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THE PROBATIVE VALUE OF TESTIMONY FROM THE HYPNOTICALLY REFRESHED RECOLLECTION

I. INTRODUCTION

“[T]HE EXPERIENCE of the last three centuries of judicial trials has demonstrated that in disputed issues one cannot depend upon the mere assertion of anybody, however plausible, without scrutiny into its basis.”¹ The recent increase in the use of hypnotic memory enhancement on the victims and witnesses of crimes,² as well as on defendants’ and plaintiffs’ witnesses, necessitates an in-depth examination of the reliability of hypnosis as a basis for testimony or statements of persons who are speaking from a hypno-enhanced recollection. Such an examination of hypnosis reveals that hypnotically enhanced memories are likely to be fraught with fantasized and falsely suggested information as a result of the hypnotic process. Even where stringent procedural safeguards are followed,³ it may be impossible to detect the memory distorting effects of hypnosis. Thus the reliability of the hypnotically refreshed memory is to a significant degree, a matter of speculation. As a result, the probative value of statements and testimony from the hypno-enhanced recollection is marginal at best and rarely outweighs its potential to mislead the trier of fact.⁴ Although many courts freely admit such evidence, the better practice would be to admit it only in exceptional circumstances and under the strictest procedural guidelines.

II. NATURE AND HISTORY OF HYPNOSIS

The discovery of hypnosis is generally credited to Franz Anton Mes-

¹ H. WIGMORE, *A STUDENT'S TEXTBOOK ON THE LAW OF EVIDENCE* 238 (1935).

² Monrose, *Justice with Glazed Eyes—the Growing Use of Hypnotism in Law Enforcement*, *JURIS DOCTOR*, Oct. 1978 at 54. See also *TIME*, Sept. 13, 1976, at 56, which describes the Los Angeles “Svengali Squad,” a group of officers trained in the use of hypnosis.

³ The first attempt to establish definitive safeguarding procedures appears to have been in the *United States v. Adams*, 581 F.2d 193, 199 (9th Cir. 1978), *cert. denied*, 439 U.S. 1006 (1978). The court suggested that, at a minimum, stenographic records be maintained of all hypnotic sessions with the witness. It was not until April, 1980, however, that any reported case attempted to put forth comprehensive guidelines designed to reduce the unreliability of hypno-refreshed recollection. See *State v. Hurd*, 173 N.J. Super. 333, 414 A.2d 291 (1980) and *People v. McDowell*, 103 Misc.2d 831, 427 N.Y.S.2d 181 (1980).

⁴ The scope of this comment will be limited to the admissibility of statements or testimony from the hypno-enhanced recollection and foundational evidence involved therewith. The following topics will not be discussed except as they relate to the topic at hand:

A. The right of the accused to have his memory refreshed by hypnosis. See *State ex rel. Sheppard v. Koblentz*, 174 Ohio St. 120, 187 N.E.2d 40 (1962), *cert. denied*, 373 U.S. 911 (1972).

B. Expert testimony as to mental state of defendant based on observations of defendant while under hypnosis. See, e.g., *Commonwealth v. Langly*, 468 Pa. 392, 363 A.2d 1126 (1976), *People v. Hiser*, 267 Cal. App. 2d 47, 72 Cal. Rptr. 906 (1968).

C. Expert testimony as to credibility of witness based upon observations of witness while under hypnosis. See e.g., *Jones v. State*, 542 P.2d 1316 (Okla. Crim. App., 1975).

D. Use of hypnosis against the subject's will. See *People v. Leyra*, 302 N.Y. 353, 98 N.E.2d 553 (1951).

mer (1734-1815).⁵ Mesmer cured patients in seance-like encounters by transmitting what he theorized to be "animal magnetism" to the affected parts of patients' bodies through metal rods.⁶ The technique as it is known today, however, did not attract widespread scientific interest until the 1880's when Sigmund Freud endorsed its use (only to reject it several years later in favor of free association.)⁷ Finally, in 1958, the American Medical Association officially endorsed the medical use of hypnosis by recognizing its place in the "treatment of certain illnesses when employed by qualified medical and dental personnel."⁸

Although hypnosis has been heavily studied, there is no generally accepted explanatory theory.⁹ Hypnosis has been described in the cases as a "highly suggestible state into which a willing subject is induced by a skilled therapist"¹⁰ or as a "heightened or intense state of concentration which enables the subject to recall past events that, for a variety of reasons, the subject was unable to remember."¹¹ More comprehensive, scientific definitions describe hypnosis in terms of its characteristics. Hilgard observed these seven characteristics:

1. *Subsidence of the planning function.* The hypnotized subject loses initiative and lacks the desire to make and carry out plans of his own. . . .
2. *Redistribution of attention* [U]nder hypnosis selective attention and selective inattention go beyond the usual range
3. *Availability of visual memories from the past, and heightened ability for fantasy-production* The memories are not all veridical, and the hypnotist can in fact suggest the reality of memories for events that did not happen.
4. *Reduction in reality testing and a tolerance for persistent reality distortion* Reality distortions of all kinds, including acceptance of falsified memories . . . and all manner of other unrealistic distortions can be accepted without criticism within the hypnotic state.
5. *Increased suggestibility.* The suggestibility theory of hypnosis is so

⁵ Spector & Foster, *Admissibility of Hypnotic Statements: Is the Law of Evidence Susceptible?*, 38 OHIO ST. L.J. 567, 568-69 (1977) [hereinafter cited as Spector].

⁶ *Id.* at 569.

⁷ 9 ENCYCLOPEDIA BRITANNICA 133, 134 (ed. 1979) [hereinafter cited as Orne]. Dr. Martin Orne, the article's author, is a professor of psychiatry at the University of Pennsylvania. He is widely respected as a clinical and research expert on hypnosis. See Diamond, *Inherent Problems in the Use of Pretrial Hypnosis on a Prospective Witness*, 68 CAL. L.R. 313, 332 (1980) [hereinafter cited as Diamond].

⁸ COUNCIL ON MENTAL HEALTH, *Medical Use of Hypnosis*, 168 J.A.M.A. 186, 187 (1958), reprinted in Note, *Admissibility of Present Recollection Restored by Hypnosis—State v. McQueen*, 15 WAKE FOREST L. REV. at 357 n.2 (1979) [hereinafter cited as *Present Recollection Restored*].

⁹ Orne, *supra* note 7.

¹⁰ *State v. Mack*, Minn., 292 N.W.2d 764, 765 (1980) quoting I. COLEMAN, *ABNORMAL PSYCHOLOGY AND MODERN LIFE* 579 (2d ed. 1960).

¹¹ *State v. Hurd*, 173 N.J. Super, 333, 337, 414 A.2d 291, 294.

widely accepted that hypnosis and suggestibility come to be equated by some writers on hypnosis.

6. *Role behavior.* The suggestions that a subject in hypnosis will accept are not limited to specific acts or perceptions; he will, indeed, adopt a suggested role and carry on complex activities corresponding to that role.
7. *Amnesia for what transpired within the hypnotic state . . .* [Amnesia] is not an essential aspect of hypnosis . . . yet is a very common phenomenon, and it can be furthered through suggestion.¹²

Hypnotic states have also been separated in several levels or depths ranging from a light trance to a deep trance, each trance being more or less distinguishable by mental and physical characteristics manifested by the subject.¹³

Of the numerous known hypnotic phenomena, this comment is primarily concerned with that known as age-regression. This is a special sort of hypnotic memory distortion where the subject appears to relive or simply recall events that he was unable to recall while in a normal state of consciousness.¹⁴ Controlled studies, however, do not support the popular myth that the mind stores forever all sensory impressions in photographic detail.¹⁵ Facts that were never consciously observed and stored in the memory cannot be recalled even under the deepest trance.¹⁶ In fact, Dr. Orne states that the belief that hypnosis facilitates memory has not been supported by adequately controlled research.¹⁷

III. HYPNOSIS AND THE LAW

The issues in the cases which have dealt with the ramifications of recollection refreshed by hypnosis seem to fall into three readily definable categories.¹⁸ The most common issue is whether a person whose memory has been refreshed through pre-trial¹⁹ hypnosis should be permitted to testify

¹² E. HILGARD, *THE EXPERIENCE OF HYPNOSIS* 6-10 (1968). [hereinafter cited as Hilgard]. These characteristics are also listed and discussed in Diamond, *supra* note 7, at 316.

¹³ Spector, *supra* note 5, at 571.

¹⁴ Orne, *supra* note 7, at 136.

¹⁵ *Id.*

¹⁶ Levendula, *The Possible Role of Hypnosis in Criminal Investigation*, in *CRIMINAL INVESTIGATION AND INTERROGATION* 335, 340 (S. Gerber & O. Schroeder eds. 1962).

¹⁷ Orne, *supra* note 7, at 137.

¹⁸ A vast majority of the cases are criminal cases. In fact, only three civil cases are reported where the plaintiff sought to admit hypno-enhanced testimony. *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). Because the majority of case law is criminal, most of this comment will deal with hypnosis in the criminal trial setting. However, the principles and analysis discussed apply equally to the use of hypno-enhanced recollection in the civil setting.

¹⁹ Only one American case was found where a person was actually hypnotized in court, but in that case the jury was excused before the procedure was conducted. As a result of the defendant's testimony under hypnosis in that case, the first degree murder charge

from his hypno-enhanced recollection.²⁰ Another recurring issue is the admissibility of an out-of-court statement made while under hypnosis.²¹ Finally, the increasing use of hypnosis to refresh recollection has given rise to foundational evidence questions in two contexts. First, what type of foundation is required prior to admitting testimony from the hypno-enhanced recollection, and second, may observations of, or tapes of the subject while under hypnosis be used to establish a foundation for expert testimony on the subject's mental state or credibility.²²

A. *Testimony from Hypno-enhanced Recollection*

A majority of the cases that deal with hypnosis involve the admissibility of testimony from hypno-enhanced recollection by prosecutors' or plaintiffs' witnesses. In admitting such testimony into evidence, many courts have held that the fact that a witness' memory was refreshed through hypnosis affects the weight of the testimony rather than its admissibility.²³ Professor Diamond,²⁴ however, holds the view that once a witness' memory has been enhanced by hypnotism, his recollections become so contaminated that he is rendered incompetent to testify.²⁵ Other courts have admitted

was reduced to manslaughter to which the defendant pled guilty. *State v. Nebb*, No. 39, 540 (Ohio Com. Pl., Franklin Co., May 25, 1962), discussed in Dilloff, *The Admissibility of Hypnotically Influenced Testimony*, 4 OHIO N.U.L.R. 1, 12 (1977). However, in *Regina v. Pitt*, 68 D.L.R. 2d 513 (1967), the Supreme Court of British Columbia permitted a defendant to be induced into a trance before the jury for the limited purpose of planting the post-hypnotic suggestion that after the hypnosis the defendant would be able to recall the event. This case is cited in Spector, *supra* note 5, at 596.

²⁰ See *Harding v. State*, 5 Md. App. 230, 246 A.2d 302 (1968), *cert. denied*, 349 U.S. 949 (1969). In this case, a rape-shooting victim was unable to identify the defendant prior to hypnosis. She was permitted to testify and identify the defendant in court from hypno-refreshed memory. *Harding* was not followed in *People v. Harper*, 111 Ill. App. 2d 204, 250 N.E.2d 5 (1969). The reliability of hypnosis was not found sufficient to permit the rape victim to testify from a hypno-enhanced memory.

²¹ See *Connolly v. Farmer*, 484 F.2d 456. There the hypnotist's testimony as to statements made by plaintiff while under hypnosis were found to be inadmissible. In *People v. Modesto*, 59 Cal.2d 722, 382 P.2d 33, 31 Cal. Rptr. 225 (1963) tapes of hypno-induced statements were held to be admissible to establish a foundation for a hypnotist's expert opinion as to the defendant's mental state. No cases were found where out-of-court hypno-induced statements were admitted as substantive evidence.

²² *People v. Hughes*, 99 Misc. 2d 863, 417 N.Y.S.2d 643 (1979) (foundation of general scientific acceptance of the technique and adequate procedural safeguards required); *United States v. Awkard*, 597 F.2d 667 (9th Cir. 1979), *cert. denied*, U.S., 100 S. Ct. 179 (1979) (no foundation required as to nature and effect of hypnosis before witness testifies from hypno-enhanced recollection); *People v. Hiser*, 267 Cal. App.2d 47, 92 Cal. Rptr. 906 (1968) (tapes of hypno-induced statements held inadmissible to establish foundation for expert opinion on mental state); *People v. Modesto*, 59 Cal.2d 722, 382 P.2d 33, 31 Cal. Rptr. 225 (error to summarily exclude tapes of hypno-induced statements without exercising judicial discretion).

²³ *Harding v. State*, 5 Md. App. 230, 246 A.2d 302 (1968), *cert. denied*, 345 U.S. 949 (1968); *State v. Jorgensen*, 8 Or. App. 1, 492 P.2d 312 (1971); *State v. Temoney*, 45 Md. App. 569, 414 A.2d 240 (1980); *United States v. Awkard*, 597 F.2d 667; *Wyller v. Fairchild Hiller Corp.*, 503 F.2d 506; *Kline v. Ford Motor Co.*, 523 F.2d 1067.

²⁴ Professor Diamond is a Professor of Law at the University of California, Berkeley, and Clinical Professor of Psychiatry at the University of California, San Francisco. See Diamond, *supra* note 7.

such testimony on the ground that any evidence that aids the jury should be admitted.²⁶ Due to the unreliable nature of hypnosis in enhancing recollection, it is questionable whether such evidence can actually assist the jury in rendering a premised, non-speculative decision.

It has also been held that hypnosis should be treated no differently than any traditional memory-refreshing device.²⁷ This view apparently springs from the idea that any memorandum or device may be used to stimulate present recollection.²⁸ Hypnosis, however, acts as far more than a mere stimulus to the recollection. It can add to, displace or otherwise heavily distort the recollection of the subject.²⁹ "Imagination and suggestion are twin artists ever ready to retouch the fading daguerrotype of memory."³⁰ For the subject under hypnosis, imagination and suggestion may destroy the whole role of film and substitute another in its place.

B. *Pre-trial Statements Made While Under Hypnosis*

The courts have uniformly excluded evidence of pre-trial statements made while under hypnosis when offered as substantive evidence.³¹ This issue seems to arise most often when the defendants seek to admit exculpatory statements made while under a trance. *People v. Ebanks*³² is the first reported case found to have considered the evidentiary problems of hypnosis. In excluding pre-trial hypnotic statements by the defendant espousing his innocence, the court held simply "that the law of the United States does not recognize hypnotism."³³ In more recent cases, similar evidence was excluded because it was hearsay,³⁴ because hypnosis was not sufficiently reliable,³⁵ and because the jury might have given it undue credence.³⁶ In cases where the plaintiff or prosecution has sought to admit statements made while under a trance, the results have been essentially the same.³⁷

C. *Establishing a Foundation for Hypnotic Evidence*

The courts have generally admitted expert testimony as to the nature

²⁶ *United States v. Awkard*, 597 F.2d at 669.

²⁷ *Kline v. Ford Motor Co.*, 523 F.2d at 1067; *State v. McQueen*, 295 N.C. 96, 244 S.E.2d 414 (1978); *Clark v. State*, 379 So.2d 372, (Fla. App. 1979).

²⁸ MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE 16 (2d ed. Cleary 1972) [hereinafter cited as MCCORMICK].

²⁹ See discussion accompanying footnotes 57-67 *infra*.

³⁰ Gardner, *The Perception and Memory of Witnesses*, 18 CORNELL L.Q. 390, 401 (1933).

³¹ For a summary of the cases, see Annot., 92 A.L.R.3d 442 (1979).

³² 117 Cal. 652, 49 P. 1049 (1897).

³³ *Id.* at 656, 49 P. at 1053.

³⁴ *People v. Blair*, 25 Cal.3d 640, 602 P.2d 738, 159 Cal. Rptr. 818 (1979); *People v. Hangleben*, 86 Mich. App. 718, 273 N.W.2d 539 (1978); *Jones v. State*, 542 P.2d 1316 (Okla. Crim., 1975); *State v. Pierce*, 263 S.C. 23, 207 S.E.2d 414 (1974).

³⁵ See *Rodriguez v. State*, 327 So.2d 903, (Fla. App. 1976), *cert. denied*, 336 So.2d 1184 (Fla., 1976); *Greenfield v. Commonwealth*, 214 Va. 710, 204 S.E.2d 414 (1974).

³⁶ *Rodriguez v. State*, 327 So.2d at 904.

³⁷ *Connolly v. Farmer*, 484 F.2d 456; *Collier v. State*, 244 Ga. 553, 261 S.E.2d 364 (1979); *People v. Kester*, 78 Ill. App.3d 902, 397 N.E.2d 888 (1979).

and effect of hypnosis to establish a foundation for the admission of a witness' testimony from a hypno-enhanced recollection. Under the extremely liberal approach taken in the federal courts, however, the requirement for such a foundation has been dispensed with "[b]ecause there is no issue about the admissibility of hypnotically refreshed evidence"³⁸ This writer was unable to find a reported case where tapes of hypnotic sessions or evidence of statements made under hypnosis were admitted as a foundation for admitting hypno-enhanced recollection testimony.

Audio or video tapes of hypnotic sessions are frequently proffered as foundational evidence for expert opinion testimony.³⁹ Foundational evidence is required in two distinct contexts.⁴⁰ In cases where the hypnotist's expert opinion as to the mental state of defendant is offered, statements under hypnosis have often been offered to establish a foundation. Justice Traynor, speaking for the California Supreme Court in *People v. Modesto*,⁴¹ held that tape recordings of hypnotic statements were "clearly" admissible to establish the foundation for expert testimony on the defendant's mental state.⁴² Pennsylvania, on the other hand, has upheld a trial court's decision to exclude any evidence that a psychiatrist's opinion was based upon observations of the defendant while under hypnosis.⁴³ In Maryland, however, although hypno-enhanced recollection testimony is admissible, tapes are excluded as well as any expert opinion based upon observations of the subject while under hypnosis.⁴⁴

IV. RELIABILITY OF HYPNOSIS

In recent years, numerous courts have recognized that hypnosis is not reliable.⁴⁵ Although it has been held that hypnosis should be treated no differently than any other memory refreshing device,⁴⁶ hypno-enhanced recollection, is more appropriately dealt with as scientific evidence. Several

³⁸ *United States v. Awkard*, 597 F.2d at 699.

³⁹ Under the rules of evidence "a rose by any other name" is often more sweet. Hence, in many cases where evidence of statements made under hypnosis are excluded as substantive evidence, the same evidence may be submitted for foundational purposes.

⁴⁰ Videotapes of hypnotic sessions are also essential in providing the court with basis on which to judge the reliability of hypnotic evidence prior to exercising its discretion in admitting or excluding the evidence. For this purpose, however, the ordinary rules of evidence may not apply. *See* FED. R. EVID. 104(a).

⁴¹ *People v. Modesto*, 59 Cal.2d 722, 382 P.2d, 33, 31 Cal. Rptr. 225.

⁴² *Id.* at 728, 382 P.2d at 39, 31 Cal. Rptr. at 231.

⁴³ *Commonwealth v. Langley*, 468 Pa. 392, 363 A.2d 1126 (1976). However, FED. R. EVID. 403 permits expert opinion testimony even where the basis for the opinion would not be admissible.

⁴⁴ *State v. Temony*, 45 Md. App. 569, 414 A.2d 240.

⁴⁵ *State v. LaMountain*, 125 Ariz. 547, 611 P.2d 551 (1980), *People v. Blair*, 25 Cal. 3d 640, 602 P.2d 738, 159 Cal. Rptr. 818; *State v. Mack*, Minn., 292 N.W.2d 764 (1980); *Greenfield v. Commonwealth*, 214 Va. 710, 204 S.E.2d 414; *People v. Harper*, 111 Ill. App.2d 204, 250 N.E.2d 5; *State v. Temony*, 45 Md. App. 569, 414 A.2d 240.

⁴⁶ *See* note 27 *supra*.

courts⁴⁷ have applied the standard of admissibility for scientific evidence established in *Frye v. United States*⁴⁸ to hypnotic evidence.

In *Frye* the court excluded results of a systolic blood pressure deception test, a type of primitive lie detector,⁴⁹ holding that "the thing from which the detection is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs."⁵⁰ The court further modified this standard by requiring that the test enjoy such acceptance "as would justify the courts in admitting expert testimony deduced from the discovery, developments, and experiments thus far made."⁵¹ Some courts in applying *Frye* seem to have overlooked this latter requirement.⁵² The reliability of memories or statements induced by hypnosis has little or no relevance to its value as a medical treatment.⁵³ Thus, the general acceptance of hypnosis in its field, having no relevance to its reliability, should not be sufficient to justify the admission of hypno-enhanced evidence.

While accepting the unreliability of hypno-enhanced memory, at least one author has advocated its admission into evidence noting that ordinary eyewitness testimony may also be unreliable and subject to the witness' prejudices, fantasies and misperceptions.⁵⁴ Spector's theory however, when subjected to a *reductio ad absurdum* analysis, would eventually result in the admission of any and all evidence regardless of reliability. The problem with Spector's theory is that the traditional guarantees of trustworthiness⁵⁵ as well as the jury's ability to view the demeanor of the witness are wholly ineffective to reveal distortions of memory induced by the hypnotic process.

As a result of the memory distorting effect of hypnosis in memory enhancement,⁵⁶ the probative value of the hypno-enhanced memory is marginal at best; in most cases that value is outweighed by its potential for abuse by the jury.⁵⁷ As will be discussed in Part V, even where stringent safeguards are followed, hypno-enhanced recollection may be unavoidably and undetectably riddled with fantasy and false suggestion. The subject, however,

⁴⁷ See *People v. Hughes*, 99 Misc.2d 863, 417 N.Y.S.2d 643; *State v. Mack*, Minn., 292 N.W.2d 764.

⁴⁸ 293 F. 1013 (D.C. Cir. 1923).

⁴⁹ The test was based upon the theory that the conscious effort required to lie resulted in a slight increase in blood pressure which could be measured and compared to the results of responses known to be truthful.

⁵⁰ *Frye v. United States*, 293 F. at 1014.

⁵¹ *Id.*

⁵² *People v. Hughes*, 99 Misc.2d 863, 417 N.Y.S.2d 643.

⁵³ *Diamond*, *supra* note 7, at 317. See also *Spector*, *supra* note 5.

⁵⁴ *Spector*, *supra* note 5.

⁵⁵ Such as cross examination, sanctity of oath, fear of perjury prosecution, and solemnity of proceedings. See *MCCORMICK*, *supra* note 28, at 581-84.

⁵⁶ See textual discussion in Part V *infra*.

⁵⁷ See *People v. Hangsleben*, 86 Mich. App. 716, 273 N.E.2d 593 and *Rodriguez v. State*, 327 So.2d 903. In both cases, hypnotic evidence was excluded due to its potential for abuse by the jury.

may be genuinely convinced of the accuracy of his memory, rendering the traditional guarantees of trustworthiness⁵⁸ useless in assessing what weight should be given to such testimony. The trier of fact, as a result, is forced to speculate as to the accuracy of the witness' memory.⁵⁹ This speculation seriously weakens the tendency of the hypnotic evidence "to establish the inference for which it is offered" and thus casts doubt on what probative force, if any, such evidence has.⁶⁰ The marginal probative force of such evidence will, therefore, be readily outweighed by its high potential to mislead or be abused by the jury.⁶¹

V. THE PROBLEMS OF HYPNO-ENHANCED TESTIMONY

Hypnotism is inherently unreliable⁶² and therefore subject to abuse either by its proponent,⁶³ the trier of fact⁶⁴ or both. Whereas in most cases abuse by the proponent may be controlled by stringent procedural safeguards,⁶⁴ the inherent unreliability of the technique does not appear to be sufficiently controllable to give the evidence it produces enough probative force to outweigh its potential for abuse by the trier of fact. This is not to say that hypno-enhanced evidence should be *per se* inadmissible.⁶⁵ A witness who has been subjected to a hypnotic memory enhancement procedure should be permitted to testify only as to pre-hypnosis recollections. This could be enforced by requiring that the witness' complete recollection prior to hypnosis be recorded and preserved.⁶⁶ Only in rare cases where stringent procedural guidelines are followed will the need for and the probative force of such evidence outweigh its potential to mislead the jury.

⁵⁸ See note 55 *supra*.

⁵⁹ The task of the trier of fact is to first understand the witness's narration of his recollection while on the stand. Assuming that the narration is not ambiguous or misleading, it must be determined whether the narration was truthful as to what the witness's recollection is or whether it is a conscious fabrication. Until this point, the traditional guarantees of trustworthiness operate with normal effectiveness. However with the hypno-enhanced recollection, even where the witness truthfully and accurately narrates his recollection of a given event, there is no way to determine to what extent the subject's memory has been distorted or altered by hypnosis. Here the traditional guarantees fail.

⁶⁰ McCORMICK, *supra* note 28, at 436.

⁶¹ See textual discussion in Part V(B) *infra*.

⁶² See cases cited in note 45 *supra*. See also Diamond, *supra* note 7, at 34.

⁶³ An extreme example of abuse of hypnosis is *People v. Leyra*, 302 N.Y. 353, 98 N.E.2d 553 (1951). In that case, the defendant was charged with the murder of his elderly parents. After arresting the defendant, the police hired a psychiatrist who interviewed him as police secretly taped their conversation. Though the psychiatrist and police denied it, there was substantial evidence that the psychiatrist put the defendant under hypnosis. The psychiatrist repeatedly urged the defendant to admit that he had committed the murder while in the heat of passion. The United States Supreme Court eventually granted habeas corpus relief upon finding that defendant's confession had been coerced. *Leyra v. Denno*, 347 U.S. 556 (1954).

⁶⁴ See *People v. Hangsleben*, 86 Mich. App. 716, 273 N.E.2d 593 and *Rodriguez v. State*, 327 So.2d 903.

⁶⁵ Professor Diamond has concluded that hypnosis renders a witness incompetent to testify. Diamond, *supra* note 7, at 349.

⁶⁶ See generally, discussion accompanying note 171 *infra*.

For purposes of analysis, the use of hypnotic evidence will be viewed in terms of its inherent dangers. These dangers may be divided into two distinct categories. The first category is unreliability which originates in the subject. Two types of subject-based unreliability, fabrication and confabulation, will be analyzed. The second category is the unreliability inherent in the technique of hypnosis itself. Hyper-suggestibility and potential for jury abuse fall into this category.

A. Subject-Based Unreliability

1. Deliberate Fabrication

It is generally accepted that hypnosis is not a reliable truth determinant.⁶⁷ Not only can the hypnotized subject willfully lie,⁶⁸ but he can also withhold information from the hypnotist.⁶⁹ These are particularly important considerations when statements made under hypnosis or tapes of hypnotic sessions are proffered as evidence.⁷⁰

The problem of deliberate fabrication is magnified by the fact that even the most skilled therapist may be unable to detect a fabricated response.⁷¹ This problem becomes particularly acute when the proponent seeks to introduce statements made under hypnosis to support or bolster the credibility of the subject's in-court testimony.⁷² Out-of-court hypnotic statements have generally been excluded as hearsay when offered for this purpose.⁷³

The ability to fabricate under hypnosis is also a serious problem where a witness is called to testify in court while under a hypnotic trance. No American court has yet permitted a hypnotized witness to testify before a jury.⁷⁴ In most cases, it would seem that the spectacle of a witness undergoing a hypnotic trance and the resulting potential for unduly arousing the emotions and prejudices of the jury would surely outweigh the probative value of any evidence so derived.

A somewhat similar danger arises from the ability of some subjects to simulate a trance without detection by the hypnotist. This cre-

⁶⁷ Orne, *supra* note 7, at 139. Ladd, *Legal Aspects of Hypnotism*, 11 YALE L.J. 173, 187 (1902).

⁶⁸ Orne, *supra* note 7, at 139.

⁶⁹ Field & Dworbin, *Strategies of Hypnotic Interrogation*, 67 J. PSYCH. 47, 55 (Sept. 1967).

⁷⁰ Presumably, if the subject fabricates his recollections while under hypnosis, he would also be lying if he recounted the same recollection on the witness stand. In this case, the traditional guarantees of trustworthiness would be effective.

⁷¹ Spector, *supra* note 5, at 594.

⁷² *People v. Hangsleben*, 86 Mich. App. at 723, 273 N.W.2d at 544.

⁷³ See *Rodriguez v. State*, 327 So.2d 903; *Greenfield v. Commonwealth*, 214 Va. 710, 204 S.E.2d 414.

⁷⁴ See discussion in note 19 *supra*. Also see *Greenfield v. Robinson*, 413 F. Supp. 1113 (W.D. Va. 1976) where the court approved the trial judge's refusal to permit the defendant to testify while in a trance.

ates a problem whenever hypnotic statements are offered for any purpose, or whenever an expert opinion that is based upon observations of the subject (under what the expert believes to be a trance) is sought to be admitted. Some subjects simulating hypnosis have performed remarkable feats of strength and endurance while under a feigned trance.⁷⁵ Because the simulation of the hypnotic state may go undiscovered, the trier of fact is forced to speculate the validity of the evidence.

Procedural safeguards traditionally thought to insure reliability of in-court testimony⁷⁶ are wholly inadequate when applied to statements made under hypnosis, whether made prior to, or during trial. Because there is no reliable way to detect or deter prevarication by the hypnotized subject, it is difficult to conceive of an adequate procedural substitute for the traditional safeguards. It has been argued,⁷⁷ however, that statements made during hypnotic age-regression should be admitted under the present-sense impression exception to the hearsay rule.⁷⁸ Professors Spector and Foster assert that, inasmuch as a subject under hypnotic age-regression "re-witnesses" the event in question, the memory and perception "infirmities"⁷⁹ of hearsay evidence are cured.⁸⁰ Applying Professor Tribe's ingenious "Testimonial Triangle"⁸¹ analysis of hearsay, Spector and Foster reach the conclusion that statements made during age-regression are strong "right leg hearsay," and therefore should be admitted.⁸² This analysis fails however, because its basic premise, that age-regression effectively cures the testimonial infirmities of memory and perception, is wholly inaccurate. What may appear to be accurate recollection of an event may actually be riddled with fantasy and false suggestion indiscriminantly adopted by the subject while under the hypnotic trance.⁸³ Though it masks the symptoms of the right-leg testimonial infirmities, hypnosis may actually render the infirmity incurable.

Even if the hearsay rule were not applicable, statements made while under hypnosis should rarely be admitted for any purpose because of their unreliability and potential to mislead the jury.⁸⁴ Hypnotic evidence should

⁷⁵ Orne, *supra* note 7, at 137.

⁷⁶ See note 55 *supra* for a list.

⁷⁷ Spector, *supra* note 5, at 608.

⁷⁸ Classic hearsay analysis would be applicable to any out-of-court statement. See McCORMICK, *supra* note 28, at 579. See also FED. R. EVID: 803(1).

⁷⁹ Spector, *supra* note 5.

⁸⁰ See Tribe, *Triangulating Hearsay*, 87 HARV. L.R. 957, 959 (1954) for a modular approach to hearsay and a discussion of this problem.

⁸¹ *Id.* at 959.

⁸² Spector, *supra* note 5, at 608. Under Tribe's analysis "one good leg is enough" to permit an exception to the hearsay rule. Tribe, *supra* note 80.

⁸³ See discussion of confabulation in text accompanying notes 88-115 and suggestion in text accompanying notes 118-74 *infra*.

⁸⁴ See discussion of the effect of hypnosis on the jury in the text accompanying notes 175-77.

only be admitted where the need for it⁸⁵ and its probative force⁸⁶ exceed its potential for abuse by the trier of fact.⁸⁷ The same holds true when the proponent seeks to have a witness testify while in a trance.

2. Confabulation

The tendency of the hypnotized subject to confabulate is the second category of subject-based unreliability. Confabulation is the tendency of the hypnotized subject to fill in memory gaps with false and fantasized bits of information.⁸⁸ The hypno-enhanced recollection is likely to be a "mosaic of (1) appropriate actual events, (2) entirely irrelevant actual events, (3) pure fantasy, and fantasized details supplied to make a logical whole."⁸⁹ In one experiment, subjects memorized various poems prior to undergoing hypnosis. Later, while under hypnosis, they were asked to recite the poems they had memorized. Although the subjects remembered more than they could without hypnotism, they also made more mistakes than they did prior to undergoing hypnosis, sometimes confabulating entire verses.⁹⁰

The case of *Emmett v. Ricketts*⁹¹ appears to be a graphic example of confabulation by a hypnotized subject. The case involved the sensational murders of a Mr. and Mrs. Mathews at their home in Georgia. The convictions of Emmett and co-defendant Creamer (one of several co-conspirators tried separately) resulted almost entirely from the testimony of one Deborah Kidd, who was with the defendants at the time of the murders. Kidd was a drug addict and a prostitute, and prior to trial was housed with a police detective with whom she admitted having had intimate relations. On several occasions, Kidd was taken to a psychiatrist and hypnotized under the pretense of treating her drug addiction. In reality, Kidd was hypnotized in order to refresh her recollection of the murders. Kidd testified that after Mr. Mathews had been shot and killed, she found Creamer shot and wounded in a utility room in the house. No trace of blood type A (Creamer's type) was found. Kidd also testified that she saw Mrs. Mathews

⁸⁵ The need for the questionable evidence may be considered in assessing its value. The need for the evidence is a function of the availability of other probative but less prejudicial evidence. McCORMICK, *supra* note 28, at 439. See *Greenfield v. Robinson*, 413 F. Supp. 1113, where the court approved the exclusion of statements made by the defendant during pretrial hypnosis even though there were no eyewitnesses to the crime and the defendant asserted unconsciousness as a defense.

⁸⁶ See generally McCORMICK, *supra* note 28, at 438.

⁸⁷ *C.f.* *Chambers v. Mississippi*, 410 U.S. 284 (1973) in which the court held, that in the context of the facts of that case, the prejudicial effect of excluding otherwise properly excludable hearsay evidence denied the defendant his right to fair trial. *Chambers* stands for the proposition that necessity may outweigh the hearsay rules. See also *People v. Blair*, 25 Cal.3d 640, 159 Cal. Rptr. 818, 602 P.2d 738. Distinguishing *Chambers*, the *Blair* court excluded hypno-enhanced testimony as being unreliable and not critical to defendant's case.

⁸⁸ See Dillhoff, *supra* note 19, at 5.

⁸⁹ *Diamond*, *supra* note 7, at 335.

⁹⁰ *Id.*

⁹¹ 197 F. Supp. 1025 (N.D. Ga. 1975).

heavily beaten by another co-conspirator, and that when she (Kidd) attempted to flee, Creamer gave chase and threw an ax which landed in a tree. An autopsy of Mrs. Mathews' body disclosed no evidence of beating and the police were unable to find any trace of an ax or ax marks on the premises. Kidd "recalled" several other details that were either unsupportable or contrary to the tangible evidence.⁹² There is no way to determine whether or to what degree Kidd's recollections were confabulated, but it is clear that Kidd's hypno-enhanced recollection was highly unreliable.

As is the case with fabrication, the hypnotist is unable to distinguish the true recollections from the untrue or confabulated ones.⁹³ The hypnotized subject tends to be eager to satisfy the hypnotist's demands for detailed recollections of the event under investigation.⁹⁴ At the same time, hypnotic age-regression seems to make the subject less concerned with the accuracy of his memory than he would normally be.⁹⁵ This is significant because in one's memory of any given event, there are likely to be many gaps and missing details.⁹⁶ A hypnotized subject will fill in the gaps with fantasized details to make what appears to be a full, detailed recollection of the event.⁹⁷ Not only will the hypnotist be unable to distinguish fact from fantasy, but the subject himself will generally be unaware, even after hypnosis, that part of his recollections were the result of confabulation.⁹⁸

In view of the tendency to confabulate false memories, it has been suggested that the reliability of the subject's hypno-enhanced recollection may be determined by independent corroboration of newly recalled facts.⁹⁹ Several courts have considered the independent corroboration of parts of the post-hypnosis recollection in permitting the subject to testify from his enhanced recollection.¹⁰⁰ The mere fact that there are some corroborated facts in the witness's hypno-enhanced recollection, however, is not a basis for concluding that the entire recollection is accurate.¹⁰¹ Indeed, if the important aspects of a witness's recollection can be corroborated, the ex-

⁹² *Id.* at 1030-33.

⁹³ Diamond, *supra* note 7, at 337.

⁹⁴ *Id.*

⁹⁵ Orne, *supra* note 7, at 136.

⁹⁶ See discussion accompanying footnotes 122-26.

⁹⁷ See note 89 *supra*.

⁹⁸ Diamond, *supra* note 7, at 337.

⁹⁹ *People v. McDowell*, 103 Misc.2d 831, 427 N.Y.S.2d 181.

¹⁰⁰ *United States v. Miller*, 411 F.2d 825 (2d Cir. 1969); *United States v. Narisco*, 446 F. Supp. 252 (E.D. Mich. 1977); *People v. Smrekar*, 68 Ill. App. 379, 385 N.E.2d 848 (1979); *People v. Harding*, 54 Md. App. 230, 246 A.2d 302. See also *Perrifield v. State*, 400 N.E.2d 146 (Ind. 1980) where the court approved the witness's post-hypnosis identification of the defendant because it had a "sufficient independent basis."

istence of such other evidence substantially lessens the need for the hypnotic evidence, thereby reducing its probative value.¹⁰²

The subject's confidence in his newly refreshed recollection is also useless as evidence of the accuracy thereof.¹⁰³ The subject may be both convinced and convincing as to the accuracy of his recollection despite the tendency of confabulate.¹⁰⁴ The subject's confidence in the accuracy of his recollections may result from "posthypnotic source amnesia" which occurs when a subject retains memories created under hypnosis but does not recall that the memories were acquired while under a trance.¹⁰⁵ The subject thus assumes that the memory, which may have been partially or wholly confabulated (or falsely suggested),¹⁰⁶ was acquired from personal experience.¹⁰⁷ "Such a belief can be unshakable, last a lifetime, and be immune to cross examination."¹⁰⁸ Hence, it is impossible for the trier of fact, by observing the witness during testimony, to distinguish between confabulated recollections and recollections derived from actual experience. The traditional guarantees of trustworthiness¹⁰⁹ would be ineffective in exposing confabulation because the subject is sincerely convinced of the accuracy of his recollection.

The expert hypnotist is also unable to detect the presence of confabulation.¹¹⁰ In spite of this, several writers have suggested that expert opinion testimony as to the reliability of the newly-recalled facts is an adequate safeguard of the trustworthiness of hypnotic evidence.¹¹¹ Experts who attempt to sort fact from fantasy generally base their opinion on the specificity of detail, and the independent corroboration of new facts. Regardless of expertise, however, the accuracy of the hypno-enhanced recollection can not be verified.¹¹²

The only way to avoid the misleading effects of confabulation is to exclude testimony from the present, hypnotically refreshed recollection.¹¹³ Although any recollections acquired under hypnosis may be used in the conduct of an investigation, testimony therefrom should not ordinarily be admitted due to the high potential to mislead the jury. Hence, in any case where hypnotic memory enhancement is used, the subject's complete

¹⁰² See McCORMICK, *supra* note 28, at 439.

¹⁰³ Diamond, *supra* note 7, at 339.

¹⁰⁴ Orne, *supra* note 7, at 136.

¹⁰⁵ Diamond, *supra* note 7, at 336.

¹⁰⁶ See discussion accompanying footnotes 118-30. *infra*.

¹⁰⁷ See Note, *Hypnotism, Suggestibility and the Law*, 31 NEB. L.R. 575, 583 (1952).

¹⁰⁸ Diamond, *supra* note 7, at 336.

¹⁰⁹ See note 55 *supra*.

¹¹⁰ See discussion accompanying footnotes 93-98 *supra*.

¹¹¹ Spector, *supra* note 5, at 593; *Present Recollection Restored*, *supra* note 8.

¹¹² Diamond, *supra* note 7, at 336.

¹¹³ Dillhoff, *supra* note 19, at 21.

pre-hypnosis recollection should be recorded and preserved.¹¹⁴ In one case that admitted hypno-enhanced testimony, the court was satisfied that the witness had testified as to what parts of his testimony came from recollections restored by hypnosis.¹¹⁵ It would be preferable, however, to have an independent record of the subject's pre-hypnosis recollection. The record could be used to insure that the witness was not testifying from his hypno-enhanced (and thus unreliable) recollection.

B. *Technique-based Unreliability*

The analysis of technique-based unreliability is divided into two categories. The first involves probably the most dramatic characteristic of the hypnotism, the susceptibility of the hypnotized subject to hypnotic suggestion.¹¹⁶ The second category concerns high potential for prejudice which accompanies the mere knowledge of the fact that a witness was subject to hypnosis.¹¹⁷

1. Suggestibility

The hypnotized subject, by definition, manifests a "heightened degree of suggestibility."¹¹⁸ In fact, suggestibility and hypnosis are virtually synonymous in the eyes of some experts.¹¹⁹ The subject's desire to please his hypnotist¹²⁰ makes him particularly receptive to express or implicit suggestions.¹²¹ Suggestion may come from any one of a variety of sources and may originate before or after the actual trance. In either case, suggestions may become an integral part of the total hypnotic experience.¹²²

The hypnotist is capable, in varying degrees, of planting totally false memories in the subject's mind. One writer describes an experiment in which he falsely suggested to his patient the memory of a one-hour session when in fact, the session was only one-half hour. When billed thereafter, the patient paid for a full hour without question.¹²³ In another experiment, a hypnotized subject was told that he had overheard a Communist plot

¹¹⁴ This has been advanced as a procedural safeguard by courts that more readily admit hypnotic evidence. See *People v. McDowell*, 103 Misc.2d 831, 427 N.Y.S.2d 181, *State v. Hurd*, 173 N.J. Super. 333, 414 A.2d 291.

¹¹⁵ *Connolly v. Farmer*, 484 F.2d 456.

¹¹⁶ The characteristic problems of hypnosis are categorized here only for the purposes of analysis. In reality these characteristics may blend together in varying degrees to make up the total hypnotic experience.

¹¹⁷ This is not to be confused with the prejudicial effect that is an outgrowth of the unreliability caused by the problems of fabrication, confabulation and suggestion. Here, prejudice and abuse result from a disclosure to the jury that the witness was hypnotized in an effort to obtain testimony.

¹¹⁸ See *Spector*, *supra* note 5, at 570.

¹¹⁹ *Hilgard*, *supra* note 12.

¹²⁰ *Diamond*, *supra* note 7, at 333.

¹²¹ *Spector*, *supra* note 5, at 578.

¹²² *Diamond*, *supra* note 7, at 336.

¹²³ *Levendula*, *supra* note 16, at 342.

to take over the television networks. After being awakened, the subject reported his discovery to a network news correspondent. Though the subject was given no details of the plot, he reported the plot replete with fully fantasized, elaborate detail. Later the subject could not be shaken from his story even under hypnosis.¹²⁴

The subject, after being awakened, may have no memory that the false recollection was planted during hypnosis by way of suggestion.¹²⁵ In fact, the subject may not even recall having been put under a trance. Hence, the ability to effectively cross-examine the witness who testifies from hypno-enhanced recollections may be extremely limited.¹²⁶

Despite the inability to detect the effects of suggestion and confabulation¹²⁷ on the hypno-enhanced recollection, some courts have placed the burden on the opponent of hypnotic evidence to show that the hypnotic process has tainted the witness's testimony, or that the testimony of the witness did not come from the witness's true memory uncontaminated by hypnosis.¹²⁸ An example of the latter situation is *People v. McDowell*,¹²⁹ a schizophrenic case in which the court recognized all of the inherent dangers of hypnotic memory enhancement, but at the same time ignored them. The *McDowell* court, recognizing the problems of confabulation and suggestibility, set forth a comprehensive list of procedural safeguards designed to deal with those problems. The safeguards included the following requirements: 1) that the hypnotist be a qualified expert; 2) that the hypnotist be independent and unbiased; 3) that the hypnotist know as little about the case as possible prior to hypnotizing the subject and that the only information given to the hypnotist be in writing; 4) that all contacts between the hypnotist and subject be videotaped; 5) that only the hypnotist and subject be present during the procedure; 6) that an extensive pre-hypnosis interview be conducted; 7) that the subject's complete recollection be recorded prior to hypnosis, 8) that the hypnotist not be suggestive in any way during any contact with the subject; and, finally, 9) that all new facts be independently corroborated.¹³⁰ The *McDowell* court, however, also became the first court to ignore nearly every one of the guidelines established thereby.¹³¹ *McDowell*, it seems, only paid lip-service to the need for "ex-

¹²⁴ TIME, May 24, 1968, at 59.

¹²⁵ See notes 105-09 *supra*, and accompanying text.

¹²⁶ *Id.*

¹²⁷ See note 93 *supra*, and accompanying text.

¹²⁸ Pavone v. State,Ind., 402 N.E.2d 976 (1980); *People v. McDowell*, 103 Misc.2d 831, 427 N.Y.S.2d 181 (1980).

¹²⁹ 103 Misc.2d 831, 427 N.Y.S.2d 181 (1980).

¹³⁰ *Id.* at 831, 427 N.Y.S.2d at 183-84.

¹³¹ The hypnotist in *McDowell* was not independent, information received by the hypnotist prior to hypnotizing the witness was not in writing, not all contacts between the hypnotist and subject were taped or recorded, no pre-hypnotic examination was conducted, the subject's complete recollection prior to hypnosis was not recorded except for a statement

treme caution¹³² in the use of hypnosis. Despite the failure to follow seven of the nine guidelines set out by the court, McDowell's motion to suppress the evidence was denied.¹³³

Many of the procedural guidelines advanced by courts and writers¹³⁵ have been primarily concerned with the control of the characteristic susceptibility of hypnotized subjects to suggestion. The reason for this is that suggestibility is subject to control by the hypnotist to a far greater extent than the tendency to confabulate and the ability to fabricate while under a trance. Because of its controllability, the hyper-suggestibility of the hypnotized subject has been the object of a great deal of intentional and unintentional abuse. As will be shown, in no way do the guidelines suggested guarantee the reliability of the hypno-enhanced recollection, which as a result of confabulation, hyper-suggestibility and the ability to fabricate, is inherently unreliable. As a result, in most cases, a witness should only be permitted to testify as to his pre-hypnosis recollections.¹³⁶ Only where the most stringent safeguards are followed, and the need for the hypnotic evidence is great should such evidence be admitted.¹³⁷

Proponents claim that the guidelines advanced by the courts and commentators justify admitting hypnotic statements into evidence. The effectiveness of these guidelines, however, even if strictly followed, is overrated by their respective proponents. At best, these guidelines would only permit admission of such evidence in rare cases where the extreme need for it gives it sufficient probative value to outweigh the potential to mislead the jury.

A safeguard commonly proposed is that the hypnotist simply avoid making undue suggestions to the subject.¹³⁸ It is impossible, however, for the hypnotist to completely avoid suggestion.¹³⁹ Even if the hypnotist is able to avoid giving conscious cues, the subject is susceptible to a myriad of cues from the hypnotist which are unintentionally or unconsciously given. The hypnotist's attitude, reaction to responses, body language, voice quality

given to the police before hypnosis was even contemplated, and instead of requiring independent corroboration of new facts, the court actually presumed that the new facts were reliable because the defendant was unable to offer contradictory evidence.

¹³² *People v. McDowell*, 103 Misc. 2d at 831, 427 N.Y.S.2d at 185.

¹³³ *Id.*

¹³⁴ See *United States v. Adams*, 581 F.2d 193; *State v. Hurd*, 173 N.J. Super. 333, 414 A.2d 291; *People v. McDowell*, 103 Misc.2d 831, 427 N.Y.S.2d 181.

¹³⁵ E.g., Dillhoff, *supra* note 19; Spector, *supra* note 5; see also Comment, *Hypno-Induced Statements: Safeguards for Admissibility*, 1970 LAW & SOC. ORDER 99 [hereinafter cited as *Hypno-Induced Statements*].

¹³⁶ See discussion in text accompanying notes 110-15.

¹³⁷ See note 85 *supra*.

¹³⁸ See *People v. McDowell*, 103 Misc.2d 831, 427 N.Y.S.2d 181; Dillhoff, *supra* note 19, at 8.

¹³⁹ *Diamond, supra note 7, at 333.*

and tonal inflection, and other unintentional behavior may all be suggestive of a desired response.¹⁴⁰ The deeply hypnotized subject can be remarkably sensitive to the most minute cues, many of which may go unnoticed even by a trained observer.¹⁴¹

It is also generally required that the hypnotist have expert qualifications.¹⁴² Presumably an expert, being knowledgeable on the susceptibility of the subject to suggestion, would be more capable of avoiding it. Hypnotists are often asked to render expert opinions as to the mental state¹⁴³ and veracity¹⁴⁴ of defendants. The expert hypnotist is generally permitted to render an opinion as to the nature and effect of hypnosis.¹⁴⁵ Few cases, have established what qualifications a person must have to be considered an "expert." No case was found where the court considered qualifications other than the hypnotist's medical or technical training. However, it is possible to be highly skilled in the technique of inducing a hypnotic trance yet be wholly ignorant of its scientific and psychological effects and the legal ramifications of using the technique on a prospective witness.¹⁴⁶ Those untrained in the true nature and effect of hypnosis, though skilled in its use, often assume clearly false beliefs as to the usefulness of the technique. When these so called "experts" are permitted to testify for any purpose regarding the hypnotic process, they may convey the same misinformation to the trier of fact.¹⁴⁷ If hypno-enhanced recollection testimony is allowed, the

¹⁴⁰ *Id.*

¹⁴¹ Orne, *On the Simulating Subject as a Quasi Control Group in Hypnosis Research*, in *HYPNOSIS RESEARCH DEVELOPMENTS AND PERSPECTIVES* 399, 402 (E. Fromm & R. Shor eds. 1972).

¹⁴² See *Hypno-Induced Statements*, *supra* note 135, at 108; *People v. McDowell*, 103 Misc.2d at 831, 427 N.Y.S.2d at 183; *State v. Hurd*, 173 N.J. Super at 340, 414 A.2d at 306; *Spector*, *supra* note 5, at 593. Expert qualifications should be required not only to allow the hypnotist to testify (whether to establish a foundation for the admission of hypno-enhanced recollection testimony or to render an opinion) but also to conduct the hypnotic procedure itself. See also *People v. Busch*, 56 Cal.2d 868, 366 P.2d 314, 16 Cal. Rptr. 898 (1961) (hypnotist not permitted to testify due to doubt as to qualifications).

¹⁴³ *People v. Hiser*, 267 Cal. App.2d 47, 72 Cal. Rptr. 906 and *People v. Modesto*, 59 Cal.2d 722, 382 P.2d 33, 31 Cal. Rptr. 225 (expert mental state testimony admitted); *contra*, *Jones v. State*, 542 P.2d 1316.

¹⁴⁴ *E.g.*, *People v. Kester*, 78 Ill. App. 3d 902, 397 N.E.2d 888; *Jones v. State*, 542 P.2d 1316 (expert testimony as to truthfulness admitted). See also *State v. Temoney*, 45 Md. App. 569, 414 A.2d 240, where witness was permitted to testify from hypno-enhanced recollection but hypnotist's expert opinions based upon observations of witness while under hypnosis were excluded because the technique of hypnosis was still controversial.

¹⁴⁵ *People v. Modesto*, 59 Cal.2d 722, 382 P.2d 33, 31 Cal. Rptr. 225; *Clark v. State*, 379 So.2d 372.

¹⁴⁶ *Diamond*, *supra* note 7, at 341.

¹⁴⁷ In *People v. Davis*, No. 52660 (Super Ct. Placer County Calif. July 30, 1979) discussed in *Diamond*, *supra* note 7, at 347 n. 137-38, the policeman hypnotist told the subject that the mind stores memories with photographic detail and that after hypnosis she would have photographic recall of everything discussed under hypnosis. Not only could this give the subject undue confidence in her post-hypnotic recollection (no matter how distorted by confabulation and suggestion) but such clearly false information, if given to the jury, would almost certainly cause it to give undue credence to the subject's testimony.

hypnotic procedure producing it should be carried out by a hypnotist with expert qualifications in the psychological, technical and legal ramifications of its use.

Frequently, the hypnotist is permitted to take the stand and testify as to the reliability of his own procedures. Unfortunately, however, many hypnotists have unjustified and undying faith in their own competence. Several cases were found where the hypnotist erroneously testified that the hypnotic procedure was conducted so that it was free of suggestion. In *State v. Hurd*,¹⁴⁸ the subject was the victim of a knife attack in her bedroom. The only two suspects were the victim's ex-husband, the defendant, and the victim's current husband. The victim was unable to identify her attacker. Prior to hypnosis, the hypnotist was insistent that the victim identify her assailant; he told her that failure to identify the attacker would allow him an opportunity to return and kill her thereby leaving her children motherless, and that her present husband would remain a suspect so long as she failed to identify another person. At one point, while under hypnosis, the hypnotist said to the subject "You are sitting at the foot of the bed,"¹⁴⁹ even though the subject had never stated that she was at the foot of the bed at the time of the attack.¹⁵⁰ Dr. Orne, a psychiatrist who testified at the trial, was highly critical of the hypnotist's techniques in the case. Dr. Orne observed that the victim's husband, though supposedly a suspect, was permitted to accompany the victim when she was hypnotized implying that he had been eliminated as a suspect. Another more flagrant example of suggestion occurred when, under hypnosis, the victim said she knew her attacker, to which the hypnotist then asked "Is it [your husband] David?" She replied, "No." The hypnotist then asked "Is it [the defendant] Paul? The victim replied "Yes."¹⁵¹ The hypnotist insisted that the procedure was not coercive or suggestive in any way.

A similar situation occurred in *People v. Davis*,¹⁵² where a witness to a robbery-murder was hypnotized to enhance her recollection of the assailants. While under hypnosis the following dialogue occurred:

Hypnotist: Now Connie, I'm going to count to three . . . and when I do, these *two* people who were wearing masks, you'll be looking at them . . . One, two, three. That's fine. How many of them are there?"

Subject: Two.¹⁵³

The policeman hypnotist testified at the evidentiary hearing that the procedure

¹⁴⁸ 173 N.J. Super. 333, 414 A.2d 291.

¹⁴⁹ *Id.* at 342, 414 A.2d at 300.

¹⁵⁰ The subject's position at the time of the attack could have been relevant as to her ability to have seen the face of her attacker.

¹⁵¹ *State v. Hurd*, 173 N.J. Super. 333, 336, 414 A.2d 291, 294.

¹⁵² See note 147, *supra*,
<https://ideaexchange.uakron.edu/akronlawreview/vol14/iss4/3>

¹⁵³ *Id.*

was free of suggestion. As a matter of strategy for the opponent, it is essential that the hypnotic procedure be evaluated by an impartial, expert hypnotist. Such a person would be far more likely to render a competent, unbiased opinion of the reliability of the procedure than the person who conducted the procedure.

Not only must the hypnotist who conducts the hypnotic procedure be a qualified expert, he must also be independent and unbiased.¹⁵⁴ The procedure should be conducted in neutral surroundings, possibly the hypnotist's private office, rather than a police station.¹⁵⁵ This is one of the most abused areas in the use of hypnotic evidence.

In *People v. Leyra*,¹⁵⁶ a police-hired psychologist hypnotized the defendant, who was exhausted from sleeplessness, under the context of "helping" him.¹⁵⁷ The psychiatrist not only suggested a confession, but insisted upon one.¹⁵⁸ In another case, not involving police abuse, it was discovered after the defendant was convicted of murder that the prosecutor's identification witness had been repeatedly hypnotized prior to trial by a friend of the victim. The court denied the defendant's petition for post-conviction relief, finding this newly discovered evidence to be merely "cumulative and impeaching."¹⁵⁹

In *United States v. Miller*,¹⁶⁰ the prosecutor himself hypnotized a key identification witness without disclosing the fact to the defendant. In granting defendant's motion for a new trial, Judge Friendly wisely observed that:

[A]s the record stands, the hypnosis had arguably placed at least some obstacle in the way of one of the most valuable protections accorded Miller by the Sixth Amendment- the possibility that the sanctity of the oath and effective cross-examination might lead [the eyewitness] to recant his identification or at least to admit some doubt.¹⁶¹

The court was clearly aware that hypnosis of the witness went far beyond mere pre-trial coaching, and that it had a great impact on the traditional guarantees of trustworthiness.¹⁶²

A case of unintentional abuse of the hyper-suggestibility of the subject is that of *United States v. Andrews*,¹⁶³ where a low ranking sailor, the victim

¹⁵⁴ Also suggested as a guideline in *State v. Hurd*, 173 N.J. Super. 333, 348, 414 A.2d 291, 306 and *People v. McDowell*, 103 Misc.2d 831, 834, 427 N.Y.S.2d 181, 183.

¹⁵⁵ See *State v. Hurd*, 137 N.J. Super 333, 414 A.2d 291; *People v. McDowell*, 103 Misc. 831, 427 N.Y.S.2d 181; Dilloff, *supra* note 19, at 7.

¹⁵⁶ 302 N.Y. 353, 98 N.E.2d 553.

¹⁵⁷ *Id.* at 360, 98 N.E.2d at 557.

¹⁵⁸ See discussion of *Leyra* at note 63 *supra*.

¹⁵⁹ *Lawson v. State*, 280 N.W.2d 400 (Iowa 1979).

¹⁶⁰ 411 F.2d 825.

¹⁶¹ *Id.* at 832.

¹⁶² See note 55 *supra*.

¹⁶³ *General Court Martial No. 75-14* (N.E. Jud. Cir., Navy-Marine Corps Judiciary, Phila., Pa., Oct. 6, 1975), discussed in Dilloff, *supra* note 19.

of a shooting, was hypnotized by a Navy commander. The commander-hypnotist hypnotized the sailor to "assist" him in identifying the assailant. In fact, the commander actually ordered the hypnotized sailor to remember the assailant's face. Since the sailor was trained to obey his superiors and desirous of pleasing the hypnotist as are many hypnotic subjects,¹⁶⁴ it is not unlikely that the face he described was at least partly the result of confabulation.

There are two significant dangers in using a biased hypnotist. The subject, anxious to satisfy the hypnotist's inquiries, is likely to confabulate a response he believes will be pleasing to the hypnotist. Compounding this danger is the fact that a biased hypnotist may unwittingly suggest desired responses. In order to avoid these dangers it is essential that the hypnotist be independent in fact and also appear to the subject to be independent.¹⁶⁵

It is not enough that the hypnotist be impartial. In order to further avoid the possibility that the hypnotist will unwittingly suggest false recollections, it is necessary that the hypnotist know as little as possible about the case prior to hypnotizing the subject.¹⁶⁶ Additionally, whatever pre-hypnosis information should be transmitted to him only in writing so that the extent of information that may have been suggested to the subject may be determined. This, however, does not preclude the hypnotist from improperly suggesting to the subject false information which he has deduced or assumed from the preliminary responses of the subject.

The surroundings in which the subject is hypnotized should not be suggestive.¹⁶⁷ Aside from the neutrality of the location itself, there should be no other person present during the proceedings who might influence the subject in the highly suggestible, hypnotized state.¹⁶⁸ In many cases the subject was hypnotized in the presence of police officers or detectives¹⁶⁹ who may have had a tendency to suggest false recollections to the subject. The subject should also be protected from the possibility of undue suggestion from biased persons and surroundings immediately before and after hypnosis, as suggestion during that time may be integrated in the subject's hypno-enhanced recollection.¹⁷⁰

Once the witness has been subject to hypnosis, it is essential that opposing parties and the trial judge be able to fully review the procedure in

¹⁶⁴ See text accompanying note 94, *supra*.

¹⁶⁵ Dilloff, *supra* note 19, at 8.

¹⁶⁶ *State v. Hurd*, 173 N.J. Super. 333, 348, 414 A.2d 291, 306; *People v. McDowell*, 103 Misc.2d 831, 834, 427 N.Y.S.2d 181, 183.

¹⁶⁷ See *State v. Hurd*, 137 N.J. Super. 333, 414 A.2d 291; *People v. McDowell*, 103 Misc. 831, 427 N.Y.S.2d 181; Dilloff, *supra* note 19, at 7.

¹⁶⁸ *Id.*

¹⁶⁹ *E.g.*, *Harding v. State*, 5 Md. App. 230, 246 A.2d 302 (1968), *cert. denied*, 395 U.S. 949 (1969); *State v. Hurd*, 173 N.J. Super 333, 414 A.2d 291.

order to determine whether it has been unduly suggestive. All contacts between the hypnotist and the subject should be videotaped or filmed.¹⁷¹ Stenographic records or audio tape recordings can not provide a sufficiently complete record due to the fact that the person under a hypnotic trance is subject to many stimuli that can not be recorded by these media. Professor Diamond warns, however, that the mere knowledge of the subject that the proceedings will be taped can be a "powerful distorting factor" inasmuch as the knowledge that one is being filmed or recorded can alter one's behavior.¹⁷² Recording the proceedings then, may contribute to the contamination of the subject's recollection.

It also has been suggested that attorneys for both parties be present at the proceedings.¹⁷³ However, in order to avoid the potential for undue suggestion by the presence of biased parties, it would be preferable that the attorneys and any other persons observing the procedure do so outside of the subject's notice or knowledge, for example, via a two-way mirror or closed circuit television. Professor Diamond's concern would be pertinent here also inasmuch as the mere knowledge that one is being watched or recorded may have a distorting effect.

A thorough review of the records of the hypnotic proceedings should be required for a trial court to make an evaluation of the admissibility of the hypno-enhanced evidence. In the rare case that this type of evidence is admitted, it would seem that a full record of the proceedings, or the presence of the opposing counsel at the proceeding would be essential if effective confrontation and examination of the witness is to be guaranteed.¹⁷⁴

None of the guidelines discussed entirely eliminates the potential for suggestion. Further, they are useless in controlling the subject-based dangers of hypnosis: of fabrication and confabulation. Even following the strictest guidelines, the probative value of hypnotic evidence remains marginal because the jury still must speculate as to the accuracy of the witness's recollection. Without minimal guidelines, however, the probative value of such evidence will surely be outweighed by its potential to mislead and be abused by the trier of fact.

2. The Potential to Mislead the Trier of Fact

The other form of technique-based unreliability is that the mere

¹⁷¹ See *State v. Hurd*, 137 N.J. Super. 333, 414 A.2d 291; *People v. McDowell*, 103 Misc. 831, 427 N.Y.S.2d 181; *Hypno-Induced Statements*, *supra* note 135.

¹⁷² Diamond, *supra* note 7, at 339.

¹⁷³ Dilloff, *supra* note 19, at 8; *Hypno-Induced Statements*, *supra* note 135, at 117.

¹⁷⁴ It is the very rare case indeed that opposing counsel could effectively cross-examine a witness whose memory was enhanced by hypnosis inasmuch as the witness may very sincerely believe in the accuracy of his recollections, parts or all of which could be the result of confabulation and suggestion. Counsel in this case might be limited to simply exposing the fact of hypnosis to the trier of fact and developing the hazards of hypno-enhanced recollection through expert testimony. This, however, still may leave the trier of fact simply to speculate as to what weight to attach to the witness's testimony.

knowledge that the witness's memory has been hypno-enhanced can, in and of itself, have a prejudicial effect on the trier of fact. The cautionary or limiting instruction and expert foundation testimony are commonly suggested devices to avoid the abuse of hypnotic evidence by the jury.¹⁷⁵ Because the witness may be thoroughly convinced of the accuracy of his hypno-enhanced recollection, the jury may be wholly unable to determine the credibility of the testimony. If such evidence is to be admitted at all, an explicit foundation must be established, detailing the nature and effect of hypnosis as well as its characteristic unreliability as a truth-determinant and memory-enhancer. Otherwise, the popularly conceived notions that one cannot lie while under hypnosis or that hypnosis can revive recollections with perfectly accurate, photographic detail, may lead the jury to the erroneous conclusion that hypnotic evidence is uncontroversial.¹⁷⁶

In addition to a proper foundation, the hypnotic evidence should be accompanied by a strict cautionary instruction.¹⁷⁷ Where hypnotic evidence is itself used as a foundation for expert testimony, the jury should be carefully instructed not to use such evidence for substantive purposes. In any case, where hypnotic evidence is admitted, the jury instructions should stress the limitation of hypnosis as a memory-enhancer. The jury should be reminded that hypnosis is not a truth determinant, rather it is merely a device to ferret out once lost memories, and that with the grains of these memories may come a significant amount of chaff.

The court's instruction should also delineate the jury's task in assessing the weight of testimony from the hypno-enhanced recollection. The jury must first sift through the witness's narration and determine whether he has truthfully testified as to what his present recollection is. The jury must then determine whether what the witness now conceives to be his present recollection has been significantly altered by the hypnotic process. Inasmuch as the experts themselves can not determine the extent to which a subject's recollections have been tainted by hypnosis, the jury may, at this point, find itself up the proverbial creek with little more than speculation with which to paddle. Finally, if the jury determines that the witness was truthful and that his recollections were not significantly tainted by the hypnotic process, it must then determine whether the recollection was founded upon observations that were accurately perceived in the first place. By de-

¹⁷⁵ See, e.g., *Wyller v. Fairchild Hiller Corp.*, 503 F.2d 506; *Collier v. State*, 244 Ga. 553, 261 S.E.2d 364; *Harding v. State*, 5 Md. App. 230, 246 A.2d 302.

¹⁷⁶ *Present Recollection Restored*, supra note 8. See also *Rodriguez v. State*, 327 So.2d 903.

¹⁷⁷ See *Dilloff*, supra note 19, at 22; *Hypno-Induced Statements*, supra note 135, at 119. The following contain sample instructions: *Present Recollection Restored*, supra note 8, at 372 n.147; *Spector*, supra note 5, at 595 n.141. *Spector's* instruction is highly misleading in that it states that "the fact that a witness has been hypnotized does not bear on his credibility. . . ." This is deceptive in as much as the sincerity of the witness on the stand is not relevant to whether and to what degree his hypno-enhanced recollection is distorted and altered by confabulation and suggestion.

fining the jury's task in this way, the court can greatly assist the jury in its use of hypnotic evidence.

VI. CONCLUSION

Undoubtedly, hypnosis can be an effective means by which investigators can discover facts formerly lost in the unconscious memories of witnesses. The hypnotic subject, however, may unwittingly confabulate memories where there once were none, and adopt suggested false memories that modify or displace memories already present. Unfortunately, the experts' understanding of the process has not yet advanced to the point where it is possible to reliably detect the memory-distorting effects of the hypnotic process.

The probative value of the hypnotized subject's statements or subsequent testimony is doubtful. In most cases, it appears that the jury's evaluation of the reliability of such evidence is premised upon speculation, in which event the minimal probative force of the evidence is far outweighed by its potential to mislead. Even when the most stringent safeguards are followed, hypnotic evidence is only marginally probative at best and only a great need for the evidence can warrant its admission.

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