Hypnosis and Eyewitness Testimony

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The use of hypnosis to facilitate eyewitness recall and testimony has become increasingly controversial in the last decade. Hypnotic procedures have been used to: 1) stimulate recall for past details; 2) compel a witness to tell the truth; and 3) instill confidence in a subject's hazy recall. The last two uses are now understood to be unethical because they use strong social pressure to form a witness's conception of the truth. The first use, however, is at the heart of the current controversy. Some have claimed that hypnosis can facilitate the recall of past details, while others have claimed to show that it does not.

ADMISSIBILITY OF HYPNOTICALLY INFLUENCED TESTIMONY

Some courts have held hypnotically enhanced testimony to be inadmissible because, unless there is some type of independent verification, the relevant scientific community overwhelmingly maintains the inability of anyone to determine when any particular piece of information derived from someone who has been hypnotized is from actual memory or a confabulation. Using what is known as the "Frye test," the courts have ruled consistently that the scientific community has not accepted hypnosis and, therefore, the courts will not accept hypnotically enhanced testimony. Note that this is the same basis upon which polygraph examinations are excluded from courtrooms; because they have not reached the degree of acceptance in the scientific community to allow them to be admissible in courtrooms.

A second problem is that lay jurors are easily convinced by the so-called magical quality of hypnosis and the mistaken belief that a witness cannot lie under hypnosis. Furthermore, some believe that a witness who has been hypnotized to remember certain evidence will be impossible to cross-examine about the means by which they came to the conclusion that an event happened or that the defendant was the person who caused the incident. Therefore, if this is true, there is a denial of the constitutional right of cross-examination.

Understandably, because of the lack of professional agreement regarding the nature and mechanisms of hypnosis and the great potential for being misunderstood by a lay jury, courts have dealt with the problem in various ways. Some courts totally exclude any evidence obtained as a result of hypnotic enhancement. Other courts exclude any evidence obtained after hypnosis, but allow the parties to use that portion of the witness's testimony that they can establish was firm in the witness's mind prior to hypnotic enhancement. Other courts take the hypnosis issue on a case by case basis depending on how the hypnosis was utilized. Finally, some jurisdictions allow hypnotic testimony in evidence and allow the fact that the witness was hypnotized to be presented to the trier of fact (ie, the judge or the jury) to assess the credibility of the witness.

The jurisdictions that hold that hypnotically refreshed testimony of a witness is inadmissible...
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regardless of procedures and/or protections employed include the states of Arizona, California, Colorado, Indiana, Maryland, Michigan, Minnesota, Oklahoma, and Pennsylvania. The Federal Court of Appeals in Illinois, Wisconsin, and Indiana is now struggling with this problem. In United States v. Kimberlin the matter has been presented to the Court of Appeals and a decision is expected shortly. Those jurisdictions that would allow testimony obtained through the use of hypnosis and hold that it merely effects credibility are North Carolina, Missouri, Wyoming, North Dakota, and the Ninth Circuit Court of Appeals (covering Arizona, California, Idaho, Montana, and Nevada).

There are other jurisdictions that adopt rigorous procedural safeguards as prerequisites to the admissibility of hypnotically refreshed recollections. Those procedures, known as the Orne safeguards (named after their progenitor, Dr. Martin Orne), require amongst other things that:

1. The hypnotic session be carried out away from the police station, out of presence of the police;
2. The session be conducted by a licensed psychologist or psychiatrist, independent and not responsible to the prosecutor, investigator, or defense;
3. Any information given to the hypnotist by law enforcement personnel prior to the hypnotic session must be in written form so the extent of the influence of the hypnotist on the subject may be subsequently determined;
4. The hypnotist should also obtain from the subject a detailed description of the facts as the subject remembers them before a hypnotic induction is attempted;
5. All contacts with the hypnotist and the subject should be recorded so that a permanent record (videotape if possible) is available for study to establish that the witness’s report during hypnosis has not been contaminated by leading suggestions made by the hypnotist;
6. Only the hypnotist and the subject should be present during each phase of the hypnotic ses-

sion, including pre-hypnotic testing and post-hypnotic interview.

Note also that many of the safeguards set out in the Hurdl case were already adopted by the FBI in their earlier 1968 guidelines.

The reasons for the safeguards are sound: if the hypnotist is working for the police, the temptation may be so great in a major case that the police may impart knowledge to the hypnotist who, in turn, suggests the “correct” answers to the subject. For instance, if the police believe a bearded man is the culprit and tell that to the hypnotist, he/she may ask the subject during the hypnotic state, “Did the man have a beard?” rather than “Describe the man.” Because such questions can be suggestive, the need to visually and audibly record the questions and the subject’s responses is compelling. A summary of recent legal decisions that bear on the admissibility of hypnotically influenced testimony can be found in the Table.

EVIDENCE USED TO ASSESS ADMISSIBILITY

In order to assess the effect of hypnosis on eyewitness accounts, one must consider current scientific knowledge about the fallibility of eyewitness reports when no hypnosis is utilized. First, the assumption that all information to which an individual has been exposed is permanently stored in memory (i.e., the permanence assumption), appears doubtful when one critically examines the evidence offered in support of this proposition. Second, an individual’s recall of past events has been shown to be influenced by subsequent exposure to information about those events. Third, a witness’s subjective belief in the accuracy of their memory has been found to be unrelated to the objective verification of that memory. These observations underscore the fallibility of eyewitness testimony even when hypnosis has not been used.

ISSUES FOR ASSESSING THE EFFECTS OF HYPNOSIS

There is no universally agreed upon definition of hypnosis. The primary characteristic of this phenomenon is that the hypnotizable subject reports alterations in perception and/or memory that for the moment become highly credible.

Different contemporary theories of hypnosis vary in their explanation of the mechanism responsible for the subject’s altered perception/memory. However, whether this mechanism is described in terms of a “goal directed imagining,” as “role enactment,” as a form of “relaxation,” as a type of “focused concentration,” or in terms of “neodissociation theory,” all explanations acknowledge that
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COURTROOM USE OF TESTIMONY OBTAINED THROUGH THE USE OF HYPNOSIS

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e that believable fluctuations in perception/memory can be observed in hypnotizable individuals.

Both clinical observations and empirical research have verified that there are wide individual differences in response to hypnotic procedures. The distribution of these differences is bimodal, and only about 15% of the population are responsive enough to evidence most of the features historically associated with hypnosis. In contrast, approximately 25% of the population show little or no responsibility. The rest of the population respond in varying degrees. Individual differences in hypnotic responsivity or hypnotizability have also been shown to be stable across time, consistent across different examiners, and show only small relative gains in response to modification procedures. Collectively the evidence strongly suggests that hypnosis is more accurately characterized as a trait and is not a universally experienced human phenomenon. This means that it is more appropriate to speak of hypnotizability rather than hypnosis.

Hypnosis has been popularly regarded as a type of treatment and as a type of retrieval technique. It has been argued, however, that hypnosis is a phenomenon in its own right and that it can be used adjunctively with almost all current therapeutic procedures. Likewise, it can be argued that
hypnosis is not a retrieval technique, although it can be utilized in conjunction with most current retrieval procedures (eg, direct suggestion for memory enhancement, mind as video-recorder technique, contextual reinstatement).

Two considerations that typically arise when evaluating the admissibility of hypnotically influenced eyewitness testimony may be labeled as: 1) the accuracy issue; and 2) the susceptibility issue. Although these two issues are somewhat related, we will discuss each separately.

Accuracy Issue
This issue deals with whether hypnotically refreshed memories are accurate. A number of studies conducted in the laboratory have claimed to demonstrate that they are not. Such studies have been criticized because:

1. The material to be remembered was not meaningful to the subject;
2. The material was not associated with an affective change, which usually accompanies memories for a highly traumatic event;
3. Most of the studies only utilized subjects who scored in the extreme ranges of the hypnotizability distribution;
4. Only a limited number of retrieval techniques have been studied.

Other experiments, however, have shown that hypnosis used in combination with some type of retrieval technique can lead to an increase in the amount of accurate information reported by the witness. For a more in-depth evaluation of studies that have addressed the accuracy issue, the interested reader is referred to more comprehensive sources.

Unfortunately, outside the laboratory it is next to impossible to objectively verify the accuracy of hypnotically refreshed memories. Therefore, some states require corroborated post-hypnotic testimony as a requisite for admissibility. That is, hypnotic testimony alone is not sufficient and must be substantiated by other sources before it can be admitted into evidence. Examples of such corroboration may be the recalling of a license plate of a car through hypnotic enhancement and later it is determined that there is such a car and the person with that car was involved in the incident. Those states that require corroboration include Alaska and Iowa, along with the U.S. Court of Appeals for the Fifth Circuit Court (which includes Texas, Louisiana, and Mississippi).

Susceptibility Issue
This issue deals with whether hypnotically influenced testimony is susceptible to misleading information, such as leading questions. A number of laboratory based studies have clearly demonstrated that such contamination can take place without the subject's awareness. Subjects in such studies have reported a high degree of confidence in their hypnotically misled recollection, even when confronted with the correct information. Unfortunately, many of the criticisms listed above of laboratory studies can also be applied to these experiments.

Note also that the susceptibility problem becomes a non-issue if the hypnotist minimizes the demand characteristics of the hypnotic interview and avoids using leading questions. The Orne safeguards were developed for this purpose. In addition, a recent study conducted by Geiselman and his associates has shown that trained forensic hypnotists do avoid using misleading questions. When leading questions were inadvertently introduced during a hypnotic interview, the amount of contamination did not exceed that of a group of subjects accidentally exposed to leading questions in a non-hypnotic forensic interview. Thus, susceptibility to leading questions was not facilitated by exposure to hypnotic beyond what would be expected when no hypnosis was utilized.

CONCLUSION
Hypnosis can be a helpful investigative tool, but unlike polygraph exams, which are also used in investigations, it is believed by some that the memory of a hypnotized witness may be forever tainted by the hypnosis session. Whether the testimony given by a hypnotized witness comes from the true recollection of the events at the time of the incident in question, or as a result of a leading hypnotic suggestion, is almost impossible to determine. To allow that witness to testify without providing safeguards can mean that innocent people may be convicted. Therefore, the police must decide whether the use of hypnosis is warranted before such procedures are utilized. The trade off between developing new leads and the risk of further contaminating a witness's recollection must be carefully considered in a free society concerned about due process of law.

REFERENCES
7. 293 F. 2d 1013 (D.C. Cir 1929).

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