

## THE USE IN COURT OF HYPNOTICALLY ENHANCED TESTIMONY

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**Abstract:** *The leading judicial decisions on the use of hypnosis on witnesses are presented. Emphasis is on the increasing use of hypnosis by the police or prosecution with witnesses in criminal cases. Hypnosis has proved to be a valuable tool to learn facts not otherwise available. There is, however, a potential for abuse when the information learned is used directly as evidence in court or when the subjective certainty of the witness is increased to the point where cross-examination becomes ineffective. Safeguards are needed to prevent abuse.*

Perhaps attorneys and litigants have become more sophisticated and reasonable in their expectations with regard to the use of hypnosis in litigation. No longer are cases seen such as *Austin v. Barker* (1906) where the plaintiff was suing for seduction of his daughter who claimed a memory loss for all acts of intercourse with the defendant, leaving her at a complete loss to explain her condition of pregnancy until she was hypnotized by counsel employed by her father, after which her memory conveniently returned. Strangely enough, it seems she was also hypnotized during the acts of intercourse—or at least so she said. A trial court permitted this evidence to be introduced in court and the appellate court reversed the decision, saying that, “The evidence here must be deemed so unreasonable, so contrary to all rational experience, that a verdict based upon it ought not to be permitted to stand [*Austin v. Barker*, 1906, Pp. 819-820].”

Probably a combination of these unreasonable expectations by litigants and the natural reluctance of the courts to accept evidence produced by “new scientific techniques” caused the California Supreme Court in one of the first judicial comments (*People v. Ebanks*, 1897) on the subject to exclude all testimony by a hypnotist engaged by the defendant on the grounds that “ ‘The law of the United States does not recognize hypnotism [p. 1053].’ ” Although this initial reluctance has been mitigated slowly over the years, the law remains largely unsettled regarding the admissibility of testimony produced, altered, or enhanced

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by hypnosis. Today, the decisions run the gamut from complete admissibility to limited admissibility with cautionary instructions, to exclusion. The use of hypnosis as a "truth serum" has consistently been rejected by our courts, and this rule has been reaffirmed as recently as February, 1979, by a California Court of Appeal (*People v. Blair*) which said, ". . . Hypnosis has not yet risen above a useful investigative tool, as with the polygraph, which is also considered to be too unreliable to be admitted into evidence [p. 657]." Similarly, modern law clearly rejects the introduction of hypnotically induced confessions by people accused of crime on the grounds that such confessions are involuntary (*Leyra v. Denno*, 1954).

Still, abuses occur, and the issues which present the greatest concern in modern cases are these: (a) Are the "facts" recalled for the first time during or after hypnosis reliable? Are they actual memories, confabulations, or a combination? (b) Does the increased subjective certainty of the witness in the accuracy of his or her memory, especially when hypnosis is used to enhance eyewitness identification of an accused, thwart cross-examination?

These current issues constitute an explosively evolving problem in the courts. The vastly increased use of hypnosis with witnesses in criminal cases seems to have been triggered in substantial part by a program implemented in 1975 by the Los Angeles Police Department, which has now trained nearly 300 persons—mostly police officers but also a few lawyers and one judge—in hypnosis. These newly trained lay hypnotists, and countless others, are more and more regularly hypnotizing witnesses who claim lack of recall.

Certainly, hypnosis can be a valuable tool when used properly by qualified professionals to enhance the memory of witnesses or to bring out memories otherwise unavailable when those memories then lead to other competent evidence, independently corroborated. A grave danger arises, however, when the enhanced or altered memory itself is later offered as evidence in a court of law, especially in a case where a person is accused of crime.

The area where this rapidly increasing use of hypnosis and the law meet is the focus of this paper. The discussion is confined to the use of hypnosis and its products by the prosecution in criminal cases and plaintiffs in civil cases. The issues and problems are discussed from the perspective of a practicing criminal defense attorney.<sup>2</sup>

<sup>2</sup>The article by Warner (1979), published in this issue of the *International Journal*, discusses in more detail the use of hypnosis by the defense in criminal cases. For a discussion of the potential misuse of hypnosis on witnesses from a medical and psychological perspective, reference is made to the affidavit of Dr. Martin T. Orne filed in the case of *Quaglino v. California* (1978; see Orne, 1978 for complete affidavit text) and to the articles by Orne (1979) and Hilgard and Loftus (1979), published in this issue of the *International Journal*.

JUDICIAL DECISIONS ON THE ADMISSIBILITY OF  
HYPNOTICALLY INDUCED OR ENHANCED TESTIMONY

*People v. Quaglino (1977)*

This is an unpublished case which gives defense attorneys cause for concern. In this case, the defendant was charged with killing his wife in a hit and run incident. The man who sold the car allegedly used in the incident was shown a *single* photo of the defendant; he stated that the picture "struck a bell," but could not identify the person in the photograph. A few days later, he was shown seven additional pictures, none of which he could identify. A week later, law enforcement officers had a local psychiatrist hypnotize the witness to improve his memory of the person who purchased the car. After the witness came out of hypnosis, he was given a stack of seven photographs, and he picked out the defendant's picture.

The defense challenged the identification procedure as unnecessarily suggestive, particularly in light of the single photo line-up and the subsequent hypnosis. At the hearing on the admissibility of this identification, the prosecution psychiatrist testified that the identification was not affected by the earlier hypnosis. Two defense psychiatrists, neither of whom, the court noted, "had nearly as much experience with or confidence in hypnosis [N.T. p. 8]," both indicated that the single photo line-up followed by the hypnosis might have affected his choice after the hypnosis.

The trial court permitted the identification testimony. The Court of Appeal affirmed the conviction, partly because in the trial court the defense failed to object to the use of hypnosis and partly because the witness did not make the identification during the hypnosis session, and there was no evidence introduced that he was left with a posthypnotic suggestion that the first photograph he was shown was the one to pick. If the defense had raised an objection during the trial and had called more qualified experts, the experts might well have established that even though the photograph was not shown to the witness during the hypnosis session, the session itself might have increased the witness's subjective certainty in the accuracy of his identification, thus thwarting effective cross-examination.

Only five published cases in the United States have admitted the testimony of a hypnotized plaintiff or prosecution witness.

*State v. McQueen (1978)*

The defendant was convicted of two counts of first degree murder. The key prosecution witness was hypnotized prior to trial. The witness

testified that following the murders she had attempted to block them from her memory, but after voluntary hypnosis her memory had been refreshed and she was able to clearly remember the details. The court held the testimony to be admissible, advised the jury that the witness had been hypnotized, and left it to the jury to determine the weight to be given to the evidence. In so doing, the court distinguished hypnosis testimony from lie detector tests. The court held that the latter invades the jury's province of determining credibility and lacks sufficient scientific accuracy.

Here, we are concerned with the admissibility of testimony which the witness says is her present recollection of events which she saw and heard, the credibility of her testimony being left for the jury's appraisal [p. 429].

In this case, although the defense had access to the entire audiotape-recording of the hypnosis session, the record appears silent as to defense arguments, for example, concerning suggestions planted by the hypnotist. The defense did not cross-examine the hypnotized witness as to the procedure used or call the hypnotist, who was apparently available. There was other evidence presented to corroborate the accuracy of the hypnotized witness's testimony.

*State v. Jorgensen (1971)*

This is a homicide case in which all parties had been engaged in a drinking party and a wild automobile chase through the hills. The key prosecution witness, an 18-year-old who was at the scene of the fight but did not see the actual murder, claimed loss of memory, which was restored with the use of drugs (sodium amytal) and hypnosis. The court held that the later testimony of the witness was admissible, as long as the witness was available to the defense for cross-examination. In fact, the witness was subjected to lengthy cross-examination before the jury. The witness had told different stories at previous times, but the court held that the credibility of the witness was for the jury to determine. The defense had made a pre-trial motion for psychiatric examination of the witness. This motion was not renewed at the time of trial, and the court said, "If defendant had any question of the mental capacity of either witness he should have renewed his motion before the trial judge [p. 314]." The decision does not make it clear whether or not the defense seriously contested the admissibility of the testimony or only sought and obtained broad cross-examination of the witness and the State's psychiatrists. Thus, this appears to be another one of those cases in which no proper foundation was laid in the trial court to properly preserve the issue on appeal.

*Harding v. State (1969)*

In this case, a rape victim remembered the assault after hypnosis. Two police officers were present during the hypnosis session but did not participate. The session was audiotape-recorded. In allowing the testimony, the court emphasized the professional expertise of the psychologist and that a solid foundation for the testimony had been established:

Modern medical science has now recognized the possibility that memory of painful events can sometimes be restored by hypnosis, although some authorities warn that fancy can be mingled with fact in some cases [Pp. 311-312].

The court also emphasized that the testimony was substantially corroborated by other evidence (see p. 312).

On the witness stand she recited the facts and stated that she was doing so from her own recollection. The fact that she had told different stories or had achieved her present knowledge after being hypnotized concerns the question of the weight of the evidence which the trier of facts . . . must decide [p. 306].

The trial judge gave the following cautionary instruction:

“You have heard, during this trial, that a portion of the testimony of the prosecuting witness, . . . , was recalled by her as a result of her being placed under hypnosis. The phenomenon commonly known as hypnosis has been explained to you during this trial. I advise you to weigh this testimony carefully. Do not place any greater weight on this portion of [the] testimony than on any other testimony that you have heard during this trial. Remember, you are the judges of the weight and the believability of all of the evidence in this case [p. 310].”

In this case, the judge recognized the need for a cautionary instruction concerning the weight to be given to the hypnotically elicited evidence. The result might have been more favorable to the defense had an expert witness testified on the possible legal dangers involved when hypnosis is used on witnesses, the manner in which the presence of police officers aggravates the situation, and the uncertainty associated with the procedure when it is not videotaped.

*Wyller v. Fairchild Hiller Corp. (1974)*

In this civil case, hypnotic age regression was used to aid the plaintiff in recall of an aviation crash. The defendant objected to the use of hypnosis on the grounds that the procedure was conducted 4 years after the crash and moved for an order requiring the plaintiff to establish the reliability of the hypnosis procedure prior to defendant's testimony or to limit the testimony. The court denied that motion and held that it was up to the jury to determine the credibility and reliability of the testi-

mony. ("Wyller testified from his present recollection, refreshed by the treatments [p. 509].")

Extensive cross-examination was allowed—both of the hypnotist and of Wyller. The hypnotist, a professional psychologist, was allowed to testify after the session as to the techniques used. Although the defense here laid a fairly good foundation for the objection in the trial court, it failed to move to exclude the audiotape-recordings of the hypnosis session from evidence and apparently allowed the hypnotist to express an opinion as to the reliability of the statements made by the witness. The appellate court noted that, had an objection been made on a timely basis, the hypnotist's testimony as to the reliability of the statements made by the witness while the latter was under hypnosis "might well have been" excluded (see p. 510, footnote 7).

*Kline v. Ford Motor Co., Inc. (1975)*

In this case, the hypnotized witness had suffered retrograde amnesia from injuries sustained in a car crash. Before trial, she had undergone hypnosis at a university under the supervision of a psychologist.

The lower court excluded the witness's testimony on the basis of incompetency. However, the Ninth Circuit Court of Appeal reversed this decision, holding that the testimony following hypnosis is competent:

Although the device by which recollection was refreshed is unusual, in legal effect her situation is not different from that of a witness who claims that his recollection of an event that he could not earlier remember was revived when he thereafter read a particular document [Pp. 1069-1070].

The court cited the *Wyller v. Fairchild Hiller Corp. (1974)* case with approval.

There is only one published case in the United States which excludes the testimony of a hypnotized *prosecution* witness, and two others which lean in that direction but are actually decided on other grounds.

*People v. Harper (1969)*

The victim was raped in her home. At the time of the assault and for a considerable time thereafter, she maintained that she was unable to identify her assailant. Some 9 months later, she voluntarily underwent psychiatric examination both under hypnosis and under the influence of sodium amytal. The hypnosis examination was not productive of any information, but the drug examination produced conflicting stories, one of which identified the defendant as her attacker. The trial court held:

"[E]vidence of any facts or supposed facts which the said [victim] may have learned solely as a result of hypnosis or use of the Amytal . . . is inadmissible . . . [p. 6]."

The appellate court stated:

We see no reason to equate examination under hypnosis and examination while under the influence of a drug having the effect of a so-called "truth serum" except to note that the scientific reliability of neither is sufficient to justify the use of test results of either in the serious business of criminal prosecution [p. 7].

*Emmett v. Ricketts (1975)*

This is a murder case with complicated facts. The key witness told investigators that she could not remember the details of the crime because she was "full of pills" during its commission. Not only did her story conflict with the known facts, but also she did not remember important things at the scene that she should have remembered. The court said,

It is a fair statement that by the end of August, K.'s scenario, riddled as it was with inconsistencies, implausibilities and gaps, was in dire need of shoring up if the prosecution were to obtain convictions [p. 1036].

At this point, a hypnotist was consulted. Although the professed purpose was to get the witness off drugs, the dominant, if not overriding, motive of the investigators appears to have been to "further her memory" and to fill in "gaps" in her story.

The hypnotist was a clinical psychologist who was paid out of public funds for hypnotizing the witness on some 12 occasions. The witness later testified that the sessions allowed her to recall the events with greater clarity, but the defense counsel consistently maintained that she "was programmed with known details of the crime during these hypnotic encounters [p. 1037]." She did admit that the hypnotist instructed her to clip news articles pertaining to the murders. Moreover, although both the hypnotist and investigators claimed that the hypnotist was given no information about the crime and was not supplied with police reports, the court said that the evidence introduced in the hearing "belies those assertions [p. 1037]."

At this point, the court sounds highly critical of the hypnotic sessions. Yet, the issue was completely dropped, because the decision turns on the blatant refusal of the prosecution to disclose the use of hypnosis before trial. For instance, the hypnotist testified at one point that 10-14 hours of the hypnosis sessions were audiotape-recorded, including some taped material relating primarily to the witness's own participation in the murders. Notwithstanding protective orders issued by several different judges in the trial court and by the Court of Appeals, the critical tapes suddenly turned up missing.

*United States v. Adams et al. (1978)*

In this hybrid case, the witness was actually called by the defense but his testimony was discredited with the statements he had made after hypnosis. Defendants were charged with conspiracy, assault, robbery, and murder, all involving postal heists in the Los Angeles area. In one of them, the evidence showed that two perpetrators (one of whom evidently got immunity), commandeered a postal truck, and the third perpetrator followed in a car. An alleged eyewitness testified that *two* men approached the truck in a large black car. This conflicted with the testimony of the immunized defendant. During their investigation, investigators hypnotized the witness M.. Adams unsuccessfully moved to have the witness M.'s testimony limited to his pre-hypnosis statements. At trial, the defense called the witness M., and the prosecution discredited his testimony with his post-hypnosis statements. The court cited with approval *Kline v. Ford Motor Co., Inc. (1975)* and *Wyller v. Fairchild Hiller Corp. (1974)* for the proposition that in civil cases hypnosis affects credibility but not admissibility and said that it saw no reason for a different result in the context of a criminal case. The court did comment, however, on the question of hypnotic distortion of eyewitness recall:

We are concerned, however, that investigatory use of hypnosis on persons who may later be called upon to testify in court carries a dangerous potential for abuse. Great care must be exercised to insure that statements after hypnosis are the product of the subject's own recollections, rather than of recall tainted by suggestions received while under hypnosis.

Although we do not approve of the hypnosis methods used here, Adams did not object to the adequacy of the foundation laid for the receipt of the testimony. Rather, he attempted to exclude all in-court testimony of M[—]. on the grounds that no testimony from witnesses who had been hypnotized could be reliable . . . [and] that the in-court testimony of a witness who had earlier been subject to hypnosis is unreliable as a matter of law rendering the witness legally incompetent to testify [Pp. 198-199].

In two footnotes, the court commented that no record was made of the questions and answers during hypnosis or the identity of the persons present. The court chastised the procedure, commenting, that at a minimum, complete stenographic records ought to be kept, and an audiotape- or videotape-recording of the interview would be helpful.

## SELECTED CASES IN PROGRESS

The following cases are examples of developments in a fast moving



field. Because these cases are still in progress, they are unpublished and cannot be relied upon for legal precedent. They are interesting, however, in that they point the direction that the use of hypnosis in litigation can be expected to follow in the future. Because the author is a California lawyer, he is more familiar with California cases, and the cases which follow are from that state. The rapidly increasing use of hypnosis is by no means limited to California, however, and litigants in other states are experiencing the same phenomenon.

*In Re Milligan (1978)*

On August 9, 1977, four female relatives ranging in age from 6 to 62 were stabbed to death in their home. No motive could be established, and for more than 2 months, investigators had no leads.

A 14-year-old girl was the sister of one of the victims and related to the others. She and a friend were interviewed by investigators shortly after the homicides, but they denied all knowledge. More than 2 months after the homicides, one Harold Bicknell was arrested and implicated Terri Milligan but not the sister and the friend. One month after that, the investigators linked the sister and the friend to the scene through bloody footprints.

Both girls were then interrogated. Both started out denying all knowledge of the murders, and the friend has maintained that stance ever since. When the sister, however, was confronted by the investigator with his belief that her friend had participated in the murders, she began to waiver, finally said that she was there, and spilled out several tape-recorded statements that made little sense. The sister was re-interviewed several times by investigators for the next several days. Although she kept recalling more detail, her statements were not consistent and she continued to say that she did not really think that she was there but was only dreaming that she had seen the horrible events. Finally, 1 day before the beginning of the first court hearing in which the sister would have been subjected to cross-examination, the prosecutor had her hypnotized by a psychiatrist. He later testified that she was in such a state that it looked as if the district attorney would not have a witness if he did not do something to shore her up.

The hypnosis session was audiotape-recorded but not videotaped. The chief investigator was present and asked many leading questions, while the psychiatrist approached the sister in a more fatherly manner, calming her and reassuring her, and asked open-ended questions. Although very little new material came out during the hypnosis session, she dropped the idea that she was dreaming, said that she really believed she was there, and reported a sequence of events that was more logical and more closely fit the physical evidence.

This case presents a classic example of the danger of altering the *manner* in which a witness testifies after having her confidence enhanced by hypnosis. She testified a total of five times in separate hearings and trials. She told a detailed and consistent story each time and appeared invulnerable to cross-examination.

*People v. Torres (1978)*

This rape/murder case was tried in Los Angeles County in the summer of 1978. The surviving victim was beaten to the extent that she suffered two skull fractures and was in a coma for 11 days. She suffered two grand mal seizures during the coma. After her release from the hospital, the victim was hypnotized by a police department psychiatrist four times. Earlier, an outside consultant had unsuccessfully tried to hypnotize her on November 3. During this period, she watched televised news accounts of the preliminary hearing and read back issues of newspapers covering the case. She was unable to select any of the three police suspects from photo line-ups shown to her by the police psychiatrist during the hypnosis sessions. A month later, a District Attorney investigator challenged the victim to explain several of the "discrepancies" in her story. She then, while in a waking state, changed her previous hypnosis-waking state story of having been chased by three men, at first in a car and then on foot, to a different waking-state account wherein she and her friend had been accosted by three men (including Torres) while sitting and talking. Still later, after having been told by the same District Attorney investigator that her second story was not candid, she changed it to include an identification of all three police suspects and a disclosure that she and her friend had been having sexual intercourse at the time they were accosted.

A defense psychiatrist testified that the victim should be disqualified as a witness due to the likelihood of confabulation from her brain damage and hypnosis. A prosecution psychiatrist stated that hypnosis does not make one more subject to suggestion or confabulation. The judge permitted the witness to testify. It is difficult to assess the impact of the witness's testimony on the jury, because they convicted of second degree murder and rape, which appears to be a compromise verdict.

*People v. Lane (1979)*

This case is presently in trial for the third time after two juries were unable to reach a verdict.<sup>3</sup> A witness saw two hitchhiking girls get in a

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pickup truck. Two days later she saw a television news story about two girls being murdered and recognized their pictures. The sheriff suggested that the witness undergo hypnosis to try to remember the license plate number of the truck.

Prior to hypnosis, the witness had given a description of the driver of the truck, and she repeated the same description under hypnosis. Both descriptions omitted any mention of a beard on the driver's face. Under hypnosis, she was unable to recall any license plate number, but the hypnotist left her with a posthypnotic suggestion that she would remember it later. A couple of days later, she did remember a partial license plate number that was traced to the defendant's pickup truck. The defendant was arrested. He has a full-face beard, and his picture was exhibited on television news. The witness saw it, immediately called the sheriff, and said that the man pictured on television was the man driving the truck. The defense agreed that the girls did get in that pickup truck. The only question is, who was driving the truck? There is substantial evidence to show that someone else had stolen the truck.

This case demonstrates the tangle of problems that can arise when hypnosis is haphazardly used. In the first trial, neither side mentioned that hypnosis had been used and the jury was unable to reach a verdict. In the second trial, the defense disclosed that the witness had been hypnotized and that in both the prehypnotic and hypnotic sessions she had not mentioned a beard on the driver. The defense argued that the failure to mention the beard either time was strong evidence that the driver did not have a beard. The second jury was unable to reach a verdict. In the trial now in progress, the defense may argue, with some persuasiveness, that because the ultimate impact of the hypnosis session on the witness's memory cannot now be evaluated, the court should find that the witness is incompetent because her memory has been tainted by the hypnotic process and now, any testimony that she gives, is simply not reliable enough to form the basis for a criminal conviction.

#### THE MAIN LEGAL ISSUES RELATING TO THE USE IN COURT OF HYPNOSIS EVIDENCE

There are four distinct objections that the opposing party typically makes when the plaintiff or prosecution offers hypnotically induced or enhanced testimony. The question of which view will prevail usually turns on the particular facts of the case and the relative determination and preparedness of the parties. Existing law gives no clear direction.

##### 1. *Reliability/Acceptance in the Scientific Community*

The general test for determining the admissibility of a new scientific technique was enunciated in *Frye v. United States* (1923) as follows:

Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be *sufficiently established to have gained general acceptance in the particular field in which it belongs* [Italics added, p. 1014].

In *People v. Kelly* (1976), the California Supreme Court reaffirmed its adherence to the *Frye v. United States* decision and set forth a "two step process" for the admissibility of evidence based upon the application of a new scientific technique:

(1) the *reliability of the method* must be established, usually by expert testimony, (2) the witness furnishing such testimony must be properly *qualified as an expert to give an opinion* on the subject. Additionally, the proponent of the evidence must demonstrate that correct scientific procedures were used in the particular case [italics in original, p. 1244].

A similar rule was applied in *People v. Palmer*, 1977/1978 and *People v. Slone*, 1978.

In questioning *reliability*, perhaps the most persuasive argument is that the authorities seem to be in almost unanimous agreement with Orne (1961, 1979) that information obtained under hypnosis is not necessarily reliable. Further, the qualifications of the hypnotist are frequently less than ideal, given that large law enforcement agencies such as the Los Angeles Police Department are training many "hypno-technicians," who are not medical doctors or clinical psychologists. The proponent's showing of correct scientific procedures often falls short of acceptable standards. Consider that all too often an investigator is present, no videotape-recording is made, leading questions may be intentionally or unintentionally asked, and the witness is placed in the position of wanting to please the examiner.

## 2. Denial of Confrontation/Cross-Examination

The Sixth Amendment of the Constitution provides that the accused shall enjoy the right of confrontation and that basic to that right is the right of cross-examination. The Supreme Court, in requiring that counsel be present at pre-trial line-ups, relied in part on the threat to effective cross-examination which pre-trial identification procedures frequently present.

This principle applies with even more force to hypnotically enhanced testimony. It may be helpful here to restate Orne's (1978) position abstracted from the affidavit for *Quaglino v. California* (1978). Orne (1978) holds that there is no practice in which false testimony is more apt

to harden and become unyielding to the blows of truth than hypnotic memory enhancement. The state of hypnosis is one of high suggestibility for the capable and willing subject. The tendency for such a subject to confabulate, or manufacture a memory, even with very strong subjective conviction, is increased by hypnosis. This tendency is compounded when there is another individual present at the session and involved in the interaction, who has his own theory of the case about which the subject's memory is purportedly being enhanced. The real danger is that if the subject confabulates, and the recalled memory is "eminently plausible," then it becomes virtually impossible for even a highly trained expert to distinguish such confabulation from actual memory. While the subject himself also cannot tell the difference, he nonetheless becomes convinced that what he recalls in hypnosis is the actual memory—unfortunately, once this process has taken place, it cannot be reversed even by subsequent hypnosis sessions.

Given the reality of memory alteration under hypnosis, no defense counsel could possibly cross-examine the witness who existed prior to the hypnotic session. Thus, the defendant is totally deprived of the right of cross-examining his accuser. For this reason, the testimony of a prosecution identification witness who has undergone hypnosis on the very subject of his testimony, must be inadmissible as in violation of the defendant's constitutional rights of confrontation and cross-examination.

### 3. *Denial of Due Process as Unnecessarily Suggestive*

The evidence obtained through hypnosis is vulnerable to this objection when it consists of an identification made while the witness was under hypnosis. The fact that hypnosis places a witness in a highly suggestive state fits into the "unnecessarily suggestive" objection to certain pre-trial identification procedures.

### 4. *Destruction of Evidence*

The theory here is that by hypnotizing the key prosecution witness, the prosecutor has negligently or intentionally destroyed material evidence within the meaning of *People v. Hitch* (1974).

The *People v. Hitch* (1974) case involved the destruction of a test ampoule in a drunk driving case, whereas the hypnosis cases involve the destruction of what might have been favorable results to be obtained from cross-examination had the witness remained "uncontaminated by" hypnosis.

One fundamental similarity between the two kinds of cases, where the witness is hypnotized before the defense ever gets a chance to talk to him or her, is that in both, the critical evidence is no longer available to be

examined to determine whether or not it would have been favorable to the defendant.

In conclusion, reasonable minds differ on the usefulness of evidence produced or enhanced by hypnosis and the potential for abuse. Regardless of which side the expert is on, the best qualified minds are needed to provide the hard evidence through research and experimentation which will shed more light on this subject.

When issues arise involving hypnosis related evidence, the court needs impartial experts, but they should be ones who are willing to deal with the issues presented. Some of the most fundamental constitutional rights of the accused are at stake when the witnesses have been hypnotized by either side. It is hoped that serious investigators in the field of hypnosis will use their expertise to assure that only the appropriate use of hypnosis will be accepted in the courts of this country.

#### REFERENCES

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### Die Brauchbarkeit der durch Hypnose verstärkten Aussage im Gerichtssaal

Thomas S. Worthington

**Abstrakt:** Es werden hier führende, juristische Entscheidungen über Hypnoseanwendung bei Zeugen aufgeführt. Dabei wird Nachdruck auf den ansteigenden Hypnosegebrauch durch die Polizei oder die Verfolgung bei Zeugen in Kriminalfällen gelegt. Hypnose hat sich als ein wertvolles Hilfsmittel im Erkunden von Tatsachen bewiesen, die andernfalls nicht zugänglich waren. Doch besteht ein Potential für Missbrauch, wenn die erhaltene Information direkt als Beweismaterial im Gerichtssaal gebraucht wird oder wenn die subjektive Gewissheit des Zeugen auf den Grad erhöht wird, wo das Kreuzverhör ineffektiv wird. Sicherheitsmaßnahmen sind nötig, um Missbrauch zu verhüten.

### L'utilisation devant la Cour de témoignages enrichis par l'hypnose

Thomas S. Worthington

**Résumé:** L'auteur présente les décisions judiciaires les plus importantes quant à l'utilisation de l'hypnose auprès des témoins. Il insiste sur le fait que la police et la poursuite utilisent de plus en plus l'hypnose auprès des témoins, dans les causes criminelles. L'hypnose est un outil valable pour découvrir des faits qui n'auraient pu être connus autrement. Toutefois, des abus sont possibles quand l'information obtenue est directement utilisée comme preuve devant la Cour, ou quand la certitude subjective du témoin est accrue au point que la contre-expertise est sans effet. Des précautions s'imposent si on veut prévenir les abus.

### La utilización en tribuna de testificación influenciada para la hipnosis

Thomas S. Worthington

**Resumen:** El autor presenta las más importantes decisiones judiciales de la utilización de la hipnosis sobre los testigos; y insiste en que la policía utiliza más y más la hipnosis con los testigos, sobre todo en causas criminales. La hipnosis constituye un instrumento importante para descubrir hechos que no serían conocidos en ningún otro modo. Hay, todavía, abusos posibles cuando la información obtenida es directamente utilizada como prueba en tribunal, o cuando la certitud subjetiva de los testigos es acrecida hasta al punto que el contro-examen es sin efectos. Hay que tomar ciertas precauciones para prevenir los abusos.