Truth Verifiers: From the Hot Iron to the Lie Detector

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Truth Verifiers: From the Hot Iron to the Lie Detector

BY RICHARD H. UNDERWOOD*

I. THE OATH — FUNCTION AND FORM

Seek the advance of truth this or that way.¹

Thousands, careless of the damning sin,
Kiss the book's outside, who ne'er look'd within.²

The ancient Egyptians believed that it was the system of rules maintained by their kings that held chaos in check. That system was ma'at. (Plate A — showing the goddess Ma'at.)

The equilibrium of the universe and the cohesion of its elements, the rotation of the seasons, the movements of the heavenly bodies, the diurnal course of the sun — and amongst human beings, proper observance of religious obligations and rituals by the priests, fair dealing and honesty and truthfulness in personal relations — all this was included in ma'at [m]a'at came to be imagined as the base on which the ordered world itself rested.³

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¹ John Bunyan, Author's Apology, in THE PILGRIM'S PROGRESS (1957).
² William Cowper (1731-1800).
³ NORMAN COHN, COSMOS, CHAOS, AND THE WORLD TO COME: THE ANCIENT ROOTS OF APOCALYPTIC FAITH 9-10 (1933).
At death, the Egyptian faced a final trial, with identifiable players — the prosecutor, witnesses, and a supreme judge. The heart of the deceased was weighed on a scale. Across the balance beam there rested the feather of *ma'at* (see Plate B) or some derivative or related hieroglyph. Souls found wanting were "plunged into the chaos that surrounded the ordered world;" they were "[n]aked, starving, deaf and blind, cut off from any contact with the sun-god or with Osiris."\(^4\)

So also in ancient Vedic India, there was a *ma'at* equivalent, namely *rita*. The moral order to be followed by humans was an aspect of *rita*. "Speech that was in accord with *rita* was truthful speech; conversely, where *rita* prevailed there was no place for lying — or for liars."\(^6\) The God Varuna watched over *rita* and was in charge of enforcement activities.\(^7\) To give false witness was to commit a particularly abominable crime, and Varuna was the god of the oath. Violators of the oath were "bound by Varuna’s fetters" and cast into chaos.\(^8\) "Swearing an oath was a religious act . . . and the words pronounced were endowed with supernatural force, which would turn back on anyone who swore falsely."\(^9\)

In turn, the Iranians identified the very forces of evil as *druj* — "The Lie" — and later Zoroaster incorporated the rule of truth telling into his laws and rituals of purity, which were "regarded as safeguards against the demonic hosts."\(^10\) Is it any wonder then that the later Christian apocalypse would cast "all liars . . . in the lake which burneth with fire and brimstone; which is the second death."\(^11\)


\(^6\) COHN, *supra* note 3, at 66.


\(^8\) Underwood, *supra* note 7, at 226 (quoting the Laws of Manu as found in HENRY C. LEA, THE DUEL AND THE OATH 25 (1974)).


\(^10\) Id. at 82, 92.

Funerary papyrus of the Princess Entiu-ny, daughter of King Pay-nudjem, from the tomb of Queen Mery et-Amun, at Bahri, Thebes. The Metropolitan Museum of Art, Museum Excavations, 1928-1929 and Rogers Fund, 1930 (30.3.31).
"Oaths were not purposed’d more than law
To keep the good and just in awe,
But to confine the bad and sinful
Like mortal cattle in a penfold."

Even we sophisticated modems, who place so much trust in a growing body of man-made law when it comes to holding chaos in check, still require our witnesses to swear an oath to tell the truth; only in these irreligious days the purpose of the oath is meant to bring home to the witness the importance of truth telling and the threat that any lies may be punished by the state. "The trial court must fashion an oath or affirmation that is meaningful to the witness . . . ." As one modern opinion put it (not so sensitively, perhaps), it is appropriate to "permit[ ] [a] Chinese to break a saucer, a [Muslim] to bow before the Koran and touch it to his head, and a Parsee [an Indian Zoroastrian] to tie a rope around his waist . . . ." A witness may "affirm" rather than swear. But the law is even more accommodating. Religious objections have also been raised to "affirmation." Again, the intent of the law is that the witness acknowledge that he or she must undertake to tell the truth under penalty of perjury; and it has been held sufficient that a witness "declare that

12 R. Vashon Rogers, Oaths, 9 GREEN BAG 57, 62 (1897) (quoting a rhyme of unknown authorship).
14 United States v. Looper, 419 F.2d 1405, 1407 n.4 (4th Cir. 1969) (stating that it was reversible error for a judge not to allow a defendant to testify because he refused to take the oath used by the court). Some other cultures have approached the oath with a similar degree of deference. See URIEL HEYD, STUDIES IN OLD OTTOMAN CRIMINAL LAW 251 (1973). In some of our earliest Judeo-Christian accounts the oath was clearly a religious ritual. In one account "a man, in swearing, [was] to place his hand on the genitals of him to whom he swore." WILL DURANT, OUR ORIENTAL HERITAGE 338 (1963) (citing Genesis 24:2-3). Enthusiasm for this "testes-fying" seems to have worn off after a while, thankfully.
15 Ferguson v. Commissioner, 921 F.2d 588, 590 (5th Cir. 1991). In Ferguson, the witness, a party in Tax Court, was prevented from giving testimony although she was willing to make the declaration set forth in Staton v. Fought, 486 So. 2d 745, 745 (La. 1986), and even add an additional sentence acknowledging that she was subject to penalties for perjury. Ferguson, 921 F.2d at 590. The Court of Appeals for the Fifth Circuit ruled that the Tax Court's exclusion of her testimony and dismissal of her petition for lack of prosecution was an abuse of discretion. Id.
16 See FED. R. EVID. 603 advisory committee cmts.; Gordon v. Idaho, 778
the facts [he or she is] about to give are, to the best of [his or her] knowledge and belief, accurate, correct, and complete." In another case an appellate court vindicated a witness’s demand that he be permitted to take an “alternative” oath that read, “Do you affirm to speak with fully integrated Honesty, only with fully integrated Honesty and nothing but fully integrated Honesty?” For reasons that the court “[would] not attempt to explain,” the witness “believe[ed] that honesty is superior to truth.” “We do not have a case where the witness offers to swear only to a cleverly worded oath that creates loopholes for falsehood or attempts to create a safe harbor for perjury.”

F.2d 1397, 1400 (9th Cir. 1985) (holding that the district court abused its discretion in not allowing plaintiff a means for testifying truthfully at his deposition other than swearing an oath or making an affirmation, in light of his religious beliefs).

17 Staton, 486 So. 2d at 745, cited in Ferguson, 921 F.2d at 589 (holding that the trial judge may require, instead of an oath, the following: “I, __________, do hereby declare that the facts I am about to give are, to the best of my knowledge and belief, accurate, correct, and complete.’”).

18 United States v. Ward, 973 F.2d 730, 731, amended and superceded on other grounds by 989 F.2d 1015 (1992) (holding that the district court had to yield to defendant’s First Amendment right to substitute “fully integrated honesty” for the word “truth” in the traditional witness oath to testify truthfully).

19 Id. at 731. The court pointed out that this liberality predates the United States Constitution. Id. at 733 (citing the English case of Omichund v. Barker, 1 Atk. 22, 45 (1744)).

20 Id. at 734. Compare Carl Sandburg, The People Yes 193 (1936):

“Do you solemnly swear before the everliving God that the testimony you are about to give in this cause shall be the truth, the whole truth, and nothing but the truth?”

“No, I don’t. I can tell you what I saw and what I heard and I’ll swear to that by the everliving God but the more I study about it the more sure I am that nobody but the everliving God knows the whole truth and if you summoned Christ as a witness in this case what He would tell you would burn your insides with the pity and mystery of it.”

John Mortimer provides us with a portrait of a protesting but pious witness in Rumpole on Trial. “[Witness:] I am saying that this court, my Lord, is a place of sin and worldliness and we should not involve a Certain Being in these proceedings. May I remind you of the Book of Ezekiel: ‘And it shall be unto them a false divination, to them that have sworn oaths.’” John Mortimer, Rumpole on Trial 208 (1992) (quoting Ezekiel 21:23).

United States v. Fowler, 605 F.2d 181 (5th Cir. 1979), is a frequently cited case of evasion. There the defendant-witness would only say “I am a truthful
A recent article in the *ABA Journal* quotes a judge on the significance of the oath: "I make [witnesses] face me, look me in the eye and take the oath. I think that has more impact on the witness being truthful [than having the court clerk administer the oath]." But if, for one reason or another, witnesses do not expect to be prosecuted, one supposes that the oath has little deterrent effect in this "scientific" and "secular" society. For example, in a famous, or infamous, American case from the McCarthy Era, the feeble William Remington went altogether out of his way to make a good impression. "Sir . . . before the questions start I would like to emphasize that . . . I have been brought up in such a way in which an oath is very meaningful;" then he lied. "Trust none; For oaths are straws . . . ."23

II. THE ORDEAL

For the true believer, the oath may have been an ordeal; but from earliest times it was recognized that a significant number of people would give a false oath. Something extra was needed. This brings us to a discussion of the major forms of the ordeal.

A. Water Ordeals

Water ordeals are mentioned in the *Code of Hamurabi,*25 and in the ancient Hindu *Laws of Manu.*26 And there are plenty of reports of the cold water, or dunking, ordeal in European records. My favorite dates to 1083. Henry Charles Lea reports:

23 WILLIAM SHAKESPEARE, KING HENRY V act 2, sc. 3.
24 The ordeal (and trial by battle) may have served a purpose even if it was an unreliable truth verifier. "Frequently the primitive mind resorted to an ordeal not so much on the medieval theory that a deity would reveal the culprit as in the hope that the ordeal, however unjust, would end a feud that might otherwise embroil the tribe for generations." DURANT, *supra* note 14, at 28.
26 See Underwood, *supra* note 7, at 226.
During the deadly struggle between the Empire and the Papacy, as personified in Henry IV and Hildebrand, the imperialists related with great delight that some of the leading prelates of the papal court submitted the cause of their chief to this ordeal. After a three days' fast, and proper benediction of the water, they placed in it a boy to represent the emperor, when to their honor he sank like a stone. On referring the result to Hildebrand, he ordered a repetition of the experiment [Lea does not say whether the same boy was still available], which was attended with the same result. Then, throwing him [whom] in as a representative of the pope, he obstinately floated during two trials, in spite of all efforts to force him under the surface, and an oath was exacted from all concerned to maintain inviolable secrecy as to the unexpected result. 27

Imperialist lies and propaganda, perhaps; but where did they get the idea for this form of ordeal? Maybe from one of the Indo-European trinity?

Let's go back to India and those Laws of Manu. Varuna was not just the god of the Oath. He was also the God of the Waters. Perhaps there is a connection. Lea informs us that the primitive Aryans believed that “the pure element would not receive into its bosom anyone stained with the crime of a false oath . . . .” 28 He intones a Mantra:

“Thou O water dwellest in the interior of all things like a witness. O water thou knowest what mortals do not comprehend.”

“This man being arraigned in a cause desires to be cleared from guilt. Therefore mayest thou deliver him lawfully from this perplexity.” 29

Lea insists that the Church picked up these notions and clever clerics reconciled the ideas with Christian dogma. He relies on Hincmar of Reims (ninth century):

[whoever, after the invocation of God, who is the Truth, seeks to hide the truth by a lie, cannot be submerged in the waters above which the voice of the Lord God has thundered; for the pure nature of the water recognizes as impure and therefore rejects as inconsistent with itself such human nature as has once been regenerated by the waters of baptism and is again infected by falsehood. 30

27 Lea, supra note 25, at 78.
28 Id. at 73.
29 Id. at 73-74.
30 Id. at 190 (quoting Hincmar of Reims, De Divortio Lotharii, in 125 Patrologia Latina ch. 6, cols. 668-69 (Ninth Century)).
This probably would not work in Cleveland.

We are told that the water ordeal was used in witch trials in Connecticut at or about the time of the more celebrated proceedings in Salem, Massachusetts; that is, circa 1692. However, the upright and up-to-date divines in Salem denounced the water test as "superstitious and Unchristian." Yet, 100 years later, Mozart's *Magic Flute*, which has much to say about the Truth (*die Wahrheit*), has its protagonists endure ordeals of water and of fire as part of their ritual purification. "Superstitious and unchristian" perhaps; but also enduring and universal. Oh — by the way — "Baptist" may come from the Greek *essene* or bather, and most would rate this symbol of purification decidedly Christian.

The boiling water ordeal also enjoyed world-wide popularity, and was a particularly big hit with Western clerics. Again, Lea relies on Hincmar, who commended this ordeal because it combined "the elements of water and of fire; the one representing the deluge — the judgment inflicted on the wicked of old; the other authorized by the fiery doom of the future — the day of judgment, in both of which we see the righteous escape and the wicked suffer." It does have a certain symmetry, though I suspect it would not have appealed very much to Mozart. The idea was that the person tested had to plunge his or her hand or arm into boiling water — sometimes to fetch a ring or the like from the bottom of the cauldron. Sometimes the exposed member would be wrapped up — for three days, three being a nice theological number — and then unwrapped and inspected for damage. The unscalded, or more nearly, the uncooked, were innocent. This does not seem very much different than an ordeal by fire or hot iron; and both methods of "trial" look like a prosecutor's dream, if you ask me.

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32 On the other hand, as Will Durant points out, Christ did not baptize anyone, nor did he keep himself in the wilderness or in a monastery. He went about in the world. WILL DURANT, CAESAR AND CHRIST 560 (1971).

33 LEA, supra note 25, at 32.

34 CHARLES MACKAY, EXTRAORDINARY POPULAR DELUSIONS & THE MADNESS OF CROWDS 673 (1980). It is suggested that this and other forms of the ordeal, such as the hot iron, could be "fixed." *Id.* at 674. Hands could be rubbed with protective substances, the hot iron might be a cold iron painted red, and so on. *Id.* In one test, in which a blindfolded examinee was required to walk over red hot ploughshares, the trick was to coach the examinee as to the spacing of ploughshares, so they could be safely navigated. *Id.* at 673. If the examiner desired a guilty result, he could move the ploughshares around so that the accused would be sure to hit one. *Id.* As in the case of the modern "lie-detector,"
B. Fire and Hot Iron

India’s epic *Ramayana* tells of Prince-God Rama’s search for his wife Sita, after she had been kidnapped by Ravana the King of the Rakshasas (a Rakshasa is a sort of demon, or Vedic bogeyman). The path led to Lanka, where Rama destroyed Ravana and freed his wife. But now came a rather strange turn of events — or perhaps not so strange. The ways of the gods are odd; but human nature can be quite perverse in some particulars, too. Instead of embracing his wife, the reserved Rama rejected her as soiled. This was the dialog according to Jonah Blank.

“I have avenged the insult done to me,” he said. “I fought this war for myself, not for you. The demon who dishonored my wife is dead. Ravana has used you, so you are of no further use to me.”

Sita’s response was to have a pyre built. Walking into the flames she called out to Agni, the god of fire.

“If I have ever given my husband the least trace of offense,” she cried, “then I do not wish to live. But, Divine Agni, if I am chaste, then let your flames protect me.”

While this Ordeal by Fire was going on, there entered the gods Brahma, Shiva, Varuna, Indra, and Yama, who scolded Rama for being a jerk. An incarnation of Vishnu the Preserver should not treat his wife this way. They vanished, whereupon Agni came out of the fire with an unharmed Sita.

“Listen, all who would hear!” the old Vedic god of ritual purity bellowed. “This woman has not sinned against her husband in thought, word, or deed. She is perfectly chaste, as unsullied as the day she was born.”

the operator could influence the result.

35 See Jonah Blank, *Arrow of the Blue-Skinned God: Retracing the Ramayana Through India* (1992). The quoted portions of the story are from this charming book. Blank explains how the epic may actually be a retelling of the Aryan mixing with earlier cultures, the Vanar and Dravidian, and contact and conflict with the Sinhalese. *Id.* at ix-xi.

36 *Id.* at 317.

37 *Id.*

38 *Id.* at 318.

39 *Id.*
You probably had to be there. In any event, there was a reconciliation. To round out the work with a really happy ending, Rama’s brother insisted that Rama take back the throne — the kingship that he had earlier renounced.40

Other Vedic and Hindu sources refer to the taking of fire, a hot iron,41 or a red-hot iron ball or spear head into the hand as a test of truthfulness.42 The Avesta of the ancient Iranians and legends relating to Zoroaster allude to fire ordeals and ordeals of boiling water.43

And the biblical story of Shadrach, Mesach, and Abednego and their stint in the fiery furnace provided Christian proponents of the ordeal with a precedent.44 Bartlett cites the following invocation associated with the ordeal of the hot iron: “'If you are innocent of this charge . . . you may confidently receive this iron in your hand and the Lord, the just judge, will free you, just as he snatched the three children from the burning fire.'”45

The Antigone of Sophocles alludes to the practices of the Greeks:

[Guard to Creon]: Whoever did it [did the funeral honors] left no trace; . . . Then there were loud words, and hard words, among us of the guard, everyone accusing someone else, 'til we nearly came to blows, and it's a wonder we didn't. Everyone was accused and no one was convicted, and each man stuck to it that he knew nothing about it. We were ready to take red-hot iron in our hands — to walk through fire — to swear by the gods that we did not do the deed and were not in the secret of whoever did it.46

One of the most celebrated stories involving the ordeal of the “hot iron” comes from the reign of Emperor Otto III (890-1002). It is depicted in a spectacular color plate in Sara Robbins’ collection,47 Dierik Bouts’ “Justice of Emperor Otto III.” (Plate C) Historian Robert Bartlett reports

40 Id. at 319.
41 LEA, supra note 25, at 22.
42 Id. at 43.
43 Id. at 19, 20.
44 Daniel 3:19.
that the work was commissioned by the town of Louvain in 1468. Today it can be found in a museum in Brussels.\textsuperscript{48} According to the Robbins notes, the scene illustrates

an account by the twelfth-century historian Godfrey of Viterbo. A count of Otto’s court, accused of adultery with the empress, is executed in the left-hand panel (not shown here). In the panel shown, Otto, distrusting the empress, forces her to undergo trial by fire. She holds a piece of red-hot metal that has been heated in the burning embers at her feet. Since she is burned, the test “proves” her guilt, and she is burned at the stake (top of the panel).\textsuperscript{49}

I have no problem with this version insofar as it illustrates the fact that the ordeal was probably used to keep the “weaker sex” and the weaker classes in their place. For another example, Chaucer’s Criseyde offers to submit to it in order to allay the suspicions of Troilus.\textsuperscript{50} But the real story behind Bouts’ work is, I think, a little bit different, and much more interesting. It is a story about how one may survive an ordeal through faith and truth. In other words, it appeals to the Medieval mind, not to the Modern.

The story is told in Lea’s classic work, which also relies upon Godfrey of Viterbo’s \textit{De Tertio Othone Imperatore} (which, incidently, Lea suggests is myth or fancy). According to Lea’s version, the woman submitting to the ordeal was the wife of Count Modena, and she survives the ordeal to see her husband vindicated (sort of — the timing left something to be desired) and the Empress burned at the stake.

The tragical tradition of Mary, wife of the Third Otho, contains . . . the somewhat unusual variation of an accuser undergoing an ordeal to prove a charge. The empress, hurried away by a sudden and unconquerable passion for Amula, Count of Modena, in 996, repeated in all its details the story of Potiphar’s wife. The unhappy count, unceremoniously condemned to lose his head, asserted his innocence to his wife, and entreated her to clear his reputation. He was executed, and the countess, seeking an audience of the emperor, disproved the calumny by carrying unharmed the red hot iron, when Otho, convinced of his rashness by

\textsuperscript{48} Bartlett, \textit{supra} note 45, at 134 n.36.
\textsuperscript{49} Robbins, \textit{supra} note 47, at 67.
this triumphant vindication, immediately repaired his injustice by consigning his wife to the stake.\footnote{Lea, supra note 25, at 47.}

The Return of Potiphar's Wife? Again? Yes, but this time there is a little more to it. My guess is that the woman shown taking the iron in her free hand is the Countess Modena. She's cradling her wronged husband's head in her other arm, a symbolic demonstration of devotion, perhaps. Or is it so that he can see what's going on? In the background we see the false witness (the Empress) getting her just deserts. In spite of appearances, it is probably sensible to view this as a defensive, and not an offensive, use of the ordeal, since the Countess of Modena was attempting to clear her husband by demonstrating the truth in his protestations of innocence.

C. The Balance Beam

The ordeal of the scales or the balance may remind younger readers of a scene from the film \textit{Monty Python and the Holy Grail}.\footnote{Monty Python and the Holy Grail (National Film Trust Co. 1974).} But the reader may recall that the balance beam appears prominently in ancient Egyptian funerary art.\footnote{See supra note 4 and accompanying text.} This ordeal was also practiced in ancient India. Always ready with the appropriate mantra, this time from the \textit{Institutes of Vishnu}, Lea chants:

"Thou, O balance, art called the same name as holy law \textit{(dharma)}; thou, O balance, knowest what mortals do not comprehend."

"This man, arraigned in a cause, is weighed upon thee. Therefore mayest thou deliver him lawfully from this perplexity."\footnote{Lea, supra note 25, at 89.}

According to the Indian tradition, if the accused were lighter on the second weighing, he or she would be acquitted. This may seem surprising given the rules of the water ordeal as described in the laws of \textit{Manu} — the guilty would float and the innocent sink, just like in the water ordeal as it came to be practiced in Europe.\footnote{Id. at 88.} But a "light equals innocence" rule is consistent with the water ordeal for witchcraft, as it was set forth in the \textit{Code of Hammurabi}:
If a man charge a man with sorcery, but cannot prove it, he who is
charged with sorcery shall go to the river, into the river he shall throw
himself and if the river overcome him, his accuser shall take to himself
his house [estate]. If the river show that man to be innocent and he
come forth unharmed, he who charged him with sorcery shall be put to
death.[1] He who threw himself into the river shall take to himself the
house of his accuser.56

"Light is better" is also consistent with a bad paternity test, and
equally bad poetry, attributed to an unidentified tribe of Indo-European
"Celts."

Upon the waters of the jealous Rhine
   The savage Celts their children cast, nor own
Themselves as fathers, till the power divine
   Of the chaste river shall the truth make known.
Scarce breathed its first faint cry, the husband tears
   Away the new-born babe, and to the wave
Commits it on his shield, nor for it cares
   Till the wife-judging stream the infant save,
And prove himself the sire. All trembling lies
   The mother, racked with anguish, knowing well
The truth, but forced to risk the cherished prize
   On the inconstant waters' restless swell.57

56 THE CODE OF HAMMURABI KING OF BABYLON, ABOUT 2250 B.C. 11
(Robert Francis Harper trans., 2d ed. 1904).
57 Quoted from a "Greek anthology" in JOHN LARSON, LYING AND ITS
DETECTION 73 (Ernest W. Burgess ed., 1932). LEA, supra note 25, at 27
(identifying the source as Anthol. IX. 125). Stories of infants set on the waters
are very old. King Sargon was nestled in a patch-covered basket and surrendered
to the Euphrates a thousand years before Moses was put adrift on the Nile.
CHARLES PELLEGRINO, RETURN TO SODOM AND GOMORRAH 127-28 (1994);
JOHN ROMER, TESTAMENT 55 (1988). Robert Graves connects Sarpedon (the
name meaning "rejoicing in a wooden ark") the son of Zeus, to ancient versions
of Sun-hero worship. At the New Year the god reappears as a child floating in
an ark or other conveyance. Graves refers us to the stories of Moses, Perseus,
and Anius (the offspring of Apollo and Rhoeo). ROBERT GRAVES, THE GREEK
MYTHS 297 (1992). Romulus and Remus, the children of Mars and Rhea Silvia,
were exposed on a raft with the object being their destruction; but the waters
carried them to land so that Rome could be founded. DURANT, CEASAR AND
CHRIST, supra note 32, at 22.
In the Europe of the Middle Ages, a balance beam test came to be used in cases of suspected sorcery or witchcraft; but since Europeans had somehow gotten it in their heads that sorcerers and witches were lighter than water, lightness was thought to be evidence of guilt. Because of this confusion, we Westerners are required to make fun of our Medieval ancestors, while paying appropriate deference to the “Wisdom of the East.” What is even more embarrassing is the fact that it took us almost forever to get things straightened out. Lea reports that as late as 1759 [in England!] a witch was convicted when she was outweighed by a bible placed on the other side of the scale or balance.58

D. Poisons and Food Ordeals

Let us meet and talk; but first, some food and drink?

It so happened that after this a rumor went out that Mary was pregnant. . . . Joseph, however, took an oath, swearing that he had never touched her. Abiathar, the high priest, said to him, “As God lives, therefore I will have you drink water of the Lord's testing, and at once he will demonstrate your sin.” . . . Joseph also was called to the altar and given the water of the Lord’s testing — which, if a man at fault should drink and then circle the altar seven times, God will cause his sin to show in the man's face. When therefore a cheerful Joseph drank and circled the altar, no sign of sin was revealed in him. . . . Then Mary, standing firm and intrepid, said, “If there is any pollution or sin, or if there was in me any concupiscence or lewdness, may the Lord expose me in view of all the people, so that I may be an example for the correction of all.” And she went to the altar of God confidently, drank the water of testing, went around the altar seven times, and no fault was found in her.59

58 LEA, supra note 25, at 90.

This trial of the "bitter waters" is consistent with the popularity of the ordeal in the dark ages, when the story was written down in Latin; but this particular test had been prescribed for cases of suspected adultery as far back as Numbers. The "bitter waters" were holy waters in which some dust from the floor of the sanctuary had been dissolved. The biblical account reserves this ordeal for an accused wife, the object being to frighten a guilty woman into making a confession. On the other hand, we are assured that the husband was also tested, if only indirectly, for if he "had at any time been guilty of sexual immorality, it was thought that the bitter waters would have no effect, even though the wife were guilty, showing that the ethics of the Rabbis demanded the purity of the man as well as the woman to be undefiled." That this seems fair to those of us of the male gland points out an interesting aspect of the ordeal, at least in the Judeo-Christian tradition. Whatever its other justifications may have been, it was a pretty good way to keep the relatively powerless members of society in their place. The scarier the ordeal, the better.

60 Numbers 11:31.
61 David Werner Amram, Chapters from the Ancient Jewish Law, 4 Green Bag 493, 494 (1892).
62 Id. at 494. If I follow the Rabbinical logic, had Joseph also imbibed then Mary's acquittal would have been inconclusive and unsatisfactory from a Christian perspective.

The Bocca della Verita (Plate D) was reportedly used to obtain confessions of adultery during the Middle Ages. The notion that the metal "Mouth of Truth" would bite the hand of a liar is like the story told in Heiz Risse's short tale Das Gottesurteil [The Judgment of God]. HEITERES UND ERNSTES (James Hepworth & Heinz Rahde eds., 1964). The story takes place in Calabria, Italy in 1412. A murder has been committed, but the evidence is circumstantial. The magistrate decides to subject one of the suspects to an ordeal based on the suspect's dreams. He has dreamed of placing his hand in the mouth of a stone lion in front of the city hall — and being bitten! He is compelled to place his hand in the mouth of the statue, and he is bitten by a deadly scorpion, which has made its home in the dark hole of the mouth. The suspect is left to die, for his guilt is apparent to all. Later the real culprit confesses. A tough break, but that's life. Sometimes crime fighters get the wrong man. "Zusammenhange, die man sehen kann, sind meist keine — überdecken die wahren . . . ." ["Relationships which one can see — and these are rare - cast a veil over the real ones . . . ."]. Id. at 83.
63 See supra notes 50, 59-61 and accompanying text, infra notes 120, 125 and accompanying text.
Bocca della Verità, S. Maria in Cosmedin, Rome, Italy. Alinari/Art Resource, NY.
Eventually the story of Mary’s “Trial by Water” became sufficiently mainstream to be commemorated in Christian art in the *Fresco Cycle of Santa Maria Di Castelseprio*, in the *Qeledjar Fresco* (Plate E), and in certain twelfth century manuscripts now located in the Vatican. The latter are the most interesting, because they parallel the Infancy Gospel most completely by showing, in two separate miniatures, the trial of Joseph and then that of Mary. The miniature showing the Virgin’s trial seems to depict Joseph (who has already “passed”) turning his back on Mary even before she has been tested. We know that he is going to be very sorry for “jumping to conclusions.”

The classic food ordeals were of the *corsnoed* (barley bread or cheese) and the eucharist. The physiological basis for the *corsnoed* is rather obvious. But like the modern lie detector, it could be beaten. Indeed, it could be used to pull a fast one. Lea notes but does not set forth the story of Calandrino in Boccaccio’s *Decameron* (circa 1351). Here it is.

The two tricksters Bruno and Buffalmacco contrived to steal the dim cheapskate Calandrino’s pig. Then they convinced the gullible Calandrino that they knew a variation of the “trial by bread and cheese” that would help him detect the true thief, if he would give them some money to secure the services of the apothecary.

Bruno went to Florence and called on a friend of his who was an apothecary. He bought a pound of nice pills, had a couple more made up of fresh hepatic aloe on centres consisting of dog’s turd, and had...
Trial by Water, S. Maria foris Portas, Castelseprio, Italy. Scala/Art Resource, NY.
these sugar-coated the same as the rest, but with a little mark by which he would clearly recognize them and avoid confusing them with the others. He bought a flask of good Vernaccia, returned to Calandrino in the country, and told him: “See to inviting all your suspects for a drink tomorrow morning. It’s a holiday so they’ll all be glad to come. Tonight Buffalmacco and I will [have the priest bless the pills] and I’ll bring them to your house in the morning. Seeing that it’s you, I don’t mind handing them out myself and doing and saying whatever needs to be said and done.”

...  

They made them [the crowd collected by the Calandrino] all form a circle, and Bruno said: “Gentlemen, let me tell you why you’re here; that won’t hold me to blame. Last night Calandrino here had a fine pig of his stolen, and he can’t lay his hands on the culprit. As whoever took it can only be one of us here present, to find out who it is, he’s going to give each of you one of these pills to eat, and some drink. What you have to realize straight away is that whoever’s taken the pig will be unable to swallow his pill — he’ll find that it tastes more bitter than gall and he’ll spit it out. So maybe it would be better, before the culprit is shown up in the presence of so many people, if he goes and makes his confession to the priest, and I’ll stay my hand.”

...  

All present insisted they were ready to eat one, so Bruno sorted them out into order and placed Calandrino among them, then started at one end handing each man his pill; when he came to Calandrino he took out one of his dog-turd pills and placed it in his hand, Calandrino promptly popped it into his mouth and started chewing — but the moment he tasted the aloe, the bitterness was more than he could stand and he spat it out. ... [S]omeone [cried]: “Hey, Calandrino, what does this mean?” ... [and Bruno said]: “Wait! It could be something else that made him spit it out. Here take another.” And he took out the second one, put it into Calandrino’s mouth, and carried on handing out the remaining pills. Now if Calandrino had found the first pill bitter, this second one was far, far more so; ashamed as he was
to spit it out, he kept it in his mouth and chewed it a little, great tears welling in his eyes, tears the size of cob-nuts, but eventually he could stand it no longer and spat it out as he had done the first. . . . When [they all] saw this, they all said that of course Calandrino must have taken the pig himself — in fact some of them were quite tart with him.\textsuperscript{71}

A bitter pill to swallow, even sugar-coated. The lesson of the story is “never take a lie detector test”; or if you prefer, “He that diggeth a pit shall fall into it . . .”.\textsuperscript{72}

Of course, here we are to assume that everyone (except the tricksters) was willing to eat a pill because they knew that they were innocent. This reminds me of the donkey test, which is not a food ordeal. It does not involve the consumption of a donkey.

[The] Arabs would put a donkey with a greased tail in a darkened tent, then would warn suspects that when the donkey’s tail was pulled by a guilty man the animal would bray. Those who emerged from the tent without grease on their hands were presumed guilty.\textsuperscript{73}

Is the commentator pulling our leg?
Lea associates the eucharist with the “Indian” rite of the cosha, in which the accused is required to drink water washed in the idol.\textsuperscript{74} This looks like the trial of the “bitter waters,” doesn’t it? In a Christian locale the Host could be administered, and have the cotton mouth effect, which is obviously psychological — fear dries out the mouth.\textsuperscript{75}

For a recent case of cotton mouth consider the course of the investigation of the World Trade Center bombing. A “warning” letter had been sent to The New York Times by the “Fifth Liberation Brigade.” Investigators were able to retrieve the words of the letter from the computer hard drive owned by one of the suspected bomb makers, Nidal Ayyad. (Hint: “Delete” does not totally “erase.”)\textsuperscript{76} Since the letter had

\begin{itemize}
\item \textsuperscript{71} Id. at 500-02.
\item \textsuperscript{72} Ecclesiastes 10:8.
\item \textsuperscript{73} FISHER, supra note 68, at 289.
\item \textsuperscript{74} LEA, supra note 25, at 98.
\item \textsuperscript{75} Id. at 98-105.
\item \textsuperscript{76} See David Jacobsen et al., Peril of the E-mail Trial, NAT’L L.J., Jan.
\end{itemize}
been mailed using the usual gummed, stamped envelope, the investigators took saliva samples from four suspects. When they swabbed Ayyad’s mouth, they found that it was dry as cotton. DNA tests confirmed that his saliva was on the envelope flap.\textsuperscript{77}

E. Lotteries

The trials of the “bitter waters” and the fiery furnace were not the only types of ordeal alluded to in the Bible. \textit{Joshua} tells the story of the unfortunate Achan, who like many soldiers took a little loot from Jericho, when the idea was that all was to be destroyed and thereby dedicated to God.\textsuperscript{78} Things began to go poorly for the Israelis because of this transgression, so it was decided that one or more offenders should be identified by a sort of lottery or trial by lot.

At the central sanctuary of the camp, the priests were to cast lots for the various tribes of Israel, and the tribe which was “seized,” that is to say, which was marked by the fatal lot, was to be balloted according to its families and the family according to its houses; and the house according to its members, one by one; and thus the lot would ultimately fall upon one man who would thereby become known as the offender.\textsuperscript{79}

Since “God was supposed to be present in the Courts of Justice,”\textsuperscript{80} this may have been thought to be as sensible a way of determining His will as any other; but it has also been suggested that “the determination of the

\textsuperscript{77} FISHER, \textit{supra} note 68, at 82.
\textsuperscript{78} Joshua 7:21.
\textsuperscript{79} David Werner Amram, \textit{The Trial of Achan by Lot}, 12 \textit{GREEN BAG} 659, 660 (1900).
\textsuperscript{80} Id. at 659.
offender by lot was really resorted to so as to obtain a confession from the guilty person through fear.\textsuperscript{81} Joshua, knowing that many soldiers may have been looters, but needing to make an example of someone, had no difficulty getting a confession from the feckless Achan.\textsuperscript{82} In typical Old Testament fashion, not only was Achan killed but so were all the members of his family, and all of their property was destroyed.\textsuperscript{83} This is what instructors in military schools call a "teaching point."

Nowadays, lotteries are only used to make money for the state or to assign law school examination grades.

\textbf{F. Decline of the Ordeal}

It is of interest that by the twelfth century faith in the ordeal was being undermined by the pious. God could intervene, of course, but "it was the guaranteed nature of the result which was in question. It was increasingly viewed as impious to believe that a constructed human test — the ordeal — could 'force' God to show his hand. That was testing God."\textsuperscript{84} This was the view of professional thinking people of the day, like Peter the Chanter (the Cantor).\textsuperscript{85} Peter expressed the same sort of scientific skepticism as do modern critics of the lie-detector. That is, he "thought that one of the worst things about ordeals was that they often condemned the innocent or vindicated the guilty, because there could only be a random correlation between guilt or innocence and the outcome of the ordeal, since the outcome depended on factors irrelevant to culpability — the callousedness of the hand picking up the iron, the heat of the iron when grasped, and so on."\textsuperscript{86} Critics of the modern lie detector have a kindred spirit in the Chanter.

Eventually a succession of Popes weighed in against the ordeal (Alexanders II and III, Innocent III, Gregory IX, and Gregory XI). Ironically, one of the famous murals in the Justice Department was quite controversial. The artist was trying to portray the Pope's condemnation

\textsuperscript{81} Id. at 660.
\textsuperscript{82} Id. at 661.
\textsuperscript{83} Id.
\textsuperscript{84} BARTLETT, supra note 45, at 86.
\textsuperscript{85} This fellow was monastic and scholastic. Id. at 160. Did he invent the original "head-banging" music (in the flagellant sense)?
\textsuperscript{86} Id. at 161.
of the ordeal. (See Plate F.) Critics thought it looked like he was blessing torture. People will always find something to fight about.

In spite of scientific skepticism and religious condemnation, variations of the ordeal persisted. A Missouri case decided in 1894 alluded to the "ordeal of the bier." The accused’s refusal to approach the body of the murder victim lest it bleed in the presence of the killer was considered as a sort of admission of guilt. This ordeal was mentioned as early as Aristotle. It turns up in Shakespeare’s Richard III.

Some would say that the ordeal is still used today — in the form of the lie detector.

III. THE LIARS SELF-BETRAYAL

Canst thou not minister to a mind diseas’d,
Pluck from the memory a rooted sorrow,
Raze out the written troubles of the brain,
And with some sweet oblivious antidote
Cleanse the stuff’d bosom of that perilous stuff
Which weighs upon the heart?

Sin has seduced your mind;
your tongue flaps with deceit.
Your mouth condemns you, not I;
your own lips testify against you.

87 State v. Wisdom, 24 S.W. 1047 (Mo. 1894).
88 Id. at 1051. Before we make too much fun of the folks in the "show me" state, we might consider the goings on in the "O.J. Simpson case." During the "jury view," when Mr. Simpson refused to get out of his car at the scene of the murders, the ever-present commentators opined that this might suggest something to the jurors. My own theory in the Simpson case is that the murders were committed by out of work television commentators.
89 LEA, supra note 25, at 113. You can also find a reference to the ordeal of the bier (not beer) in GRAHAM GREENE, THE QUIET AMERICAN 16 (1992).
90 WILLIAM SHAKESPEARE, KING RICHARD III act 1, sc. 2, lines 55-56 (Antony Hammond ed., 1981) (1597) (Lady Anne accuses Richard of murder when the body of King Henry VI begins to bleed as Richard arrives at the funeral procession).
91 WILLIAM SHAKESPEARE, MACBETH act 5, sc. 3.
Maurice Sterne. *Ordeal*. Pope Innocent III blesses the victim of a trial by ordeal. This is one of twenty panels found in the law library of the U.S. Department of Justice Building.
If guilt, fear, or some other emotion preys upon the mind, then perhaps the liar will be revealed by his or her own look, or word, or deed. It has long been thought that the eyes are the key to lie-catching, with honorable mention going to the voice.

Except in indifferent matters, never take your eye from that of the witness; this is a channel of communication from mind to mind, the loss of which nothing can compensate. "Truth, falsehood, hatred, anger, scorn, despair, And all the passions — all the soul is there." . . . Be not regardless, either, of the voice of the witness; next to the eye it is perhaps the best interpreter of his mind. The very design to screen conscience from crime, — the mental reservation of the witness, — is often manifested in the tone or accent or emphasis of the voice . . . .

Occasionally someone will come along and boast of being able to smell a liar. Like Tennessee Williams’ Big Daddy in *Cat On A Hot Tin Roof*, they claim to be able to smell "the unpleasant odor of mendacity." However, the olfactory organ is pretty far down the list when it comes to lie-detectors.

A turn of the century legal authority opined that "[f]or unnumbered ages the external appearance has been deemed to be an index to the internal man" and quoted this "curious passage" from the "Gentoo [Hindu] Code".

When two persons upon a quarrel refer to arbitrators, those arbitrators at the time of examination shall observe both the plaintiff and the defendant narrowly, and take notice if either, and which of them, when he is speaking, hath his voice falter in his throat, or his color change, or his forehead sweat, or the hair of his body stand erect, or a trembling come over his limbs, or his eyes water, or if during a trial he cannot

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94 See, e.g., Quentin Reynolds, *Courtroom* 181 (1961) ("I [Reynolds] once asked Judge Leibowitz, ‘After all these years as lawyer and judge, how expert have you become in spotting a liar in the courtroom?’ The judge smiled. ‘I can smell a liar a mile away.’").
95 Tennessee Williams, *Cat On A Hot Tin Roof* act 2.
96 Henry Hardwicke, *The Art of Winning Cases or Modern Advocacy* 153 (1894).
97 Id.
98 Id.
stand still in his place, or frequently licks or moistens his tongue, or hath his face grow dry, or in speaking to one point wavers and shuffles off to another, or, if any person puts a question to him, is unable to return an answer; from the circumstances of such commotions, they shall distinguish the guilty party.\textsuperscript{99}

In a popular new book on the American jury, journalist Stephen Adler reports that jurors judge the truthfulness of witnesses on their recitation of detail, their use of simple and direct speech as opposed to "hypertechnical speech," and their willingness to look the jury members "in the eye."\textsuperscript{100} Adler guesses, correctly I think, that some of these positive factors may be more indicative of coaching than truthtelling.\textsuperscript{101} But then he drifts into his own criteria, which he has gleaned from "studies."

Studies show that compared with truthtellers, liars typically make fewer hand gestures, move their heads less, speak more slowly, and sit more rigidly, but that they betray their anxiety by shifting their feet or taping their fingers. In addition, liars tend to relax their facial muscles and effect pleasant expressions, as if aware that observers will be watching their faces for signs of deceit. Partly because untrained observers seem to watch for the wrong signals, they often reach wrong results. In one

\begin{footnotes}
\item[99] Id. at 153-54. \textit{Compare} Amos Miller, \textit{Examination of Witnesses}, 2 \textit{ILL. L. REV.} 244, 257 (1907) ("A witness who is testifying falsely, will as a general rule, try to evade, on cross-examination, questions on collateral matters; this, of course, in order to avoid being entrapped. . . . He will frequently ask the cross-examiner to repeat plain, simple questions in order to give him time to think up a consistent reply. He will often carefully and slowly repeat over a question on cross-examination for the purpose of giving him time to think; or he will answer irresponsively in order to steer the cross-examiner off the track.") (The ILL. \textit{L. REV.} was absorbed by \textit{NW. U. L. REV.}, and the Miller article can be found at 2 \textit{NW. U. L. REV.} 244 (1907-08)). These observations are consistent with the Trial in Queen Caroline's Case, which required the witness to be confronted with prior inconsistent statements and to be given an opportunity to explain the inconsistency. 2 Brod. & Bing. 284 (1820). But they are inconsistent with the conduct of Detective Fuhrman in the "O.J. Simpson case." Fuhrman rather unnecessarily and unconvincingly lied on what might otherwise have been a collateral matter. People v. Simpson, No. BA097211, 1995 WL 109035, at *20-24 (Cal. Super. Trans. Sept. 6, 1995). It was very odd.
\item[100] \textsc{Stephen Adler}, \textit{The Jury} 191-95 (1994).
\item[101] Id. at 193.
\end{footnotes}
often cited academic study [unfortunately not cited by Adler] of 715 observers, a truthful speaker was judged to be lying by 74.3 percent of the subjects, and a lying witness was judged truthful by 73.7 percent. . . . [A] startling consensus has emerged among researchers that observers without special training such as jurors, are egregiously bad at determining when someone is telling the truth, inadvertently giving false testimony or lying. ¹⁰²

Adler argues (not very convincingly) that jurors might perform better if they were given the conclusions associated with these “studies” rather than the usual demeanor charge. ¹⁰³

Other authorities have been even less sanguine about their, or anyone else’s, ability to detect truth from the eye, the voice, or from outward appearances. Some “tests” are more ridiculous than others. In the famous case of Quercia v. United States,¹⁰⁴ the trial judge had made the following comment to the jury in his summing up:

And now I am going to tell you what I think of the defendant’s testimony. You may have noticed, Mr. Foreman and gentlemen, that he wiped his hands during his testimony. It is a rather curious thing, but that is almost always an indication of lying. Why it should be so we don’t know, but that is the fact. I think that every single word that man said, except when he agreed with the Government’s testimony, was a lie.¹⁰⁵

¹⁰² Id. at 177, 208-09. Most professional teachers of advocacy operate on the same assumptions as Adler. See John Conley et al., The Power of Language: Presentational Style in the Courtroom, 1978 DUKE L.J. 1375 (describing the influence of the presentational style of witness on a jury). But is it correct or “scientific”?

¹⁰³ ADLER, supra note 101, at 210. This takes a lot for granted. Like most of us, Adler takes the studies at “face value,” assumes that there really is a consensus, assumes that jurors and lawyers can actually detect the phenomena alluded to in the studies in a real live courtroom environment, and fails to take into account the lawyer-as-witness problem. Can a lawyer “testify to the jury” about what he saw, about what it means to him — based on “the studies”? Aren’t there some downsides to bringing in experts on credibility?

¹⁰⁴ 289 U.S. 464 (1932).

¹⁰⁵ Id. at 469. Compare CHARLES DICKENS, A TALE OF TWO CITIES 79 (Random House 1950) (1859) (“Lastly, came my Lord himself, turning the suit of clothes, now inside out, now inside in, but on the whole decidedly trimming and shaping them into grave clothes for the prisoner.”).
The Supreme Court would have none of this, although the Court's emphasis seems to have been on the exaggerated nature of the judge's comment, and its probable impact on the jury as a sort of unexamined, de facto expert opinion.\footnote{Quercia, 289 U.S. at 470.}

In the instant case, the trial judge did not analyze the evidence; he added to it, and he based his instruction upon his own addition. Dealing with a mere mannerism of the accused in giving his testimony, the judge put his own experience, with all the weight that could be attached to it, in the scale against the accused. He told the jury that "wiping" one's hands while testifying was "almost always an indication of lying." Why it should be so, he was unable to say, but it was "the fact."\footnote{Id. at 471-72.}

Others with experience have expressed similar reservations. These are from trial lawyer and author Jake Ehrlich:

A shifty eye usually means nothing but shyness; a restless manner is simply a restless manner; hesitation indicates as often as not an effort to be accurate.

The liars are spotted by judges and juries by self-contradiction and inconsistency — not by their voices or appearances.Appearances are many times deceitful.\footnote{J.W. EHRLICH, THE LOST ART OF CROSS-EXAMINATION: OR PERJURY ANYONE? 93 (1970).}

[T]he theory [is] that the detection of falsehood or uncertainty is facilitated by seeing and hearing the witness give evidence. However, it is an exaggeration to suppose that a lie can be detected merely by observing the way in which the witness utters it, for some liars are bold and some witnesses hesitant and nervous. . . . [T]hose who have reluctantly come to court and who are very nervous by being there at all are apt to give their evidence in a hesitating manner and, indeed, often to contradict themselves and forget things which they remembered before they got on the witness stand. The confidence with which a witness recalls an event is no guide to the accuracy of his recollection.\footnote{Id. at 98.}
The trial of Alger Hiss provides us with an amusing portrait of a pseudo-scientific lie-catcher.\textsuperscript{110} In the \textit{Hiss} case the defense presented the testimony of Dr. Carl Binger — "psychiatrist" extraordinaire\textsuperscript{111} — who testified, over strenuous objection by the prosecution, that Whittaker Chambers, the principal witness for the prosecution, had a psychopathic personality that was associated with "persistent and repetitive lying." This excerpt from Alan Weinstein's book \textit{Perjury}\textsuperscript{112} tells the tale:

At one point [prosecutor] Murphy caught the witness [Binger] in an amusing trap of his own making. Binger had testified on direct examination that there existed "certain confirmatory things" by which to detect a psychopathic personality and mentioned, as one of them, Chamber's tendency on the witness chair to gaze up at the ceiling frequently. One of Murphy's assistants had counted Binger staring in that direction fifty times in fifty-nine minutes, and the prosecutor asked if this constituted such symptoms as the doctor ascribed to Chambers. "Not alone," came the irritated response.\textsuperscript{113}

Still, it is hard to shake the faith that many place in the sweaty palm or the wandering eye. They should remember poor Othello's folly.

Othello: Give me your hand. This hand is moist, my lady.

\textellipsis

... here's a young and sweating devil here
That commonly rebels. 'Tis a good hand,
A frank one.\textsuperscript{114}

\textsuperscript{110} United States v. Hiss, 185 F.2d 822 (2d Cir. 1950), \textit{cert. denied}, 340 U.S. 948 (1951).

\textsuperscript{111} Dr. Binger had been around for some time, expressing opinions in a variety of fields; but he had only been certified in psychiatry in 1946, just two years before the trial.

\textsuperscript{112} ALAN WEINSTEIN, \textit{PERJURY: THE HISS CHAMBERS CASE} (1978).

\textsuperscript{113} \textit{Id.} at 489. For a similar but more good natured exchange, see \textit{The Doctor's Case}, HON. J.F. DALY, THE BRIEF 10 (1900), \textit{reprinted in JOHN H. WIGMORE, THE SCIENCE OF JUDICIAL PROOF} 751 (1937) [hereinafter \textit{THE SCIENCE OF JUDICIAL PROOF}] (Q: "What, Doctor, you can't recall the second indication of progressive mental decay which you spoke of yesterday? 
\quad \Rightarrow\quad A: "No, I cannot, I confess." Q: "Well, that's funny. Your second indication was 'loss of memory of recent events'!")

\textsuperscript{114} WILLIAM SHAKESPEARE, \textit{OTHELLO, THE MOORE OF VENICE} act 3, sc. 4,
Othello: Let me see your eyes; 
Look in my face.\textsuperscript{115}

Othello got it exactly wrong. He believed Iago, the false witness, whom he thought “honest.” Believing the lies, he doubted, rejected, and finally slew his innocent wife.\textsuperscript{116}

IV. “Scientific” Lie Detection

Carrying a Radnor, Pennsylvania, dateline on the UPI wire in the mid-eighties was the story of Judge Ira Garb’s tossing out charges against a hapless defendant who fell for too ridiculous an interrogation method. The suspect was not familiar with lie detectors but was apparently willing to take a test. Detectives placed a metal colander on his head with wires running to a nearby Xerox machine. On the Xerox machine’s glass copy plate was a sheet of paper with the words, “HE’S LYING.” When the suspect made a statement, a detective pushed a button (“Print”) on the Xerox machine, delivering a copy of the sheet of paper, which was then shown to the suspect. After a while, he confessed.\textsuperscript{117}

A. The Blood

“Guilt carries Fear always about with it; there is a Tremor in the Blood of a Thief . . . but take hold of his Wrist and feel his Pulse, there you will find Guilt; . . . a fluttering Heart, an unequal Pulse, a sudden Palpitation shall evidently confess he is the Man, in spite of a bold Countenance or a false Tongue.”\textsuperscript{118}

This was Daniel Defoe’s answer to the street crime of 1730, and the quoted language provided David Lykken with inspiration and a title for his 1981 critique of the polygraph or “lie detector.”\textsuperscript{119}

lines 36-37 (Lawrence Mason ed., 1920) (1622).
\textsuperscript{115} Id. act 4, sc. 1, lines 24-25.
\textsuperscript{116} Id. act 4, sc. 1.
\textsuperscript{117} CHUCK SHEPARD, AMERICA’S LEAST COMPETENT CRIMINALS 121-22 (1993).
\textsuperscript{119} Id. Remember that it was Abel’s blood that rose up to accuse his brother Cain of the first murder.
Wires and lights, bells and whistles, do not science make. Like the ordeal, the modern polygraph or "lie detector" has been used in the very way that the colander and photocopy machine were used. "[I]t is common to confront the suspect with a recording and then accuse him of lying without going through the interpretation process at all. Apparently, this is a fairly successful method of eliciting confessions." In a widely publicized case from Pikeville, Kentucky, FBI Agent Mark Putnam confessed to murdering a young woman who had acted as a source, and who had become his lover, after he was told that he had failed his lie-detector test.

However, the big question is this: Does the polygraph provide us with a scientific method of lie detection? Until recently the answer has been "no." Its use as evidence has not been supported by scientific theory and convincing experimental research. And the lie detector has not been received with open arms by all segments of law enforcement either. In 1938, when lie detector tests administered in a murder-kidnapping case in Florida "proved" an innocent man was guilty, and "cleared" the person who later confessed, J.Edgar Hoover told his agents to "throw that box into Biscayne Bay." Hoover completely banned "the box" from FBI investigations in 1964, but the Bureau brought it back and established a Polygraph Unit in 1978. Incidently, Pope Pius the XII had already condemned "the box" in 1958.

Some of the ancient and non-scientific tests or ordeals are thought to have had some physiological basis. For example, the thought behind having the person under examination lick a hot iron (a test employed in Kenya in the movie *Something of Value*) or swallow a

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120 MICHAEL SAKS & REID HASTIE, SOCIAL PSYCHOLOGY IN COURT (1978). On the value of the "box" in inducing confessions, see FISHER, supra note 68, at 290. Compare State v. Cayward, 46 Crim. L. Rep. (BNA) 1225-26 (Fla. Dist. Ct. App. 1989), in which the police used fabricated scientific reports to induce a confession from a man they suspected of sexually assaulting and smothering his five year old niece. The court held that this technique violates due process of law. Id. at 1225. It is of interest that the court also expressed concern that a report falsified for the purpose of inducing a confession might get into the file for other purposes and find its way into the courtroom. Id.

121 FISHER, supra note 68, at 292.

122 Id. at 289 (quoting J. Edgar Hoover).

123 Id. at 290.

124 LYKKEN, supra note 118, at 40.

125 SOMETHING OF VALUE (Loews Inc. 1957).
bit of food, is that fear or stress will reduce the production of saliva.

The polygraph operates on a similar basis. It does not detect or measure lies, but instead is designed to measure emotions, or at least what are thought to be their physiological manifestations. The inventor of the device was an interesting fellow by the name of William Moulton Marston, J.D. and Ph.D, student under the celebrated Hugo Munsterberg, and creator of the cartoon character “Wonder Woman” (under the name Charles Moulton). The Marston device was based on the measurement of systolic blood pressure, and it was his device that received the hostile reception in Frye v. United States.

Marston was too controversial to be taken seriously, but his work was taken up by John Larson. This scholarly man had been a cop in Berkeley, California, before attending Rush Medical College in Chicago and becoming a forensic psychiatrist. Larson came up with the forerunner of the modern machine, which could measure and graph pulse rate, blood pressure, and respiration — that is “many” or “poly” things. Larson’s honest scientific bent compelled him to subject his own theories to rigorous testing, and he wound up (bitterly?) rejecting polygraphy as a “racket” and a “psychological third degree.”

126 See supra notes 67-77 and accompanying text.
127 SAKS & HASTIE, supra note 120, at 192.
129 LARSON, supra note 57, at 172.
130 Id.
132 LARSON, supra note 57, Editor’s Foreward, at xi.
133 Named after Benjamin Rush, the doctor who signed the Declaration of Independence and bled George Washington to death.
134 LARSON, supra note 57, Editor’s Foreward, at xi.
135 A device called the hydrophygmograph was used as early as 1895. It measured pulse and blood pressure. Larson continuously measured these, as well as respiration, and had a “polygraph.” Id. at 271.
136 LYKKEN, supra note 119, at 30. FISHER, supra note 68, at 295 (explaining how two suspects being interviewed in separate rooms can be played against each other during the Q&A phases of polygraph tests; the examiners may have pizza delivered to one room and let the suspect in the other room draw his own conclusions!).
The torch passed from Larson to his student, Leonarde Keeler, who developed the modern form of the box (galvanic skin resistance is an added measurement) and who played the role of the polygraph examiner in the Jimmy Stewart movie *Northside 777*; and to Professor Fred Inbau and John Reid, who came up with systematic questioning techniques as well as the standard texts and training courses in the field. University of Minnesota psychologist David Lykken developed the more reliable "Guilty Knowledge Test" after criticizing the "Control Question" method of Reid and Inbau.

It is not possible to resolve the controversy regarding the admissibility of polygraph evidence here and now. It is enough to note that the validity of the theory leaves something to be desired, testing has been a mixed bag, and the accuracy rates do not support the routine use of results in criminal trials. At best, the device can claim only to detect symptoms of emotions consistent with the examinee's belief in the truth of his or her answers. At worst, it generates false positives as well as false negatives. And the machine can be beaten.

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138 Lykken, *supra* note 119, at 245-307. Lykken describes the purpose of the Guilty Knowledge Test: "[T]o detect, not lying [as the Control Question method purports to do], but the presence of guilty knowledge." *Id.* at 247.
139 *Id.* at 238-39 (describing how a subject can beat the Control Question method of lie detection: The subject should augment his or her physiological reaction to control questions in order to frustrate the examiner's efforts to establish a reliable baseline for comparison).
141 Fisher, *supra* note 68, at 289 ("Anybody who believes he is telling the truth is going to pass this test.").
142 *See* Pete Earley, *Circumstantial Evidence: Death, Life, and Justice in a Southern Town* 62 (1995) (discussing one of the shifty informants in the case of McMillian v. State, 616 So. 2d 933 (Ala. Crim. App. 1993)); Fisher, *supra* note 68, at 297-98 (claiming that it is "absolutely" possible to beat the machine); see also Lykken, *supra* note 119, at 238-39. One of the more memorable rulings in the "O.J. Simpson case" had to do with the testimony of former Los Angeles police officer and sometime hanger-on Ronald Shipp that on June 13 Simpson told him that he was worried about taking a polygraph test because he thought that his dreams about killing his ex-wife might
The real weakness of the polygraph should be apparent. The critical link is the operator. A high degree of subjectivity is built into the methodology; and the opportunities for manipulation are great. Leaving aside the inherent weaknesses of the standard “control question”
techniques, examiners often do not follow the standard procedures, and partisan, private examiners and their counsel release results while withholding details concerning the warm up and control questions. Suggestive and coercive games may be played, and not reflected in any kind of record. Even honest examiners admit that their interpretation of results depend on subjective factors, and many of their own observations of the examinee’s demeanor (miscellaneous “lie-catching” rules of thumb). The widespread use of polygraph evidence would almost surely introduce another layer of discovery abuse, pretrial bickering, partisan and conflicting expert testimony, and assorted skulduggery.

On the other hand, *Daubert v. Merrell Dow Pharmaceuticals, Inc.* opens the door wide to reconsideration of polygraph evidence.\(^{145}\) Already there are new decisions admitting polygraph evidence offered by defendants in “special circumstances.”\(^{146}\) These new opinions note that a great deal of marginal testimony is admitted as “relevant evidence” under current standards (true),\(^{147}\) and that “studies” suggest that jurors will not give disproportionate weight to polygraph evidence (questionable).\(^{148}\) One case refers (but convincingly?) to “tremendous advances” in the technology, and cites accuracy rates in the prediction of truth or deception of between seventy and ninety percent.\(^{149}\) It is ironic that this judicial enthusiasm has come at a time when Congress has acted to limit

\(^{145}\) 113 S. Ct. 2786 (1993) (replacing the “general acceptance” test for the admission of scientific evidence with a more flexible inquiry under FED. R. EVID. 702).


\(^{147}\) Compare *infra* notes 141-43 and accompanying text. Again, the push is coming from the defense “side of the v.”

\(^{148}\) See United States v. Piccinonna, 885 F.2d 1529, 1535 (11th Cir. 1989). One assumes that these studies are based on “mock” or “hypothetical” litigation, since there could be no substantial body of real cases involving real jurors.

\(^{149}\) United States v. Posado, 57 F.3d 428, 484 (5th Cir. 1995) (creating a possibility that polygraph evidence offered by the defense will be admitted).
the use of the polygraph in the employment context. In any event, trial lawyers had best become familiar with the polygraph.

B. The Voice

The voice is very hard to control; listen and learn its inflections.

We have already noted the importance that some cross-examiners have placed on any sign of stress in the voice. Is there a scientific method of detecting and interpreting "voice stress?" Lie-detection skeptic David Lykken contends that devices such as the widely marketed Psychological Stress Evaluator ("PSE") are not even good at detecting and measuring stress, let alone detecting lies. He goes so far as to suggest that the technology has "zero validity." Lykken is not alone in his criticisms of the technique and technology, and the overwhelming weight of judicial authority rejects courtroom use of PSE, although we may see

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150 See, e.g., Employee Polygraph Protection Act of 1988, 29 U.S.C. §§ 2001, 2001 notes, 2002-09 (amended 1994) (prohibiting the use of polygraph examinations by private employers, and prospective employers, except in special circumstances such as theft investigations and national security). In the Clarence Thomas confirmation hearings, Senator Biden rejected Senator Metzenbaum's efforts to introduce the results of Anita Hill's polygraph examination (she passed) into the record with the comment: "If we get to the point in this country where lie detector tests are the basis upon which we make judgments . . . we have reached a sad day for the civil liberties of this country." Michael Ross, Effect of Hill's Taking of Lie Test Uncertain, L.A. TIMES, Oct. 14, 1991, at A1.

151 See, e.g., STAN ABRAMS, THE COMPLETE POLYGRAPH HANDBOOK (1989); STAN ABRAMS, A POLYGRAPH HANDBOOK FOR ATTORNEYS (1977); F. LEE BAILEY & KENNETH J. FISHMAN, CRIMINAL TRIAL TECHNIQUE ch. 17 (1994) (Bailey was a polygrapher at one time, and, after he became famous, he hosted a television show in California in which he opined on the truth detecting powers of the polygraph); F. LEE BAILEY & HENRY B. ROTHBLATT, INVESTIGATION AND PREPARATION OF CRIMINAL CASES ch. 17 (2d ed. 1985).

152 ROLLA LONGENECKER, SOME HINTS ON THE TRIAL OF A LAWSUIT 138 (1927).

153 LYKKEN, supra note 118, at 160.


its return to the arena after Daubert. On the other hand, the gimmick sells. The American Bar Association Journal has carried adds hawking concealable "voice stress computers" despite an ABA Formal Opinion which purports to ban secret tape recording by lawyers. At least one state bar association has opined that it is improper to secretly tape record depositions for purposes of voice stress analysis.

C. The Eye — and Other External Appearances

Bertram Suspends his purpose stern,
And crouches in the brake and fern,
Hiding his face lest foeman spy
The sparkle of his swarthy eye.

We need not rely on the poets. Judges and lawyers have given us a great number of things to look for when it comes to lie detection. Here are some choice testimonials from the legal literature. This from a police magistrate meting out justice at the turn of the century:

I make a mental note if a prisoner has abnormal ears. They are often significant. And if I am doubtful about a witness speaking the truth, I direct my attention to his mouth and to his hands. The mouth is perhaps the most expressive feature, and the hands of a liar are seldom at rest. But where I often think much is to be learned from a witness is after he has given his evidence and left the box. I continue to watch him as he sits unsuspectingly in his place in the court, while other witnesses, especially those that are opposed to him, are examined. The expressions that pass over his face on these occasions are often very instructive.

(N.M.), cert. denied, 488 U.S. 822 (1988) (holding PSE evidence admissible at direction of trial court if the test is reliable).

159 Sir Walter Scott, Rokeby, canto third, verse 4, line 89, in The Complete Poetical Works of Sir Walter Scott 247 (1900).
160 A.C. Plowden, Grain or Chaff: The Autobiography of a Police
We have the following observations from an early researcher in psychology, which were injected into the legal world and lent considerable “credibility” by the towering figure of John Wigmore:

Sometimes the only perceptible mark is a trembling hand, or a winking of the eyes, or a rapid dilation of the nostrils, or a slight creasing of the hairy skin, or an odd smile either fugitive or lasting and then almost inscrutable. The protrusion of the lips, or their contraction with the discoloration of the mucus, sometimes replaces the smile. In some instances the liar tosses his head; . . . No intentional derogation from the truth can take place without a tendency to muscular contractions or expansions, — phenomena of inhibition or excitation. The reason for this must be sought in the cerebral physiology which is the basis for a psychological explanation of the lie.\textsuperscript{161}

And from the advocate:

I have also observed that the witness who is swearing to a clear-cut lie will, while so doing, throw back his head with an indifferent air and close his eyes or blink. My experience has taught me to believe that this is an almost certain sign of deliberate dishonesty.\textsuperscript{162}

The most sensitive index to the quality of the nervous sensations is the eye, and when all other affectations are quiet, the eye should be carefully watched. . . . The mouth is also an index in some persons.\textsuperscript{163}

Many lawyers and judges believe in this stuff. Modern judicial opinions are full of praise for lie — or truth — detection based on “facial expressions” and “eyeball testimony.”\textsuperscript{164} What is of equal or greater


\textsuperscript{162} The Principles of Judicial Proof, supra note 160, at 495; The Science of Judicial Proof, supra note 113, at 606-07 (quoting G.L. Duprat, Le Mensonge: Étude de Psychosociologie 120 (2d ed. 1909)).

\textsuperscript{163} Miller, supra note 99, at 258.

\textsuperscript{164} Longenecker, supra note 152, at 138.

importance is the fact that even lawyers who don't believe in this stuff, do believe (correctly) that jurors and judges believe in it, and, therefore, use it to advantage.\textsuperscript{165} It is part of the conventional wisdom, and, therefore, part of everyday practice. Alas, social scientists have subjected these lie-catching techniques to empirical trial and have found that such “manner and conduct” evidence cannot be used to detect actual deception on any sort of reliable basis.\textsuperscript{166} Admittedly, social scientists have their own credibility problems. Elsewhere I have argued that we ought to resist the temptation to substitute social scientists for lay jurors.\textsuperscript{167} But in this case we ought to consider the empirical work from a policy perspective.

Perhaps the most interesting work in this area has been done by psychologist Paul Ekman, whose book \textit{Telling Lies}\textsuperscript{168} ought to be read by trial lawyers. Ekman used scientific methodology to find clues to deception. He believes that he has found them in fleeting, almost imperceptible, movements of the eyes, mouth, and brow. The work is fascinating. But one must ask the following question: Can lawyers be trained to use this research? Assuming that a significant number of lawyers could absorb this knowledge, it seems highly unlikely that it could be employed in the courtroom. And here is another nice question: How do you convey the information you (the advocate) have perceived to the finder of fact (judge or jury)? The advocate cannot be a witness.\textsuperscript{169}

Consider the following scenario, which comes from an old trial in which counsel was rebuked and his cross-examination cut off for this objectionable colloquy (testimony) with the witness (in the hearing of the jury):

\begin{quote}
[Counsel:] “Are you now perfectly cool? . . .”

[Witness:] . . . “I am, yes, sir.”

[Counsel:] . . . “I see your hands and feet are jerking all the time, I thought perhaps you were a little nervous.”\textsuperscript{170}
\end{quote}

\begin{footnotes}
\item[1157, 1163] (1993) (giving a critical survey of reliance on demeanor evidence).
\item[166] WRIGHTSMAN ET AL., supra note 128, at 178; Blumenthal, supra note 164, at 1159.
\item[167] See supra notes 103, 107, 109, 110-13 and accompanying text.
\item[168] EKMAN, supra note 140.
\end{footnotes}
It is not clear that the observations of counsel were warranted by the facts, and it was the opinion of the court that counsel intended to give the jury the message that he had "seen something in the conduct and actions of the witness which was unobserved by them." But the latter problem (the "advocate as witness problem") would probably exist in any event.

D. Demeanor

"Give your evidence," said the King; "and don't be nervous, or I'll have you executed on the spot."  

Should this man be saved by his words, Acquitted because he speaks well?

Demeanor is a tricky thing. Consider just two little examples. A student of Britain's infamous Wallace case, in which an innocent man was convicted, in part, because of his cool demeanor, quotes a retiree of Scotland Yard:

"It is impossible to get away from the fact — humanity is a strange mixture, some men are weak and others are 'tough bastards' who would not flinch in any circumstances. I believe that only the very experienced investigator can truly assess 'outward signs,' but to interpret such conclusions would be too dangerous."

So there is a problem of interpreting even unstaged conduct. But what about coached conduct?

I placed a cross mark on the wall. No one in the courtroom knew it was there except Brock [who had pled not guilty by reason of insanity] and his counsel. I told Brock to glue his eyes to that cross mark — come what may — and never relax his gaze for an instant. . . .

(1908).

171 Id. at 555.
173 MITCHELL, supra note 92, at 31 (a translation of Job 11:2).
The jury came in with the finding we wanted. It is well to get the juror reaction, which we did. One of the jurors summed it all up when he said: "Did you notice that boy staring into space during this whole trial? Crazy as hell!"\(^{175}\)

What are we to do with demeanor then? Is there a "science"? Can lawyers learn it? If so, can the jury be educated regarding the "science?" It would seem that we are back to the question of whether it is wise, or worthwhile, admitting "expert" testimony on witness credibility. This could prove to be a bonanza for social scientists and a nightmare for the administration of justice.

E. Truth Serum

Is there some other "scientific" way to get past the play acting and pluck the truth from the brain? Some have thought so. In vino veritas est. In wine is the truth, or so the saying goes. What the Romans undoubtedly meant by this was that people "under the influence" lose their inhibitions and may let slip things they would otherwise conceal. But is there a scientific parallel to a chug from the jug of the "bitter waters"?\(^{176}\)

That thought seems to have provided the inspiration for the work of Drs. House, Lorenz, and others. Dr. House was a Texas obstetrician who experimented with scopolamine.\(^{177}\) Scopolamine induces the so-called "Twilight Sleep," and, with morphine, can be used as a sedative in obstetrics and surgery. It is also the stuff that Dr. Hawley Harvey Crippen used to kill his wife in a famous British murder case.\(^{178}\) Dr. Lorenz is associated with early research involving the use of sodium amytal. He seems to have been more conservative in his claims than Dr. House, noting that he had observed subjects lie under the influence of such drugs. He did conclude that such "truth serums" could be used to clear the innocent or to develop leads.\(^{179}\)

175 ALLEN L. HENSON, CONFESSIONS OF A CRIMINAL LAWYER 164 (1959).
176 See supra notes 59-66 and accompanying text.
177 See LARSON, supra note 57, at 204-20; see also THE SCIENCE OF JUDICIAL PROOF, supra note 113, at 764-68.
179 LARSON, supra note 57, at 219.
Suffice it to say that "the courts have uniformly rejected the admissibility of statements made by a person while under the influence of 'truth serum' drugs when those statements are offered to prove the truth of the matter asserted." 180 And this brings us to hypnosis, and the admissibility of declarations made under hypnosis, which to some extent have been treated in a manner similar to drug-induced statements.181

F. Hypnotism

Hypnotism has been characterized "as a state of heightened concentration . . . achieved by creating a passiveness in the subject, usually by employing eye fatigue. The subject, with increased receptivity to instruction, is guided into a trance-like state through a series of suggestions from the hypnotist."182 Several commentators have suggested that the Serpent used hypnotism on Eve in the Garden.183 Its use has been traced to ancient times, and the therapeutic use of hypnotism may have originated in India.184 It has been used for investigative purposes in a number of celebrated criminal cases, including the Chowchilla Bus-Knapping case, the Boston Strangler case, the Hillside Strangler case, in the investigation of the kidnapping of General James Dozier by the Red Brigade, and in connection with the defense of Sirhan Sirhan.185

180 GIANELLI & IMWINKELRIED, supra note 154, at 271. See, e.g., Orange v. Commonwealth, 61 S.E.2d 267, 274 (Va. 1950) (affirming the trial court's refusal to admit, as requested by the defendant, evidence of the defendant's answers to questions while under the influence of "truth serum").

181 Greenfield v. Commonwealth, 204 S.E.2d 414, 419 (Va. 1974) (affirming refusal to admit hypnosis evidence on grounds that such evidence, like "truth serum" evidence and drug-induced statements, is unreliable).

182 Commonwealth v. Nazarovitch, 436 A.2d 170, 173 (Pa. 1981) (affirming suppression, as requested by defendant, of testimony based on hypnotically-refreshed memory on the grounds that such evidence is not sufficiently accepted in the scientific community). For an odd little introduction to the subject, see MYRON TEITELBAUM, HYPNOSIS INDUCTION TECHNICS (1965).


184 See DURANT, OUR ORIENTAL HERITAGE, supra note 14, at 532.

There are said to be five problems with the forensic use of hypnosis: (1) hypersuggestiveness (leading questions will elicit more incorrect answers from a hypnotized subject), (2) hypercompliance (eagerness to please the examiner), (3) confabulation (a decrease in the subject's critical judgment), (4) jury misunderstanding of the technique (a mistaken assumption that it elicits truth as opposed to memory) and (5) the "unusually strong confidence [of] the hypnotized subject in his [or her] ability to recall events accurately." The fifth factor affects the demeanor of the witness, makes cross-examination difficult if not impossible, and relates to another problem known as posthypnotic source amnesia, a syndrome that renders the subject unable to distinguish between what was real and what was learned under hypnosis.

It is difficult to square a per se rule excluding all hypno-induced criminal statements with constitutional rights. On the other hand, it is hard to justify the admission of expert testimony as to what a subject said under hypnosis, and even harder to justify opinion as to the truth content of such statements. After the demise of the Frye

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186 Id. at 82.
187 Id. at 84-85. See also People v. Shirley, 723 P.2d 1354, 1383 (Cal. 1982) (holding inadmissible testimony based on hypnotically-restored memories and testimony relating to the restored memories from the time of the hypnosis forward), superceded by statute, People v. Aguiler, 218 Cal. App. 3d 1556, 1564 (1990).
189 Shaw, supra note 183, at 161-62. See also Commonwealth v. Reed, 583 A.2d 459, 466-69 (Pa. 1990) (affirming refusal to admit, as requested by the defendant, a videotape of an interview of the defendant while under hypnosis on the grounds that such evidence is unreliable), appeal denied, 598 A.2d 282 (1991); Greenfield v. Commonwealth, 204 S.E.2d 414, 418-19 (Va. 1974) (affirming refusal to admit, as requested by the defendant, testimony by psychiatrist who hypnotized and interviewed the defendant on the grounds that the evidence was unreliable). But see CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE 502 (1995) ("[P]arties are often allowed to offer expert testimony on the reliability of hypnotically refreshed testimony and to request cautionary instructions that will enable the jury to assess the proper weight to be given to the evidence."). For a collection of cases excluding this type of evidence, see People v. Smrekar, 385 N.E.2d 848, 853 (Ill. App. Ct. 1979) (affirming court's refusal to admit testimony of witness who was hypnotized prior to identifying defendant), cert. denied, 498 U.S. 1029 (1991), overruled by People v. Seidler, 561 N.E.2d 386 (Ill. App. Ct. 1990).
test, one hopes that the courts will continue to exclude this sort of testimony under the Daubert guidelines or under Federal Rule of Evidence 403. Memory is reconstructive and not reproductive, and what one remembers can be altered.

In many jurisdictions, hypnosis may be used to refresh a witness’s recollection of events, and it is appropriate that the jury be made aware of the fact that hypnosis was employed to this end. But it seems the better view that the cross-examiner may forgo the opportunity to attack on this ground, and keep out expert testimony about the techniques of hypnosis and their reliability. Such testimony is not really necessary, and might be used as a means of “bolstering” or shoring up the primary witness’s testimony. The hypnotist or other memory expert should not be permitted to serve as an “oath helper” and should not be permitted to give an opinion that the primary witness’ memory has been accurately refreshed. “Credibility ... is for the jury — the jury is the lie detector in the courtroom.”

\[190\] Frye v. United States, 293 F. 1013 (D.C. Cir. 1923), superseded by rule as stated in Daubert v. Merrell Dow Pharmaceuticals, Inc., 113 S. Ct. 2786, 2793-94 (1993) (Frye established the “general acceptance” test for the admissibility of scientific evidence).

\[191\] Daubert, 113 S. Ct. at 2796-97 (establishing a more flexible test for admission of scientific testimony based on methodology, validity, applicability of scientific techniques, and the levels of scrutiny and acceptance by the scientific community).

\[192\] FED. R. EVID. 403 allows exclusion of relevant evidence if the danger of prejudice, confusion, or misleading of the jury substantially outweighs the probative value of the evidence.

\[193\] See State v. Collins, 464 A.2d 1028, 1034-43 (Md. 1983). It is said that a distinction can be drawn between hypnosis, on the one hand, and polygraph testing and the use of truth serum on the other hand, on the ground that the latter are “truth elicitors” and have nothing to do with memory. By the same token, it is said that hypnosis has to do with memory, and cannot produce the truth.

\[194\] See United States v. Awkward, 597 F.2d 667, 669 (9th Cir.), cert. denied, 444 U.S. 885 (1979) (affirming admission of hypnotically-refreshed memory evidence and holding that, if the jury is informed of hypnosis that fact goes to credibility).

\[195\] Id.

\[196\] Id. at 670.

\[197\] Id.

\[198\] Id.

\[199\] Id. at 671 (quoting United States v. Barnard, 490 F.2d 907, 912 (9th Cir. 1973), cert. denied, 416 U.S. 959 (1974)).
However, there does seem to be a split of authority on the issue of whether a witness whose memories have been refreshed by the use of hypnosis may testify as to such post-hypnotic memories, or whether the witness should only be permitted to testify to matters that can be proved to have been part of the witness's pre-hypnotic memories, or whether all of the witness's memories will be deemed "tainted" by the hypnotism. Once again, *Daubert* may favor the more wide-open view. What I have already said in connection with the lie-detector, social science opinion, and the like, I must repeat with regard to hypnosis. Lawyers must become familiar enough this kind of "scientific" evidence to mount effective challenges to it. Otherwise what passes for truth-detection may end up being used as an instrument of deception.

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201 State ex rel. Collins v. Super. Ct., 644 P.2d 1266, 1295-97 (Ariz. 1982) (holding admissible testimony based on memories demonstrably recalled prior to hypnosis) (supplemental opinion); People v. Hayes, 783 P.2d 719, 724-25 (Cal. 1989) (holding admissible testimony based on memories that the court finds the witness recalled prior to hypnosis); State v. Collins, 464 A.2d 1028, 1044-45 (Md. 1983) (holding admissible testimony based on statements clearly demonstrated to have been made prior to hypnosis); People v. Hughes, 453 N.E.2d 484, 494-95 (N.Y. 1983) (holding not necessary inadmissible testimony related to events recalled prior to hypnosis).

202 People v. Mena, 624 P.2d 1274, 1279-80 (Ariz. 1981); People v. Shirley, 723 P.2d 1354, 1373-83 (Cal.), cert. denied, 459 U.S. 860 (1982), superceded by statute People v. Aguilar, 218 Cal. App. 3d 1556, 1564 (1990). These opinions were reversed on the ground that they would discourage investigatory use of hypnosis by the police.

203 *But see* Borawick v. Shay, 68 F.3d 597, 610 (2d Cir. 1995) (holding inadmissible hypnotically refreshed memory of abuse that supposedly occurred 20 years prior).

204 See, e.g., ALAN W. SCHEFLIN & JERROLD L. SHAPIRO, TRANCE ON TRIAL (1989).

205 Compare Shaw, *supra* note 183, at 165-66 (likening hypno-induced memory to therapy induced (repressed) memory).