissible as basis for hypnotist's opinion that defendant had amnesia following a car accident).


8See supra section I. See also Wyller v. Fairchild Hiller Corp., 503 F.2d 506 (9th Cir. 1974), where the court stated that an objection to such testimony may well have been sustained. Id. at 510 n.7.


on the efficacy of hypnosis. In addition, once the hypnotist is allowed to testify he can speak only of the witness’ character for truthfulness, not the witness’ ability to recall a particular event.

2. The Witness’ State of Mind

The courts in several states have refused to allow a hypnotist to testify as to a defendant’s state of mind at the time of an alleged crime. Their reason for refusing such testimony was that no adequate foundation had been laid for such testimony. Thus, if a court is not convinced of the reliability of hypnosis, it may feel that a jury can decide a defendant’s state of mind as well as an expert can decide the same question. This is true even when the sole issue is the sanity of the defendant.

C. Laying A Foundation

The necessity of laying a foundation has already been discussed. Courts will not admit pretrial statements or an expert’s opinion on the patient’s state of mind into evidence unless a foundation for such evidence has been laid. When evidence of a new technique such as hypnosis is sought to be introduced at trial, “the proponent ... must establish (1) the reliability of the method, usually by expert testimony, (2) that the witness furnishing such testimony is properly qualified as an expert to give an opinion on the subject, and (3) that correct scientific procedures were used in the particular case.” The issue thus becomes: What constitutes an adequate foundation? Most of the states discussing the question use the Frye test as the standard. One prominent decision, however, chooses a variation of the Frye standard.

1. The Frye Test

The Frye test involves a set of standards which govern the admissibility of the results of scientific tests. It was developed in Frye v. United States. In Frye, the court would not admit results obtained from a “deception test,”

'*Id. at 670.
"Id.
"A foundation entails asking a witness preliminary questions to establish admissibility of evidence. See, e.g., FED. R. EVID. 104.
"See section III(A) and III(B)(2) of text.
"See infra section III(C)(1) for a discussion of the Frye test and the states accepting it.
"See infra section III(C)(2).
"293 F. 1013 (D.C. Cir. 1923).
a crude form of our present lie detector or polygraph machine. The court stated that in order to admit the results from such scientific methods or mechanical devices, "the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs." 8

Since the Frye test is the standard to use for mechanical testing methods, the issue becomes whether hypnosis is properly classified as a mechanical method. "Unlike voiceprints, fingerprints, blood alcohol analysis, and other techniques, the hypnosis issue is not centered upon an expert’s interpretation of data or results obtained from physical tests." 9 The hypnotic technique, however, is scientific. Therefore, despite the fact that the testimony of a patient is the end product of such a technique, the induced recall is still "dependent upon, and cannot be disassociated from, the underlying scientific method." 10 Thus:

Although hypnotically-adduced "memory" is not strictly analogous to the results of mechanical testing, we are persuaded that the Frye rule is equally applicable in this context, where the best expert testimony indicates that no expert can determine whether memory retrieved by hypnosis, or any part of that memory, is truth, falsehood, or confabulation. . . .

2. A Lesser Standard

The New Jersey courts have adopted a different standard for the admissibility of hypnotic evidence than most other courts. New Jersey recognizes that the Frye standard will usually render hypnotic results inadmissible due to their scientific inaccuracy. 62 Thus, to allow hypnotic evidence to be admitted, New Jersey’s standard requires tests to have a sufficient scientific basis to produce uniform and reasonably reliable results which will contribute materially

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8Id. at 1014.
11State v. Mack, 292 N.W.2d 764, 768 (Minn. 1980). One court has varied the Frye technique for determining reliability of scientific procedures. The Georgia courts follow the rule that a procedure must be generally accepted in the scientific community; but they allow the trial judge, rather than experts, to make that determination. They state:

[T]he Frye rule of "counting heads" in the scientific community is not an appropriate way to determine the admissibility of a scientific procedure in evidence . . . . We hold that it is proper for the trial judge to decide whether the procedure or technique in question has reached a scientific stage of verifiable certainty, or in the words of Professor Irving Younger, whether the procedure "rests upon the laws of nature."


We must immediately recognize that no claim is or can be made that hypnotically-induced recollections are scientifically accepted as reliable to the extent, for example that a breathalyzer is accepted as a device to measure the level of alcohol in the blood. It must be conceded that as a technique or procedure for determining "truth," hypnosis would fail to satisfy the Frye test of general acceptance in the scientific community.

Id. at 361, 414 A.2d at 305. See also, Orne, supra note 13.
to the ascertainment of the truth.\textsuperscript{63}

This standard depends upon the reliability of the procedures used rather than their ability to revive "truthful or historically accurate recall."\textsuperscript{64} New Jersey accepts the fact that the purpose of hypnosis is not to obtain the truth. "Instead, hypnosis is employed as a means of overcoming amnesia and restoring the memory of a witness."\textsuperscript{65} As a result, after \textit{Hurd}, hypnotically-induced testimony will be admissible in New Jersey when it is demonstrated "that the use of hypnosis in the particular case was a reasonably reliable means of restoring memory comparable to normal recall in its accuracy."\textsuperscript{66}

The problem with New Jersey's standard is whether a hypnotic trance can ever accurately produce a memory comparable to normal recall. W. Putnam conducted an experiment whereby subjects viewed a video tape of an accident.\textsuperscript{67} After all subjects viewed the tape one-half were hypnotized. Then all the subjects were asked two kinds of questions. One type was leading questions with an incorrect answer suggested. The second type was objective questions. For the leading questions with the incorrect answer suggested, the hypnotized subjects made significantly more errors than the non-hypnotized control group. On the objective questions, no difference between the two groups was observed. These results suggest that a reconstructive theory of memory is more accurate than an exact copy theory.\textsuperscript{68} They also lead to a questioning of the benefits of hypnosis in refreshing recollection. When leading questions are asked, as is common on cross-examination, the hypnosis has a contrary effect. When objective questions are asked, the hypnosis has no beneficial effect. Therefore, there appears to be little advantage in employing hypnosis.

3. The Necessary and Sufficiency of Foundations

One court has held that the necessity of laying a foundation no longer exists if the jurisdiction previously accepted the admissibility of hypnotic evidence. In \textit{U.S. v. Awkard}\textsuperscript{69} the court stated:

In jurisdictions in which the admissibility of hypnotically refreshed evidence is still an open question, a foundation concerning the reliability of hyp-


\textsuperscript{64}Id. at 537, 432 A.2d at 92.

\textsuperscript{65}Id.

\textsuperscript{66}Id. The New Jersey court stated, however, that in certain instances the tougher \textit{Frye} standard would be met. This will occur when those individuals in our society particularly akin to suggestibility and the hypnotic procedure are used as witnesses.

\textsuperscript{67}Putnam, \textit{Hypnosis and Distortions in Eyewitness Memory}, 27 INT'L. J. CLIN. AND EXPR. HYPN. 437 (1979) [hereinafter cited as Putnam].

\textsuperscript{68}Id. at 445. A reconstructive theory is where a normal subject relates his memory as best he can by unaided recall. An exact copy theory is where hypnosis is used to retrieve the memory as it actually happened, unhampered by subconscious screening processes.

\textsuperscript{69}597 F.2d 667 (9th Cir. 1979), \textit{cert. denied}, 444 U.S. 885 and 969 (1979).
nosis is no doubt necessary . . . But admissibility of such evidence has not been an issue in the federal courts of this circuit . . . Because there is no issue about the admission of hypnotically refreshed evidence, there is no need for a foundation concerning the nature and effects of hypnosis.

Thus, once a jurisdiction accepts hypnosis, an expert does not have to testify on techniques before the previously hypnotized witness testifies. However, the court has discretion to admit such foundational evidence.

Despite the fact that a proper foundation has been laid, hypnotic evidence will not always be admitted. In addition to laying the appropriate foundation, a proponent must show that, “the techniques employed were correctly performed, free from bias or improper suggestibility.” Thus, to have evidence of hypnosis admitted in most jurisdictions two criteria must be met: 1) a proper foundation must be laid and 2) the reliability of the procedures must be shown.

D. The Reliability of Hypnotic Evidence

The courts have always recognized the need to insure reliability of the procedures used to induce hypnosis. “The scientific reliability . . . is [not] sufficient to justify the use of [the] test results . . . in the serious business of criminal prosecution.” Consequently, the courts have always had, at least, minimal procedural safeguards, such as requiring a qualified hypnotist.

Once a proponent satisfies these minimal safeguards, several courts have been quite willing to admit recollection which has been refreshed by hypnosis. They view such testimony as the witness’ present recollection, regardless of how it was obtained. Thus, the testimony is admissible with the fact of prior hypnosis going to the credibility of the witness.

In Wyller v. Fairchild Hiller Corp., the plaintiff was the lone survivor of a helicopter crash which occurred four years before the trial began. The court would not exclude the plaintiff's testimony merely because he underwent

90Id. at 669 (citations omitted).
91Id. If, however, such evidence is admitted without the court exercising its discretion or without the previously hypnotized witness’ credibility being attacked, there is reversible error.
93In New Jersey the sole criteria is that the reliability of the procedures used must be demonstrated.
97See, e.g., Kline v. Ford Motor Co., 523 F.2d 1067 (9th Cir. 1975); Wyller v. Fairchild Hiller Corp. 503 F.2d 506 (9th Cir. 1974); Creamer v. State, 232 Ga. 136, 205 S.E.2d 240 (1974); State v. McQueen, 295 N.C. 96, 244 S.E.2d 414 (1978).
98503 F.2d 506 (9th Cir. 1974).
hypnosis to refresh his memory. "We cannot accept Fairchild's argument that Wyller's testimony was rendered inherently untrustworthy by his having undergone hypnosis. Wyller testified from his present recollection, refreshed by the treatments. His credibility and the weight to be given such testimony were for the jury to determine."

Some courts have analogized the use of hypnosis to the showing of a document to refresh recollection. They view the fact of pretrial hypnosis as going to the weight of the testimony not the witness' competency. A good example of this rationale appears in State v. McQueen. In McQueen, the witness saw a murder that took place five years earlier. The defense tried to exclude that witness' testimony since her memory was restored by hypnosis. The court said:

The fact that the memory of a witness concerning events, distant in time, has been refreshed, prior to trial, as by the reading of documents or by conversation with another, does not render the witness incompetent to testify concerning his or her present recollection. The credibility of such testimony, in view of prior uncertainty on the part of the witness, is a matter for the jury's consideration. So it is when the witness has, in the meantime, undergone some psychiatric or other medical treatment by which memory is said to have been refreshed or restored. So it is when the intervening experience has been hypnosis.

Other courts have been more cautious in admitting testimony previously refreshed by hypnosis recognizing the great potential for the tainting of such evidence by hypnotic suggestions. In State v. Koehler, a witness had a difficult time identifying the defendant's car. Following hypnosis the witness could positively identify the defendant's car as the one he saw on the night in question. The court found the hypnotically refreshed testimony to be "incriminating in the extreme, and its admission into evidence highly prejudicial." Therefore, on remand the court would only let the witness testify as to matters which were "previously and unequivocally disclosed by him to the authorities, prior to the hypnosis."

Another example of where the court is concerned with a subject's own recollections becoming tainted by suggestions received while under hypnosis is United States v. Adams. In Adams, the witness' posthypnotic statements

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19Id. at 509.
20E.g., Kline v. Ford Motor Co., 523 F.2d 1067 (9th Cir. 1975).
21Id. at 1069-70.
22295 N.C. 96, 244 S.E.2d 414 (1978).
23Id. at 119-20, 244 S.E.2d at 427-28.
24312 N.W.2d 108 (Minn. 1981).
25Id. at 310.
26Id.
27581 F.2d 193 (9th Cir. 1978), cert. denied, 439 U.S. 1006 (1978).
differed so much from his prehypnotic statements that the prosecutor impeached him on the discrepancy. To lessen the opportunity for suggestion during the hypnotic procedure, the court recommended that the trial court should maintain a complete stenographic record of the hypnosis session. By allowing the judge, the jury and the opposing party to know who was present, as well as the questions that were asked and the answers given, the posthypnotic effect can be ascertained.

The court in *People v. Smrekar* recognized the importance of the *Adams* procedure. Nevertheless, it did not feel that such a stringent process had to be followed in order to determine if testimony had been tainted by hypnosis. In *Smrekar*, the hypnotist was a doctor with ten to fifteen years of hypnosis experience. Only the doctor and the witness were present during the sessions, and the doctor testified that he did nothing suggestive during the sessions. In addition, the witness' testimony was corroborated by other evidence. Based on all of these factors, the Illinois court felt that it could determine that the testimony was not tainted by hypnosis without seeing a tape of the sessions.

The necessity of employing safeguards to avoid admitting testimony tainted during the hypnosis procedure has been accepted by the courts since *Adams*. The courts disagree as to whether a recording of prehypnotic testimony is essential or whether factors such as those found in *Smrekar* are sufficient indices of reliability. They do agree, however, that the testimony must be examined for factors of suggestibility by the trial judge "in the first instance, as a question of admissibility, rather than by the jury as a matter of the sufficiency of the evidence."

Despite the advancements over the years in hypnosis and the safeguards taken by the courts, some jurisdictions still hold that any memory refreshed by hypnosis is inadmissible per se. These courts are concerned that the danger of confabulation and suggestibility would pose a threat to our system of justice. As Martin Orne, a prominent psychologist in the hypnosis field, stated, "as

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8*Id. at 198-99 n.12. The court also stated that an audio or video recording of the session would be helpful.
8*Id.
9*Id. at 387-88, 385 N.E.2d at 855.
9Lemieux v. Superior Ct., 132 Ariz. 214, 644 P.2d 1300 (1982) (before hypnotizing a potential witness the party intending to offer the witness' recollection must appropriately record by written statement, tape recording or preferably videotape form the prehypnotic recollections of the subject).
9Clark v. State, 379 So.2d 372 (Fla. Dist. Ct. App. 1980) (the hypnotist's statements that he had no knowledge of the case were sufficient for the court to determine that no posthypnotic suggestions were made to the witness while he was under hypnosis).
9E.g., State v. La Mountain, 125 Ariz. 527, 611 P.2d 551 (1980). *See also supra* note 31. While, however, some courts hold memory refreshed by hypnosis to be per se inadmissible, no jurisdiction has held that the fact of hypnosis precludes all testimony from a particular witness. Thus, a witness can testify as to events remembered prior to undergoing hypnosis. *See, People v. Wallach, 110 Mich. App. 37, 312 N.W.2d 387 (Mich. Ct. App. 1981).*
9Martin T. Orne is both a psychologist and a psychiatrist. He is the head of the University of Pennsylvania Winter, 1983] COMMENTS 527
a rule, the average hotel credit manager is considerably more adept at recognizing
deception" than are experienced hypnotists.

One of the leading cases to hold hypnotically refreshed testimony to be
per se inadmissible is *State v. Mack.* In *Mack*, the victim awoke in a motel
room with a serious cut through her vaginal muscle. Due to her intoxicated
state she could not remember how she received the wound. The police had her
interviewed by a self-taught, lay hypnotist who told her she would remember
the events of the night in question. Before trial the defense sought to exclude
the victim's testimony due to its unreliability. The trial court heard testimony
from five experts before certifying the issue of admissibility to the Minnesota
Supreme Court. The Minnesota Supreme Court held the hypnotically refreshed
testimony of the victim to be inadmissible.

The court in *Mack* based its conclusion on the unreliability of the hyp-
nosis experience. It agreed with the two experts who stated that the hypnotist's
direction, "You will remember very clearly everything that has happened on
the 13th and 14th," created a posthypnotic suggestion. The suggestion was
to remember everything after the hypnosis session as it was related therein.
The threat of confabulation and "filling-in the gaps" made her testimony
unreliable. The court stated:

The crux of the problem is that hypnosis can create a memory of percep-
tions which neither were nor could have been made, and, therefore, can
bring forth a "memory" from someone who cannot establish that she
perceived the events she asserts to remember. Neither the person hypnotized
nor the expert observer can distinguish between confabulation and accurate
recall in any particular instance.0

As a result under the *Frye* standard of admissibility, the results were not found
to be scientifically reliable or accurate. Therefore, the court felt that the victim
was incompetent to testify.

The case of *State v. Blanchard* followed the holding in *Mack*. In
*Blanchard*, the defendant was convicted of killing a young girl. The prosecu-
tion called to the stand a friend who had been with the defendant the night
of the murder. The witness' memory was previously refreshed by hypnosis due
to his intoxication on the night in question. Although the court did exclude
the testimony, they noted that, "the hypnosis in this case does not indicate
the potential for suggestion apparent in our previous cases." The court fur-

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hypnosis laboratory and is editor-in-chief of the Journal of Clinical and Experimental Hypnosis.

Orne, supra note 13, at 334.
292 N.W.2d 764 (Minn. 1980).
*Id.* at 769.
*Id.* at 769 (footnote omitted).
315 N.W.2d 427 (Minn. 1982).
*Id.* at 430.
ther stated that despite their adherence to the Mack approach, they were will-
ing to consider future developments in the area of hypnotic evidence.103

The court in Greenfield v. Robinson104 also held hypnotically refreshed testimony inadmissible as unreliable. In Greenfield the defendant was given a ride by a girl. As he was getting out of the car he blacked out. When he awoke she was dead. The court would not allow testimony as to his statements under hypnosis. It stated, however, that if there was some other evidence to corroborate the hypnotically refreshed testimony then it would have been admissible.105

These two cases, Blanchard and Greenfield, indicate that the per se rule of inadmissibility for hypnotic evidence may not be too strong. The courts in both of these cases recognized that these were poor fact situations on which to admit hypnotic testimony. In Blanchard, the witness was drunk on the night in question. Therefore, any memory revived would be blurred at best. In Greenfield, the defendant was the only witness. Therefore, he could confabulate any story without worry of contradiction. Thus, these two cases are good ex-

amples of when a court should not rely upon the accuracy of hypnosis.

Likewise in Mack, the facts were appropriate for holding the hypnotically refreshed testimony inadmissible. In Mack, the witness was drunk at the time in question, and the hypnotist had no formal training. Further, the police, but not defense counsel, were present at the hypnotic questioning. Finally, the session took place long after the crime when none of the refreshed recollection could be corrobrated.106 As a result given these facts it would have been more pre-
judicial than probative107 to admit such testimony.

On the facts before it, the court in State v. Hurd108 recognized the inap-
propriateness of allowing testimony that has been refreshed by hypnosis into evidence. It did not, however, hold such testimony to be per se inadmissible. In Hurd, someone stabbed the victim through the window while she was sleeping in her ground floor apartment. Since she was unable to describe her assailant, the police had her hypnotized. During the session, two police officers were present. Following the session the victim was unsure of the validity of her recall. The two police officers encouraged her to accept her new memory and iden-
tify the defendant. At trial, defense counsel was successful in barring the victim’s testimony. The New Jersey appellate and supreme courts affirmed the deci-
sion, but would not hold such testimony to be per se inadmissible.

103 Id.
105 Id. at 1120-21.
106292 N.W.2d at 772.
107 Evidence which is more prejudicial than probative, although relevant, is usually excluded. See, e.g., Fed. R. Evid. 403.
The Hurd court felt that a per se rule was unnecessarily broad. It felt that such a rule would "result in the exclusion of evidence that is as trustworthy as other eyewitness testimony." As a result the Hurd court felt that hypnotically refreshed testimony should be excluded only if it is not at least as reliable as ordinary recall. To determine if such testimony is at least as accurate as normal human memory, one must examine the procedures that are used to elicit the recall. In other words, "[t]he object of this review is not to determine whether the proffered testimony is accurate, but instead whether the use of hypnosis and the procedure followed in the particular case was a reasonably reliable means of restoring the witness' memory." Thus, if the procedures followed are reliable, the court will assume that hypnotically refreshed testimony is at least as accurate as normal recall.

The Hurd court adopted six procedures with which a proponent must comply in order to demonstrate that the hypnotic process was reliable. These procedures are:

1. an experienced hypnotist must conduct the sessions.
2. the hypnotist must be a neutral party.
3. any information on the case given to the hypnotist prior to the session must be recorded. This will allow a determination of the information which the hypnotist could communicate to the patient.
4. before inducing hypnosis the hypnotist should record the patients' prehypnotic recollection of the facts in the case.
5. all contact between the hypnotist and the patient must be recorded. (Videotaping is encouraged but not required.) This will enable a court to determine if any suggestions or information were transferred during the session.
6. only the hypnotist and the patient should be present at any phase of the sessions.

Some states have rejected the rationale and procedures outlined in Hurd. In Commonwealth v. Nazarovitch, a witness who was having nightmares

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109 Id. at 541, 432 A.2d at 94. The court cited evidence of how ordinary recall can be unreliable. Examples of this problem include the following: (1) memory naturally consists of confabulation; (2) interrogation distorts memory; and (3) interrogation can suggest answers.
110 Id. at 543, 432 A.2d at 95.
111 The Mack court noted these procedures without adopting them. 292 N.W.2d at 771 n.14 (Minn. 1980).
112 In People v. Nixon, 114 Mich. App. 233, 318 N.W.2d 655 (Mich. Ct. App. 1982), the court allowed the defense to play prehypnotic and posthypnotic tapes of a prosecution witness to the jury. This was done to allow the jury to decide the credibility of the witness' posthypnotic testimony. The court allowed this not because of their affinity for hypnotic testimony, but rather because the testimony was not prejudicial. It stated: "While the playing of the prehypnotic testimony and posthypnotic testimony is relevant to show that the error of allowing...[the witness] to testify about his hypnotically refreshed testimony is not prejudicial, we do not hold that this procedure will justify the use of hypnotically enhanced testimony."
113 86 N.J. at 545-46, 432 A.2d at 96-97.
came forth three years after a young boy was murdered. Her recall was hazy because she was on drugs at the time of the murder. Therefore, the police had her hypnotized to restore her memory. The court rejected the witness' testimony and the rationale of the *Hurd* court. It stated:

[A]t this time, we remain unconvinced that the trier of fact could do anything more than speculate as to the accuracy and reliability of hypnotically-refreshed memory . . . . It is unchallenged that a jury can more critically analyze a witness’ ability to perceive, remember, and articulate his recollections when such testimony has not been hypnotically refreshed. The probative worth of the hypnotically-adduced evidence cannot overcome the serious and fundamental handicaps inherent therein.\(^{115}\)

The court in *People v. Shirley*\(^{116}\) also rejected the *Hurd* position that the six procedures would forestall the dangers of hypnotic evidence.\(^{117}\) Further, the *Shirley* court found that some of the possible dangers with hypnosis were not even addressed by *Hurd*.\(^{118}\) The *Shirley* decision suggests that even if requirements adequate in theory could be devised to forestall the dangers of hypnotic evidence, they would inject "undue delay and confusion into the judicial process."\(^{119}\)

This position was reiterated by a Michigan court in *People v. Gonzales*.\(^{120}\) The *Gonzales* court went further, however, in stating that acceptance of such standards would diminish any value hypnotically derived testimony may possess. "The standards themselves, would give the hypnotic process an aura of reliability which, in actuality, it does not possess. It is far too likely that a jury would be even less critical of the testimony because of the indicia of reliability provided by such standards."\(^{121}\) Thus, the Michigan court felt that by trying to improve the reliability of hypnotic testimony an impossible situation is made worse.

Still, others are not quite so willing to cast-off any and all uses of hypnosis. Certainly, "there must be care taken in the employment of the techni-

\(^{111}\)Id. at 109. 436 A.2d at 176-77. Once again the facts of the case indicate the court’s reluctance to admit hypnotically refreshed testimony.

\(^{112}\)Id. at 39 n.24, 641 P.2d at 787 n.24, 181 Cal. Rptr. at 255 n.24. The court cites as an example the requirement that the session be recorded to enable a court to determine what information was transferred to the witness. Yet it is recognized that even experts cannot tell when cues are being conveyed. See also *supra* section 1.

\(^{113}\)Id. E.g., that the subject will lose his critical judgment, will confuse actual recall with confabulation, and will exhibit confidence in the validity of his new recollection.

\(^{114}\)Id. at 40. Examples of the things which would cause the delay are elaborate discovery demands, parades of expert witnesses, and excessive pretrial hearings and appeals. "In our opinion, the game is not worth the candle." See also, Hilgard & Loftus, *Effective Interrogation of the Eyewitness*, 27 INT'L. J. CLIN. AND EXPR. HYPN. 342 (1979), where the authors suggest, "It may be too much to expect that the precise controls available in the laboratory be used in non-experimental settings in the real world." *Id.* at 354.


\(^{116}\)Id. at 160, 310 N.W.2d at 313.
que and there must be good cause.’” Once such criteria are met, however, it may be more prejudicial to justice to exclude such testimony than to admit it.

E. Hypnosis In Pretrial Investigation

Several courts, while holding evidence hypnotically-adduced to be per se inadmissible, have noted the propriety of using hypnotic techniques in the investigatory phase of a case. They recognize the usefulness of hypnosis in eliciting leads and bringing forth new information. When hypnosis is used for such purposes, however, some courts still require that the Hurd standards be followed. The drawback in using hypnosis at the investigative stage is that the subject hypnotized cannot later be used as a witness at trial. This puts a party in “the difficult position of choosing whether to use a particular witness’ testimony at . . . trial or to subject that witness to hypnotism as an investigatory tool.”

IV. CONSTITUTIONAL CONSIDERATIONS

The use of hypnosis to aid in the investigation, prosecution or defense of a case can lead to the possible abridgment of constitutional rights. If hypnosis can cause confabulation, hypnotist-suggested testimony or incorrect answers to leading questions, then proponents of such evidence may be guilty of destruction of the evidence or using unduly suggestive techniques. Such effects may be found violative of due process. It has been held, however, that denying a defendant the opportunity to testify while under hypnosis is not an abridgment of his or her due process rights. Similarly, refusing a demand by the defendant that the complaining witness be hypnotized to refresh his or her recollection has also been held not to be a denial of due process.

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123Arizona Chief Justice Holohan commented in a dissent on the exclusion of hypnotically induced recall which had been corroborated at trial. He stated:

While much has been written by this court on the subject of hypnosis, the facts of this case illustrate the absurd result caused by this court’s current rule on hypnotically developed recall. The testimony of the witness subjected to hypnosis was corroborated by an independent non-hypnotized witness. To cast aside the corroborated testimony of this victim and witness does more damage to our system than the phantom dangers described by the several opinions of this court on the subject. State v. Stolp, 133 Ariz. 213, ___, 650 P.2d 1195, 1197 (1982).

125A recent study was done on 53 victims and witnesses in 23 different cases. It showed that hypnosis in the investigative stage led to new information being found in 60% of the cases. Kroger & Douce, supra note 34.

127The subject cannot be used to testify to any material pertaining to the subject of his hypnosis. He still can testify on totally unrelated matters. State v. Mena, 128 Ariz. 226, 232 n.1, 624 P.2d 1280 n.1 (1981).
128See supra, section 1; Putnam, supra note 67.
129See U.S. CONST. amends. V and XIV.
When hypnosis is used by, under or in conjunction with law enforcement personnel, it is clearly an identification proceeding. The issue of unduly suggestive procedures becomes an important question when hypnotically derived testimony is used to aid in identifying a defendant. The general rule is to let a witness testify, with any evidence that suggestive means were used to refresh his recollection going to the weight of his testimony. In the case of identification evidence, testimony cannot be given if unduly suggestive means were used in the identification procedure. The United States Supreme Court has outlined the standard for pretrial identification proceedings. The procedures must not be "so unnecessarily suggestive and conducive to irreparable mistaken identification" as to violate due process.

A Florida appellate court has held that a witness can testify as to an identification made if he or she is no longer under hypnosis at the time of the identification. The Hurd court takes the approach that once reliability is shown, due process is no longer an issue. If reliability is not shown, then the hypnotically induced evidence is not admissible and due process never becomes an issue.

Defendants have raised the issue of whether the prosecution's use of pretrial hypnosis to refresh a witness' memory violates their right to confront their accusers. One court stated that when the use of hypnosis evidence is exposed and the defense is allowed a prolonged and rigorous cross-examination, the right of confrontation is not denied. An Arizona court, however, stated: "[T]here is a strong belief among several authorities that hypnotism of a witness renders subsequent cross-examination ineffective." In essence, the use of hypnotism may so alter the witness' previous recollection that a defendant is denied an effective cross-examination of the witness. "Because the person hypnotized is subjectively convinced of the veracity of the 'memory,' this recall is not susceptible to attack by cross-examination." Thus, the right to confrontation may be denied.

136Id.
137Id. at 302. See also, U.S. v. Narcisco, 446 F. Supp. 252, 282 (E.D. Mich. 1977), for a discussion on the differences between identification of a person and testimony that relates events.
13986 N.J. at 548, 432 A.2d at 98.
140U.S. Const. amend. VI.
143State v. Mack, 292 N.W.2d 764, 770 (Minn. 1980).
144In Mena the court stated, "Cross-examination is a right so essential to protection of criminal defendants that it has been held to be a vital part of the federal constitutional right of confrontation." 128 Ariz. at 232, 624 P.2d at 1280.
On the other hand, an Illinois court has held that the right to confrontation is denied only if the hypnotist testifies as to what the patient said under hypnosis. If the patient himself takes the stand, no denial of confrontation exists. "While the hypnosis could affect the mind of the witness in such a subconscious way that the cross-examination could not reach, all witnesses are, to some extent, subject to subconscious stimuli similarly obscure."145

Another sixth amendment right which has been raised with respect to hypnotic evidence is the right to assistance of counsel. The issue usually arises when a defendant has sought to have the state provide a hypnotist along with appointed counsel. In those instances the defendant is attempting to use hypnosis to gather data on the motivational factors that were present at the time of the alleged crime.146

In Cornell v. Superior Ct.,147 the defendant was accused of murder. He had no recall due to intoxication at the time of the crime. Defense counsel sought to have the defendant examined by a hypnotist. The sheriff and the trial court both refused saying it would not make a difference as such testimony was inadmissible. On appeal the California courts reasoned that the issue was not one of admissibility but rather was one of the accused's defense. In order to prepare a proper defense, the defendant should have been allowed to ascertain the facts surrounding his crime.148 The court stated:

To make that right effective, counsel is obviously entitled to the aid of such expert assistance as he may need in determining the sanity of his client and in preparing his defense . . . . The use of hypnosis for the purpose desired is recognized by medical authorities . . . . 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.149

Georgia has held that the refusal by the prosecution to turn over statements made by the defendant while under hypnosis is not an abridgment of effective assistance of counsel.150 But several courts have held that there is a duty of

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144 People v. Smrekar, 68 Ill. App.3d at 388, 385 N.E.2d at 855.
145 Kline, Defending the Mentally Ill: The Insanity Defense and the Role of Forensic Hypnosis, 27 INT'L. J. CLIN. AND EXPR. HYPN. 375 (1979). Kline goes on to say:
   to summarize the situation in which the use of hypnosis may become an integral part of the insanity plea on behalf of the mentally ill or emotionally disturbed defendant, one might say that the expert witness in a broader context has four major contributions to make other than to the trial itself: (a) advising on the question of the "trialability" of the defendant; (b) giving information and advice on the appropriate disposition of the convicted criminal; (c) providing techniques for developing self-awareness and contributing to the reform of the convicted criminal; and (d) advising on questions connected with the defendant's release from custody.

Id. at 379.
147 Id. at 102-03, 338 P.2d at 449.
148 Id. (quoting In re Ochse, 38 Cal.2d 230, 231, 238 P.2d 561 (1951)).
a proponent of hypnotic evidence to make a timely disclosure to the court and opposing counsel. One court has even suggested that the defendant may be constitutionally entitled to such material.

Whether or not the duty reaches constitutional proportions, the court in Miller noted, "where such a duty has not been discharged, a motion for a new trial must be granted if there is a significant possibility that the undisclosed evidence might have led to an acquittal or a hung jury ...."

CONCLUSION

Hypnosis has advanced greatly since the time of Mesmer. Unfortunately, the modern experts are in agreement that hypnosis is not a means for determining truth. The possibility of inaccuracy is so great that even trained experts find it difficult to determine when a subject is lying or confabulating. In addition, there is the risk that a hypnotist will consciously or unconsciously leave a suggestion with the subject. This suggestion can surface as posthypnotic memory. To make matters worse, the subject cannot always distinguish posthypnotic and prehypnotic memory.

Despite all of these shortcomings, hypnosis does have a place in litigation. The shortcomings of hypnosis are prevalent only when it is used in an improper manner. The experts agree that hypnosis cannot determine veracity. Thus, it should not be used to ascertain the truth of a matter. This, after all, is a matter for the trier of fact to decide.

The strength of hypnosis lies in its ability to aid in recall. Recall is never totally accurate no matter how it is refreshed. As a result hypnosis should not be discarded as a means for refreshing recollection merely because it is as inadequate a method as any other. It is a legitimate method which can work well in some instances and poorly in others. Thus, it should be utilized in those instances for which it is suited, and laid aside, but not discarded, in those instances in which it is inappropriate.
Of course, certain precautions must be undertaken in the use of hypnosis. The procedures outlined by the court in *Hurd* do not necessarily define the state of the art. Yet, they are a starting point. Psychology and hypnosis deal with the individualized study of man. Therefore, it should not be surprising that certain procedures work better with some subjects than others. To utilize a method of psychology our legal process must be willing to flex its structured system. This flexing of the system may cause additional troubles and delays. Our system of justice, however, is not designed to be the least burdensome or swiftest. It is designed to be the best.

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