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Hypnosis and Legal Immntability

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HYPNOSIS AND LEGAL IMMUTABILITY

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Commissioner Searls, speaking for the Supreme Court of California in 1897,[1] unequivocally rejected hypnosis as a scientific medium having a place in our legal system. Since that time, the modernized approaches and the medical and psychiatric therapeutic values of hypnosis have attained world-wide recognition. Legally, no such acknowledgement has been achieved, and the state of the law in its relation to the subject of hypnosis has remained peculiarly static and immutable. Cases, decided during the late 19th and early 20th centuries, remain as stolid reminders of the period when hypnosis was considered a "black art" and its practice was analogized to the mystic incantations of the alchemists of the Dark Ages.

The systematic advances made in hypnosis, as well as in other scientifically related fields,[2] have far out-distanced the inflexible attitudes of the courts. It is not the purpose of this paper to settle the century-old dispute between those who advocate the efficacy of dealing with the legal problems, inherent in a recognition of hypnosis, by analogy to related propositions under our present laws and those who claim the need for an entirely new set of legal doctrines to effectively encompass these problems.[3] It cannot be denied, however, once a subject has reached the stage where its continually increasing effects on society are immediately apparent, that our courts can no longer retreat into their shells of semantic legal technicalities and adopt the outmoded 19th Century view that "the law of the United States does not recognize hypnotism."[4] Hypnosis has outgrown its infancy. It now demands its legal emancipation. A court that will not heed this plea bespeaks rigidity and unenlightenment.

PRESENT LEGISLATION

The statute law, dealing specifically with hypnosis, in jurisdictions throughout the United States, is at present almost entirely devoid of any semblance of practical legislation or workable rules that could be used effectively to meet any of the real legal problems involved in hypnosis.

[1] People v. Ebanks, 117 Cal. 652, 49 Pac. 1049 (1897).

[2] Lie detector devices, narco-synthesis, and expert psychiatric testimony.

[3] In this regard see: CHAPIN, *The Forensic Aspects of Hypnotism*, 3 AM. LAW. 534; 2 Hamilton, Leg. Med. 212 (1894); LADD, *Legal Aspects of Hypnotism*, 11 Y. L. J. 173, 176 (1902); Hypnotic Crime, CASE & COM. 27: 7 (Jan., 1921).

[4] People v. Ebanks, 117 Cal. 652, 49 Pac. 1049 (1897).

Almost every state has a law regulating the sale of barbitals and other hypnotic or somnifacient drugs.[5] No reference, however, is made in any of these statutes to the criminal liabilities of persons using such hypnotic drugs on themselves or on others with the intent to commit a crime on the subject or to have the subject himself commit a crime.

Three states[6] have passed laws prohibiting the public exhibition of hypnosis, mesmerism, animal magnetism or so-called psychical forces for gain. A Nebraska court has construed its state statute to include a prohibition against religious spiritualistic seances, if they are "public and open and for gain."[7] Three other jurisdictions[8] have felt it necessary only to make the hypnotizing of minors or the public exhibition of such minors unlawful.

The state of Virginia has declared by statute[9] that hypnotism shall not be attempted by any but licensed physicians or surgeons; however, Chief Justice Lore of the Delaware Court of General Sessions in 1907[10] held that any person could hypnotize another, if unaccompanied by any directions as to the use of drugs, medicines, or other remedies to be used by the subject, without obtaining a license to practice such occupation. The Tennessee legislature, on the other hand, mindful of the practical importance of hypnosis in our modern society, since 1937 requires all hypnotists,[11] along with fortune tellers, clairvoyants, spiritualists, palmists, and phrenologists, to pay an occupational privilege tax of $250 per annum.

The only significant legislation on the criminal liability of a hypnotized subject (which legislation was originally passed without any contemplation of its applicability to the pragmatical problems of hypnosis) has been adopted by three states.[12] These statutes read that all persons are capable of committing crimes, except, among other classifications, persons who committed the act as charged *without being conscious thereof*. At least, such a law stands as a questionable[13] guide-post for a court

[5] A sample statute is as follows:

"No barbital or any other hypnotic or somnifacient drug as defined herein shall be sold at retail or dispensed to any person except upon the written prescription of a duly licensed physician, dentist, or veterinarian, compounded or dispensed by a registered pharmacist, or under the immediate personal supervision of a registered pharmacist, and no pharmacist shall dispense any such drug without affixing to the container in which the drug is sold or dispensed, a label bearing the name and address of the pharmacist, the date compounded and the consecutive number of the prescription under which it is recorded in his prescription files, together with the name of the physician, dentist or veterinarian prescribing it, and the directions for the use of the drug by the patient as given upon the said prescription of the physician, dentist or veterinarian, . . . " COLO. STAT. ANN. vol. 3, ch. 58, sec. 50 (1935).

[6] NEBRASKA: NEB. REV. STAT. vol. 2, sec. 28-1111 (1943); OREGON: O. C. L. A. vol. 3, sec. 23-1053 (1939); SOUTH DAKOTA: S. D. Code vol. 1, sec. 13.3502 (1939).

[7] Dill v. Hamilton, 137 Neb. 723, 291 N. W. 62 (1940).

[8] KANSAS: KAN. GEN. STAT. ch. 38, sec. 703 (1935); SOUTH DAKOTA: S. D. Code vol. 1, sec. 13.3501 (1939); WYOMING: WYO. STAT. vol. 4, sec. 58-116, -117 (1945).

[9] Va. Code vol. 4, sec. 18-348 (1950).

[10] State v. Lawson, 6 PENNEWILL (Dela.) 193, 65 Atl. 593 (1907).

[11] TENN. CODE ANN. vol. 4, sec. 1248.56, item 41 (Williams 1943).

[12] CALIFORNIA: CAL. PENAL CODE sec. 26(5) (1949); IDAHO: IDAHO CODE vol. 4, sec. 18-201(5) (1947); NORTH DAKOTA: N. D. REV. CODE sec. 12-0201(6) (1943).

[13] There are strong differences of opinion among writers on the subject whether a person, in a state of hypnosis, who commits a crime, should be held legally responsible for such act. See note *infra*.

that chooses to apply it, as it may easily do, to a legal question involving hypnosis.

Legislative expression on any other of the numerous legal incidents of hypnosis seems to be completely lacking on the statute books.

THE PROBLEMS

Hypnotism has been defined as ". . . a condition, artificially produced, in which the person hypnotized, apparently asleep, acts in obedience to the will of the operator; . . ."[14] Since the popularization of the hypnotic technique by Friedrich Mesmer during the 18th Century, learned writers on the subject have continually argued the pros and cons of the propositions that first, any person can be hypnotized against his will,[15] and secondly, that once under hypnosis a person can be made to perform any act suggested by the hypnotist.

At least one commentator,[16] as early as 1894, expressed the view that hypnotism, like other theories and investigations received at first with ridicule, has been placed at last on a sure scientific basis, thanks to the labors of Charcot and his successors, and that the great French experts in legal medicine now recognize the possibility that the will may be entirely abolished under hypnotic influence.

Dr. George H. Estabrooks[17] in his book, "Hypnotism,"[18] stated conclusively that by employing the guilefully "disguised" technique of relaxation, fully awake subjects could be hypnotized without knowing what is happening to them.

More recently, Dr. Robert M. Lindner, in his book describing his successful application of the technique of hypnoanalysis in the treatment of a known criminal psychopath,[19] concludes:

> . . . it is not conclusive that all individuals cannot enter the hypnotic state. While this writer has encountered persons whom he could not immediately hypnotize, he has found that failure was usually due to (1) the fact that in the eyes of his subject he lacked prestige; or (2) that he too soon abandoned his efforts. It is now his belief that there is no other reason for the inability of some persons to enter a hypnotic trance than the fact that in such cases the transference—depending as it does upon the neat balance of prestige, flow of energy toward the analyst and the analyst's own attitude—is inadequate. Where the transference is complete and adequate, hypnosis can be accomplished.

On the other hand, the minority view of authorities (but the prevalent popular superstition) was forcefully expounded in a Reader's Digest article entitled, "Hypnotism Comes of Age",[20] wherein the author emphasized the fact that "you cannot be hypnotized if you do not wish to be. Full cooperation is necessary. If you mistrust

[14] Louis v. State, 24 Ala. App. 120, 121, 130 So. 904, 905 (1930).

[15] Authorities holding that persons can be hypnotized against their will are: 2 WITTHAUS & BECKER, MED. JUR. 452 (1894); HERZOG, HYPNOTISM AND CRIME—AN EDITORIAL, 41 MED. LEG. J. 33 (1924); ALLEN, *Hypnotism and Its Legal Import*, 12 CAN. B. R. 14, 80 (1934); *Hypnotism As A Weapon*, NEWSWEEK 22:70 (July 19, 1943); LINDNER, REBEL WITHOUT A CAUSE 17 (1944). *Contra*: MUNSTERBERG, ON THE WITNESS STAND 223 (1909); SLOAN, *Hypnotism As A Defense to Crime*, 41 MED. LEG. J. 37 (1924); *Hypnotism Comes of Age*, READER'S DIGEST 43: 11 (Oct., 1943).

[16] 2 WITTHAUS & BECKER, MED. JUR. 452 (1894).

[17] Professor of Psychology, Colgate University.

[18] See *Hypnotism As A Weapon*, NEWSWEEK 22: 70 (July 19, 1943).

[19] LINDNER, REBEL WITHOUT A CAUSE 17 (1944).

[20] *Hypnotism Comes of Age*. READER'S DIGEST 43: 11 (Oct., 1943).

the operator, you simply remain wide awake." While in a hypnotic trance, you will never do or say anything which you would consider indecent or harmful. The author, however, offers peculiarly inadequate proof of these statements.[21]

Some justification for the reluctance of the courts to seriously consider the problems of hypnosis can be understood when one realizes the further confusion added to the subject by the fringe experiments of publicity-seeking charlatans. One such escapade in hypnotic technique, that may be remembered, happened a few years ago when Dr. David F. Tracy[22] proposed to exert hypnotic influence over an ineffectual basketball team at St. Francis College of Brooklyn. The quintet, although seemingly willing subjects, lost after the first experiment and continued to display a poor record during the remainder of the season. An editor of "The New Yorker Magazine," commenting on a later game between St. Francis and City College of New York,[23] after another session with Dr. Tracy, caustically observed, "We'd like to report that St. Francis won this game, but it didn't—46 to 68".[24]

Regardless of whether a person can or cannot be hypnotized against his will, presuming that in some manner he comes under the influence of hypnotic suggestion, the legal aspects of hypnotism are presented in three situations: (1) its use in procuring submission to criminal acts or attacks, (2) its use in procuring the commission of crime, and (3) its use in relation to the admissibility and procurement of certain evidence.

I. Submission to Criminal Acts

The question whether a person in a hypnotic state can become the passive subject of a criminal act on the part of the hypnotist has been dealt with in a variety of cases, both Continental and American. Most of these cases have reported situations wherein the hypnotic subject was the victim of sexual attack.[25] The most famous case of the kind was that of Czynski,[26] tried in Munich, Bavaria, in 1894, where the defendant was convicted of having hypnotized a wealthy woman for the purpose of criminal intimacy.

In a New York seduction case,[27] evidence that the female claimed to have been hypnotized by the defendant, and not to have remembered anything, even after the birth of a baby, until alleged subsequent hypnotic examination by her father's lawyer, was held insufficient to sustain a verdict for the plaintiff. However, in an

[21] "To demonstrate this to a class of skeptical medical students, a famous neuro-psychiatrist at one of New York's large medical centers gives a revolver to a hypnotized subject, and tells the subject to shoot him. Invariably the subject tosses the gun away or awakens with a start." *Id.* at 13. See note 36 *infra.*

[22] Director of the New York Institute of Modern Hypnotism, 333 East 43rd Street, N.Y.C.

[23] The New Yorker 25: 29 (Feb. 18, 1950).

[24] Dr. Tracy tried again on November 15, 1950—this time in an attempt to aid the New York Rangers professional hockey team. That night the Rangers lost to the Boston Bruins, 4–3. N. Y. Herald Tribune, Nov. 16, 1950, p. 33, col. 1 (with photograph).

[25] See 2 Hamilton, Leg. Med. 533, 541–2 (1894); 2 Witthaus & Becker, Med. Jur. 434–5, 453–4 (1894); 13 Med. Leg. J. 241, 254 (1896); 15 Med. Leg. J. 266 (1898); for a recent detailed review of such cases, see Note, 31 Neb. L. Rev. 575 (1952).

[26] Reported in 14 Med. Leg. J. 150 (1897).

[27] Austin v. Barker, 96 N. Y. S. 814, 110 App. Div. 510 (1906).

Iowa decision,[28] it was held that evidence of a seduction accomplished by either hypnosis or love-making or both was sufficient to warrant a conviction.

In a more recent legal comment,[29] the writer stated that he believed that a good many crimes could be committed on a hypnotized person, provided that a higher degree of hypnosis was attained. This author, however, rejected the more radical view[30] that every conceivable crime could be committed under these circumstances. He based this conclusion on the fact that the hypnotized person himself afforded important protections against this in that the criminal intent of the hypnotist could be thwarted by the subject's untimely awakening, by his remembering what had occurred after awakening, or by his recollection being refreshed during a subsequent hypnotic state.

II. Commission of Criminal Acts

There is a strong conflict of opinion as to whether hypnotism can be used to procure the commission of crime, but the more modern and seemingly scientifically accurate view is that such a result is highly probable, if induced under the proper circumstances and in the appropriate manner.[31]

As early as 1902, one legal writer[32] summarized this conflict, in his statement that "the hypnotized subject is in a condition of preparation to become the 'tool' of another—for evil as well as also for good." Some years later, Dr. Alfred W. Herzog, a prominent psychiatrist of the early twenties, announced emphatically:

> I am fully confident that any good hypnotist can . . . [induce one of his subjects to commit a crime] without much difficulty. It is only necessary to consider how easily the average person's mind is influenced by propaganda and insinuations in the daily papers. The same act may be considered by one person an act of cowardice, by another an act of heroism. The same man may be considered by one a vile scoundrel, by another a paragon of virtue. So it is only necessary to influence the hypnotized subject by changing his view-point as to the righteousness of an act to be committed. If there would naturally be too much resistance, the hypnotist must understand how to make his suggestions so as to cause least abhorrence.[33]

A simple case study of the aforementioned technique of suggesting a false premise directly when resistance is offered was put forth by Liegeois.[34] The subject was to be induced to steal a watch. He refused, but when it was suggested that the watch belonged to him, and that he was only taking it back, the subject obeyed the command.

[28] State v. Donovan, 128 Iowa 44, 102 N. W. 791 (1905).

[29] Allen, *Hypnotism and Its Legal Import*, 12 Can. B. R. 80 (1934).

[30] See Forel, Hypnotism or Suggestion and Psychotherapy 280 (1905).

[31] 21 Hamilton, Leg. Med. 212 (1894); Ladd, *Legal Aspects of Hypnotism*, 11 Y. L. J. 173 (1902); Herzog, Hypnotism and Crime—An Editorial, 41 Med. Leg. J. 33 (1924); Allen, *Hypnotism and Its Legal Import*, 12 Can. B. R. 14, 80 (1934); *Hypnotism As A Weapon*, Newsweek 22: 70 (July 19, 1943). *Contra*: 2 Bouvier's Law Dict. 1479 (Rawle's 3d Rev. 1914); Sloan, *Hypnotism Is A Defense To Crime*, 41 Med. Leg. J. 37 (1924); *Hypnotism Comes of Age*, Reader's Digest 43: 11 (Oct., 1943).

[32] Ladd, *Legal Aspects of Hypnotism*, 11 Y. L. J. 173, 176 (1902).

[33] Herzog, *Hypnotism and Crime—An Editorial*, 41 Med. Leg. J. 33 (1924).

[34] See Allen, *Hypnotism and Its Legal Import*, 12 Can. B. R. 14, 18 (1934).

Again, if the hypnotist desires his subject to commit arson, and the person demonstrates reluctance, the hypnotist need only suggest that the house is infested with termites, unsanitary, and unhealthy, and that a public service would be performed in ridding the community of the structure, in order to overcome the subject's resistance.

Professor George Estabrooks,[35] admitting that there is no record of a successful murder by hypnotism, concludes, however, that a "hypnotist who really wished a murder could almost certainly get it." To make sure a subject would pull the trigger of a gun, all that would be necessary would be to convince him while in a trance that the gun he is about to use in a "psychological test" is loaded with blanks.[36]

It should be borne in mind, in addition, that not only is it likely that an unwilling subject could be forced to commit a crime by the use of these methods, but that this technique could just as readily be carried one step further and that the hypnotized person could be induced to undertake a criminal act by post-hypnotic suggestion. That is, in a presumably fully awake state, the subject will respond to a pre-arranged sign or signal and immediately undertake the commission of a previously suggested crime or act, without knowing why he is doing it. At least one commentator has claimed that "everything which is produced in hypnosis itself can very frequently be called forth also in the waking condition by giving the suggestion to the hypnotized person" during the hypnotic state.[37]

Assuming that it is entirely possible for one person to induce another person to unwillingly commit a crime by means of hypnotic influence or post-hypnotic suggestion, the question then arises as to what shall be the legal liabilities of each of the parties for the criminal act.

There can be little debate that the hypnotist, employing such devious means—but means that would tend to remove suspicion from himself as the motivating force behind the actual perpetration of the crime—should be held responsible to the full extent of the law for the crime which his unwilling subject has committed.

That the hypnotized person, who has in some manner aided the hypnotist, by placing himself in the vulnerable position of being hypnotized, should also suffer the full consequences of his actions, appears to be the considered opinion of the majority of writers on the subject.[38] This argument carries some weight in view of the fact that persons who have once been hypnotized can be more easily re-hypnotized

[35] See *Hypnotism As A Weapon*, NEWSWEEK 22: 70 (July 19, 1943).

[36] See note 21 *supra*. The famous neuro-psychiatrist mentioned in the Reader's Digest was either peculiarly unaware of this technique—the suggestion of a false premise to the subject—to overcome the resistance of a hypnotized person to committing a crime, or else he was "loading" his experiments by purposely ignoring this technique in order to deceive his students and thereby unscientifically prove an invalid proposition.

The objection that a person under hypnosis will never do or say anything which he would consider indecent or harmful often becomes inconsequential in the light of the "kill or be killed" attitude and lowering of moral standards occasioned by World War II.

[37] ALLEN, *Hypnotism and Its Legal Import*, 12 CAN. B. R. 14, 18 (1934).

[38] LADD, *Legal Aspects of Hypnotism*, 11 Y. L. J. 173 (1902); SLOAN, *Hypnotism As A Defense to Crime*, 41 MED. LEG. J. 37 (1924); ALLEN, *Hypnotism and Its Legal Import*, 12 CAN. B. R. 14, 80 (1934). *But see Hypnotic Crime*, CASE & COM. 27: 7 (Jan., 1921), wherein the author quotes from BARON GAROFALO'S treatise on CRIMINOLOGY.

against their will and "without internal compliance with the ordinary conditions",[39] and that such persons, susceptible to hypnosis in the highest degree, would be easy prey for some other criminally-inclined hypnotist, if they were completely freed of all responsibility for the criminal act. Proponents of this view would demand that any person subjecting himself in the slightest degree to the possibility of being hypnotized may be supposed to have anticipated all the consequences of his act and agreed to have become responsible for them, and that the well-settled principle of law that a person cannot take advantage of his own misconduct would govern in case he violated the law while in this condition.[40]

However, Baron Garofalo, in his treatise on Criminology,[41] adheres to the idea that the person hypnotized could only be regarded as the passive instrument—guilty, perhaps, of an involuntary offense for having imprudently subjected himself to the hypnotic influence, but of nothing more.[42]

Nevertheless, the more sensible approach seems to be a position between the two extremes. If a person can only be hypnotized with his consent, it follows that every time he is in a state of hypnosis, he should incur *ipso facto* a certain responsibility to society, for having surrendered the conscious control of his will. If, however, a person can be hypnotized against his will, he should not incur such responsibility merely from the fact that he is in a state of hypnosis. Responsibility for crimes committed under the influence of hypnotic suggestion is a matter of such indefinite degrees that the working rule should be that the court will render a decision, only after a thorough investigation of the fact situation and circumstances of each case that comes before it.

One final point should be made on the possibility of hypnosis affecting the commission of crimes. That is the subject of "collective suggestibility." The view was expressed in 1902[43] that the basic cause of many crimes of violence was an intricate form of mass hypnosis. This theory has taken on added significance since that time in the light of present day lynch mobs, mass rioting, and Hitleristic war crimes. Legislatures and courts have found almost insuperable difficulties in preventing or in punishing crimes due to "collective suggestibility." Perhaps, a better understanding of the basic causes of such crimes would aid them in attaining their goal.

III. Admissibility of Evidence

It has been suggested that, by the law of Holland, a prisoner may be subjected to hypnotic experiments, with a view to obtaining information, which although not admissible as evidence against him, may lead to his ultimate conviction.[44] It seems plausible that such a system, of employing hypnosis for detective purposes, could easily be adopted in the United States, without seriously jeopardizing the consti-

[39] See Allen, *Hypnotism and Its Legal Import*, 12 Can. B. R. 14, 17 (1934).

[40] The defense of hypnotism was held inadmissible in People v. Worthington, 105 Cal. 166, 38 Pac. 689 (1894), where the only evidence of its existence was the mere fact that the accused had been told by another to kill the deceased and did.

[41] See *Hypnotic Crime*, Case & Com. 27: 7 (Jan., 1921).

[42] If it could be shown that the accused committed the offense charged when under the influence of hypnotism, so that he did not know what he was doing, it would probably be a defense. 16 C. J. 111.

[43] Ladd, *Legal Aspects of Hypnotism*, 11 Y. L. J. 173 (1902).

[44] *Hypnotism and the Law*, 95 Law Times 500 (1893).

tutional freedoms of its citizens. The unfairness of such a scheme would be no greater than that of numerous other methods of detecting crime and procuring evidence which are now actually employed;[45] and which, if not sanctioned in all jurisdictions, are, at least, winked at by the law.

A. Testimony of Experts

Although expert witnesses are usually qualified by the amount of actual experience or observation they have had concerning the subject they have been asked to testify about, at least one court has held that hypnotism is a field upon which knowledge derived solely from reading books may qualify such an expert witness.[46] In 1905, when that decision was handed down, the court was undoubtedly following a sensible course, considering the sparcity of persons who had actually practiced or who were even vaguely familiar with the techniques of that comparatively novel science. Today, however, in the light of the varied practical uses that have been found for hypnosis by psychiatrists and medical practitioners alike, it seems reasonable and necessary that a revaluation of the qualifications for expert witnesses on hypnosis should be made.

B. Credibility of Witnesses

There seems to be absolutely no theoretical bar to hypnosis being used for the purpose of procuring or inducing false evidence or testimony,[47] and that, by means of retroactive hallucinations or post-hypnotic suggestions, subjects can be made to believe that they have witnessed certain incidents or have been present during certain conversations which never actually occurred. A thorough cross-examination might reveal the true source of the false testimony, or, at least, discredit the witness sufficiently, in the eyes of the jury, so that the testimony would be disregarded.

Nevertheless, as an added precaution, whenever it can be shown satisfactorily that a witness has been hypnotized on previous occasions or has been subjected to the especial influence of another party, such evidence should be admitted as affecting the credibility of the witness.[48]

[45] Wire and telephone tapping, dictaphone records, narco-synthesis and truth drugs, and lie detector devices. *But see* Ladd, *Legal Aspects of Hypnotism*, 11 Y. L. J. 173, 188 (1902).

"Of course, the legal practice under English and American law would not allow evidence obtained in this way, from the accused himself, to be used for his conviction, however, highly probable it might be that the evidence was a sufficient proof of the facts. For there is a very great danger that the patient will, by suggestion, falsify his own memory and sincerely but falsely accuse himself. In this connection we are reminded of the numerous cases of children or even adults who have been urged into the confession of crimes which they never committed."

It must be remembered, however, that this statement was written in 1902 before the above-mentioned scientific devices had gained any prominence in crime detection.

[46] State v. Donovan, 128 Iowa 44, 102 N. W. 791 (1905).

[47] "It is undoubtedly theoretically possible to induce hypnotized subjects to falsify testimony against themselves, or against others, to persuade themselves that they remember committing crimes which they never committed, . . . " Ladd, *Legal Aspects of Hypnotism*, 11 Y. L. J. 173, 179 (1902). See also Allen, *Hypnotism and Its Legal Import*, 12 Can. B. R. 80, 88 (1934).

[48] State v. Exum, 138 N. C. 599, 50 S. E. 283 (1905). *But cf.* People v. Worthington, 105 Cal. 166, 38 Pac. 689 (1894).

C. Confessions

Although it may be forcefully contended that information procured from a subject by means of hypnosis should be permitted to be used for detecting purposes as leads to legally admissible evidence, a distinct line should be drawn between such a use of hypnosis and its employment to extract a confession that could be used directly against a defendant in a criminal case. The latter procedure has absolutely no legal justification and the slightest suspicion of such an application should be thoroughly investigated by the court.[49]

The majority of legal authorities on this subject are in full agreement with this view and buttress their opinion by pointing up the probable unreliability of such confessions,[50] since the hypnotic subject can be made to say anything, and will often lie even under honest questioning. Confessions obtained under analogous conditions such as in sleep,[51] by a clairvoyant,[52] or under narco-synthesis,[53] have been excluded. Even where the statements made under hypnosis by a defendant tended to exculpate him from guilt, such evidence offered by an expert hypnotist was undoubtedly rightly excluded for the same reasons.[54] Moreover, in such circumstances there remains the barrier of the privilege against self-incrimination.[55]

[49] "A criminal who does not confess in his full senses will not yield to any hypnotising efforts, as no outsider can bring about the new state of mind. Hypnotisation cannot work on an unyielding brain as a sponge with chloroform which is held by force to the mouth might work. If the imagination of the subject does not help in reaching the somnambulist state, no one can inject a mesmeric fluid into his veins. And finally, even if such hypnotising by force were possible, it is self evident, from moral and legal reasons, that no civilised court ought to listen to such extorted evidence . . . " Munsterberg, On the Witness Stand 206–7 (1909).

[50] Chapin, *The Forensic Aspects of Hypnotism*, 3 Am. Law. 534; Bannister, *Hypnotic Influence in Criminal Cases*, 51 Albany L. J. 87 (1895); Ladd, *Legal Aspects of Hypnotism*, 11 Y. L. J. 173, 188 (1902); Munsterberg, On the Witness Stand 207 (1909); Tuckey, Hypnotism and Suggestion 422 (6th ed. 1913); Allen, *Hypnotism and Its Legal Import*, 12 Can. B. R. 80, 90–1 (1934).

[51] Where a witness who slept in the same room with the defendant testified as to what the defendant had said in his sleep, the court stated:

"The bill of exceptions in this case states certain words uttered by defendant while sleeping were given in evidence against him at the trial. It is difficult to see upon what principles this evidence was admitted, and we are of the opinion that the objection to it should have been sustained. If the defendant was asleep, the inference is that he was not conscious of what he was saying, and words spoken by him in that condition constituted no evidence of guilt." People v. Robinson, 19 Cal. 41, 42 (1861). *Contra*: State v. Morgan, 35 W. Va. 260, 13 S. E. 385 (1891).

[52] Where the defendant was tried and convicted of murdering his wife, and the confession had been obtained by "Pauline," a crystal gazer at the Atlantic City Boardwalk, the court said:

"Since a reversal of this conviction may lead to a retrial, we cannot forbear to characterize this confession and the circumstances under which it was obtained as suspicious. It was given to a woman who under oath stated that at the first interview, by supernatural power, she saw the occurrences attending the murder, and the participation of the defendant in it . . . That she dominated the defendant in his admitted feeble condition, and put words in his mouth, by suggesting answers to her questions, seems apparent." State v. Strong, 83 N. J. L. 177, 187, 188, 83 Atl. 506, 510 (1912).

[53] Sell, *Deception Detection and the Law*, 11 U. of Pitt. L. Rev. 210 (1950).

[54] People v. Ebanks, 117 Cal. 652, 49 Pac. 1049 (1897); State v. Pusch, 77 N.D. 860, 46 N.W. 2d 508 (1950).

[55] 3 Wigmore, Evidence, sec. 823 (3d ed. 1940). See also Sell, *Deception Detection and the Law*, 11 U. of Pitt. L. Rev. 210 (1950).

Nevertheless, there would still seem to be little objection to the use of hypnosis for obtaining evidence or facts, analogous to that of the lie detector, which although could not be employed as evidence in courts,[56] might still be used by detectives (with the consent of the accused) to ascertain facts in the interrogation of the defendant.[57]

The Canadian case of *Rex* v. *Booher*[58] well illustrates the type of information, obtained through the hypnotizing of a defendant, that should be admissible in court and that type which should not. There the defendant, charged with murder, was examined by a Dr. Langsner, a man who called himself a criminologist but who was known to have hypnotic powers. Shortly after the interview with the defendant, Dr. Langsner discovered the location of the missing rifle used in the killing, and later advised police officers that the defendant was ready to confess, which he did. Evidence concerning the rifle was admitted at the trial; however, although there was no direct testimony that the confession had been obtained through hypnotism, as the hypnotist denied such use, yet the appellate court refused to allow its introduction in evidence on the grounds that the accused may have been hypnotized, and that the burden was on the state to show that the defendant was not thus mentally affected.[59]

A few years ago a situation almost "on all fours" was brought before the Court of Appeals of the State of New York in the case of *People* v. *Leyra*.[60] There the defendant, Camilo Leyra, was accused of the premeditated hammer murder of his mother and father. While in police custody, the defendant had been examined by a psychiatrist, Dr. Max Helfand, who allegedly hypnotized and coerced him into confessing to the crimes.[61] A blue ribbon jury refused to accept the defendant's contentions and returned a verdict of guilty on both counts of first degree murder.

[56] Frye v. U. S., 293 Fed. 1013, 54 App. D. C. 46 (1923).

[57] See McCormick, *Deception-Tests and the Law of Evidence*, 15 Calif. L. R. 501 (1927).

[58] 4 D. L. R. 795 (1928).

[59] "Under the circumstances I am of the opinion that the Crown should clearly establish that the defendant's mentality was not affected by Dr. Langsner's visits. Dr. Langsner says he did not hypnotize the defendant and he seemed to be quite normal when Detective Leslie visited him. The evidence of Dr. Pope supports the hypothesis that although the defendant appeared to Detective Leslie to be normal yet the effects of hypnotism might still be present. Langsner's denial of hypnotism must be viewed with suspicion in view of the admission that he obtained information as to the location of the rifle by feeling the defendant's thoughts and in view of the admission he can practice mesmerism and also his admission that his visits were for the purpose of obtaining a confession.

"If the confession had been made to Detective Leslie under normal ordinary condition I would have no hesitation of admitting it, but the fact that Langsner announced that the confession might be expected, that his announcement was followed by a desire to see Detective Leslie, and the time elapsing between those events being so short, raises in my mind a doubt as to the bona fide of the method used by Dr. Langsner during his visits with the accused.

"In my opinion then the Crown has failed to discharge the onus that I have placed upon it of establishing that the defendant was not under the influence of mental suggestion exercised by Dr. Langsner and therefore I will not admit the confession." Rex v. Booher, 4 D. L. R. 795, 797 (1928).

[60] 302 N.Y. 353, 98 N.E. 2d 553 (1951). The case was appealed from the County Court of Kings County, where Judge Samuel S. Leibowitz had been the presiding trial judge.

[61] A letter from Mr. Frederick Scholem, one of the defense counsel, reveals some of the facts of the case and points up the defendant's contention that Dr. Helfand hypnotized him to secure his confession:

"The defendant in this case was grilled by detectives and police officials for approximately four days and denied any connection with the crime. The hammer and the blood-stained clothing have

The Court of Appeals, nevertheless, reversed the judgments of conviction and ordered a new trial on the sole ground that the aforementioned "confession" was involuntary and coercive, and constituted a deprivation of the defendant's constitu-

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never been found. A psychiatrist was called in by the District Attorney's office. The defendant was left alone in a room with the psychiatrist. The room was completely wired. A loud speaker was placed in the basement of the police precinct, to which approximately forty detectives were listening. Wire tapped recordings were made. These tapped recordings and the cross-examination indicate that the psychiatrist massaged the defendant's forehead and temples, repeatedly told him to stare into his eyes, to look at him, and then the psychiatrist suggested to the defendant that he picked up the hammer and struck his mother. After repeated statements like this by the psychiatrist to the defendant and after the psychiatrist threatened to give the defendant an injection, the defendant confessed to this crime."

In the appellate brief, Mr. Scholem and Mr. Harry Anderson quote the following excerpts from the conversation between Dr. Helfand and the defendant during the examination to demonstrate the alleged use of hypnosis:

"Q. I want you to recollect and tell me everything. I am going to make you remember and recollect back and bring back thoughts—thoughts which you think you might have forgotten. I can make you recollect them. It's entirely to your benefit to recollect them because, you see, you're a nervous boy. You got irritable and you might have got in a fit of temper. Tell me, I am here to help you. A. I wish you could, Doctor."

"Q. I am going to put my hand on your forehead and as I put my hand on your forehead, you are going to bring back all these thoughts that are coming to your mind. I am going to keep my hand on your forehead and I am going to ask you questions and now you will be able to tell me."

"Q. . . . I have got my hand on your forehead and I am making you tell me the truth. It's all for your benefit if you tell me everything. I am here to help you . . . ".

"Q. I know you are trying hard, but I am trying to help you. I'm making your thoughts come back to you. A. I hope you can."

"Q. It's coming all clear to you now. I've got my hand on you. I'il make you think back. All your thoughts are coming back to you. Did your father hit you? A. No."

"Q. What happened next? Speak up. It's coming clear now. You will feel lots better after you tell me. It's all in a fit of argument . . . I have my hand on your head. What did you do? . . . "

"Q. Now you listen to me. Listen to me and concentrate. A. I'll try."

"Q. . . . I have my hand on your forehead and your thoughts are coming back to you. A. No, Doc., they don't."

"Q. Now, you think. All your thoughts will come back to you. Just think. Just relax. All your thoughts will come back to you. I have my hand on your head. Your thoughts are coming back to you. It's much better for you. You will get along much better and you will feel better. I can't hear you. What did you say?"

"Q. I'll help you. I've got my hand on your forehead and your thoughts are coming back to you . . . ".

"Q. Just concentrate; now listen to me, just concentrate . . . Just concentrate, and your thoughts will come back; just concentrate. Just concentrate, relax; . . . ".

"Q. Close your eyes, just keep your eyes closed and listen to me and concentrate and your thoughts will all come back to you. Now your father went away; he went to get the paper . . . ".

"Q. All your thoughts come back to you, we will make them come back to you. Just concentrate; . . . ".

"Q. . . . Now open your eyes and look at me. Just open your eyes and look at me. Just open your eyes—look at me. Your thoughts will come back look at me and concentrate."

"Q. Just close your eyes and it will all come back to you. Just close your eyes and relax."

"Q. Close your eyes, and your thoughts will come back, relax. I am going to make your mind recollect everything. Your mind is getting clearer and clearer; all your thoughts are coming back now. Now they are coming back . . . ".

tional liberties. The highest court of the State conveniently side-stepped the contention of hypnotic influence, however, by suggesting that this issue "was one of fact concerned largely with the credibility of defendant as against that of the doctor", which fact had been conclusively decided adversely to the defendant by the jury.[62] Undoubtedly, because of the horrendous nature of the crime, the court was wary of basing their decision for reversal on the obvious illegal use of a comparatively novel scientific technique, and preferred to adhere to the traditional, time-tested safeguard against forced confessions.

It is submitted that the justices of the Court of Appeals, by their prudish attitude in this case, were derelict in their legal and moral duty in not taking full advantage of the opportunity for withdrawing the subject of hypnotism from the clutches of ancient legal doctrinality. The Court, presumably blinded by a despicable occurrence, seemingly unthinkingly perpetuated the not-unfounded notion, that unsavory facts make poor law. To be so swayed by the circumstances of a particular case, however, so as to revitalize antiquated and dangerous legal principles concerning hypnosis, is not the sign of an enlightened court.

Unfortunately, the Justices placed the ultimate legal determinations, concerning a technique of ever-increasing scientific complexity, in the hands of a lay jury—totally unfamiliar with even the barest rudiments of the subject. Their folly in brushing aside the major issue in this case has, perhaps more recently, come home to haunt them (and the ghost is not dead yet!)

In December, 1951, the defendant, Leyra, was retried and convicted of the first degree murder of his father and the second degree murder of his mother, confessions made to persons other than the psychiatrist having been admitted in evidence by the trial court. Thereafter, a two-year-series of legal battles through state and federal courts[63] was finally culminated, at least temporarily, when the Supreme Court of the United States, by a 5–3 decision,[64] reversed the convictions once more on the principle ground that *all* of the defendant's confessions, made following the "psychiatric treatment", were involuntary and mentally coerced.[65]

Some little hope was proffered for the future recognition by the courts of hypnosis and its serious legal implications, when Justice Black, writing for the Supreme Court

[62] To bolster the proposition that the court should not now interfere with the determination of the jury in this finding, the decision in People v. Peller, 291 N.Y. 438, 446 (1943), is cited. The one partially relevant statement in that case, however, was specifically restricted to the facts of that case. "In such a situation [where the important witnesses were all convicts, dope peddlers and drug addicts] justice requires that the decision be left to the jury as triers of the facts who have seen and heard the witnesses and are most competent, under proper instruction from the court, to determine questions of credibility." Using this case to include hypnosis within the realm of those questions of credibility to be decided by the jury, is a flagrant application of circular reasoning!

[63] 304 N.Y. 468, 108 N.E. 2d 673 (1952); 304 N.Y. 844, 109 N.E. 2d 714 (1952); 345 U.S. 918, 73 S.Ct. 730 (1952); 345 U.S. 946, 73 S.Ct. 835 (1952).

[64] Leyra v. Denno, 347 U.S. 556, 74 S.Ct. 716 (1954).

[65] The People of the State of New York are presently considering the wisdom of a third trial, this time lacking all evidence of confessions and again without the murder weapon. Unlike the *Booher* case, here the police psychiatrist never was able to elicit from the defendant any information concerning the missing hammer. Judge Samuel S. Leibowitz, who presided at the first two trials, has already disqualified himself from all participation in a third one.

majority, at least, alluded to the real possibility that the defendant may have been hypnotized and to the resultant dangers if, in fact, that were true. He concluded his opinion by stating unequivocally:

> First, an already physically and emotionally exhausted suspect's ability to resist interrogation was broken to almost *trance-like submission* by the use of the arts of a highly skilled psychiatrist [*"with considerable knowledge of hypnosis"*]. Then the confession petitioner was 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. (Italics mine).

CONCLUSION

Hypnotism has undoubtedly come of age.[66] Its practical advantages in medicine, psychiatry, psychoanalysis, and related fields, spurred on principally by its extensive use with neurologic patients during World War II, have finally been fully recognized. The inherent evils in the use of hypnotic techniques have long been apparent.[67] That hypnosis may be a factor in crime causation must be admitted. That hypnosis may even be an important factor in crime prevention was acknowledged almost half a century ago.[68] The ever-increasing importance of hypnosis as a scientific medium for exploration of the mind cannot be denied.[69]

It would, therefore, seem incumbent upon our legal system to not only recognize hypnosis as such, but to prepare itself for the inevitable series of judicial determinations that will have to be made concerning it. Whether such preparation can be best attained by legislative enactments pertaining specifically to hypnosis and its accompanying legal problems or whether our courts can capably handle such issues by analogy to existing case law on related subjects, is a question too broad for the scope of the present inquiry.

The significant points, however, are: 1) present legislation in jurisdictions throughout the United States is inadequate to cope with the practical problems of hypnosis; 2) it is a reasonable assumption that persons can be hypnotized against their will; 3) a person once under hypnosis can be made to perform or submit to any act suggested by the hypnotist (admittedly the more radical view); 4) a hypnotist, employ-

[66] This is further evidenced by the following list of impressively titled recent articles on the subject: *Starches? Ugh! Master Hypnotist*, TIME 58: 70 (July 30, 1951); *Hypnosis For Hips*, AMERICAN MAGAZINE 152: 56 (Oct., 1951); *Grow Slim By Hypnotism?*, SCIENCE DIGEST 30: 36 (Oct., 1951); *Suggestion Helps Learning*, SCIENCE DIGEST 32: 29 (Aug., 1952); *Uses of Hypnosis*, TIME 61: 34, (March 30, 1953); *Medical Hypnosis*, COSMOPOLITAN 134: 14 (May, 1953); *Dentistry Without Fear*, AMERICAN MERCURY 77: 85 (Oct., 1953); *Hypnosis Aids Memory*, SCIENCE NEWS LETTER 65: 6 (Jan. 2, 1954); *My Operation Under Hypnosis*, LOOK 18: 47 (Nov. 2, 1954); *Hypnosis for Burns*, TIME 65: 48 (Feb. 7, 1955).

[67] For an evil that has not been apparent, see N.Y. DAILY NEWS, Apr. 3, 1953, p. 11, col. 1 (hypnosis as an aid to adultery).

[68] "The craving for an immoral and illegal end may take possession of a weak nervous system in the same way in which any neurasthenic impulse becomes rooted, and it seems therefore not unjustified to hope for such a criminal disposition the same relief by hypnotic treatment as for the neurasthenic disturbance." MUNSTERBERG, ON THE WITNESS STAND 227 (1909).

[69] Perhaps even for complete control of the mind! Query whether the recent Communist "brainwashings" are not a form of hypnosis employing the use of continued post-hypnotic suggestion.

ing his skills for criminal purposes, should be penalized to the full extent of the law, even though he himself is not the actual perpetrator of the crime; 5) if a person can be hypnotized against his will, a subject committing a crime under hypnotic influence should incur liability for his act, but only after a thorough investigation of the circumstances of each particular case has been made; 6) the courts should consider the possible implications of hypnosis in crimes of "collective suggestibility;" 7) a revaluation of the qualifications for expert testimony on hypnosis should be made; 8) evidence that a witness has been hypnotized, or has been subjected to a strong influence by some other person, should be admitted as affecting the credibility of the witness; and 9) admissions or confessions elicited from a person who may have been hypnotized should not be admitted in any legal proceeding; but information, obtained in this manner, should be exploitable for detecting purposes as "leads" to legally admissible evidence.

It should be emphasized, in addition, that every case involving hypnosis that occurs should be investigated by competent experts and allowed to take its place before the law on its own merits. Lawyers and judges must adopt a scientific attitude, must desist in the use of antiquated legal thinking in relation to hypnosis, and must acquire the needed enlightenment concerning the phenomena and principles of hypnotism. Only in this manner will scientific advancement secure its rightful position in our courts of law.