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Hypnosis, Truth Drugs, and the Polygraph: An Analysis of Their Use and Acceptance by the Courts

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HYPNOSIS, TRUTH DRUGS, AND THE POLYGRAPH: AN ANALYSIS OF THEIR USE AND ACCEPTANCE BY THE COURTS

Hypnosis, narcosis, and the polygraph are scientific tools that have been the subject of much controversy concerning their use in the criminal investigatory process and the admissibility of their fruits into evidence. Much of this debate has concerned the admissibility of evidence derived from their use when offered to prove the truth of the matter asserted. To a large extent other uses of these devices and the information gathered therefrom have received only cursory treatment. This note presents the historical and technical developments in the three areas and surveys the instances in which information derived from their use is accepted by the courts. The rationale for treating hypnosis, narcosis, and the polygraph together is that many objections, such as the lack of reliability and the impingement on constitutional safeguards, to the use of this type of information are common to all three. The focus will be placed on the criminal defendant with a view toward the extent and form in which the courts will accept evidence derived from hypnosis, truth drugs, and the polygraph.

THE POLYGRAPH

Historical and Technical Background

In 1895, Cesare Lombroso made the first attempt to detect deception by a scientific device.[1] His approach was to measure fluctuations in blood pressure and pulse rate as indicative of the truth or falsity of the subject's response. In 1915, Benussi, and shortly thereafter, Brutt, began experimenting with an analysis of changes in respiration and their relation to deception.[2] John Larson designed a more sophisticated instrument, which he called the "polygraph." It was capable of measuring blood pressure, pulse rate, and respiration simultaneously.[3] Galvanic skin response, which is the measure of "changes or variations in the conductance of external current between the palmar and dorsal surfaces of the subject's hand (or of the fingers, et cetera),"[4] was added to the factors measured by Leonarde Keeler.[5] John Reid further refined the polygraph by adding the capability of measurement of muscular activity.[6]

The theory of the polygraph is based on the assumption that a definite relationship exists between lying and certain physical responses.[7] According

1. F. INBAU & J. REID, LIE DETECTION AND CRIMINAL INTERROGATION 2 (3d ed. 1953) [hereinafter cited as INBAU & REID].
2. *Id.* at 3.
3. Larson, *Modification of the Marston Deception Test*, 12 J. CRIM. L.C. & P.S. 390 (1921).
4. INBAU & REID, *supra* note 1, at 99.
5. Skolnick, *Scientific Theory and Scientific Evidence: An Analysis of Lie-Detection*, 70 YALE L.J. 694, 697-98 (1961).
6. INBAU & REID, *supra* note 1, at 4.
7. Skolnick, *supra* note 5, at 700.

to the theory, lying causes a fear or anxiety that translates itself into certain physical reactions – changes in the blood pressure, pulse rate, respiration, or galvanic skin response of the subject, which are recorded by the polygraph.[8] An examiner draws a conclusion as to the truth or falsity of the subject's response through interpretation of the recorded data. That this is a difficult process requiring a highly skilled operator is indicated by a glance at the factors that may complicate the examiner's interpretation. The chief difficulties in the diagnosis of deception by the polygraph are: (1) extreme nervousness, (2) mental abnormality, (3) physical abnormality, (4) unresponsiveness, and (5) muscular pressure or controlled breathing.[9] Commentators are quick to point out other sources of error such as the psychological bias of the examiner[10] and the chance that the examiner may unwittingly give misleading cues on crucial questions.[11]

The critical link in the process is the examiner. He has the task of detecting error producing factors and compensating for them in his examination technique and data interpretation. This responsibility places a high premium on training and skill. However, there is serious disagreement as to the extent and type of training an examiner should receive. Suggestions range from six-month courses[12] to training equivalent to that of a psychiatrist.[13] Proponents of the lie detector admit that a large portion of the examiners lack sufficient training by almost any standard[14] and that this in conjunction with the lack of standardization in the instrument used makes the results unsuitable for court use.[15] They attempt to show statistically a ninety-five per cent accuracy in the determination of guilt or innocence, four percent indefinite results, and only one per cent error under the most favorable conditions.[16] Some advocates of the polygraph claim even greater accuracy.[17] Skeptics, however, question both the accuracy of the statistical results due to unknown error,[18] and the basic physiological theory itself:[19]

> In sum, academic psychology and psychophysiology challenge both substantive assumptions underlying lie-detection theory: the assumption of a regular relationship between lying and emotional states,

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8. *Id.* at 699.
9. INBAU & REID, *supra* note 1, at 64-65.
10. Skolnick, *supra* note 5, at 711.
11. Levitt, *Scientific Evaluation of the "Lie Detector,"* 40 IOWA L. REV. 440, 451 (1955).
12. INBAU & REID, *supra* note 1, at 115.
13. Skolnick, *supra* note 5, at 707, believes the task of the examiner is actually more difficult than that of a psychiatrist. A psychiatrist determines only whether a person has a tendency for lying where the examiner must determine if the subject is lying in that particular instance.
14. INBAU & REID, *supra* note 1, at 114; Arther, *The Lie Detector – Is it of Any Value?*, FED. PROB., Dec. 1960, at 36, 39.
15. INBAU & REID, *supra* note 1, at 128.
16. *Id.* at 111.
17. Arther, *supra* note 14.
18. Burack, *A Critical Analysis of the Theory, Method, and Limitations of the "Lie Detector,"* 46 J. CRIM. L.C. & P.S. 414, 421 (1955); Levitt, *supra* note 11.
19. Skolnick, *supra* note 5, at 703.

and the assumption of a regular and measurable relationship between emotional change and autonomic activity.

Admissibility of Results as Direct Evidence

Since the first reported case dealing with the question,[20] courts have consistently excluded results of lie detector tests from evidence in both civil[21] and criminal[22] cases. The reasons generally advanced to support this exclusion are judicial precedent (lack of scientific acceptance of the polygraph as a reliable instrument in ascertaining truth or falsity)[23] and failure of the proponent to lay a proper foundation through expert testimony.[24] Ancillary reasons such as the belief that the results may have an undue influence on the jury,[25] the impossibility of cross-examining the lie detector,[26] and usurpation of the jury's factfinding role[27] have also been suggested. This exclusion has been extended to the implication of test results as well,[28] and in either case admission, whether urged by the state or defendant, constitutes reversible error that cannot be cured by instruction.[29] This refusal is given further

20. Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).

21. Gideon v. Gideon, 153 Cal. App. 2d 541, 314 P.2d 1011 (1957); Molino v. Board of Pub. Safety, 154 Conn. 368, 225 A.2d 805 (1966) (dictum); Stone v. Earp, 331 Mich. 606, 50 N.W.2d 172 (1951); Parker v. Friendt, 99 Ohio App. 329, 118 N.E.2d 216 (1954).

22. United States v. Tremont, 351 F.2d 144 (6th Cir. 1965); McCroskey v. United States, 339 F.2d 895 (8th Cir. 1965); Frye v. United States, 293 F. 1013 (D.C. Cir. 1923); Kaminski v. State, 63 So. 2d 339 (Fla. 1953); State v. Brown, 177 So. 2d 532 (2d D.C.A. Fla. 1965); State v. Lowry, 163 Kan. 622, 185 P.2d 147 (1947); People v. Frechette, 380 Mich. 64, 155 N.W.2d 830 (1968); People v. Becker, 300 Mich. 562, 2 N.W.2d 503 (1942); State v. Perry, 274 Minn. 1, 142 N.W.2d 573 (1966); Boeche v. State, 151 Neb. 368, 37 N.W.2d 593 (1949); State v. Trimble, 68 N.M. 406, 362 P.2d 788 (1961); Henderson v. State, 94 Okla. Crim. 45, 230 P.2d 495 (1951); State v. Bohner, 210 Wis. 651, 246 N.W. 314 (1933). Only one case has admitted the results of a lie detector test as evidence, People v. Kenny, 167 Misc. 51, 3 N.Y.S.2d 348 (Queens County Ct. 1938). However, this was impliedly overruled by People v. Forte, 279 N.Y. 204, 18 N.E.2d 31 (1938).

23. Frye v. United States, 293 F. 1013 (D.C. Cir. 1923); Kaminski v. State, 63 So. 2d 339 (Fla. 1953); People v. Frechette, 380 Mich. 64, 155 N.W.2d 830 (1968); State v. Perry, 274 Minn. 1, 142 N.W.2d 573 (1966); State v. Arnwine, 67 N.J. Super. 483, 171 A.2d 124 (Super. Ct. 1961).

24. People v. Becker, 300 Mich. 562, 2 N.W.2d 503 (1942); State v. Cole, 354 Mo. 181, 188 S.W.2d 43 (1945); Boeche v. State, 151 Neb. 368, 37 N.W.2d 593 (1949) (concurring opinion); People v. Forte, 279 N.Y. 204, 18 N.E.2d 31 (1938).

25. People v. Frechette, 380 Mich. 64, 155 N.W.2d 830 (1968); State v. Perry, 274 Minn. 1, 142 N.W.2d 573 (1966); State v. Cole, 354 Mo. 181, 188 S.W.2d 43 (1945); State v. Foye, 254 N.C. 704, 120 S.E.2d 169 (1961).

26. State v. Lowry, 163 Kan. 622, 185 P.2d 147 (1947); Boeche v. State, 151 Neb. 368, 37 N.W.2d 593 (1949); State v. Foye, 254 N.C. 704, 120 S.E.2d 169 (1961).

27. People v. Schiers, 329 P.2d 1 (Cal. 1958) (dissenting opinion); *see* Silving, *Testing of the Unconscious in Criminal Cases*, 69 HARV. L. REV. 683 (1956).

28. People v. Wochnick, 98 Cal. App. 2d 124, 219 P.2d 70 (1950); State v. Arnwine, 67 N.J. Super. 483, 171 A.2d 124 (Super. Ct. 1961); State v. Foye, 254 N.C. 704, 120 S.E.2d 169 (1961).

29. State v. Foye, 254 N.C. 704, 120 S.E.2d 169 (1961). *Contra*, People v. Schiers, 160 Cal. App. 2d 364, 324 P.2d 981 (1958). Witness for the prosecution testified that he told the defendant the results were unfavorable. The district court of appeals held that the

support by experts in the field of lie detection who discourage its wholesale acceptance.[30] The question thus raised focuses on the appropriateness of total exclusion. Experts in the field do recognize the effectiveness of the polygraph when used under the most favorable conditions.[31] The more logical result is reached by courts that in each case give the proponent of the evidence the opportunity to show that the factors of reliability are present.[32] If it is demonstrated to the satisfaction of the court that these factors[33] are present, the reliability hurdle should be deemed crossed. If there are no prevailing constitutional or policy objections, the evidence should be admitted.[34]

One exception to the exclusionary rule concerns the effect of stipulations entered into by the prosecution and defense as to the taking of the test, the qualifications of the examiner, and the admissibility of the results without objection by the adversely affected party.[35] Courts view such stipulations strictly and require that they extend to the admissibility of the evidence.[36] Although this exception is not universally recognized,[37] the trend is toward recognition. Jursidictions that recognize this exception approach it in two different ways. Some look no further than the stipulation.[38] Florida appears not to be in this group.[39] Once the stipulation is presented to the court, results

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trial judge's curative instructions were sufficient. Tyler v. United States, 193 F.2d 24 (D.C. Cir. 1951). The results of a lie detector test were admitted for the sole purpose of proving a voluntary confession.

30. INBAU & REID, *supra* note 1, at 128; Inbau, *Detection of Deception Technique Admitted as Evidence*, 26 J. CRIM. L.C. & P.S. 262, 270 (1936).

31. INBAU & REID, *supra* note 1, at 111; Arther, *supra* note 14.

32. People v. Becker, 300 Mich. 562, 2 N.W.2d 503 (1942); State v. Cole, 354 Mo. 181, 188 S.W.2d 43 (1945); Boeche v. State, 151 Neb. 368, 37 N.W.2d 593 (1949) (concurring opinion); People v. Forte, 279 N.Y. 204, 18 N.E.2d 31 (1938).

33. Factors of reliability are a satisfactory mental and physical condition of the subject and a competent examiner. The subject should not be extensively interrogated or physically abused before the lie detector examination. The qualifications for a competent examiner are generally set out in INBAU & REID, *supra* note 1, at 114-16.

34. *See* Herman, *The Use of Hypno-Induced Statements in Criminal Cases*, 25 OHIO ST. L.J. 1 (1964). Professor Herman advocates a case-by-case analysis for reliability factors in the areas of hypnosis, truth drugs, and the polygraph.

35. Herman v. Eagle Star Ins. Co., 283 F. Supp. 33 (C.D. Cal. 1966); State v. Valdez, 91 Ariz. 274, 371 P.2d 894 (1962); People v. Houser, 85 Cal. App. 2d 686, 193 P.2d 937 (1948); State v. Brown, 177 So. 2d 532 (2d D.C.A. Fla. 1967); State v. Freeland, 255 Iowa 1334, 125 N.W.2d 825 (1964); State v. McNamara, 252 Iowa 19, 104 N.W.2d 568 (1960); State v. Lowry, 163 Kan. 622, 185 P.2d 147 (1957) (the court implied that if there had been a stipulation the results would have been admissible).

36. People v. Zazzeta, 27 Ill. 2d 302, 189 N.E.2d 260 (1963); People v. Potts, 74 Ill. App. 2d 301, 220 N.E.2d 251 (1966); State v. Lowry, 163 Kan. 622, 185 P.2d 147 (1947); *cf.* Colbert v. Commonwealth, 306 S.W.2d 825 (Ky. 1957) (court would not give effect to the stipulation because it was oral and did not extend to the qualifications of the examiner).

37. Stone v. Earp, 331 Mich. 606, 50 N.W.2d 172 (1951); State v. Trimble, 68 N.M. 406, 362 P.2d 788 (1961); LeFevre v. State, 242 Wis. 416, 8 N.W.2d 288 (1948).

38. Herman v. Eagle Star Ins. Co., 283 F. Supp. 33 (C.D. Cal. 1966); People v. Houser, 85 Cal. App. 2d 686, 193 P.2d 937 (1948); State v. Freeland, 255 Iowa 1334, 125 N.W.2d 825 (1964).

39. State v. Brown, 177 So.2d 532 (2d D.C.A. Fla. 1965).

of the test are admissible. No inquiry is made into the presence or absence of reliability factors. The rationale of this approach seems to be grounded in theory that contracts to alter or waive established rules of evidence are valid and enforceable in the absence of fraud or coercion.[40] This approach seems to beg the question. The biggest failing of the polygraph is its unreliability in most instances. The fact that the parties have stipulated to its reliability does not affect its actual reliability. The risk of injustice is apparent. Picture the innocent defendant who willingly and forcefully demands a polygraph test and stipulates to the admission of the results because he is sure it will exonerate him, yet the result is unfavorable.

A sounder approach is represented by jurisdictions following *Valdez v. State*[41] where the defendant entered into a written agreement with the county attorney stipulating that the results of a lie detector test would be admissible. The results were unfavorable to the defendant, and over his objection the polygraph operator was permitted to testify to this effect at the trial. Upon certification of the question of admissibility, the Arizona supreme court held that the lie detector had developed to such an extent that the results were probative enough to be admitted into evidence upon stipulation in order to corroborate other evidence of defendant's participation in the crime or, if the defendant testified, to corroborate or impeach his own testimony. Several qualifications were placed on this admission:[42]

> (1) that the stipulation pertain to admissibility,
> (2) that the trial judge may exclude the evidence if he feels that factors of unreliability are present,
> (3) that the opposing party be given an opportunity for full cross-examination of the operator,
> (4) that the jury be instructed that the evidence does not tend to prove or disprove any element of the crime, but only the defendant's belief at the time of the examination, and
> (5) that the jury should determine how heavily to weigh the evidence.

The Arizona court has faced the reliability problem directly; however, its presumption is one of admissibility rather than inadmissibility. By limiting its use to corroboration and impeachment the court has also insured that the evidence obtained through the use of the polygraph will not be the sole evidence of guilt. This straightforward approach may provide the wedge for a general extension of this type of reasoning into cases where there has been no stipulation yet the factors militating towards reliability are present.

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40. Dession, Freedman, Donnelly & Redlich, *Drug-Induced Revelation and Criminal Investigation*, 62 YALE L. J. 315, 328 (1953) [hereinafter cited as Dession]; Note, *Contracts To Alter the Rules of Evidence*, 46 HARV. L. REV. 138 (1932).

41. 91 Ariz. 274, 371 P.2d 894 (1962); People v. Zazzetta, 27 Ill. 2d 302, 189 N.E.2d 260 (1963); People v. Potts, 74 Ill. App. 2d 301, 220 N.E.2d 251 (1966).

42. State v. Valdez, 91 Ariz. 274, 371 P.2d 894, 900 (1962).

Evidence of Defendant's Willingness or Refusal To Submit to a Polygraph Test

In an attempt to accomplish indirectly what is not permitted directly, counsel frequently attempt to show, either through comment or as evidence, a defendant's willingness or refusal to submit to a lie detector test. Courts have held such comments and the admission of this type of evidence to be error for several reasons:

(1) Since the results of lie detector tests are inadmissible, the fact of defendant's willingness or refusal to submit to the examination is likewise inadmissible.[43]

(2) This type of information has an adverse effect on the jury.[44]

(3) Unwillingness to take a lie detector test has no probative value in showing a general consciousness of guilt.[45] The reasoning here is that a defendant might refuse to take the test simply because he is aware of its unreliability.

(4) Willingness to take a lie detector test has no probative value in showing a general consciousness of innocence.[46] The defendant could express his desire to take the test without fear because of the general inadmissibility of the results.

Although the courts find such comment or the admission of this type of evidence to be error, it is not always prejudicial error requiring reversal. The determination of prejudicial error rests on a consideration of a number of factors. If the case is a close one with the evidence being only mildly persuasive of guilt, the error will usually be deemed prejudicial due to the chance that it could provide the added weight necessary for conviction.[47] Conversely, if the evidence is overwhelmingly against the defendant, the error will usually not require reversal.[48] If the judge gives adequate curative instructions, appellate courts will generally not consider the error prejudicial;[49] however,

43. Aetna Ins. Co. v. Barnett Bros., Inc., 289 F.2d 30 (8th Cir. 1961); People v. Carter, 48 Cal. 2d 737, 312 P.2d 665 (1957); Mills v. People, 139 Colo. 397, 339 P.2d 998 (1959); Kaminski v. State, 63 So. 2d 339 (Fla. 1953); State v. Chang, 46 Hawaii 22, 374 P.2d 5 (1962); State v. Emory, 190 Kan. 406, 375 P.2d 585 (1962); Penn v. Commonwealth, 417 S.W.2d 258 (Ky. 1967); State v. Kolander, 236 Minn. 209, 52 N.W.2d 458 (1952); State v. Driver, 38 N.J. 255, 183 A.2d 655 (1962); People v. Neumuller, 29 App. Div. 2d 886, 288 N.Y.S.2d 511 (1968); Commonwealth v. Saunders, 386 Pa. 149, 125 A.2d 442 (1956).

44. Aetna Ins. Co. v. Barnett Bros., Inc., 289 F.2d 30 (8th Cir. 1961); State v. Green, 254 Iowa 1379, 121 N.W.2d 89 (1963); State v. Emory, 190 Kan. 406, 375 P.2d 585 (1962); State v. Perry, 274 Minn. 1, 142 N.W.2d 573 (1966); State v. Driver, 38 N.J. 255, 183 A.2d 655 (1962); State v. Britt, 235 S.C. 395, 111 S.E.2d 669 (1959).

45. People v. Carter, 48 Cal. 2d 737, 312 P.2d 665 (1957); Johnson v. State, 166 So. 2d 798 (2d D.C.A. Fla. 1964) (dictum); State v. Green, 254 Iowa 1379, 121 N.W.2d 89 (1963).

46. People v. Carter, 48 Cal. 2d 737, 312 P.2d 665 (1957); Penn v. Commonwealth, 417 S.W.2d 258 (Ky. 1967); Commonwealth v. Saunders, 386 Pa. 149, 125 A.2d 442 (1956).

47. Mills v. People, 139 Colo. 397, 339 P.2d 998 (1959); State v. Kolander, 236 Minn. 209, 52 N.W.2d 458 (1952); State v. Driver, 38 N.J. 255, 183 A.2d 655 (1952).

48. People v. Parrella, 158 Cal. App. 2d 140, 322 P.2d 83 (1958); Barber v. Commonwealth, 206 Va. 241, 142 S.E.2d 484 (1965).

49. Marable v. State, 203 Tenn. 440, 313 S.W.2d 451 (1958).

if the instructions are equivocal or the information particularly damaging due to the facts and circumstances of the particular case, the instructions will be to no avail.[50]

Waiver is an important consideration in this area. If the defendant is the first to make reference to his willingness to submit to examination, pursuit of this subject, usually for discrediting purposes, is less likely to be prejudicial error.[51] Some cases hold that if the defendant does not take the proper procedural steps for preserving the error at trial, he will be foreclosed from pursuing it on appeal.[52]

The underlying premise seems to be that information as to the willingness or refusal of the defendant to submit to a lie detector test can have a great effect on the jury, particularly in the usual case when no expert testimony has been offered to apprise the factfinder of the scientific qualities and shortcomings of the polygraph. It becomes easy for the jury to assume the accuracy of the "scientific" technique and to make the inferential leap to a conclusion of guilt or innocence based on the defendant's attitude towards submitting to examination.

Use of the Polygraph in Obtaining Confessions

One of the most prevalent uses of the polygraph is as a tool in the process of obtaining confessions. The mere fact that a lie detector was used in obtaining an otherwise voluntary confession will have no effect on its admissibility.[53] The problem lies in determining which uses of the lie detector make a confession involuntary. Courts have excluded involuntary confessions because they violate fundamental notions of fairness implicit in our concept of due process, and because they have a high probability of unreliability.[54] If there has been mental or physical coercion, or some examiner action that would promote unreliability, the confession will be excluded.[55] The cases have generally held that a confession obtained by

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50. People v. Carter, 48 Cal. 2d 737, 312 P.2d 665 (1957); Kaminski v. State, 63 So. 2d 339 (Fla. 1953); State v. Chang, 46 Hawaii 22, 374 P.2d 5 (1962); State v. Green, 254 Iowa 1379, 121 N.W.2d 89 (1963); State v. Driver, 38 N.J. 255, 183 A.2d 655 (1962).

51. People v. Barton, 172 Cal. App. 2d 474, 341 P.2d 709 (1959); State v. Fox, 257 Iowa 174, 131 N.W.2d 684 (1964); Rodriquez v. State, 170 Tex. Crim. 295, 340 S.W.2d 61 (1960).

52. Sheppard v. Maxwell, 346 F.2d 707 (1965), *rev'd on other grounds*, 384 U.S. 333; People v. Parrella, 158 Cal. App. 2d 140, 322 P.2d 83 (1958); State v. LaRocca, 81 N.J. Super. 40, 194 A.2d 578 (Super. Ct. 1963); Marable v. State, 203 Tenn. 440, 313 S.W.2d 451 (1958).

53. United States v. McDevitt, 328 F.2d 282 (6th Cir. 1964); State v. Traub, 150 Conn. 169, 187 A.2d 230 (1962); Johnson v. State, 166 So. 2d 798 (2d D.C.A. Fla. 1964); Pinter v. State, 203 Miss. 344, 34 So. 2d 723 (1948); Fernandez v. State, 172 Tex. Crim. 68, 353 S.W.2d 434 (1962); State v. DeHart, 242 Wis. 562, 8 N.W.2d 360 (1943).

54. Rogers v. Richmond, 365 U.S. 534 (1961); Rochin v. California, 342 U.S. 165 (1952); Lisenba v. California, 314 U.S. 219 (1941); 3 J. WIGMORE, EVIDENCE §824 (McNaughton rev. 1961); Dession, *supra* note 40, at 335. *See generally* Kamisar, *What Is an "Involuntary" Confession?*, 17 RUTGERS L. REV. 728 (1963).

55. Rochin v. California, 342 U.S. 165 (1952); Lisenba v. California, 314 U.S. 219

artifice or deception is admissible as long as the action is not of the type that might induce an unreliable result.[56] The courts had concentrated on the reliability effect almost to the exclusion of notions of fairness and due process, although they consistently expressed their distaste for these methods of obtaining confessions.[57]

The courts are now shifting to a concentration on the due process notion of fairness, which has been enunciated by the United States Supreme Court.[58] *Lisenba v. California*[59] supports this proposition through dictum that confessions obtained by fraud, trickery, coercion and extortion, or physical violence violate that fundamental fairness that is essential to the concept of justice.[60] As this due process standard supplants the reliability doctrine, the use of the lie detector in obtaining confessions will be severely qualified where trickery or deception is involved.

Admissibility of Results of Polygraph if Reliable

Assuming the state of the science were such that the results obtained through the polygraph were reliable, there would still be the hurdles of hearsay, self-incrimination, and due process to clear before admission into evidence. It is at least arguable that the testimony of the examiner would not be excluded by the hearsay rule. The basic policy consideration underlying all hearsay exceptions is that in those situations there are certain guarantees of trustworthiness that justify the denial of cross-examination.[61] If the lie detection technique were reliable in ascertaining the truth and falsity of the subject's responses, there would be no reason to invoke the hearsay rule.

Whether the admission of results would violate the privilege against self-incrimination is a more difficult question. There is some debate whether the results of a lie detector examination are testimonial and, consequently, whether the privilege even applies. Skolnick believes that the physiological responses are a function of testimony.[62] Herman, citing Wigmore, maintains that there is testimonial compulsion present because the psysiological reactions are predicated on the subject's knowledge of facts, and the purpose

(1941); Dession, *supra* note 40, at 335.

56. United States v. Murphy, 222 F.2d 698 (2d Cir. 1955) (dictum); People v. Arguello, 65 Cal. 2d 768, 423 P.2d 202, 56 Cal. Rptr. 274 (1967); Grant v. State, 171 So. 2d 361 (Fla. 1965); Harrison v. State, 110 Fla. 420, 148 So. 882 (1933); Denmark v. State, 95 Fla. 757, 116 So. 757 (1928); State v. Robuck, 126 Mont. 302, 248 P.2d 817 (1952); Commonwealth v. Graham, 408 Pa. 155, 182 A.2d 727 (1962).

57. *See* Annot., 99 A.L.R.2d 772, 789 (1965).

58. Miranda v. Arizona, 384 U.S. 455, 457-58 (1966); Rochin v. California, 342 U.S. 165 (1952); Lisenba v. California, 314 U.S. 219 (1941). *See also* Kamisar, *supra* note 54.

59. 314 U.S. 219 (1941). Miranda v. Arizona, 384 U.S. 455, 457 (1966), further emphasizes the shift away from testing the constitutionality and admissibility of confessions by a "voluntary-involuntary" standard.

60. 314 U.S. at 237.

61. 5 J. WIGMORE, EVIDENCE §1420 (McNaughton rev. 1961).

62. Skolnick, *Scientific Theory and Scientific Evidence: An Analysis of Lie-Detection*, 70 YALE L.J. 694, 725 (1951). *See also* Schmerker v. California, 384 U.S. 757, 764 (1966) (dictum).

of the interrogation is to elicit these reactions.[63] Justice Carter in his dissent in *People v. Schiers*[64] states that the results are testimonial because they are communication and are therefore protected by the privilege. He argues that the lie detector is a new and artificial method of communication. Although the case did not deal with a lie detector, Justice Black in his concurring opinion in *Rochin v. California*[65] leaves the impression that he would apply the privilege because a person is compelled to be a witness against himself not only when he is compelled to testify, but when incriminating evidence is forcibly taken from him by a contrivance of modern science. McCormick[66] and Inbau[67] argue that the results of lie detectors are not testimonial. The test is allegedly not a communication but a bodily demonstration, because it is the physical responses that are the important part of the test. This question has never been decided by the courts. A more fundamental objection to the admission of the results of a polygraph examination is that it would violate the policy foundations of the privilege.[68]

Assuming the privilege does apply to lie detector examinations at what point does the privilege attach? Classically, the privilege applied to legally compelled testimony,[69] and Wigmore argued that this did not include police interrogation.[70] It is now clear that the privilege against self-incrimination attaches as soon as the individual is placed in custody or otherwise deprived of freedom of action.[71] Of course, if the defendant waives the privilege by consenting to the test[72] or if he voluntarily confesses after taking the examination, there is no question of self-incrimination.[73]

The argument has been advanced that the admission of results of lie detector tests would violate a defendant's guarantee of due process under the fifth and fourteenth amendments to the United States Constitution. In the absence of affirmative case law on the subject, it may be helpful to examine two confession cases. In *Rochin v. California*,[74] the court held that forcefully

63. Herman, *supra* note 34.

64. 160 Cal. App. 2d 364, 329 P.2d 1, 3 (1958).

65. 342 U.S. 165, 175 (1952).

66. C. McCORMICK, EVIDENCE 266 (1954).

67. F. INBAU, SELF-INCRIMINATION 67 (1950). *See also* Hardman, *Lie Detectors, Extrajudicial Investigations and the Courts*, 48 W. VA. L. REV. 37 (1942).

68. Some of the policies that are considered to underlie the privilege against self-incrimination are: (1) to stimulate law enforcement agencies to develop independent evidence; (2) to protect the private citizen from undue harassment by law enforcement officers unless they have probable cause to believe that one has broken the law; (3) to insure the dignity of the legal process; and (4) to preclude inquisitions before a person is charged, which could lead to blackmail and oppression. *See* People v. Schiers, 329 P.2d 1, 4 (Cal. 1958); C. McCORMICK, EVIDENCE 136 (1954); 8 J. WIGMORE, EVIDENCE §2251 (McNaughton rev. 1961). Some commentators question the merits of these policies. Schaefer, *Police Interrogation and the Privilege Against Self-Incrimination*, 61 NW. U.L. REV. 506 (1966).

69. 8 J. WIGMORE, EVIDENCE §2263 (McNaughton rev. 1961).

70. 8 J. WIGMORE, EVIDENCE §2252 (McNaughton rev. 1961).

71. Miranda v. Arizona, 384 U.S. 455 (1966).

72. People v. Houser, 85 Cal. App. 2d 686, 193 P.2d 937 (1948) (the court held the accused to be bound by his consent to take the test).

73. *Cf.* Lyons v. Oklahoma, 322 U.S. 596 (1944).

74. 342 U.S. 165 (1952).

pumping the stomach of a defendant to obtain evidence "offend[ed] those canons of decency and fairness which express the notion of justice,"[75] thereby violating the defendant's right to due process of law. *Lisenba v. California*[76] involved an inquiry into the methods used to obtain a confession from the defendant. The court stated in dictum that the notion of fairness is fundamental to our concept of justice.[77] Neither of these cases involve a lie detector, but they indicate a strong reliance on the concept of fairness in testing due process. This emphasis could cause either of two effects in lie detector cases. The courts may look at the procedure involved in the administration of the test and the general circumstances surrounding it to see if there are any elements of unfairness present. Alternatively, the courts could declare the admission of results of lie detector tests violative of due process regardless of the circumstances. The dissent in *People v. Schiers*[78] argues for the latter approach. A prosecution witness testified that he told the defendant the lie detector indicated he was lying. The defendant, who was convinced of the infallibility of the machine could not understand this and, in fact, never retreated from his plea of innocent. No evidence was offered as to the capability of the machine nor was it ever proved what the results really indicated. The trial judge instructed the jury to disregard the evidence and the district court of appeals held this was sufficient.[79] The California supreme court denied a petition for hearing.[80] Justice Carter, in a vigorous dissent,[81] emphasized the unfair methods used in administering the test and the manner in which the evidence was presented to the court. He also stated that the admission of lie detector test results under any circumstances violated due process because it offended the traditions of our law.[82] The outcome of the due process argument is not clear; however, the implications of that decision are great and will be treated in the conclusion of this note.

TRUTH DRUGS

Historical and Technical Background

In the late 1800's Ernest Schmidt, a German professor at the University of Marburg, isolated a drug that he called "scopolamine."[83] It was discovered shortly thereafter that this drug had a depressant effect and would cause hypnosis or narcosis if a sufficient dose were administered.[84] In the early 1900's, German doctors began experimenting with it in obstetrics cases.[85] It was

75. *Id.* at 169.
76. 314 U.S. 219 (1941).
77. *Id.* at 236.
78. 329 P.2d 1 (Cal. 1958).
79. People v. Schiers, 160 Cal. App. 2d 364, 324 P.2d 981 (1958).
80. People v. Schiers, 329 P.2d (Cal. 1958).
81. *Id.*
82. *Id.* at 4.
83. Geis, *In Scopolamine Veritas*, 50 J. CRIM. L.C. & P.S. 347 (1959).
84. *Id.* at 348.
85. Moenssens, *Narcoanalysis in Law Enforcement*, 52 J. CRIM. L.C. & P.S. 453 (1961).

used to place the patient in a "twilight sleep" after which she would have no memory of the ordeal. The problem with this procedure was the difficulty in determining the proper dosage of scopolamine. J. Christian Gaus and Bernard Kronig developed "memory tests" that would be administered periodically until it was determined that the patient's ability to recall was deadened.[86] It was the development of these tests that led to the eventual use of truth drugs in criminal interrogation, the thought being that once consciousness could be measured, reliability would be assured.[87]

Dr. R. E. House was largely responsible for the development of the use of scopolamine as a truth drug in criminal interrogation in the United States.[88] He discovered its effects while using the drug in his obstretrics practice, where in one instance an unconscious patient responded accurately to a question he asked of her husband. From 1921 to 1929, Dr. House crusaded for the acceptance of scopolamine as a substitute for the third degree and as an aid for the mentally disturbed, but he met with limited success.[89]

During World War II and the Korean conflict, medical officers used barbiturates as an aid in speeding recovery in cases of combat neuroses.[90] The modern preference for barbiturates (sodium pentothal and sodium amytal) is explained by the feeling that they are less toxic and produce fewer unsatisfactory side effects.[91] The most recent developments concern the use of these drugs in conjunction with anesthesia. Through changes in the depth of the anesthesia and the use of additional drugs, the administrator can manipulate the subject's mental status in order to achieve the desired results. Attempts are being made to combine this procedure with electronic equipment that will be able to gauge and direct the planes of anesthesia.[92]

Theories advanced to describe the action of these drugs indicate that they act as a central nervous system depressant.[93] Clinical evidence indicates that various segments of the brain may be selectively depressed in reverse order of their evolutional development.[94] For purposes of narco-analysis the segments affected are the cortex, which psychiatrists generally believe performs the discriminatory and integrative functions, and the diencephalon, which expresses the primitive and emotional drives.[95] Through varying the levels of depression and stimulation the examiners alter the metabolism and psychological adjustments of the subject.[96] This is by no means a totally accurate or simple process.[97]

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86. Geis, *supra* note 83, at 349.
87. *Id.* at 349-50.
88. Moenssens, *supra* note 85.
89. *Id.* at 454.
90. Dession, *supra* note 40, at 317.
91. *Id.*
92. Hanscom, *Narco Interrogation*, 1 J. FOR. SCI. 37 (1956).
93. Dession, *supra* note 40, at 317.
94. Hanscom, *supra* note 92, at 40.
95. *Id.*
96. Dession, *supra* note 40, at 317.
97. *Id.*

> Referred to . . . as "truth serum," the drug used is not a serum and . . . people do not always tell the "truth" under its influence. Nor does an understanding of the pharmacological action of the drug itself explain its mechanism of action in any given case. The particular type of behavior manifested under the influence of amytal is a complex resultant of the interaction of the personality of the subject, his specific physiological and bio-chemical reaction to it, and what is happening to him at the time.

There is also the possibility of harmful effects and permanent damage to the subject.[98]

Admissibility of Results as Direct Evidence

Courts have invariably excluded from evidence the results of narco-analysis and narco-interrogation.[99] As with the polygraph, the major objection is either lack of general scientific acceptance of reliability[100] or failure of the proponent to lay a proper foundation through expert testimony.[101] The basis of this exclusionary rule, unreliability, finds great support among those with expertise in the use and effect of these drugs.[102] It is generally believed that only those who had some predilection to confess will do so under the influence of truth drugs.[103] Some subjects are capable of withholding information, while others fantasize, telling wild tales presumably prompted by their subconscious and implicating themselves when in fact innocent.[104] A minority decries this broadly based exclusionary rule and would prefer to have the courts proceed from case to case in determining whether certain factors indicating reliability are present.[105] Following the rationale of the lie detector

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98. Gall, *The Case Against Narcointerrogation*, 7 J. FOR. SCI. 29, 33 (1962). Dr. Gall explains the mental and physical injuries that may result from the administration of truth drugs and indicates that this damage may be permanent. Some of these are: aggravation of heart disease, deprivation of oxygen to the brain and other vital organs, pneumonia, peripheral nerve injuries, and death from anoxia or other complications. Dr. Gall argues against the use of these drugs in criminal interrogation.

99. Knight v. State, 97 So. 2d 115 (Fla. 1957); People v. Myers, 35 Ill. 2d 311, 220 N.E.2d 297 (1966); Merritt v. Commonwealth, 386 S.W.2d 727 (Ky. 1965); Dugan v. Commonwealth, 333 S.W.2d 755 (Ky. 1960); State v. Hudson, 289 S.W. 920 (Mo. 1926); State v. Sinnott, 24 N.J. 408, 132 A.2d 298 (1957); State v. Lindemuth, 56 N.M. 257, 243 P.2d 325 (1952); Henderson v. State, 94 Okla. Crim. 45, 230 P.2d 495 (1951); Orange v. Commonwealth, 191 Va. 423, 61 S.E.2d 267 (1950); State v. White, 60 Wash, 2d 551, 374 P.2d 942 (1962).

100. Knight v. State, 97 So. 2d 115 (Fla. 1957); Merritt v. Commonwealth, 386 S.W.2d 727 (Ky. 1965); State v. Hudson, 289 S.W. 920 (Mo. 1926); State v. Lindemuth, 56 N.M. 257, 243 P.2d 325 (1952).

101. Dugan v. Commonwealth, 333 S.W.2d 755 (Ky. 1960); Orange v. Commonwealth, 191 Va. 423, 61 S.E.2d 267 (1950); *cf.* People v. Cullen, 37 Cal. 2d 614, 234 P.2d 1 (1951).

102. Despres, *Legal Aspects of Drug-Induced Statements*, 14 U. CHI. L. REV. 601, 606 (1947); Dession, *supra* note 40, at 318; Geis, *supra* note 83, at 356; Moenssens, *supra* note 85, at 456.

103. Dession, *supra* note 40, at 318.

104. Despres, *supra* note 102, at 606; Dession, *supra* note 40, at 318.

105. Herman, *The Use of Hypno-Induced Statements in Criminal Cases*, 25 OHIO ST. L.J. 1 (1964).

cases[106] it may be said that any implication of the results of an examination under narcosis to the jury would constitute reversible error. Implied results can be more damaging than evidence offered directly because in the former instance the information presented is divorced from any foundation that would point out the shortcomings of the technique.

The effect of a stipulation to the admissibility of direct evidence obtained through narcosis has not been settled by the courts. It seems probable that the decisions will follow the trend of admission in polygraph cases.[107] One court has implied that had the stipulation extended to the admissibility of the evidence and not just to submission to examination, the results would have been admissible.[108] Again,[109] the difficulty with this approach is that the stipulation does nothing to correct the defect of unreliability. A better approach would follow *Valdez v. State*,[110] which dealt with stipulations in lie detector cases. This approach squarely meets the reliability problem and would prevent injustice to one who erroneously believed in the accuracy of the technique and submitted himself to examination to prove his innocence.

Admissibility of Expert Psychiatric Evidence of Personality Traits Based on Narco-Analysis

There has been much controversy about the use of expert psychiatric evidence concerning personality traits.[111] The focus of the controversy is the character evidence rule, which directs that proof of good character can be adduced only by evidence as to the defendant's general reputation in the community. Evidence of particular facts or of an individual's opinion of the defendant's disposition in regard to the particular trait concerned is not admissible.[112] Led by Wigmore,[113] much criticism has been directed toward this rule of evidence. In one of the first cases admitting this type of evidence[114] the trial judge allowed into evidence psychiatric testimony which indicated that the chief prosecution witness was a psychopath with a tendency towards making false accusations.

If the psychiatrist has utilized narcosis in his examination the problem is further complicated. An analysis of leading cases indicates variant views. In *People v. Ford*[115] the issue before the court was the ability of the defendant to form the requisite premeditative intent. The psychiatrist had interviewed

106. *E.g.*, State v. Arnwine, 67 N.J. Super. 483, 171 A.2d 124 (Super. Ct. 1961).
107. *See* cases cited note 35 *supra*.
108. Orange v. Commonwealth, 191 Va. 423, 439, 61 S.E.2d 267, 274 (1950).
109. *See* discussion concerning stipulations in polygraph cases notes 35-42 *supra*.
110. 91 Ariz. 274, 371 P.2d 894 (1962).
111. Curran, *Expert Psychiatric Evidence of Personality Traits*, 103 U. PA. L. REV. 999 (1955); Falnor & Steffen, *Evidence of Character: From the "Crucible of the Community" to the "Couch of the Psychiatrist,"* 102 U. PA. L. REV. 980 (1954).
112. Michelson v. United States, 335 U.S. 469 (1948) (dictum); 7 J. WIGMORE, EVIDENCE §§1980, 1981, 1983 (McNaughton rev. 1961).
113. 7 J. WIGMORE, EVIDENCE §1986 (McNaughton rev. 1961).
114. United States v. Hiss, 88 F. Supp. 559 (S.D.N.Y. 1950).
115. 304 N.Y. 679, 107 N.E.2d 595, 105 N.Y.S.2d 657 (1952).

the defendant on three occasions, one of which involved the use of narcosis. Relying upon lack of judicial precedent the trial court prevented the psychiatrist from testifying as to the interview in which drugs were used. The New York Court of Appeals[116] affirmed this decision. The psychiatrist was allowed to testify as to his findings derived from the other two examinations. The California supreme court has permitted a psychiatrist to testify that the defendant was not a sexual deviate.[117] The psychiatrist had interviewed the defendant under narcosis, and the court stated that the results of examinations under narcosis were inadmissible only when they were used to prove the truth of the matter asserted. The court grounded its decision on statutory interpretation, stating there had been a legislative determination that persons found to be sexual psychopaths were more likely to violate sexual psychopath laws than those without such propensities. Thus, evidence of character was relevant to show the defendant's disposition.[118] It is not clear whether the court would have reached this result without the aid of a statute, but the broad statement referring to the admissibility of the results of truth serum tests remains intact. In *State v. White*[119] the defendant attempted to prove by expert psychiatric testimony that he was psychotic. The court excluded statements made by the defendant while under narcosis but permitted the psychiatrist to present his findings based on the same examination.

The New Jersey supreme court affirmed the exclusion of expert psychiatric testimony that the defendant was not a sexual deviate and did not have the capacity to commit sodomy.[120] The defendant had been examined under narcosis. The court excluded the evidence on the grounds that it violated the character evidence rule and that the efficacy of truth serum had not been recognized. Thus, four different approaches have emerged:

(1) Expert psychiatric testimony of personality traits is inadmissible.[121]
(2) The exidence is admissible except when based on interviews conducted under narcosis.[122]
(3) The evidence is admissible even when the interview was conducted under narcosis; however, the statements made by the defendant while under narcosis are not.[123]
(4) The evidence is admissible even when the interview was conducted under narcosis and the statements made by the defendant while under narcosis are also admissible so long as they are not used to prove the truth of the matter asserted.[124]

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116. *Id.*
117. People v. Jones, 42 Cal. 2d 219, 266 P.2d 38 (1954).
118. *Id.* at 223, 266 P.2d at 42.
119. 60 Wash. 2d 551, 374 P.2d 942 (1962).
120. State v. Sinnott, 24 N.J. 408, 132 A.2d 298 (1957).
121. *Id.*
122. People v. Ford, 304 N.Y. 679, 107 N.E.2d 595, 105 N.Y.S.2d 654 (1952).
123. State v. White, 60 Wash. 2d 551, 374 P.2d 942 (1962).
124. People v. Jones, 42 Cal. 2d 219, 266 P.2d 38 (1954). It should be pointed out that cases that have admitted this type of evidence have dealt with crimes that psychiatrists believe carry certain isolated and identifiable personality traits.

A leading article on the subject indicates that narcosis can be a useful adjunct to a complete psychiatric analysis of the subject's mental condition and personality structure.[125] When used as an auxiliary technique "the results have acquired enough reliability in the field of medical psychology to be recognized as bases for an expert opinion."[126] Although it is difficult to predict how cases in this area will be decided, it can be said that in most instances the dual hurdles of the character evidence rule and the reliability problem of truth serum will have to be overcome.

Admissibility of Expert Psychiatric Evidence of Sanity Based on Narco-Analysis

A closely related problem is the admissibility of psychiatric testimony on the issue of defendant's sanity when the expert's opinion is based in part on narco-analysis. Two recent cases have admitted this type of evidence.[127] The court in *People v. Cartier*[128] permitted the psychiatrist to give an opinion based on narco-analysis of defendant's sanity. Statements made by the defendant while under narcosis were also admitted on the theory that they were not offered for the purpose of proving the truth of the matter asserted but rather to provide insight into the basis of the psychiatrist's opinion. In *People v. Myers*,[129] while permitting the psychiatrist to testify to his findings, the court did not admit the statements made by the accused under narcosis. If the defendant voluntarily submits to the examination and the results are unfavorable, the question arises whether the physician-patient privilege applies. The privilege should not apply because it exists only where the physician has been consulted in his professional capacity with a view towards curative treatment.[130]

One court had admitted testimony based partly on narcosis where the examination was involuntary.[131] The results were unfavorable to the defendants. The New York Court of Appeals held that this did not violate the privilege because defendants had waived it when they pleaded insanity as a defense. Inbau suggests that a compulsory examination would not violate the privilege because it protects the defendant only from supplying any testimonial link in the chain of evidence necessary to show that he committed the crime in question. An investigation into mental responsibility would not fall within this protection unless the subject was required to discuss the crime.[132]

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125. Curran, *supra* note 111, at 1014.
126. Dession, *supra* note 40, at 342.
127. People v. Cartier, 51 Cal. 2d 520, 335 P.2d 114 (1959); People v. Myers, 35 Ill. 2d 311, 220 N.E.2d 297 (1966).
128. 51 Cal. 2d 520, 335 P.2d 114 (1959).
129. 35 Ill. 2d 311, 220 N.E.2d 297 (1966).
130. Dession, *supra* note 40, at 325.
131. People v. Esposito, 287 N.Y. 389, 39 N.E.2d 925 (1942).
132. F. INBAU, SELF-INCRIMINATION 52-61 (1950).

Admissibility of Results of Truth Drugs if Reliable

Assuming that narcosis was found to be reliable enough for court use, questions as to the admissibility of the results, when used to prove the truth of the matter asserted, must be tested by due process and the privilege against self-incrimination. Since evidence obtained from a person under the influence of narcosis is testimonial, the privilege against self-incrimination would apply,[133] and if incriminating evidence were obtained during an involuntary examination under truth drugs or an examination conducted without *Miranda* warnings, it would be excluded either under the privilege against self-incrimination or the confession rule. If the examination under narcosis were voluntary, it is probable that the waiver doctrine would operate to admit the results.[134] This proposition deserves closer scrutiny. Many of the previously advanced arguments pertaining to the polygraph are applicable to narcosis but apply more forcefully. The doctrine of waiver presupposes man's essential rationality,[135] yet irrationality plays an important role in man's mental processes.[136] Since narcosis probes the unconscious and subconscious mind of the defendant, he can have no concept of the scope of his waiver. He has left himself helpless in the hands of the examiner who is free to probe as he sees fit, possibly into areas of which the defendant is not even consciously aware.

Under more conventional examination procedures, even if the subject has waived his privilege against self-incrimination, he is still free to discriminate consciously as to the content of his answers and the subject areas covered. In the case of narcosis the undeterminable scope of the waiver should make it inoperative. It is also arguable that the concepts expressed in *Rochin v. California*[137] are applicable to a voluntary narcosis examination. Such expressions of due process as "those personal immunities so rooted in the traditions and conscience of our people as to be ranked as fundamental. . . ." and "those canons of decency and fairness which express the notions of justice of English-speaking people. . . ."[138] are pertinent.

The privacy and integrity of one's mind, and the concept of our system of law as adversarial would seem to be protected by this philosophy of due process.

133. *Id.* at 69; Despres, *supra* note 102.

134. *Cf.* Lyons v. Oklahoma, 322 U.S. 596 (1944); People v. Houser, 85 Cal. App. 2d 686, 193 P.2d 927 (1948).

135. *See* Silving, *Testing of the Unconscious in Criminal Cases,* 69 HARV. L. REV. 683 (1956).

136. *Id.* at 692.

137. 342 U.S. 165 (1952).

138. *Id.* at 169.

HYPNOSIS

Historical and Technical Background

Unlike the polygraph and truth drugs, the practice of hypnotism is an ancient art. Ladd maintains that it is as old as human history and is nearly as widespread as the race itself.[139] Despite modern research, the true nature of hypnosis is unknown, and none of the theories presently advanced cover all of its phenomena adequately.[140] It will be helpful, however, to examine briefly one theory. Kubie and Margolin contend that hypnosis is a three-stage process.[141] The first of these is the induction stage. This consists of a progressive elimination of all the subject's sensori-motor contacts with the outside world except that with the hypnotist. This is likened to the role parents play in the psychology of a newborn child. The hypnotist becomes the sole representative of and contact with the outside world. In the second phase, the reduction of these contacts to the one between the subject and the hypnotist obliterates the ego boundaries of the subject and constructs them causing a psychological fusion of the hypnotist and subject. To the subject, the words of the hypnotist become indistinguishable from his own thoughts. The third stage of a fully developed hypnotic state consists of a reexpansion of ego boundaries and the incorporation of a "fragmentary image" of the hypnotist in that ego. The subject has reestablished contact with the world and all of his sensori-motor contacts have reactivated. The hypnotist's influence then operates from within through his incorporated image, which echoes his voice commands. This is accomplished without the subject being aware of it. This process is compared to the ego development in an infant where the ego retains parental images as unconscious incorporated components. Physiologically, the reduction of the sensori-motor contacts increases the subject's capacity for concentration, creating a state of maximum attention. This to some extent explains the increased ability for recollection. Psychologically, the creation of the hypnotic state depends on a diminution of alertness through eliminating fears and other personal defenses in order to facilitate the reduction of the sensori-motor contacts. Kubie and Margolin maintain that the hypnotic process is a recapitulation of the most important and complex psychological evolution of infancy and in effect is "an experimental reproduction of a natural development process."[142]

Admissibility of Results as Direct Evidence

Many of the problems attendant to the use of truth drugs are also present with hypnosis. Hypnotic responses cannot be relied upon as factually

139. Ladd, *Legal Aspects of Hypnotism*, 11 YALE L.J. 173, 174 (1902). For a general historical background see THE NATURE OF HYPNOSIS (R. Shor & M. Orne ed. 1965).

140. A. MEARES, A SYSTEM OF MEDICAL HYPNOSIS 56 (1960).

141. Kubie & Margolin, *The Process of Hypnotism and the Nature of the Hypnotic State*, in THE NATURE OF HYPNOSIS 217 (R. Shor & M. Orne ed. 1965).

142. *Id.* at 232.

truthful.[143] Subjects tend to weave webs of fantasy as well as exercise some positive control over their responses.[144] Some are able to resist answering questions at will. It is also possible for the subject to feign the hypnotic state and this, in many instances, cannot be detected by the hypnotist.[145] A major factor in the unreliability of hypnosis as to factual truth is the suggestibility of the subject.[146] This presents extreme interpretive difficulties. Rather than answering the question truthfully, the subject may have detected the answer desired by the examiner. Through the examiner's manner or the relationship between examiner and the subject, the subject may assume the philosophy and impressions of the hypnotist. For example, if the hypnotist believes the subject is guilty, his feeling may be translated into the response of the subject. If the examiner is unaware of the source of the response and its meaning to the subject, his conclusions may be inaccurate.[147]

There have been few cases concerning hypnotism and the court's acceptance of it. Hypnosis and narcosis are related, however, in the respect that the subject's critical faculties are impaired. Additionally, the reliability problems of hypnosis, narcosis, and the polygraph are similar, permitting the gaps in the case law on hypnosis to be filled by analogy to the other two areas. When results of an examination under hypnosis have been offered to prove the truth of the matter asserted, they have been uniformly excluded by the courts.[148] This is consistent with the approach taken in the truth serum[149] and lie detector[150] cases. Again, the reason advanced for the exclusion is the lack of general scientific acceptance of the reliability of hypnosis in ascertaining truth and falsity.[151] The courts find support from the experts who readily point out the shortcomings of hypnosis for determining factual truth.[152]

Although there appear to be no cases on the subject, stipulation by the parties to the administration of a hypnotic examination and to the admissibility of its results would probably be given effect by the courts. As indicated by *Orange v. Commonwealth*,[153] it is important that the stipulation extend to the admissibility of the results rather than simply to the administration of the examination.

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143. Herman, *supra* note 195, at 26; Levin, *Hypnosis in the Law*, 1964 INS. L.J. 97, 102; Note, *Hypnosis as an Evidenciary Tool*, 8 UTAH L. REV. 78, 79 (1962).

144. A. MEARES, *supra* note 140, at 374.

145. Note, *supra* note 143, at 82.

146. A. MEARES, *supra* note 140, at 13-33.

147. Note, *supra* note 143, at 81.

148. People v. Ebanks, 117 Cal. 652, 49 P. 1049 (1897); People v. Marsh, 170 Cal. App. 2d 284, 338 P.2d 495 (1959); State v. Pusch, 77 N.D. 860, 46 N.W.2d 508 (1950); Rex v. Booher, [1928] 4 D.L.R. 795 (Alta. S.C.).

149. *See* cases cited notes 21, 22 *supra*.

150. *See* cases cited note 99 *supra*.

151. State v. Pusch, 77 N.D. 860, 46 N.W.2d 508 (1950); George, *Scientific Investigation and Defendant's Rights*, 57 MICH. L. REV. 37 (1958).

152. A. MEARS, *supra* note 140, at 374.

153. 191 Va. 423, 439, 61 S.E.2d 267, 274 (1950).

Admissibility of Expert Psychiatric Evidence of Personality Traits and Sanity Based on Hypnosis

In the area of expert psychiatric evidence of personality traits and sanity the California supreme court has recognized that hypnosis is an accepted analytical tool in the psychiatric determination of state of mind.[154] Admission of the evidence was predicated on its reliability as an analytical tool and proof that the hypnotist was qualified. The court also indicated that it was within the trial court's discretion to permit a recording of defendant's examination under hypnosis to be played to the court. This result is consistent with California's position on the admissibility of this type of evidence when truth drugs are involved.[155] It seems likely that most jurisdictions will follow the pattern of their truth drug cases.[156]

The question of whether a defendant has the right to consult with a hypnotist in the preparation of his defense has been treated in two cases with seemingly contrary results. In *Cornell v. Superior Court*,[157] the California supreme court held that the trial judge abused his discretion when he prevented the defendant from consulting with a hypnotist. The defendant, who was accused of murder and awaiting trial, claimed no recollection of his activities at the critical time and wished to undergo hypnosis in order to stimulate his memory. The Ohio supreme court held that Dr. Sam Sheppard was not entitled to consult with a hypnotist in order to aid his recollection.[158] The court stressed, however, that Sheppard had already been convicted, and the two cases may be distinguished on this point.

Admissibility of Results of Hypnosis if Reliable

Assuming the results obtained were reliable, there would still be objections to their admissibility similar to those advanced in the case of the polygraph and truth drugs. If the hypnosis is not submitted to as a matter of choice and a confession is induced thereby, clearly this should be held violative of due process as an involuntary confession. The United States Supreme Court in *Leyra v. Denno*,[159] although sidestepping the hypnosis issue, seems to provide for this result.[160] If the defendant voluntarily submitted to

154. People v. Modesto, 59 Cal. 2d 722, 382 P.2d 33, 31 Cal. Rptr. 225 (1963).

155. People v. Jones, 42 Cal. 2d 219, 266 P.2d 38 (1954).

156. People v. Myers, 35 Ill. 2d 311, 220 N.E.2d 297 (1966); State v. Sinnott, 24 N.J. 408, 132 A.2d 298 (1957); People v. Ford, 304 N.Y. 679, 107 N.E.2d 595 (1952); State v. White, 60 Wash. 2d 551, 374 P.2d 942 (1962).

157. 52 Cal. 2d 99, 338 P.2d 447 (1959).

158. Sheppard v. Koblentz, 174 Ohio St. 120, 187 N.E.2d 40 (1962).

159. 347 U.S. 556 (1954).

160. "First, an already physically and emotionally exhausted suspect's ability to resist interrogation was broken to almost trance-like submission by use of the arts of a highly skilled psychiatrist. Then the confession petitioner began making to the psychiatrist was filled in and perfected by additional statements given in rapid succession to a police officer, a trusted friend, and two state prosecutors. We hold that use of confessions extracted in such a manner from a lone defendant unprotected by counsel is not consistent with due process of law as required by our Constitution." *Id.* at 561.

examination under hypnosis, it is possible that the evidence obtained would be admissible under the waiver doctrine; however, the arguments previously advanced against the admission of results in truth drug cases are still applicable.

CONCLUSION

It is apparent that hypnosis, truth drugs, and the polygraph perform valuable functions and have carved a permanent place for themselves in the law. This is particularly true of truth drugs and hypnosis, which have been proved to be useful adjuncts in the determination of such questions as personality traits and sanity. As these tools become increasingly more acceptable to the courts, a word of caution is necessary. It is conceivable that these techniques will eventually develop to such an extent that there will be no question as to their reliability in ascertaining factual truth. If this stage is reached, close legal reasoning might provide as follows: Since these tools have been accorded general scientific acceptance as to their reliability in ascertaining factual truth, and if the examination were voluntary, the results should be admissible to prove the truth of the matter asserted. This solution is deceptively simple. Consider the plight of the defendant, who, regardless of his motive, refuses to submit to an examination by one of these techniques. In the eyes of the factfinders he would be considered guilty. There would be no effective way to keep this refusal from the jury. As soon as the jury realized that evidence of the results of one of these tests was not going to be offered, the defendant's conviction would be assured. Certainly any innocent party would offer evidence that would exonerate him. The forum then would shift from the court to the laboratory, leaving to the judge the function of setting the penalty and to the jury no function at all. The argument has been advanced that the person who wishes or demands to take the test to prove his innocence should have the right to do so. Admittedly, the interests have to be balanced, but the law already affords the innocent party enough protection if the system operates properly.

The admission of the results of these tests as proof of the truth of the matter asserted would revolutionize our whole system of trials and philosophy of administration of justice. Instead of being an adversary system it would become inquisitorial with the defendant becoming its object rather than a party. Truth is not the *sine qua non* of our system of justice. The fourth and fifth amendments are but two examples of the sacrifice of efficient methods for ascertaining truth to protect the more treasured values of personal dignity and privacy. The probing into and the manipulation of man's mind is foreign to these values and caution should be exercised before these scientific investigatory tools are afforded unqualified judicial acceptance.

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