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Trances, Trials, and Tribulations

Gary M. Shaw

TRANCES, TRIALS, AND TRIBULATIONS

Hon. George C. Pratt:

Now we get into a subject with Professor Shaw on hypnotically-enhanced testimony, and it is almost into the realm of the esoteric. Once a hypnotist gets a hold of somebody's brain cells, what reliability is left as to what that person can testify? Can you explain that to us, Gary?

*Professor Gary M. Shaw**:

INTRODUCTION

I will try. I have the honor of the death slot. That is to say, everybody here is saying, "It is Friday afternoon at five to three. I want to go home." It is my job to keep you here for a little bit longer. But it is a job made much easier by the excellent lead-in of Professor Scheck and Judge Pratt. I am going to take a few seconds to comment on Professor Scheck's presentation. It was gratifying to hear you say that you thought that *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[1] was going to be applied more strictly than *Frye v. United States*,[2] since I think it has the potential for being applied less strictly than *Frye*.

Professor Barry C. Scheck:

It is just an exercise in spin control, that is all.

Professor Gary M. Shaw:

Well, I am hoping you are right. As far as your comments, Judge Pratt, as to how the mind works, I am going to talk a little

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1. 113 S. Ct. 2786 (1993).
2. 293 F. 1013 (D.C. Cir. 1923).

bit about that in dealing with hypnosis. I was really tempted, given the lateness of the hour and the fact that you are probably bloated from that delicious lunch, to come up and talk very slowly about hypnosis. (You are getting sleepy.) To talk about how hypnosis works. (Your eyes are getting tired.) At some point you see this on television, or you see it in the movies. A hypnotist tells someone, "You are getting tired, you are getting sleepy and when I snap my fingers, you will be hypnotized." I was watching a Dick Van Dyke episode the other night in which a hypnotist made a character on the show act like a chicken. These portrayals contribute to the many misunderstandings about hypnosis. Let me give you an idea as to why I am talking about it. You mentioned esoteric, Judge. A couple of years ago, I wrote an article that appeared in the *Marquette Law Review*.[3] I had seen a case involving hypnosis and it seemed like a very interesting area to write on, but I have to admit, I immediately thought this must be an esoteric area. Having the advantage of being able to access Westlaw for free, I did a very quick word search. I just typed in "hypnosis" or "hypnotically-enhanced testimony" or "hypnotically-refreshed testimony." Now, I guess I did this about two and a half years ago, and I came up with about 750 cases throughout the entire country, but of those cases, probably eighty percent of them had occurred between 1975 and 1990, which is when I wrote the article. For purposes of this afternoon's lecture, I duplicated the search. I got on Westlaw this morning and I typed in "hypnosis" or "hypnotically-enhanced testimony" or "hypnotically-refreshed testimony," and it came up with about 1,100 cases. This means that in the last two and a half years or so, since I wrote the article, there have been approximately 350 cases reported on Westlaw. Now, to some extent that is misleading, because clearly not every case reported in Westlaw is a new or different case. Some cases go up to courts, go back down, go back up, and they get reported in different areas. But it is clear that there are a lot of hypnosis cases going on out there.

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3. Gary M. Shaw, *The Admissibility of Hypnotically Enhanced Testimony in Criminal Trials*, 75 MARQ. L. REV. 1 (1991).

I. USING HYPNOSIS TO SOLVE CRIMES

Why are there so many hypnosis cases going on out there? Let me give you an example. There is a crime that takes place in California; a school bus is hijacked.[4] The children and the bus driver are imprisoned by the hijackers.[5] Ultimately the children and the bus driver escape, but nobody can identify the hijackers, and nobody can remember anything of significant help to the police.[6]

The bus driver is hypnotized.[7] He cannot remember anything helpful for investigative purposes prior to hypnosis, but post-hypnosis or during hypnosis he remembers the digits of the hijackers' car.[8] The hijackers had driven up to the bus and then hijacked it.[9] He remembers all but one digit of the license plate of the hijackers' car.[10] Ultimately, the police trace the license plate, arrest the hijackers and there is a conviction.[11]

Now, that sounds pretty compelling. This event took place in California, in Alameda County.[12] It is called the Chowchilla kidnapping case,[13] and it is constantly referred to by law enforcement agents as the reason for utilizing hypnosis, or the

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4. The above related facts are taken from People v. Woods, No. 63187ANBC (Alameda Co. 1977). *See The Svengali Squad*, TIME, Sept. 13, 1976, at 56-57 [hereinafter *The Svengali Squad*].

5. *See The Svengali Squad*, *supra* note 4, at 56.

6. *See The Svengali Squad*, *supra* note 4, at 56.

7. *See The Svengali Squad*, *supra* note 4, at 56.

8. *See The Svengali Squad*, *supra* note 4, at 56.

9. *See The Svengali Squad*, *supra* note 4, at 56.

10. *See The Svengali Squad*, *supra* note 4, at 56.

11. *See* Richard G. Montevideo, Comment, *Hypnosis - Should the Courts Snap Out of It? - A Closer Look at the Critical Issues*, 44 OHIO ST. L.J. 1053, 1056 n.30 (1983) ("[T]he three men were soon found, arrested, and convicted.").

12. *See The Svengali Squad*, *supra* note 4, at 56.

13. *See* Montevideo, *supra* note 11, at 1056 n.30 ("One famous case in which hypnosis was used successfully . . . was the Chochilla [sic] Kidnapping case.").

reason we have to hypnotize potential witnesses to crimes.[14] It brings out additional information, and this claim is true.

There is no disputing that, in a wide variety of cases, hypnosis extracts additional information from a person who has been hypnotized. There have been several systemic studies done that show that hypnosis increases the amount of material that is recalled.[15] But just as Professor Scheck pointed out earlier, what may be appropriate in one setting may not be appropriate in a forensic setting, in a court of law.[16] That is clearly the case with hypnosis, because those same studies that show that the amount of information recalled increases also show that that information tends to be inaccurate.[17] Some of it may be accurate, but much of it will be inaccurate, and of even greater importance, it is impossible to tell which portions of the additional information are accurate and which are inaccurate.[18] There is simply no effective way to tell. Part of the reason for this results from the way that memory works.

II. MEMORY

We do not know precisely how memory works. Scientists can generally agree on one fact, and that is that memory is reconstructive rather than reproductive.[19] In other words, let me

14. *See* Montevideo, *supra* note 11, at 1056; *see also The Svengali Squad*, *supra* note 4, at 56.

15. *See* HOWARD B. CRASILNECK & JAMES A. HALL, CLINICAL HYPNOSIS: PRINCIPLES AND APPLICATIONS 439 (2d ed. 1985) ("Hypnosis was found valuable in increasing the recall of witnesses . . . . "); *see also* Rock v. Arkansas, 483 U.S. 44, 59 (1987) ("The most common response to hypnosis . . . appears to be an increase in both correct and incorrect recollections." (citing Council on Scientific Affairs, *Scientific Status of Refreshing Recollection by the Use of Hypnosis*, 253 JAMA 1918, 1921 (1985))).

16. *See* Barry C. Scheck, *Expert Testimony*, 11 TOURO L. REV. 107 (1994).

17. *See infra* notes 19-31 and accompanying text.

18. *See infra* notes 19-31 and accompanying text.

19. *See* People v. Shirley, 723 P.2d 1354, 1377 (Cal.) ("[M]emory does *not* act like a videotape recorder, but rather is subject to numerous influences that continuously alter its content."), *cert. denied*, 459 U.S. 860 (1982); Helen

start out with what memory is not. Memory is not a videotape recorder or a video cassette recorder in which you receive the input through your eyes, your ears, your nose, your mouth, your senses, and it is perfectly stored and then, upon hitting the appropriate button, you play back precisely what happened.[20] It is not reproductive in nature.[21] That is absolutely clear. There are numerous studies on this point and reputable scientists are clear that that is not what happens.[22]

Memory is reconstructive; that is to say, what you remember can be altered.[23] There are basically three stages of memory: the acquisition stage, the retention stage, and the recall stage.[24] Your memory can be altered in any one of those levels, at any one of those stages.[25] During the acquisition of the memory, several factors can come into play. How much time did you spend looking at what happened? Was it something of import to you, or was it something that you just glanced at? What were your expectations regarding the event you witnessed? These and other factors can affect how you remember.[26]

M. Pettinati, *Hypnosis and Memory: Integrative Summary and Future Directions, in* HYPNOSIS AND MEMORY 278 (Helen M. Pettinati ed., 1988) ("[M]emory is reconstructive, not reproductive.").

20. *See* Council on Scientific Affairs, *supra* note 15, at 1920 ("The assumption . . . that a process analogous to a multichannel videotape recorder inside the head records all sensory impressions and stores them in their pristine form indefinitely is not consistent with research findings or with current theories of memory.").

21. *See* Pettinati, *supra* note 19, at 278.

22. *See* ALAN W. SCHEFLIN & JERROLD L. SHAPIRO, TRANCE ON TRIAL 153 (Michael J. Diamond and Helen M. Pettinati eds., 1989) ("Stimuli in the world are altered in memory first as they are encoded; again as they are stored; and finally in the decoding, retrieval, and expression process.").

23. *See id.*; *see also* Pettinati, *supra* note 19, at 278.

24. Martin T. Orne et al., *Reconstructing Memory Through Hypnosis: Forensic and Clinical Implications, in* HYPNOSIS AND MEMORY 25 (Helen M. Pettinati ed., 1988).

25. *See* SCHEFLIN & SHAPIRO, *supra* note 22, at 153.

26. Daniel R. Lenorovitz & Kenneth R. Laughery, *A Witness-Computer Interactive System for Searching Mug Files, in* EYEWITNESS TESTIMONY 38-51 (Gary L. Wells & Elizabeth F. Loftus eds., 1984).

Retention deals with how long it has been since this event occurred.[27] It is clear that the longer the interval between the occurrence and the recollection, the less information you are likely to recall.[28] The manner in which the recollection takes place can also result in distortion, or at least affect what you remember.[29] The wording of a question - whether it is a leading question or an open-ended question - can affect your recollection.[30] There have been studies done that show that asking the question, "Did you see a gun?" using the article "a," as opposed to, "Did you see *the* gun," using the article "the," creates significant differences in recall among people who have observed the same occurrence.[31] Therefore, it is clear that memory can be altered, and hypnotism does that.

III. HYPNOSIS

We do not really know what hypnotism is. There are some people who would say it dates back to antiquity.[32] There are scholars who claim they can see evidence of hypnotism in the Bible, though it is not called that.[33] It gained notoriety through

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27. Hadyn D. Ellis, *Practical Aspects of Face Memory, in* EYEWITNESS TESTIMONY 12-13 (Gary L. Wells & Elizabeth F. Loftus eds., 1984).

28. *See* Fred H. Frankel, *The Clinical Use of Hypnosis in Aiding Recall, in* HYPNOSIS AND MEMORY 250 (Helen M. Pettinati ed., 1988) ("With time . . . deviations from the original occur . . . . Subsequent experiences may influence and alter the original memory and bring it to conscious awareness in a changed form."); Daniel F. Hall et al., *Postevent Information and Changes in Recollection, in* EYEWITNESS TESTIMONY 127 (Gary L. Wells & Elizabeth F. Loftus eds., 1984) ("Time causes memory to fade . . . .").

29. *See* Shaw, *supra* note 3, at 4 ("The events that take place during the retention interval can . . . affect the observer's memory.").

30. *See* Hall, *supra* note 28, at 131 ("Research indicates that fairly subtle aspects of the way in which questions are worded can have profound effects on a subject's recollection of details of an event.").

31. *See* Hall, *supra* note 28, at 131.

32. *See* CRASILNECK & HALL, *supra* note 15, at 7.

33. *See* Lisa K. Rozzano, Comment, *The Use of Hypnosis in Criminal Trials: The Black Letter of the Black Art*, 21 LOY. L.A. L. REV. 635, 636 n.3 (1988) ("The power of suggestion dates back to the cunning serpent who overpowered Adam and Eve in the Garden of Eden.").

Franz Mesmer, an Austrian physician who is universally considered the father of modern hypnotism.[34] He found that when people were put in a sleep-like state and magnets were placed over them, that in fact the magnets were affected.[35] He became so well identified with hypnotism that you often hear the phrase "mesmerism."[36] Eventually hypnotism became accepted, especially after World War II, for therapeutic purposes.[37] For psychotherapy, it was deemed to be useful.[38] As I said earlier, it can also be extremely helpful in trying to increase the acquisition of knowledge.

If you are a law enforcement agency and you are in fact trying to gain clues as to what happened during a crime, you do not particularly care whether the additional information is accurate or inaccurate. You do not care because you can follow up each of those leads. If they turn out to be inaccurate, no harm is done. However, if any of the leads turn out to be accurate, you may have hit the jackpot. Therefore, for investigative purposes, hypnosis is extremely useful.[39] But in a trial setting, it becomes

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34. *See* CRASILNECK & HALL, *supra* note 15, at 7-8.

35. Diane Barr & Larry Spurgeon, *Testimony by Previously Hypnotized Witnesses: Should It Be Admissible?*, 18 IDAHO L. REV. 111, 112 (1982) ("[Franz Mesmer] found that ailing people were helped by passing magnets over their bodies, resulting in a sleep-like state referred to as 'animal magnetism.'").

36. *See* CRASILNECK & HALL, *supra* note 15, at 8 ("Mesmer believed that hypnotic effects were caused by 'animal magnetism,' . . . [which] was also called *mesmerism.*").

37. *See* Shaw, *supra* note 3, at 7 ("[H]ypnosis was . . . used to a limited extent for the treatment of combat fatigue in World Wars I and II."); *see also* 9 ENCYCLOPEDIA BRITANNICA 134 (15th ed. 1982) ("[S]ome use was made of [hypnosis] . . . in treating combat neuroses during World Wars I and II.").

38. *See* Shaw, *supra* note 3, at 7 ("As knowledge of hypnosis became more widespread, more research was done, including research into the use of hypnosis as a psychoanalytic tool . . . .").

39. *See* Council on Scientific Affairs, *supra* note 15, at 1922 ("It can be concluded that hypnosis can be useful during the investigative process . . . ."); *see also* Orne et al., *supra* note 24, at 22 ("[There] has been the enthusiastic response by many law enforcement agencies to the proposals and demonstrations of the usefulness of hypnosis in the forensic context.").

very dangerous. We are not sure what it is, but the one thing that virtually every definition of hypnosis has in common is the concept of heightened suggestibility and suspension of disbelief.[40] The very definition of hypnotism, then, involves suggestibility.

IV. CASE LAW DEALING WITH HYPNOTICALLY-ENHANCED TESTIMONY

Since my time is brief, let me turn to how New York and the federal courts have treated hypnotically-enhanced testimony. The first issue I am going to deal with is whether hypnotically-enhanced statements are admissible. In other words, if a statement has been made during hypnosis, should the witness be able to testify as to what he or she said during hypnosis, or should someone else be able to testify to it, and have it admitted into evidence? Alternatively, if it is a posthypnotic memory, that is, if the witness remembers it during hypnosis and then remembers it after the hypnotic session ends, should the witness be able to testify to it?

In New York, the answer is clearly no. The New York Court of Appeals so held in *People v. Hughes*.[41] The *Hughes* court adopted the *Frye* test and stated that it requires that scientific evidence will only be admitted at trial "if the procedure and results are generally accepted as reliable in the scientific community."[42] The *Hughes* court found, correctly, that hypnotically advanced recall is not generally accepted as reliable in the scientific community.[43]

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40. *See* Council on Scientific Affairs, *supra* note 15, at 1919 ("During [hypnosis] . . . the subject is invited to suspend critical judgment and to accept rather than to question the suggestions given.").

41. 59 N.Y.2d 523, 453 N.E.2d 484, 466 N.Y.S.2d 255 (1983), *cert. denied*, 492 U.S. 908 (1989).

42. *Id.* at 537, 453 N.E.2d at 490, 466 N.Y.S.2d at 261.

43. *Id.* at 543, 453 N.E.2d at 494, 466 N.Y.S.2d at 265.

The vast majority of studies conclude that hypnosis does not increase accurate recollection.[44] The Council Report of the American Medical Association has stated that "recollections obtained during hypnosis not only failed to be more accurate but actually appeared to be generally less reliable than nonhypnotic recall."[45] That conclusion was accepted by the United States Department of Justice, as well.[46] Thus, the court found, in *Hughes*, that hypnotically-enhanced testimony is inadmissible.[47] I do not use the phrase hypnotically-refreshed testimony, because refreshed seems to imply, that the witness had it, lost it and then regained it. "Enhanced" does not contain that implication, as far as I am concerned. Rather, it implies that something has been added, and that added factor seems to be unreliable. It is unreliable because of two dangers.

A. Unreliability

The first danger is the problem of heightened suggestiveness. That is to say, the hypnotist, in conducting the hypnotic session, may actually suggest the answers. It might seem that this could be easily solved. What is necessary is to simply make sure that the hypnotist is very careful not to suggest anything. The problem is that this cannot be done. Indeed, the one thing that most scientists agree on is that it cannot be done. Unwittingly, a hypnotist may suggest answers with body language or, with the phraseology of the question or in some other way. The fact that

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44. *See* Orne et al., *supra* note 24, at 44-47. "[A] demonstration . . . illustrates the malleability of memory in hypnosis; more importantly, it shows the persistence and seeming reality following hypnosis of such hypnotically created (distorted) memories." Orne, *supra*, at 46.

45. Council on Scientific Affairs, *supra* note 15, at 1921.

46. NATIONAL INST. OF JUST., U.S. DEP'T OF JUST., HYPNOTICALLY REFRESHED TESTIMONY: ENHANCED MEMORY OR TAMPERING WITH EVIDENCE? 51 (1985) ("[T]he recollections obtained during hypnosis are less reliable than non-hypnotic memory . . . .").

47. *Hughes*, 59 N.Y.2d at 545, 453 N.E.2d at 495, 466 N.Y.S.2d at 266 (holding that the trial court erred in "permitt[ing] the victim to testify to events recalled after the hypnotic sessions").

answers may be unwittingly suggested means that suggestibility cannot be reduced to the point where it is no longer a factor.

The second aspect is something called confabulation.[48] Confabulation can take place when the hypnotized subject does not know what the answer is to the question that the hypnotist is asking.[49] However, in an attempt, for any one of a number of reasons, to answer the question, the hypnotized subject confabulates, i.e., makes up the answer, and often it is amazingly consistent with other facts even though it is not true. This possibility has been repeatedly shown in studies.[50] The danger of confabulation especially exists in the forensic context for a variety of reasons. Often, especially when you are talking about somebody who is cooperating with the police, the witness wants to be helpful. The witness will have a desire to please the hypnotist or the law enforcement agency. Sometimes the hypnotist is a member of the law enforcement agency, and that can lead to confabulation. This confabulation is entirely unintended. The subject is not aware that he or she is doing it but confabulates nonetheless. The result of that confabulation is a memory that the witness believes to be true posthypnosis. Thus, the court, in *Hughes*, clearly found that the information obtained

48. The court in *Walraven v. State* stated that confabulation occurs when a person under hypnosis, "responds to suggestion or expectation to fill in gaps in his memory with fantasy, exaggeration, or memories of other events transferred to compensate for the lack of actual memory." 336 S.E.2d 798, 802 (Ga. 1985).

49. *Id.*

50. *See* Peter W. Sheehan, *Confidence, Memory, and Hypnosis, in* HYPNOSIS AND MEMORY 95, 115-16 (Helen M. Pettinati ed. 1988). "The 'willingness to respond' phenomenon was replicated across separate studies for actually hypnotized subjects but not for simulating subjects . . . ." *Id.* at 116; Martin T. Orne et al., *Hypnotically Induced Testimony, in* EYEWITNESS TESTIMONY 186 (Gary L. Wells & Elizabeth F. Loftus eds., 1984). In one study, a subject under hypnosis attempted to recall a poetry stanza. *Id.* The recollection was almost entirely incorrect, although the subject appeared to be actually remembering the stanza. *Id.*

through hypnosis was unreliable and therefore, pursuant to *Frye*, was inadmissible.[51]

B. Tests

Now, in the federal courts prior to *Daubert*, there had been a variety of tests. Some circuits adopted *Frye*;[52] some circuits adopted other tests, such as relevance tests.[53] For example, the

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51. *Hughes*, 59 N.Y.2d at 537, 543, 453 N.E.2d at 490-91, 494, 466 N.Y.S.2d at 261, 265.

52. *See, e.g.*, Christophersen v. Allied-Signal Corp., 939 F.2d 1106, 1110 (5th Cir. 1991) ("The Federal Rules of Evidence, combined with *Frye v. United States* provide a framework for judges struggling with proffered expert testimony.") (citation omitted), *cert. denied*, 112 S. Ct. 1280 (1992); United States v. Tranowski, 659 F.2d 750, 756 (7th Cir. 1981) ("[W]e believe that the technology . . . relied on was not 'sufficiently established to have gained general acceptance in the particular field to which it belongs.'" (quoting Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923))); United States v. Hendershot, 614 F.2d 648, 654 (9th Cir. 1980) (holding that the fingerprint technique used for shoeprints was admissible because it was taught in a "crime scene investigation course" and was used by other cities); United States v. Brady, 595 F.2d 359, 363 (6th Cir.) (referring to "the general acceptance of microscopic hair analysis in the scientific community"), *cert. denied*, 444 U.S. 862 (1979).

53. *See, e.g.*, United States v. Downing, 753 F.2d 1224, 1238 (3d Cir. 1985) ("[W]e join a growing number of courts that have focused on reliability as a critical element of admissibility . . . . Unlike the *Frye* standard, the reliability assessment does not require . . . explicit identification of a relevant scientific community and an express determination of a particular degree of acceptance within that community."); United States v. Luschen, 614 F.2d 1164, 1169 (8th Cir.) (stating that the Eighth Circuit has not adopted any fixed set of criteria but would determine whether an expert could testify based on "whether his knowledge of the subject matter is such that his opinion will most likely assist the trier of fact in arriving at the truth" (quoting Holmgren v. Massey-Ferguson, Inc., 516 F.2d 856, 858 (8th Cir. 1975))), *cert. denied*, 446 U.S. 939 (1980); United States v. Williams, 583 F.2d 1194, 1198 (2d Cir. 1978) (stating that *Frye* is difficult to administer and the court should instead weigh the probative value and reliability of the evidence against its potential to mislead the jury), *cert. denied*, 439 U.S. 1117 (1979); United States v. Baller, 519 F.2d 463, 466 (4th Cir.) (stating that as long as the expert has a "demonstrable, objective procedure for reaching the opinion" then his or her

United States Court of Appeals for the Seventh Circuit, in the case of *People v. Kimberlin*,[54] effectively stated that it will let the evidence in for what it is worth.[55] The court held that the fact that the evidence was obtained through hypnosis goes to weight rather than admissibility.[56] The court recognized that there is a tremendous danger of unreliability but stated that was for the jury to decide.[57] However, the United States Supreme Court in *Daubert* established the standard for admitting scientific evidence under the Federal Rules of Evidence.[58] It seems to me that under *Daubert* the hypnotically-enhanced testimony should also be inadmissible. Remember that the Court in *Daubert* listed a number of factors to be considered in determining the admissibility of scientific evidence.[59] These factors are not exhaustive; they are illustrative.[60] If you apply these factors to

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testimony should be admitted and "allow its weight to be attacked by cross-examination and refutation"), *cert. denied*, 423 U.S. 1019 (1975).

54. 805 F.2d 210 (7th Cir. 1986), *cert. denied*, 483 U.S. 1023 (1987). The author finds the *Kimberlin* case fascinating because Mr. Kimberlin is the person who claimed that he sold marijuana to Dan Quayle while Dan Quayle was a law student. Mr. Kimberlin said that when he threatened to reveal that fact, he was put in solitary, that Mr. Quayle had pulled strings to keep him in solitary and keep him from revealing this information. *See No Political Actions Against Quayle's Accuser*, N.Y. TIMES, Sept. 27, 1993, at A16.

55. *Kimberlin*, 805 F.2d at 219.

56. *Id.* at 216-17.

57. *Id.* at 217.

58. Daubert v. Merrell Dow Pharmaceuticals, Inc., 113 S. Ct. 2786 (1993).

59. *Id.* at 2796-97. "Many factors will bear on the inquiry . . . . [A] key question to be answered in determining whether a theory or technique is scientific knowledge that will assist the trier of fact will be whether it can be (and has been) tested." *Id.* at 2796. "Another pertinent consideration is whether the theory or technique has been subjected to peer review and publication." *Id.* at 2797. "Additionally, in the case of a particular scientific technique, the court ordinarily should consider the known or potential rate of error." *Id.* "Finally, 'general acceptance' can yet have a bearing on the inquiry." *Id.* "Widespread acceptance can be an important factor in ruling particular evidence admissible, and 'a known technique that has been able to attract only minimal support within the community.'" *Id.* (quoting United States v. Downing, 753 F.2d 1224, 1238 (3d Cir. 1985)).

hypnotically-enhanced testimony it becomes clear that under *Daubert* the hypnotically-enhanced testimony should be inadmissible.

The first factor is whether the scientific evidence has been tested.[61] The answer in this case is yes. The accuracy of hypnotically-enhanced testimony or hypnotically-enhanced recollections has been tested and has been found to be extremely unreliable.[62] As I previously stated, the American Medical Association actually found that posthypnotic recollections are likely to be less accurate than nonhypnotic recollections.[63]

The second factor is whether the scientific evidence has been subjected to peer review.[64] Again, each one of these factors is not dispositive, they are simply relevant factors.[65] The articles involved in peer review all tend to agree that hypnotically-enhanced testimony is unreliable.

The third factor is the potential rate of error.[66] It is clear that the potential rate of error in hypnotically-enhanced testimony is huge. Last but not least, the fourth factor is whether the scientific evidence is generally accepted as a reliable means of obtaining information.[67] The answer, with respect to hypnotically-enhanced testimony, is clearly no, it is not.

All in all, then, it seems to me that under *Daubert*, hypnotically-enhanced testimony should be inadmissible. That will work a significant change in a number of federal circuits. There were federal circuits that allowed hypnotically-enhanced

60. *Daubert*, 113 S. Ct. at 2796 ("Many factors will bear on the inquiry, and we do not presume to set out a definitive checklist or test.").

61. *Id.*

62. *See, e.g.*, Council on Scientific Affairs, *supra* note 15, at 1921.

63. *See supra* text accompanying note 45.

64. *Daubert*, 113 S. Ct. at 2797.

65. *Id.* at 2796.

66. *Id.* at 2797.

67. *Id.*

testimony to be introduced,[68] and I think *Daubert* works a change in that. I hope so.

Since we are here in New York, I anticipated Second Circuit cases on hypnosis would be of interest to you. However, there are none, so I cannot tell you what the Second Circuit has done or will do. *Barnes v. Henderson*[69] is the one district court case that utilized the same analysis as the Seventh Circuit, although the *Barnes* court did not refer to the Seventh Circuit.[70] The court referred to a case, *Harker v. Maryland*,[71] which essentially utilized an "it goes to weight not admissibility" analysis.[72] That case was affirmed on appeal, but the decision was without a published opinion.[73] Now, it seems to me, again, that *Daubert* will work a change in circuits utilizing such analysis and require a finding that hypnotically-enhanced testimony not be admissible.

I am running out of time, but there is one last aspect to this that I must discuss. That is a case called *Rock v. Arkansas*,[74] dealing with the admissibility of hypnotically-enhanced testimony.[75] So far, you may have interpreted what I have said as taking a position that there should be a per se rule against the adoption of or the admission of hypnotically-enhanced testimony into evidence during trial. I think that is what I would say, except for *Rock*. *Rock* works a modification on *Hughes* and on any other circuit that would adopt, or had adopted, a per se inadmissibility rule, and it works when it is the defendant who wishes to

68. *See* United States v. Kimberlin, 805 F.2d 210 (7th Cir. 1986), *cert. denied*, 483 U.S. 1023 (1987); Beck v. Norris, 801 F.2d 242 (6th Cir. 1986); Clay v. Vose, 771 F.2d 1 (1st Cir. 1985), *cert. denied*, 475 U.S. 1022 (1986); United States v. Awkard, 597 F.2d 667 (9th Cir.), *cert. denied*, 444 U.S. 885 (1979).

69. 725 F. Supp. 142 (E.D.N.Y. 1989), *aff'd*, 923 F.2d 843 (2d Cir. 1990), *cert. denied*, 499 U.S. 925 (1991).

70. *Id.* at 146.

71. 800 F.2d 437 (4th Cir. 1986).

72. *Id.* at 442 (stating that "the general view of federal courts that prior use of hypnosis on a witness goes to the weight to be given his testimony rather than its admissibility").

73. *See* Barnes v. Henderson, 923 F.2d 843 (2d Cir. 1990).

74. 483 U.S. 44 (1987).

75. *Id.* at 45.

introduce the hypnotically-enhanced testimony, rather than the prosecution. In such a case, a rule of per se inadmissibility is not permitted. That is because the defendant has certain constitutionally guaranteed rights that do not accrue to the prosecution.[76] In *Rock*, the defendant was charged with manslaughter.[77] She claimed she did not intend to shoot her husband.[78] During hypnosis, she remembered that her finger was not on the trigger when the gun went off.[79] She wanted to introduce that recollection into evidence at trial.[80] Arkansas had a per se exclusionary rule.[81] In other words, under Arkansas law, hypnotically-enhanced testimony was inadmissible per se.[82] Thus, the Arkansas court ruled the testimony inadmissible.[83] It went up to the United States Supreme Court, which held it was improper for the state to adopt a per se exclusionary rule regarding hypnotically-enhanced testimony when the defendant has been hypnotized and wishes to introduce posthypnotic recollection into evidence.[84] The Court looked to the Fifth,[85]

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76. These include the rights afforded under the Fifth, Sixth, and Fourteenth Amendments. For a view of these amendments see *infra* notes 85-87.

77. *Rock*, 483 U.S. at 45.

78. *Id.* at 46 n.1.

79. *Id.* at 47.

80. *Id.* ("The trial judge held a pretrial hearing on the motion and concluded that no hypnotically refreshed testimony would be admitted.").

81. *Id.* at 48-49 ("The [lower] court concluded that 'the dangers of admitting this kind of testimony outweigh whatever probative value it may have,' and decided to follow the approach of States that have held hypnotically refreshed testimony of witnesses inadmissible *per se*." (quoting Rock v. State, 708 S.W.2d 78, 81 (Ark. 1986))).

82. *Id.*

83. *Rock*, 708 S.W.2d at 81.

84. *Rock*, 483 U.S. at 61. The Court stated:

> A State's legitimate interest in barring unreliable evidence does not extend to *per se* exclusions that may be reliable in an individual case. Wholesale inadmissibility of a defendant's testimony is an arbitrary restriction on the right to testify in the absence of clear evidence by the State repudiating the validity of all post-hypnosis recollections.

Id.

Sixth[86] and Fourteenth[87] Amendments, looking at aspects of the Compulsory Process Clause,[88] for example, and the Due Process clause.[89] The Court then stated that the defendant witness had a constitutional right to present her defense, or to have an opportunity to present her defense, and that a per se exclusionary rule improperly precluded her from having an opportunity to present her defense.[90] The Court seemed to feel that given certain safeguards, hypnotically-enhanced testimony might be sufficiently reliable so that a court might justify its admissibility.[91]

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85. U.S. CONST. amend. V. This amendment provides in pertinent part: "No person shall be . . . compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law." *Id.*

86. U.S. CONST. amend. VI. This amendment provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . to be confronted with the witness against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Id.

87. U.S. CONST. amend. XIV. This amendment provides in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Id.

88. U.S. CONST. amend. VI. The Sixth Amendment, which embodies the Compulsory Process Clause, provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy . . . compulsory process for obtaining witnesses in his favor . . . ." *Id.*

89. *Rock*, 483 U.S. at 51-52. The Due Process Clause of the Fourteenth Amendment provides in pertinent part: "No state shall . . . deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV.

90. *Rock*, 483 U.S. at 52. ("[F]undamental to a personal defense is . . . an accused's right to present his own version of events in his own words.").

91. *Id.* at 60. The Court suggested that this could be accomplished by having the hypnosis performed by a specially trained psychologist or psychiatrist, conducting the hypnosis in a neutral setting and taping or video recording all interrogations. *Id.*

Now, I will tell you that I think the Supreme Court was wrong in saying that sufficient safeguards could be set in place. It relied on a set of safeguards that were set forth by Doctor Martin Orne,[92] who is probably the foremost psychological authority in this area. Those guidelines can be found in a case arising out of New Jersey called *State v. Hurd*.[93] The Supreme Court said perhaps the *Hurd* guidelines could suffice to make evidence reliable.[94] Because of the Fifth, Sixth and Fourteenth Amendment rights for a criminal defendant to present his or her defense, the defendant should have an opportunity to attempt to show that the hypnotically-enhanced testimony is sufficiently reliable so as to be admissible.[95]

Now, there is a serious problem with the Court's reliance on the *Hurd* guidelines. Dr. Orne has admitted that he does not think

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92. Dr. Martin Orne is a psychiatrist from the University of Pennsylvania Medical School and an expert in hypnosis. Additionally, Dr. Orne proposed a set of guidelines to be followed where hypnosis would be utilized for forensic purposes.

93. 432 A.2d 86 (N.J. 1981).

> First, a psychiatrist or psychologist experienced in the use of hypnosis must conduct the session . . . . Second, the professional conducting the hypnotic session should be independent of and not regularly employed by the prosecutor, investigator or defense . . . . Third, any information given to the hypnotist by law enforcement personnel or the defense prior to the hypnotic session must be recorded, either in writing or another suitable form . . . . Fourth, *before* inducing hypnosis the hypnotist should obtain from the subject a detailed description of the facts as the subject remembers them. The hypnotist should carefully avoid influencing the description by asking structured questions or adding new details . . . . Fifth, all contacts between the hypnotist and the subject must be recorded . . . . Sixth, only the hypnotist and the subject should be present during any phase of the hypnotic session, including the pre-hypnotic testing and the post-hypnotic interview.

Id. at 96-97.

94. *Rock*, 483 U.S. at 60 ("[I]naccuracies . . . can be reduced . . . by the use of procedural safeguards." (citing Orne, *The Use and Misuse of Hypnosis in Court*, 27 INT'L J. CLINICAL AND EXPERIMENTAL HYPNOSIS 311, 335-36 (1979))).

95. *Id.* at 49-56 ("[R]estrictions of a defendant's right to testify may not be arbitrary or disproportionate to the purposes they are designed to serve.").

the guidelines are sufficiently useful to guarantee reliability so as to permit the use of hypnotically-enhanced testimony at trial.[96] He expressly stated that the concerns we have about hypersuggestibility and confabulation are not remedied by the guidelines he set forth and recommended.[97] So, it seems to me, given that even Dr. Orne would say that these reliability factors are not remedied, that the Court was wrong to rely on *Hurd* as a precedent for allowing hypnotically-enhanced testimony into evidence. Nonetheless, we have *Rock*, which states that when a defendant has been hypnotized and wishes to introduce her own hypnotically-enhanced testimony, a per se exclusionary rule is inappropriate.[98]

Now, my own sense would be that, even if the court has to engage in a case-by-case determination, it should be rejecting the admissibility of hypnotically-enhanced testimony in any event. As a practical matter, it should not make a difference. Hypnotically-enhanced testimony should still not be coming in for the reasons I have set forth before. It is too unreliable. Each court should exclude the testimony after making a case-by-case determination. Nonetheless, a per se exclusion, the Court says, is inappropriate.[99]

There are other issues raised by hypnosis in a forensic context which I do not have time to answer. Let me simply raise the questions for you and tell you where you can find the answers. As I stated earlier, law enforcement agencies are going to desire to engage in hypnosis. Does the fact that a witness has been hypnotized mean that the witness should no longer be allowed to testify? Has he or she been "contaminated?" In fact, two cases, arising out of California[100] and Arizona,[101] held that once the

96. Martin Orne, Address to Evidence Section of Association of American Law Schools (1988).

97. *Id.*

98. *Rock*, 483 U.S. at 44.

99. *Id.*

100. People v. Shirley, 723 P.2d 1354 (Cal.), *cert. denied*, 459 U.S. 860 (1982).

101. People v. Mena, 624 P.2d 1274 (Ariz. 1981).

witness has been hypnotized, the witness can no longer testify.[102] That seemed horribly undesirable, because now law enforcement agents are on the horns of a dilemma. On one horn they can forgo the possibility of finding a useful clue. That does not seem desirable. But on the other horn, if they hypnotize the witness, they may lose the witness for the trial. That seems undesirable, as well. The compromise that everybody reached, including California and Arizona, which reversed their earlier rulings, was that a witness should be allowed to testify to prehypnotic recollections.[103] Of course the problem is determining which recollections the witness has are posthypnotic and which are prehypnotic. The court addresses that in *Hughes*, stating that these determinations must be made on a case-by-case basis.[104] Although the *Hughes* court does not mention this, my own personal opinion is that the *Hurd* guidelines I referred to earlier are appropriate for helping to make such determinations.

There is one last aspect of hypnosis that I did not talk about, and that is the idea of memory hardening.[105] When someone has been hypnotized, they remember memories after they are out from under hypnosis, and they are much more certain of those

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102. *Mena*, 624 P.2d at 1279 ("[W]e feel that testimony of witnesses which has been tainted by hypnosis should be excluded in criminal cases."); *Shirley*, 723 P.2d at 1384 (holding that "the testimony of a witness who has undergone hypnosis for the purpose of restoring his memory of the events in issue is inadmissible as to all matters relating to those events, from the time of the hypnotic session forward").

103. State *ex rel.* Collins v. Superior Court, 644 P.2d 1266, 1295 (Ariz. 1982) ("Th[e] witness will be permitted to testify with regard to those matters which he or she was able to recall *and* relate prior to hypnosis."); People v. Hayes, 783 P.2d 719, 727 (Cal. 1989) ("[A] witness is permitted to testify to events that the trial court finds the witness both recalled and related to others before undergoing hypnosis.").

104. People v. Hughes, 59 N.Y.2d 523, 547, 453 N.E.2d 484, 496, 466 N.Y.S.2d 255, 267 (1983) ("Experience and determination on a case-by-case basis will be required before procedural standards can be properly enunciated with any degree of definiteness."), *cert. denied*, 492 U.S. 908 (1989).

105. *See Rock*, 483 U.S. at 60 ("[T]he subject [of hypnosis] experiences 'memory hardening,' which gives him great confidence in both true and false memories . . . .").

memories than they would have been if they were not hypnotized.[106] That creates Confrontation Clause[107] problems, or potential Confrontation Clause problems, because it may preclude effective cross-examination. Now, a case has come down, *United States v. Owens*,[108] which I think moots out that problem.[109] Nonetheless, the New York Court of Appeals has been concerned about the problem of potential memory hardening, and in *People v. Tunstall*[110] it gave seven factors that a judge should look at for determining whether or not sufficient memory hardening took place so that the prehypnotic recollection should not be admissible because of memory hardening.[111]

One last problem regarding hypnotically-enhanced testimony is demonstrated in a case called *People v. Santana*.[112] In that case, a psychiatrist hypnotized the defendant.[113] Then, in dealing with the issue of whether or not the defendant had the requisite intent, the defense wished to introduce statements made by the defendant

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106. *Id.*

107. U.S. CONST. amend. VI. The Sixth Amendment, which embodies the Confrontation Clause, provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witness against him." *Id.*

108. 484 U.S. 554 (1988).

109. *Id.* at 564. ("[N]either the Confrontation Clause nor Federal Rule of Evidence 802 is violated by admission of an identification statement of a witness who is unable, because of a memory loss, to testify concerning the basis for the identification.").

110. 63 N.Y.2d 1, 468 N.E.2d 30, 479 N.Y.S.2d 192 (1984).

111. *Id.* at 9, 468 N.E.2d at 34, 479 N.Y.S.2d at 196.

> [T]he court should take into consideration the amount of confidence the witness had in her initial recollections prior to being hypnotized, the extent of her belief in the ability of hypnosis to yield the truth, the degree to which she was hypnotized, the length of the session, the type and nature of questioning employed, the effectiveness of the hypnosis in yielding additional details, and any other factors which the court may deem important based upon the specific facts and circumstances of th[e] case.

Id.

112. 159 Misc. 2d 301, 604 N.Y.S.2d 1016 (Sup. Ct. Queens County 1993).

113. *Id.* at 302, 604 N.Y.S.2d at 1017.

while under hypnosis.[114] These statements were not being introduced to show they were true. Rather, the defense wanted to introduce them in order to explain how its expert witness derived his diagnosis that the defendant lacked responsibility for his actions by reason of mental disease or defect.[115] The question was whether those statements should be admissible.[116] The court said yes, subject to some stringent rules such as ensuring that there is a limiting instruction, and that the jury should not be allowed to consider these statements made under hypnosis for the truth of the matter asserted.[117] It is an interesting case that I wish I had more time to discuss. Thank you for your attention.

Hon. George C. Pratt:

Gary, I have a question. Is there a sharp distinction between hypnotically-enhanced testimony, as you have described it, and what you might say is called psychiatrically-enhanced testimony, this rash of incidents we have heard about over the last year or so of adults who have problems in their lives? For example, they go to a psychiatrist, a psychiatrist lays them out on the couch and gets them to talk and talk and talk, and eventually they realize their father abused them when they were three years old and they remember it very distinctly now. Are we talking about something of a different character, or are we in just gradations of the same problem?

Professor Gary M. Shaw:

CONCLUSION

I was going to apologize for the esoteric aspect of my subject, however, I think there are significant ramifications today in

114. *Id.*
115. *Id.*
116. *Id.*
117. *Id.* at 306, 604 N.Y.S.2d at 1020.

precisely that forum. I do not know that we can say that there is a sharp distinction; it is probably more one of gradations. Clearly some of the therapy that is involved here does contain hypnosis. To that extent, we will soon be having this rash of cases involving issues of admissibility of hypnotically-enhanced testimony. There was one just filed in California last week.[118] The father of the woman who had gone for therapy is suing the therapists for malpractice, saying they implanted these memories in the daughter.[119] What is clear is that there is a great deal of suggestibility in this therapist/client relationship. There is a great deal of suggestibility and there is also a demonstrated significant degree of confabulation. So that I think that the very issues we are talking about in hypnosis, even in those cases where the therapist does not engage in hypnosis, exist in these cases as well, the same degree of excessive suggestibility exists because of the total reliance between the client and the psychotherapist. With any psychotherapist, there is this incredible degree of trust and relaxation that it opens the way, it has been demonstrated, for extreme suggestibility for confabulation. I think that these issues may not be quite as extreme as in the hypnosis cases, but they are clearly going to be discussed in great detail in the future. Yes, I think it is a matter of gradation, but they are very, very close.

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118. Jane Gross, *Dad Sues Therapist Over Incest Accusation Recovery of Memory Was A Con, He Charges*, DETROIT FREE PRESS, Apr. 8, 1994, at 1A. ("[Father sued] his daughter's therapists on malpractice charges, claiming they conned a depressed young woman suffering from bulimia into remembering childhood sexual abuse that never occurred.").

119. *Id.* Additionally, it was reported that the father received a malpractice award of $500,000 in damages. Leslie Berkman, *Verdict Heats Up Memory Debate "I Was Really Hurt By The Verdict,"* LOS ANGELES TIMES, May 22, 1994, at 3A. For an in-depth discussion on memory implantation, see ELIZABETH LOFTUS & KATHERINE KETCHAM, THE MYTH OF REPRESSED MEMORY (1994).