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NOTES AND COMMENTS

NOTE: HYPNOTISM—MODERN LEGAL DEVELOPMENTS

Despite the fact that hypnosis is as old as human history and had been practiced by ancient civilizations, it has remained an area of great uncertainty. It has been suggested that mankind's experience with hypnotic phenomena may be divided into three eras:

- (1) the period in which hypnosis was concerned with soothsaying, magic, healing and witchcraft;
- (2) the period of Mesmer, a Viennese physician, who in 1766 put forth the claim that man was susceptible to influences from the stars and from other persons through the medium of a universal fluid; and
- (3) the modern period, begun in 1841 when Mesmer's theory of magnetic fluid or other occult influences was rejected by Dr. Braid, an English physician who asserted that hypnotic phenomena are of a mixed nervous and mental character.¹

One of the problems inherent in any study of hypnosis is that of its definition.²

¹ Ladd, *Legal Aspects of Hypnotism*, 11 YALE L.J. 173, 174 (1902).

² See Orne, *The Nature of Hypnosis: Artifact and Essence*, 58 JOURNAL OF ABNORMAL & SOCIAL PSYCHOLOGY 277, 296 (1959). The author states: "There is a high consensus of opinion about what constitutes hypnosis in terms of a variety of scales. However, the essential characteristics have re-

The American Medical Association has defined hypnosis as "a temporary condition of altered attention in the subject which may be induced by another person and in which a variety of phenomena may appear spontaneously or in response to verbal or other stimuli."³ Another definition has emphasized the heightened suggestibility during the trance state,⁴ while still another has described it simply as "a passive state of mind, akin to ordinary sleep."⁵

In addition to these definitions, there are various theories interpreting hypnotic phenomena and describing the psychophysical stages through which an individual passes while under the influence of hypnosis.⁶

mained obscure."

³ GORMLEY, *MEDICAL HYPNOSIS—HISTORICAL INTRODUCTION TO ITS MORALITY IN THE LIGHT OF PAPAL, THEOLOGICAL AND MEDICAL TEACHING* 26-27 (1961). Included in the phenomena are the following: consciousness and memory alterations, heightened susceptibility to suggestion, the rigidity of muscles, anesthesia, paralysis and the subject's production of responses and ideas which are unfamiliar when he is not under hypnosis.

⁴ WARREN, *DICTIONARY OF PSYCHOLOGY* (1934).

⁵ RHODES, *THERAPY THROUGH HYPNOSIS* 2 (1961). However, hypnosis should not be confused with sleep. In sleep the subconscious mind comes to the fore without external direction while in hypnosis the subconscious is subject to the hypnotist's control.

⁶ Orne, *supra* note 2, at 277, 297; DORCUS, *HYPNOSIS AND ITS THERAPEUTIC APPLICATIONS* 3-27 (1956). After discussing five theories, the author

Within the past twenty years the practice of hypnosis has been used increasingly in the field of medicine for the relief and cure of nonorganic disorders and psychic disturbances.⁷ It has also been used as an anesthetic "in certain manipulative and operative procedures and in childbirth."⁸ Indeed, it has been used in the delicate area of brain surgery.⁹

Despite the many advantages of modern hypnosis, there are several disadvantages in its use. Since an individual under hypnosis is highly susceptible to the suggestions of the hypnotist, and since no single technique has yet been perfected, a slight mistake by the practitioner could leave the subject in a state of permanent mental depression.¹⁰

concludes that there is actually no adequate theory of hypnosis. See also 1 WOLBERG, *MEDICAL HYPNOSIS* 106-07 (1948); CAPPENS, *MORAL PRINCIPLES AND MEDICAL PRACTICE* 203-04 (1921). It is interesting to note that hypnotic phenomena are daily occurrences of many individuals. An example of such daily hypnotic phenomena is modern advertising which is based largely upon inducing suggestibility in consumers. See Note, *Hypnotism, Suggestibility and the Law*, 31 NEB. L. REV. 575, 587 (1957).

⁷ RHODES, *op. cit. supra* note 5, at 11. This text is essentially a compilation of case histories and reports of how hypnosis cured alcoholism, various gynecological disorders, suicidal tendencies, insomnia, asthma, excessive smoking and impotence.

⁸ 1 TAYLOR, *PRINCIPLES AND PRACTICE OF MEDICAL JURISPRUDENCE* 78 (11th ed. 1956). In the field of psychology, hypnosis may be used as a means for commanding the disappearance of disturbing symptoms resulting from traumatic experiences. NOYES & KOLB, *MODERN CLINICAL PSYCHIATRY* 639-40 (5th ed. 1958). See also CAPPENS, *op. cit. supra* note 6, at 202-03.

⁹ For an interesting account of the use of hypnosis in delicate brain surgery, see 52 *SCIENCE DIGEST* 44 (Dec. 1962); see SCHNECK, *HYPNOSIS IN MODERN MEDICINE* 55 (1959) where the author likens hypnosis to both a "psychological scalpel" and a "psychological microscope."

¹⁰ CAPPENS, *op. cit. supra* note 6, at 206-11; 50 *SCIENCE DIGEST* 15-16 (Sept. 1961) (where hyp-

At the present time hypnosis is being studied primarily by the medical profession, but recent breakthroughs and the resulting legal problems now call for a serious analysis of the area by the legal profession. Because of the paucity of legal studies of hypnotic phenomena, the purpose of this note is to acquaint the reader with modern developments from a legal and moral standpoint.

Regulation by Statute

It has been pointed out recently that the study of hypnotic phenomena is still greatly in the experimental stage and is subject to divergent views by various schools of thought.¹¹ Because experimentation is continuing and the public may be exposed to abuses, several states have enacted statutory regulation. As early as 1902 one legal scholar had called for statutory regulation of hypnotism used in public exhibitions.¹² At present, some states have enacted legislation aimed at preventing public demonstrations of hypnotized subjects, the violation of which is punishable by imprisonment and fine.¹³ Other states have concentrated on the protection of minors in this area.¹⁴ Virginia limits the practice to a

notic treatments rendered to a schizoid personality resulted in serious mental depression).

¹¹ Sutcliff, "Credulous" & "Skeptical" Views of Hypnotic Phenomena, 62 *JOURNAL OF ABNORMAL & SOCIAL PSYCHOLOGY* 189, 200 (1961).

¹² Ladd, *Legal Aspects of Hypnotism*, 11 *YALE L.J.* 173, 191 (1902). The author noted that Belgium forbade the public exhibition of hypnotized subjects and the hypnotizing of anyone under the age of eighteen.

¹³ *E.g.*, ORE. REV. STAT. § 167.705 (1961); NEB. REV. STAT. § 28-111 (1943); S.D. CODE §§ 13.3501-03 (1939).

¹⁴ *E.g.*, KAN. GEN. STAT. ANN. § 38-703 (1949); WYO. STAT. §§ 14.8-9 (1957).

licensed physician or surgeon in the practice of his profession.¹⁵ Maine has adopted a liberal position by allowing hypnotic cures, provided no dangerous or poisonous drugs are used and no surgical operations are performed.¹⁶ Increased governmental regulation has been advocated in the same manner as the Food and Drug Laws, Narcotics Laws, and Medical Practice Laws regulate their respective fields.¹⁷ Certainly, as hypnotism becomes more developed and consequently more frequently used, governmental restraints should be increased to protect the public from various abuses.

Admissibility as Evidence

Paralleling the increased use of hypnosis by the medical profession is the growth of various legal problems, not the least of which is the problem of the admissibility of evidence procured through the use of hypnosis. In the case of *People v. Ebanks*¹⁸ the defendant denied his guilt while in an hypnotic state. The Supreme Court of California refused to admit such testimony and held that hypnosis was not recognized in the United States and that a defense based on statements made under an hypnotic state would be illegal.¹⁹ In a more recent case,²⁰ the Supreme Court of North Dakota refused to admit the defendant's evidence, consisting of the testimony of an expert as well as various recordings of the defendant's denial of guilt made while in an hypnotic trance. The evidence was excluded despite the fact that the doctor was thoroughly familiar with

performing the mechanics of the test, that the prosecuting counsel had been invited to attend but had declined, and that the defendant alleged that the questionnaire was unbiased. The court simply reasoned that no previous cases had admitted evidence obtained by hypnosis.²¹

The California Supreme Court, however, appears to have discarded the theory enunciated in the *Ebanks* case that such evidence is inadmissible because hypnosis is not fully accepted in the United States. Recently, in the case of *Cornell v. Superior Court of San Diego County*,²² that court noted that hypnosis has been accepted by the medical profession as a legitimate science.

In spite of the recent acceptance of hypnosis by the medical profession, the courts may, nevertheless, exclude the testimony of a hypnotist as to what a person stated while under an hypnotic trance because of the hearsay rule. The principal objection to admitting hearsay testimony into evidence is the fact that the declarant is not available for cross-examination. It does not appear, however, that the hearsay objection will be overcome even if the declarant is available for cross-examination. The person who takes the stand differs to a certain extent from the person who made the statements under an hypnotic trance. Therefore, the cross-examination of the un hypnotized person as to what he said while in an hypnotic state would not satisfy the hearsay objection.

¹⁵ VA. CODE ANN. § 18.1-414 (1950).

¹⁶ ME. REV. STAT. ANN. § 8 (1954).

¹⁷ II WOLBERG, MEDICAL HYPNOSIS 504 (1948).

¹⁸ 117 Cal. 652, 49 Pac. 1049 (1897).

¹⁹ *Id.* at 665, 49 Pac. at 1053.

²⁰ *State v. Pusch*, 77 N.D. 860, 46 N.W.2d 508 (1950).

²¹*Id.* at 888, 46 N.W.2d at 522; see *People v. Worthington*, 105 Cal. 166, 172, 38 Pac. 689, 691 (1894), where the court, although holding evidence obtained through hypnosis inadmissible, emphasized the insufficiency of evidence as to whether or not the defendant was actually under hypnosis.

²² 52 Cal. 2d 99, 103, 338 P.2d 447, 449 (1959).

Aside from the problem presented by the hearsay rule, the questions of the competency of a witness-hypnotist and the competency of the hypnotic method employed are also presented. In the case of *People v. Busch*,²³ the court held testimony based upon an hypnotic examination to be inadmissible, but it did so on the grounds that a proper foundation as to the reliability of the hypnotic technique and the qualifications of the witness were not sufficiently established. On the question of competency, a distinction is drawn between opinions of physicians who treated the patient and those who merely made an examination to qualify as expert witnesses. In the case of *Peterson v. Department of Labor & Indus.*,²⁴ the Washington Supreme Court stated that opinions of treating physicians based on the statements of their patients and the doctor's own examination were admissible on the theory that the patient has told the truth in a good faith attempt to be cured.²⁵

A trend toward relaxing the restrictions against this type of evidence is found in the recent admission of testimony procured through the use of "truth serums." In the case of *People v. Jones*,²⁶ the court admitted testimony by a psychiatrist based on his examination of the defendant who was under the influence of "truth drugs," but only to determine the sanity or insanity of the defendant. This rule was reiterated in the later case of *People v. Cartier*.²⁷ By analogy, there is little reason why the same rule of admissibility should not be applied in the area of hypnosis, since the court in

the case of *People v. McNichol*²⁸ likened the state of mind under "truth drugs" to that of the hypnotic state.

The Problem of Self-Incrimination

Wigmore has stated,

If medical science or psychic science, represented by an accord among the experts of the science, establishes the trustworthiness of a confession induced by some artificial means known to such science, then a confession so induced should be admissible.²⁹

The privilege against self-incrimination prevents the admissibility of a confession obtained through coercive hypnosis. In the case of *Leyra v. Denno*,³⁰ the United States Supreme Court held that admissions of guilt, mentally coerced by a highly skilled psychiatrist well versed in the practice of hypnosis were inadmissible as a violation of due process. Although it did not wish to expressly invade the province of the jury by a finding that hypnosis was employed, the Court did find such a high degree of suggestibility in the method used by the psychiatrist as to allow an inference of hypnosis.³¹ There are, however, other areas where courts will find it necessary to strike a delicate balance between the admissibility of evidence and self-incrimination. It has been asserted in the area of drug-induced

²³ 16 Cal. Rptr. 898, 366 P.2d 314 (1961).

²⁴ 36 Wash. 2d 266, 217 P.2d 607 (1950).

²⁵ *Id.* at 610.

²⁶ 42 Cal. 2d 219, 266 P.2d 38 (1954).

²⁷ 51 Cal. 2d 590, 335 P.2d 114 (1959).

²⁸ 100 Cal. App. 2d 554, 558, 224 P.2d 21, 24 (1950).

²⁹ 3 WIGMORE, EVIDENCE § 841 (a) (3d ed. 1940).

³⁰ 347 U.S. 556 (1954).

³¹ *Id.* at 561. An example of the psychiatrist's method objected to by the Court and closely related to hypnosis is: "I am going to put my hand on your forehead, and as I put my hand on your forehead, you are going to bring back all these thoughts that are coming to your mind. I am going to keep my hand on your forehead and I am going to ask you questions, and, now you will be able to tell me." *Id.* at 565.

statements (truth serum) where the drug is administered with consent, that the statements obtained are not within the privilege against self-incrimination.³² Cases involving the use of lie detectors have held admissible resulting confessions where the defendant agreed to the test, or did not oppose it, and there were no improper inducements or threats.³³ By analogy, a confession obtained through hypnotic means, if not coerced, should be admissible.

Hypnotism as an Aid in Trial Preparation

At the turn of the century the value of hypnotism for detective purposes was suggested.³⁴ One author has stated that hypnotism may be helpful in obtaining the proper clues that will eventually lead to a conviction through legally admissible means.³⁵

Hypnotism may also be constructively used by a defendant. For example, where an accused murderer was unable to recall his whereabouts at the time of the alleged murder because of shock or intoxication, it was held that the accused's constitutional right to counsel included the right of counsel to employ expert hypnotists to aid in the

construction of a proper defense.³⁶ It should be pointed out, however, that the courts have not gone so far as to allow hypnotic demonstrations in the courtroom itself. Such refusals have been upheld on the ground that such demonstrations come within the discretion of the trial court.³⁷

Hypnotism as an Instrument of Crime

There are basically two areas in which hypnotism may be used as an instrument of crime. The first is the area in which crimes are committed upon a hypnotized subject. The crimes most frequently perpetrated upon hypnotized subjects are in the nature of sexual assaults,³⁸ since the susceptibility and suggestibility of the hypnotized individual is greatly increased.³⁹ Thus, the legal problem is raised whether a person who assaults a female subject may be guilty of rape. The problem becomes further complicated when the female subject consents to be hypnotized.

In the case of *Harlan v. People*,⁴⁰ a dentist who assaulted a patient after he had administered chloroform to her, was subsequently convicted of rape. By analogy, it would seem that a sexual assault after hypnosis should be categorized as rape.⁴¹ It

³² See *People v. Esposito*, 287 N.Y. 389, 39 N.E.2d 925 (1942); MCCORMICK, EVIDENCE § 126 (1954).

³³ *State v. Collett*, 144 Ohio 639, 58 N.E.2d 417 (1944); *State v. Dehart*, 242 Wis. 562, 8 N.W.2d 360 (1943). See Dession, Freedman, Donnelly & Redlich, *Drug-Induced Revelation and Criminal Investigation*, 62 YALE L.J. 315, 333 n.57 (1953).

³⁴ Ladd, *Legal Aspects of Hypnotism*, 11 YALE L.J. 173, 188 (1902).

³⁵ Allen, *Hypnotism and Its Legal Import*, 12 CAN. B. REV. 14, 92 (1934). There is always the danger, however, that law enforcement agencies will become oppressive and therefore, use of hypnotism in this area should be curtailed.

³⁶ *Cornell v. Superior Court of San Diego County*, 52 Cal. 2d 99, 338 P.2d 447 (1959). For an interesting report of the *Cornell* case relating how hypnosis, used to obtain pre-trial evidence, saved a man from the gas chamber, see BRYAN, LEGAL ASPECTS OF HYPNOSIS 57-70 (1962).

³⁷ See *People v. Marsh*, 170 Cal. App. 2d 284, 338 P.2d 495 (1959).

³⁸ Ladd, *supra* note 34, at 178.

³⁹ *Id.* at 176.

⁴⁰ 32 Colo. 397, 76 Pac. 792 (1904).

⁴¹ An interesting case wherein hypnotism was used as an instrument of crime is *Louis v. State*, 24 Ala. App. 120, 130 So. 904 (1930). The defendant was convicted of common-law robbery on evidence tending to show that he hypnotized a

has been asserted, however, that the hypnotized subject is not merely a tool in the hands of the hypnotist, but, on the contrary, the subject's will is likely to manifest itself unexpectedly during the hypnotic state.⁴² It is possible under this theory, therefore, that a woman who consents to be hypnotized, under circumstances where sexual relations are foreseeable, may be deemed to have consented.

Some modern psychiatrists, on the other hand, believe that the subjects of hypnosis are influenced by suggestion as the subject tends to accept ideas without analysis. They contend that the factors accompanying critical thought appear to deteriorate under hypnosis.⁴³ Under this school of thought an assaulted woman, while under hypnosis, cannot consent freely to sexual acts.

This is, however, a highly problematical area since suggestibility varies with the individual.⁴⁴ The evidentiary problems are vast. For example, in the case of *State v. Donovan*,⁴⁵ the complainant alleged that the defendant combined flattery and hypnotism to make her yield to acts of intercourse. The testimony given was unclear as to whether hypnosis was actually employed,⁴⁶ but the

woman, causing her to withdraw her money from a bank and to hand it to him. Because no violent taking or fear was established, the court reversed the conviction.

⁴² Allen, *supra* note 35, at 18.

⁴³ GORMLEY, *MEDICAL HYPNOSIS* 47 (1961). For another view that increased suggestibility means an increase in motivation to conform to the wishes of the hypnotist, see Orne, *The Nature of Hypnosis: Artifact and Essence*, 58 *JOURNAL OF ABNORMAL & SOCIAL PSYCHOLOGY* 277-99 (1959).

⁴⁴ GORMLEY, *op. cit. supra* note 43 at 50. The author suggests three factors to consider. They are the training of the subject, the depth of the trance, and the rapport with the hypnotist.

⁴⁵ 128 Iowa 44, 102 N.W. 791 (1905).

⁴⁶ *Id.* at 792. The complainant testified as to the

court accepted evidence on the effect of hypnotic influences, leaving to the jury the question of where flattery terminated and hypnosis commenced.

The second area is that of crimes committed through hypnotized subjects. Some experts are of the opinion that an hypnotic suggestion to do a criminal act would be of little success, though it is possible. The reason for this is that successful suggestion varies directly with the morality of the act called for and its public benefit.⁴⁷ In other words, it is difficult to force a person to commit an act which he or she feels is immoral. However, suggestions may be so phrased as to conceal the fact that they are of a criminal nature, thereby eliminating a revolt of conscience. In addition, there are many acts which a person might be induced to perform which are in no way criminal, and yet which might have disastrous results.⁴⁸

Another problem in this area is the guilt or innocence of the hypnotized person committing the criminal act. An authority has

following: "All I can tell, he had an influence over me in some way — whether through flattery or hypnotism I can't say. I kind of liked him. I don't know if I would have yielded if he hadn't told me that he loved me. I can't tell anything about it. No one knows. I can tell what was done." See *Austin v. Barker*, 110 App. Div. 510, 96 N.Y. Supp. 814 (1906), where in a prosecution for seduction, the girl claiming to have been hypnotized, evidence of the seduction obtained under a subsequent hypnotic examination was held insufficient to support a conviction.

⁴⁷ GORMLEY, *op. cit. supra* note 43, at 63. For example, a subject was induced to steal a watch. He refused, but when it was suggested to him that the watch was his own, and that he was only taking it back, he obeyed the command.

⁴⁸ Allen, *Hypnotism and Its Legal Import*, 12 *CAN. B. REV.* 14, 84 (1934). (For example, inducement to sign promissory notes, deeds of gift, large donations to charity and signing testamentary dispositions).

stated that "hypnotic influence is a defense to a criminal act committed at the will of the hypnotist when the hypnotic does not know what he is doing or is totally unable to desist."⁴⁹ The theory is that the conduct results from the complete domination of the hypnotist and thus making the hypnotic incapable of committing the crime.⁵⁰

Serious evidentiary problems arise here as well. It is possible that a person already intending to commit a crime would cause himself to be hypnotized, having the dual purpose of overcoming inhibitions and evading punishment should he be apprehended.⁵¹

Perplexing legal problems are also raised by the phenomenon of post-hypnotic suggestion. Here the subject is not in a trance, but is influenced psychologically.⁵² Should the person committing the criminal act under post-hypnotic suggestion be considered innocent? The answer to this question should depend on whether or not the person was powerless to resist the suggestions to commit criminal acts.⁵³

Conclusion

It would appear from the great attention given hypnotism by the medical and psychological professions that its use has very definite advantages in various fields. On the other hand, much of the science is in the

experimental stage and only a highly skilled medical technician should be allowed to practice hypnotism. Increased governmental regulation as to the use of hypnotism and the persons who may practice it is desirable.

Moreover, an educational campaign should be instituted to acquaint the public with the virtues of hypnotism as a healing art. Such a campaign would not only tend to overcome unnecessary fears as to morality that have impeded the progress of hypnotism, but would also dispel in the minds of many the belief that hypnotism is an occult art.

The Catholic Church has adopted a liberal position on the science of hypnosis which is exemplified by Pope Pius XII's statement that hypnosis is morally permissible under certain circumstances and should be left to prudent medical judgment.⁵⁴

Unfortunately, the legal profession has not kept pace with this expanding science. As the use of hypnotism becomes more widespread, its legal problems will undoubtedly increase. Sufficient problems now exist for an intensive study by legal scholars. Some legal problems connected with hypnosis parallel those presented by "truth drugs" and lie detectors, and analogies between these areas should be helpful in such a study.

Perhaps, it would be wise to cooperate with the medical profession in a joint study of the medico-legal problems posed by hypnosis. Such joint studies have proved successful in the fields of narcotics and mental health. In any event, more attention by the legal profession is required.

⁴⁹ DANGEL, CRIMINAL LAW §§ 91, 127 (1951).

⁵⁰ *Id.* at § 127.

⁵¹ Allen, *supra* note 48, at 86.

⁵² RHODES, THERAPY THROUGH HYPNOSIS 11 (1961).

⁵³ Note, *Hypnotism, Suggestibility and the Law*, 31 NEB. L. REV. 575, 589 (1957). However the tendency to criminal activity is latent in all of us, thereby making the entire area problematical. Allen, *supra* note 48, at 85.

⁵⁴ GORMLEY, MEDICAL HYPNOSIS 114-15 (1961).