The Utility of Hypno-Induced Statements in the Trial Process: Reflections on *People v. Smrekar*

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The Utility of Hypno-Induced Statements in the Trial Process: Reflections on People v. Smrekar

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INTRODUCTION

The recent proliferation of cases1 and literature2 discussing hypnosis3 emphasizes the impact of this phenomenon upon investiga-
tory and trial phases of the legal process. Such discussion also indicates recognition by the legal system that hypnosis, when properly employed, is a useful device for retrieval of otherwise inaccessible material. Questions concerning the relationship between hypnosis and the evidentiary process have emerged concomitant with this recognition. Courts have begun, and must continue, to define this relationship. Hypnosis remains, however, a complex phenomenon, requiring considerable and close analysis before judgments are made concerning admissibility of hypnotic material.

People v. Smrekar is the first case in which the issue of admissibility of hypno-induced statements and thus, the status of hypnosis as an appurtenance to the evidentiary process, was squarely presented to an Illinois Appellate Court. The function of this article is to analyze the rationale for the opinion and to offer recommendations regarding the admissibility and utility of evidence gleaned through hypnotic processes.

**People v. Smrekar**

In People v. Smrekar, defendant was convicted of the shotgun murders of a potential prosecution witness against defendant in a misdemeanor theft case, and his wife. Defendant raised an alibi.
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defense, supported by testimony of his mother, father, cousin, and girlfriend. A sister of the slain witness who lived next door to him testified that on the night of the homicides, upon hearing a "roaring noise" from the direction of her brother's house, she peered out the window and observed, for a 30-40 second interval, a man lingering in her brother's yard. After attempts to contact her brother by telephone proved futile, the witness and her husband entered the brother's residence and discovered the bodies. This witness identified defendant as the person she had observed loitering outside her brother's residence shortly before the slayings.

On the day after the killings, the witness had selected two photographs from a police display as resembling the man she had observed. One of the photographs was of the defendant. During the next several days, the witness, concerned about the quality of her memory of the occurrence, consulted a physician on three occasions. During her visits to the physician, she twice underwent examination through the use of hypnosis. The physician, a general practitioner who was not certified as a specialist in hypnotic processes but had utilized hypnosis regularly in his practice for 10 to 15 years, testified that he had maintained no permanent record of the conversations between himself and the witness during the hypnotic induction sessions. He further stated that his procedure involved directing the witness "to form a picture in her mind of the scene she saw . . . when she looked out and noticed a man" in her brother's yard.

Nine days after the slayings, the witness fortuitously encountered the defendant at the county courthouse, and immediately singled him out to the officers accompanying her as the person she had seen near her brother's residence.

Although no objection was lodged at trial, defendant urged on appeal that the witness' in-court identification of defendant, as a product of the courthouse encounter, which defendant contended was influenced by the hypnotic experiences of the witness, was impermissibly tainted. In affirming the conviction, the court noted that the propriety of utilizing extrinsic aids in an attempt to stimulate a witness' recollection is ordinarily unquestioned, and bears only on the witness' credibility. After reviewing recent judicial to these killings; although her bloodstained automobile was later discovered, her whereabouts remained unknown. Id.

12. As the court noted, the issue is drawn somewhat differently in a criminal case, where a question regarding the validity of an in-court identification is raised. The trial identification is impermissible where defendant demonstrates that it has been sullied by "a prior unduly suggestive procedure and has no independent origin." Id. at 386, 385 N.E.2d at 853. The
authority approving the use of trial testimony of persons whose faltering memories had been restored through hypnotic induction, the court ruled that the hypnotic techniques experienced by the witness, at the hands of an operator deemed competent, were not tainted by undue suggestiveness. When she testified on the basis of her restored recollection, the witness was subject to cross-examination. Therefore defendant was deprived of no trial safeguards. "While the hypnosis could affect the mind of the witness in such a subconscious way that the cross-examination could not reach, all witnesses are, to some extent, subject to subconscious stimuli similarly obscure."13

In dissent, Justice Craven articulated a dual concern regarding the admissibility of testimony from a witness whose recall of the incident in question has been refreshed after hypnotic treatment. Analogizing the properties of hypnosis as a truth-determinant to similar capabilities allegedly possessed by scientific processes such as narcoanalysis, polygraphy, and spectrography, Justice Craven denounced what he perceived to be the consequence of the majority determination of admissibility of this hypno-retrieved testimony: that "any other real or imagined way of judging truth would be rendered admissible with only the weight to be given to such testimony left for resolution by the trier of fact."14 Moreover, his inspection of the record revealed a dearth of foundation evidence concerning the validity and effectiveness of hypnosis as a retrieval device generally as well as the nature and propriety of procedures adopted by the operator in this case.15 Thus, Justice Craven concluded:

While I am not persuaded that the truth-seeking process is necessarily helped by the use of hypnosis, I certainly am persuaded that it is incumbent upon one who tenders testimony retrieved, enhanced, or obtained by hypnosis to establish what the procedure is, what its limitations are, and what such tinkering amounts to. Absent such foundation, the evidence is inadmissible.16

13. Id.
14. Id. at 395, 385 N.E.2d at 860.
15. "There is no foundation in the record, there is no showing as to the scientific basis for hypnosis, there is no recording of the hypnosis sessions, there is nothing to establish that the testimony thus retrieved is substantially probative and an aid in the truth-seeking process." Id. at 394, 385 N.E.2d at 859.
16. Id. at 395, 385 N.E.2d at 859-60.
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VALIDITY OF HYPNOSIS AS A RECOLLECTION RETRIEVAL DEVICE

Justice Craven's identification of hypnosis as a device which purported to separate fact from fantasy and impel a subject to utter only truth expresses a fundamental, yet common, misperception among courts and commentators regarding the nature of this scientific phenomenon. Emphatically, hypnosis does not purport to function as a litmus test for truthfulness. It must be divorced from processes, such as narcoanalysis and polygraphy, which allegedly serve as techniques for mechanically determining the genuineness of the witness' testimony. Rather, the utility of hypnosis is due to its scientifically established significance as a tool for attaining or retrieving suppressed or unrecollected material, notwithstanding the truth or falsity of that information.

Requiring hypnosis to perform a truth-determinant function as a precondition to admissibility of evidence obtained by its use transmogrifies this scientific process and aborts its potential benefit to

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20. The opposite of this position is that of some scientists who actively oppose introducing hypno-induced material in the trial process. See references cited at note 2, supra. Their basis is that hypnosis cannot guarantee veracity of information obtained thereby either objectively or subjectively, rendering its courtroom use dangerous and unwarranted. It is submitted that this position, although accurate in its assessment of hypnosis' capabilities misapprehends the dictates of the evidentiary process. Accuracy and truthfulness of proposed testimony are not inflexible prerequisites for admissibility; evidence which may be inaccurate or which tends to deceive is not automatically excluded. Perceptual psychologists, for example, agree that eyewitness testimony is often factually inaccurate and unreliable, characteristically riddled with fantasy, prejudice, misperception and bias. See, e.g., Buckout, Psychology and Eyewitness Identification, 2 LAW & PSYCH. REV. 75 (1976); Buckout, Eyewitness Testimony, 15 JURIMETRICS J. 171 (1975); Fishman & Loftus, Expert Psychological Testimony in Eyewitness Identification, 4 LAW & PSYCH. REV. 87 (1979); Foster, Present Sense Impressions: An Analysis and a Proposal, 10 LOY. CHI. L.J. 299 (1979); Loftus, Reconstructing Memory: The Incredible Eyewitness, 15 JURIMETRICS J. 188 (1975); Stewart, Perception, Memory and Hearsay: A Criticism of Present Law and the Proposed Federal Rules of Evidence, 1970 UTAH L. REV. 1. Yet such testimony is routinely admitted for scrutiny by the finder of fact because it is insulated, to some degree, from risks of flawed perception, erroneous recall, imprecision of language and insincerity by the enforcement of procedural safeguards, such as opportunity for cross-examination. The acuity, sincerity and credibility of the witness are subject to probing through the panoply of testimonial protections inherent in the trial process, so that risks of error are minimized to the extent possible in our adversary system.

The issue raised by the introduction of hypno-induced evidence is whether the process, as a scientific phenomenon, accomplishes what it purports to accomplish, attaining or retrieving otherwise inaccessible information. This issue is, as Justice Craven perceived, a matter of adding a proper foundation, a question discussed at text accompanying notes 35 through 38, infra.
litigation. Recognition of hypnosis as merely a means by which testimony otherwise unattainable might be acquired, but which offers no warranties concerning its verisimilitude, allows development of concomitant procedural safeguards. Thus, the admissibility of evidence bearing some probity is assured, while the integrity of the judicial and evidentiary processes remains intact. The cogent inquiry confronting courts is not simply whether hypno-induced testimony should be admitted at all, but whether incorporation of this evidence in the trial process accords with recognized capabilities of the phenomenon as well as with established evidentiary principles. Thus stated, the issue must be resolved affirmatively, since valid uses for hypno-induced statements are demonstrable.

**Utility of Hypno-Induced Statements**

a) *Stimulating the Recall of Witnesses*

Given the effectiveness of hypnosis as a recollection retrieval device, its primary significance in litigation lies in its restorative potential in the treatment of amnesiac witnesses. In accordance with the *Smrekar* majority, courts which have considered the question have proven receptive to permitting testimony of a witness whose amnesia concerning the litigated event has been treated and dispelled through pretrial application of hypnotic processes, as the phenomenon of recall has been accorded general recognition. Introduction of testimony of a witness whose recall has been enhanced through pretrial hypnosis must be tempered by imposition of adequate safeguards. Where this is accomplished, it must be recognized that a memory revived through the device of hypnosis is as valid as, and therefore, in terms of legal effect, indistinguishable


Procedures governing the refreshment process are codified in the federal system at Rule 612 *Fed. R. Evid.*

23. *See* text accompanying notes 35 through 38 infra for a proposal concerning foundation evidence which must be adduced as a prelude to admissibility.
from, a memory restored through application of any approved technique, such as requesting the witness to peruse a document while on the witness stand, or employing leading questions. 24

Concededly, employment of hypnotic processes as a recall stimulation device fosters additional concerns which must be addressed in order to assure the reliability of the forthcoming testimony. Peculiar to espousal of hypnosis as a memory restorative are two problems: the prospect that the aura of augmented suggestibility in which the hypnotized subject is suspended will engender distortion; and the possibility that the jury will give undue significance to hypno-induced testimony. 25 Conditioning admissibility of this testimony upon fulfillment of procedural safeguards alleviates both concerns.

Distortion of the hypnotically-revived witness' testimony may arise in two ways: the hypnotized witness may, during the process of recall, commingle fantasy with fact, yet remain steadfast after-

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24. Adducing proper foundation evidence for the hypno-restored testimony, which is subject to judicial scrutiny and cross-examination, is similar to procedures followed generally when a memorandum or other aid is used to stimulate a witness' failing recollection. The court retains authority to exclude restorative material where its worth as a refresher is outweighed by the danger of undue suggestion. Moreover, the adversary is entitled to inspect any aid, and to use it as the basis for cross-examination of the revived witness. Fed. R. Evid. 612.

25. A frequently expressed fear concerning use of hypno-induced testimony is that the hypnotized subject retains whatever faculty he has for lying. At least two variables are pertinent. The subject may feign induction into the hypnotic state; or the truly hypnotized subject may deliberately dissemble where it is to his benefit. Procedures exist to assure that the subject remains entranced and relates "fact" as he has perceived it. For example, analgesia is experienced by the hypnotized subject only after a medium trance level has been achieved. A subject who exhibits a reflex response to a pin prick, yet feigns a medium or deep trance, is clearly simulating. Or, the operator may implant a suggestion that a physical reaction, such as a thumb-flick or a knee-jerk, will accompany a lie and that the presence of this reaction will persist into the waking state. However, the consensus of informed opinion is that a hypnotized subject is capable of deception if so motivated. The degree of reliability attributable to the behavior of the cooperative, truly hypnotized individual is difficult for even the skilled operator to ascertain. See generally, H. Arons, Hypnosis in Criminal Investigations 138-41 (1967); W. Bryan, Legal Aspects of Hypnosis 246 (1962); H. Crasilneck & J. Hall, Clinical Hypnosis: Principles and Applications 29 (1975); Brum, Retrograde Amnesia in a Murder Suspect, 10 Am. J. Clinical Hypnosis 209 (1968); Levitt & Chapman, Hypnosis as a Research Method, in Fromm & Shor, supra note 3, at 109.

This concern for the possibility of deception on the part of the subject, either during the process of induction or afterwards, is not peculiar to the use of hypnosis. Statements made by the witness under hypnosis are not admissible as accreditation of his trial testimony. Jones v. State, 542 P.2d 1319 (Okla. Crim. App. 1975). Any self-interest or bias on the part of the hypnotized subject provides the same basis for shading or distortion of the recounting of an event as exists in witnesses generally. Fear of a perjury prosecution, cross-examination and aspects of the trial process, such as the solemnity of the proceedings and the administration of an oath, remain effective implements for detecting and deterring falsehood in either context.
wards in proclaiming the accuracy of his statements; or, the subject, due to heightened suggestibility, may seek to conform the material he communicates to what he perceives to be the expectations of the operator.

Distortion attributable to the witness' mixture of reality and imagination during the hypnotic recollection process does not differ from perceptual and memory flaws which plague witness' testimony generally. The vagaries of any witness' ability to perceive, recall and articulate is well-documented in both legal and scientific literature. That the testimony of a witness who undergoes hypnosis is not conducive to warranting the objective accuracy of all facts encompassed therein simply fails to state a ground for exclusion, given the overall lack of reliability in the functioning of errant human faculties generally. Thus, the testimony of the witness whose recollection has been hypnotically restored poses no more potential for inaccuracy due to disabilities associated with perception, memory, and articulation than the testimony of any other witness.

Concern regarding the validity of the hypnotically-restored memory of the witness is warranted, for it is heightened susceptibility to suggestion which defines and characterizes the hypnotic state. However, two points should be stated. First, in any interrogation situation, there is the risk that the person subject to inquiry will attempt to mold his information to assuage the interrogator. During hypnotic induction, as in other interrogation situations, the significance of this risk is dependent upon the balance of numerous factors, such as pliability and desire to conform on the part of the subject, and the degree of authority exerted by the interrogator. The influence of these factors during hypnotic induction can be

26. The functioning of perceptual processes is highly influenced by the subjective biases, prior conditioning, and preconceptions of the observer. Likewise, memory, as a cognitive, reconstructive process, is susceptible to subjective components. Imprecision in verbalization is a common difficulty. See Spector & Foster, supra note 2, at 587-91, and authorities cited therein.

27. In fact, since a hypnotized subject may be “age regressed,” or transported backward in time, so that he actually re-experiences the incident in question, distortions that typically occur through the exercise of cognitive memory processes are precluded. R. Reiff & M. Scheerer, Memory and Hypnotic Age Regression 52-53 (1959). For an explanation of the hypnotic processes of age regression, hypermnesia and posthypnotic suggestion, see Spector & Foster, supra note 2, at 573-74, and authorities cited therein.

28. “The nature of hypnosis is such that you respond to suggestion... The same way I can help you refresh your memory, I also can help you construct memory where there isn’t any.” Wall Street Journal, June 27, 1978, quoted in People v. Smrekar, 68 Ill. App. 3d 379, 385 N.E.2d 848, 859 (1979)(Craven, J., dissenting).

29. See note 3, supra, and authorities cited therein.

circumscribed to some extent by imposition of procedural safeguards; to the extent these factors remain uncontrolled, they bear upon the credibility of the testimony so adduced. Second, in ordinary encounters which occur during the trial and related processes between witnesses and questioners, such as attorneys, police, or insurance adjusters, the nature and form of the inquiry posed often unwittingly modify the original memory of the witness. In the commonplace trial procedure of refreshing the recollection of a witness through the use of leading questions, for example, deliberate altering of a single word might dramatically alter the witness' account of the occurrence.\(^3\) Thus, the influence wielded by suggestiveness over witness' testimony, although somewhat weakened by cross-examination, remains a force even in the absence of hypnosis.\(^3\)

The unique hazard of suggestiveness posed by hypnosis is the risk that the restored memory forming the basis for the witness' testimony has been the object of tampering during the induction process, that the suggestibility engendered in the hypnotic subject has resulted in a reconstructed, rather than a revived, memory.\(^3^3\) This danger is mitigated, however, as Justice Craven suggests,\(^3^4\) by formulation of stringently adhered to foundation requirements as a pre-condition to admissibility of testimony of any hypnotically-revived witness.

Indeed the prime difficulty with the Smrekar case is the divergence in viewpoint between the majority and the dissent concerning the adequacy of the foundation evidence adduced. The operator testified to his regular use of hypnosis as a treatment device in his general practice of medicine, summarized the technique utilized in this particular case, and stated that he suggested no specific images to the witness during induction. Although minimal at best, the ma-

\(^{31}\) See Loftus, Reconstructing Memory: The Incredible Eyewitness, 15 JURIMETRICS J. 188, 190-92 (1975), wherein the author demonstrates varying responses elicited when several questions concerning whether observers had seen "a broken headlight" were changed to "the broken headlight." The latter form of the questions, imparting an implicit belief on the part of the examiner, elicited many more affirmative responses. Similar variations in response occurred when subjects were asked to estimate the speed of vehicles involved in a collision when the cars "hit," as opposed to using the more descriptive terms, "smashed" or "collided."

\(^{32}\) Marshall, Marquis & Oskamp, Effects of Kind of Questions and Atmosphere of Interrogation on Accuracy and Completeness of Testimony, 84 HARV. L. REV. 1620 (1971); Stern, The Psychology of Testimony, 34 J. ABNORMAL & SOC. PSYCH. 3, 8 (1939). The Smrekar majority was cognizant of this potential risk.

\(^{33}\) It is this aspect of the suggestibility associated with hypnosis which seems to be one of the significant bases for his concern. People v. Smrekar, 68 Ill. App. 3d 379, 394, 385 N.E.2d 848, 859 (1979).

\(^{34}\) Id. at 394, 385 N.E.2d at 859-60.
majority determined this evidence sufficient to establish the competence of the operator and lack of undue suggestiveness in the induction procedures utilized.

In order to prevent the possibility of improper suggestion during the induction process and to assure sufficient explanation of the role of hypnosis in the retrieval of faltering recollection for the trier of fact, it is submitted that, at a minimum, the foundation must encompass the following information.

The operator who induced the trance should, after detailing his qualifications and experience, explain the function performed by hypnosis in the treatment of amnesia and retrieval of previously unremembered information generally, and state his opinion concerning the dependability of hypnosis as a retrieval device. He should identify and explain the etiology of the amnesia or psychological disturbance which afflicted the subject, and specify the procedures employed to induce trance and to ascertain duration of the desired hypnotic trance depth. Although it might not prove feasible to mandate that the proponent of the hypno-induced testimony supplement the operator's description of the hypnotic technique used by producing a transcript or film of the session, availability of such material would prove helpful to the finder of fact. It also would enhance the believability of the operator's testimony that no undue suggestion tainted the induction process. Finally, the operator

35. Standards for determining competency of the hypnotist are discussed at text accompanying notes 40 through 43 infra.

36. See discussion and authorities cited at note 25 supra.

37. See People v. Adams, 581 F.2d 193, 199 n.12 (9th Cir. 1978):

We think that, at a minimum, complete stenographic records of interviews of hypnotized persons who later testify should be maintained. Only if the judge, jury, and the opponent know who was present, questions that were asked, and the witness's responses can the matter be dealt with effectively. An audio or video recording of the interview would be helpful.

Although the existence of a preserved record is desirable, some practical considerations should be noted. Some hypnotists may not be equipped to record an entire induction session, either mechanically or through stenographic resources, particularly where it is a long session. The presence of a stenographer or a recording device might disrupt the concentration of the subject, and therefore the effectiveness of the session. It might prove unfeasible and counterproductive to read into evidence a question-and-answer transcript of a long session. The sheer drama conveyed by an audio or visual recording may mesmerize the jurors and render cautionary instructions ineffectual, see note 52 infra, although this contention may accord too little sophistication to modern juries. In a murder prosecution where defendant was charged with killing her newborn infant by feeding it a caustic substance, defendant introduced testimony of a psychiatrist who maintained defendant was incapable of committing this crime. In order to illuminate the basis for this opinion, the court permitted the jurors to view a film of a hypnotic interview between defendant and the psychiatrist. Despite the emotionally-charged content of the film, the jury returned a verdict of guilty of murder in the first degree. Time, April 12, 1968, at 57.
should state his professional opinion regarding the effectiveness of the techniques used in dispelling the amnesia of the witness. The operator would be subject to probing cross-examination regarding each of these particulars. Adherence to this foundation requirement abates the potential for distortion through improper suggestion of the restored witness' recall to a level which is customarily tolerated during pretrial interrogation and preparation situations.  

The Smrekar majority articulated four factors as influential in the determination that the testimony of the hypno-revived witness in this case was untainted by improper suggestion. It is crucial to note that each of these factors was not intended, and therefore should not be construed, as requisites of foundation which must be fulfilled in each case as a precondition to admissibility.

First, the court pronounced the operator, a physician licensed as a general practitioner who regularly incorporated hypnosis into his treatment processes, competent. Qualifications, skill and experience of the operator must, of course, be established as a foundation matter. The question, however, becomes whether an operator must qualify as a specialist in hypnosis in order to be deemed competent. It is submitted that standards governing the degree of experience or training necessary to qualify a hypnotist as an expert should be identical to those ordinarily obtaining for other disciplines. Certainly, the credentials presented by a particular operator might be determined too meagre to allow his testimony to be considered by the fact finder. However, so long as minimal competence of the operator is established, as was apparently done in the Smrekar case, further questions of qualification generally should bear on the

Thus, production of a record of the interview, although desirable, should not constitute an inexflexible requirement.


39. The court refers to the foundation evidence adduced in this case by determining that the operator was competent, and the techniques utilized not unduly suggestive. 68 ILL. APP. 3d 379, 387, 385 N.E.2d 848, 854 (1979).

40. Although the American Medical Association has designated hypnosis as an area of recognized specialization, such specialization does not lead to board certification. Directory of Medical Specialists (17th ed. 1977).


weight to be accorded the operator’s testimony.  

Second, the court determined that “suggestion was not used in the hypnosis.” It is important to specify what the court meant by this term “suggestion.” It must be reiterated that suggestibility of the subject is inextricably bound up with the hypnotic induction process, and therefore cannot be wholly prevented, just as suggestibility cannot be eradicated from interrogation situations generally. However, absent any attempt by the operator, or anyone else present during the induction process, to construct the subject’s memory, suggestibility during hypnosis should bear on the weight, rather than the admissibility of the subject’s testimony. As previously stated, the lack of implantation of improper suggestion should be established by the operator as a foundation matter.

Third, the court noted that the witness’ “identification was corroborated by other substantial evidence unknown to the witness at the time she made positive identification of the defendant.” Corroboration is significant in the Smrekar case, because the issue was drawn more narrowly than the admissibility of the testimony of a witness whose memory has been restored through hypnosis. Rather, defendant urged that the hypnotic treatment undergone by the witness altered her recall of the events on the night her brother was murdered, thereby impermissibly tainting her subsequent identification of him at the courthouse, and at trial. Independent evidence corroborating her identification was significant in terms of establishing its validity and basis in her recall.

The existence of corroborating evidence in a case raising the broader issue of admissibility of testimony of a hypno-restored witness is pertinent only as it bears on the credibility of the evidence. So long as a proper foundation is adduced, the revived witness’ testimony requires no corroboration in order to be admitted for consideration by the trier of fact. The proper approach is to allow the

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43. Formal education is not a requirement to be considered an expert. To render an opinion an expert need only possess special skill and knowledge beyond that of the ordinary layman. Buckler v. Sinclair Ref. Co., 68 Ill. App. 2d 283, 216 N.E.2d 14 (1966). Non-medical personnel have often been held qualified to give an opinion on medical questions because of practical experience in the area. See, e.g., Hocker v. O’Klock, 16 Ill. 2d 414, 158 N.E.2d 7 (1959); Piacentini v. Bonnefil, 69 Ill. App. 2d 433, 217 N.E.2d 507 (1966). Thus, it is not necessary for the physician to specialize in hypnosis in order to qualify as an expert. A practicing hypnotist, who is not a doctor, would also qualify. See generally Spector, Who is An Expert, 1977 ILL. JUDICL CONF. REP. 144.

44. 68 Ill. App. 3d 379, 388, 385 N.E.2d 848, 855.

45. See notes 29 through 32 supra and accompanying text.

46. See notes 36 through 38 supra and accompanying text.

47. 68 Ill. App. 3d 379, 388, 385 N.E.2d 848, 855.

hypnotically-refreshed witness to testify, and reserve the existence of corroboration as a means for gauging the sufficiency of the evidence to sustain a verdict.49

Finally, the court noted that "the evidence showed that at the time of the occurrence, the witness had ample opportunity to view [defendant]."50 This observation merely states the first-hand knowledge requirement, a precondition to the testimony of any witness,51 and thus does not peculiarly relate to admissibility of testimony of a hypno-restored witness.

The second concern, that lay jurors may accord disproportionate weight to hypno-induced testimony, is neutralized by proper instruction. A touchstone of our adversary system is the conviction that jurors are endowed with sophistication sufficient to enable them to exercise discrimination in culling permissible uses for a piece of evidence from among several impermissible uses. Forceful, clear instruction explaining the restorative function of hypnosis as a memory aid, rather than as a mechanical indicator of veracity, should adequately secure the jury's ability to assess the significance and credibility of a hypno-revived witness' testimony.52

b) Additional Uses

The Smrekar majority noted that "when the test results of hypnosis of a witness have been offered in evidence through the testimony of the examining expert as to what the witness told the expert while under hypnosis, the courts have, apparently uniformly, ruled this testimony to be inadmissible."53 The import of this statement is

49. Harding v. State, 5 Md. App. 230, 246 A.2d 302 (1968). Contra, Greenfield v. Commonwealth, 214 Va. 710, 204 S.E.2d 414 (1974) (testimony from witness whose memory has been hypnotically restored is admissible only where substantially corroborated by other evidence). It has been argued that restricting admission of testimony of a hypnotically-restored witness is not only erroneous as a matter of evidence law, but also may deprive defendant of due process under the authority of Chambers v. Mississippi, 410 U.S. 284 (1973). Spector & Foster, supra note 2, at 610-13.


52. A sample instruction is as follows:

You have heard the testimony of a witness whose memory was restored when [s]he underwent hypnosis. You have also heard the testimony of the doctor [expert] who conducted the hypnotic session[s] regarding the effectiveness of hypnosis as a means of restoring lost memories. The fact that a witness has been hypnotized does not relate in any way on his/her credibility, and does not entitle his/her testimony to any particular weight. The testimony of a witness who has been hypnotized must still be evaluated and weighed by you very carefully. You are the sole judges of the facts of this case, and that includes the reliability of each and every witness, and the weight to be placed on the testimony of each.

unclear. If the court is saying that statements uttered by the subject while in hypnotic trance have not been admitted when offered as proof of the truth of the content of those statements, the court's observation is accurate. If, however, the court is suggesting that use of hypno-induced evidence is limited to a restorative function, the statement is clearly incorrect. A number of uses for hypno-retrieved evidence are feasible, some of which are proper, some of which are improper. Analysis of the propriety of injecting evidence adduced with the aid of hypnosis into the trial process must proceed on the basis of the articulated purpose for which the evidence is offered, not simply on the basis of a rule which decrees the admissibility or inadmissibility of such evidence. Thus, for example, an attempt by an operator to testify that the version of an event related by the witness at trial was identical to the account that the witness related while under hypnosis would constitute impermissible accretion and should be disallowed.

Evidentiary considerations aside, this use of hypnosis distorts its utility by torturing its function to conform to that of a truth-determinant, a role to which this phenomenon is ill-suited.

A legitimate use of hypnosis in the trial process is as part of the basis for an expert opinion regarding the mental state of the hypnotic subject. Contrary to the traditional position regarding permissible data upon which an expert might depend in the formulation of an opinion to be elicited in the trial context, Illinois, in People v. Ward, has apparently embraced the logical viewpoint embodied in Rule 703 of the Federal Rules of Evidence. Rule 703 wisely

56. Traditionally, an expert witness lacking first-hand knowledge is permitted to testify only on the basis of hypothetical questions; many jurisdictions require that the data contained in the question be material that has been, or will be admissible at trial. E. Cleary, McCormick's Handbook of the Law of Evidence §§ 14-15 (2d ed. 1972). The rationale supporting this position was prevention of contamination of the trial by hearsay and other unreliable information being cloaked by the expert's opinion. This position is obviously erroneous, since much of the data and knowledge forming the basis for the expert's opinion are not independently provable at trial. Basis material merely serves an explicative function, and is therefore not offered as proof of the truth of the matter asserted.
58. Fed. R. Evid. 703 provides:
The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.
permits an expert to adapt and utilize in formulating an opinion any material which an expert would reasonably rely upon. As a scientific phenomenon, hypnosis is a tool of recognized utility in the treatment of amnesia and other psychological problems; it is effective because of its capacity to ferret out data for use in treatment. The usefulness of this data for the psychotherapist is in no way dependent upon its veracity. Therefore, allowing an expert to formulate a conclusion based upon hypnotic contact with the subject, and to state that conclusion for consideration by the finder of fact, accords with established law in both Illinois and the federal system.

The Smrekar majority cited two cases, in support of its aforestated observation, which repudiated expert evaluation of mental state premised upon hypno-induced statements. However, the weight of judicial authority is contrary, sanctioning expert opinions based, at least in part, upon hypnotic statements. It should be noted parenthetically that in the cognate area of narcoanalysis Illinois courts have permitted experts to explain opinions premised on narco-induced statements.

The only remaining inquiry concerning the permissible use of hypno-induced statements as a premise for expert evaluation of mental state is the propriety of permitting the operator to relate statements made by the subject under hypnosis in order to clarify

60. See Spector & Foster, supra note 2, at 597-601.
61. Rodriguez v. State, 327 So. 2d 903 (Fla. Dist. Ct. App. 1976); Greenfield v. Commonwealth, 214 Va. 710, 204 S.E.2d 414 (1974). The remaining cases cited by the Smrekar majority held the proffered hypno-induced evidence inadmissible on other grounds. In Jones v. State, 542 P.2d 1316 (Okla. Ct. App. 1975), the testimony constituted impermissible accreditation of the subject's trial testimony. In State v. Pierce, 263 S.C. 23, 207 S.E.2d 414 (1974), defendant sought to elicit from the operator statements defendant had made while hypnotized which related to defendant's whereabouts on particular dates and to defendant's culpability in order to prove the substantive truth of those statements. The hypnotist was permitted to testify to knowledge regarding defendant's mental state which was gleaned from the hypnotic examination. Likewise, in State v. Pusch, 77 N.D. 860, 46 N.W.2d 508 (1951), defendant offered the results of his hypnotic examination as proof of his protestations of innocence contained therein.
the basis for the opinion and better equip the trier of fact to intelligently evaluate it. The hazard, of course, is that the jury may accord such evidence substantive weight. Although there is some indication that such utterances may be communicated to the finder of fact in explanation of the expert's opinion, it is submitted that, in accordance with judicial authority on this point, discretion must be lodged in the trial court to exclude the statements where it is determined that the risk of jury utilization of this material substantively outweighs the worth of the statements in terms of understanding the expert's opinion. Presumably, this would be the result in the federal system, and could be secured in Illinois through judicial adoption of a provision analogous to Federal Rule 705.

64. People v. Cartier, 51 Cal. 2d 590, 600, 335 P.2d 114, 121 (1959) (tape recording of statements made by defendant to psychiatrist while under narcoanalysis not hearsay when offered to explain basis and are therefore admissible). In Lemmon v. Denver & R.G.W.R.R., 9 Utah 2d 195, 341 P.2d 215 (1959), the court stated in regard to statements made by plaintiff to a psychiatrist while under narcoanalysis:

It is recognized that there is danger that such statements may be taken as evidence of the matters stated and also that being related by the doctor may give them an aura of authenticity beyond that of the original declarant. But this danger is present in a great deal of evidence which is hearsay when used for one purpose and not hearsay when used for another. However, the hazards therein are outweighed by the psychiatrist's need and obligation to demonstrate the foundation for his opinion so that the jury may intelligently evaluate it and may be guarded against by proper admonition to the jury as to the limited purpose for which the evidence is received.

Id. at 201, 341 P.2d at 219.

In a slightly different context, namely, the relationship of expert testimony to the formulation of a definition for and parameters of the insanity defense, Judge Bazelon has urged that "[t]he job of the expert is to give the jury the basic information it needs to make [its] decision — to tell the jury all he can about the defendant's mental and emotional processes, his behavior controls and about how he came to his unlawful act" (citation omitted). Bazelon, New Gods for Old: "Efficient" Courts in a Democratic Society, 46 N.Y.U.L. Rev. 653, 659 (1971). See also Washington v. United States, 390 F.2d 444, 452-55 (D.C. Cir. 1962) (en banc).


Predictably enough, the trial judge has generally excluded the statements, and this exclusion is affirmed on appeal. See, e.g., Connolly v. Farmer, 484 F.2d 456 (5th Cir. 1973); People v. Hiser, 267 Cal. App. 2d 47, 72 Cal. Rptr. 906 (1968); People v. Myers, 35 Ill. 2d 311, 220 N.E.2d 297 (1966); State v. Chase, 206 Kan. 352, 480 P.2d 62 (1971).

66. Fed. R. Evid. 705 provides:

The expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

The rule is clearly fashioned to eliminate the ineffactual and redundant hypothetical question. By implication, if the rule gives the court discretion to compel recitation of facts forming the basis for the expert's opinion, it also authorizes the court to refuse to permit recitation of
Finally, the question of substantive admissibility of hypno-
induced statements must be addressed. When offered as substan-
tive proof of the truth of content of the statements, this evidence is
susceptible to a recurring objection on hearsay grounds, regardless
of whether the declarant, the hypnotic subject, actually testifies at
trial. It is submitted, however, that if material hypnotically ad-
duced fulfills admissibility requirements for any established excep-
tion to the hearsay rule, the fact that the matter is a product of
hypnotic induction should have no bearing on admissibility, so long
as foundation requisites are satisfied.67

CONCLUSION

Advances in scientific research have removed hypnotism from the
realm of carnival diversion. Its value for a panoply of psychothera-
peutic purposes foreshadows widespread clinical and diagnostic use,
as well as accompanying increases in scientific research and theoreti-
cal evaluation. Judicial thought in clarifying the relationship be-
tween hypnotic phenomena and the evidentiary process must paral-
el this scientific progression, so that utilization of hypno-induced
statements results in development of hypnosis as a salutary litiga-
tion device.

In fact, adoption by the Illinois courts of an analogue to Rule 705 seems a natural conse-
quence of the court's espousal of the principles articulated by Rule 703. Although the winnow-
ing of data through the evaluative processes of the expert renders material reliable enough
to serve as a basis for the expert's conclusion, that same material might prove too provocative
or prejudicial to warrant its transmission to the trier of fact.

67. Cf. Connolly v. Farmer, 484 F.2d 456 (5th Cir. 1973). In that case, plaintiff sought to
introduce testimony of a physician and tape recordings of a hypnotic session, during which
plaintiff stated his speed prior to the accident was only 55 m.p.h. Plaintiff urged admissibility
under the hearsay exception for statements made to a treating physician. Although properly
excluded on hearsay grounds because the statements, relating to cause of the mishap, were
outside the parameters of the exception, admissibility would be warranted were the hypno-
induced statements properly within the confines of some recognized exception.
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