Memory and Mischief in Forensic Hypnosis

Alan W. Scheflin and
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Trance on Trial
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Alan W. Scheflin, professor of law at Santa Clara University (California), received the 1991 Manfred S. Guttmacher Award from the American Psychiatric Association and the American Academy of Psychiatry and Law for the best book on forensic psychiatry for Trance on Trial. *Scheflin is coauthor, with E. Opton, Jr., of* The Mind Manipulators *and a special member of the American Society of Clinical Hypnosis.* ■ *Jerrold Lee Shapiro, associate professor of counseling psychology at Santa Clara University, was recipient of a Regents' Medal for Excellence in Teaching from the University of Hawaii and the 1991 Manfred S. Guttemacher Award and is author of* When Men are Pregnant *and* The Measure of a Man. ■ *John F. Kihlstrom, professor of psychology at the University of Arizona (Tucson), received the American Psychological Association's 1979 Distinguished Scientific Award for an Early Career Contribution to Psychology, in the area of personality, and numerous awards for hypnosis research. Kihlstrom is coauthor, with N. Cantor, of* Personality and Social Intelligence *and coeditor, with F. J. Evans, of* Functional Disorders of Memory.

Hypnosis is a social interaction in which one person offers suggestions to another for imaginative experiences that, at their core, involve alterations of perception and memory. This ability of hypnosis to modify cognition is interesting to theorists, but it is also useful to practicing clinicians. For more than 150 years, for example, medical patients have obtained significant relief of pain by means of hypnotic suggestions for analgesia. More recently, another practical application has emerged: the use of hypnotic suggestions for hypermnesia to improve the memories of witnesses and victims of crimes. In the face of poor or uncertain memory, police officers, attorneys, judges, and not a few health professionals have taken to hypnotizing witnesses and victims in the hope of getting something usable in court. The same practice can be seen in therapists who resort to hypnosis in order to recover ostensibly repressed memories of childhood incest, sexual abuse, and other trauma.

In *Trance on Trial,* Scheflin and Shapiro analyze the legal implications of this trend. Their scope includes more than 500 cases in state appeals courts, military tribunals, and federal district or appeals courts. The first of these in the modern era, a Maryland case in 1968, declared hypnotically refreshed memory to be admissible without restrictions. However, in response to a large number of cases in which hypnosis produced questionable or patently false recollections and an emerging consensus among scientific researchers that hypnotically refreshed memory is inherently unreliable (Council on Scientific Affairs, 1985), that decision was overturned. Scheflin and Shapiro document a clear trend since then toward a per se exclusion of hypnotic evidence. However, some states continue to admit hypnotic evidence, sometimes imposing procedural safeguards but sometimes not, creating a situation that begs for eventual resolution by the Supreme Court.

In fact, hypnosis has already reached the High Court once in *Rock v. Arkansas* (1987). That case was unique—hypnosis was used to refresh the memory of a defendant, not a witness or victim—and was decided on narrow constitutional grounds without reaching a conclusion about the validity of hypnotically refreshed memory. By a hairline majority, the Court determined that despite serious questions about hypnotically refreshed memory, defendants must be given every opportunity to defend themselves. In a careful analysis, however, Scheflin and Shapiro show that this decision leaves the door open to diversity of opinion among the states. Moreover, as they argue, the majority opinion can be read as supporting forensic hypnosis for witnesses and victims as well as defendants. In fact, as the authors show, it is possible to see in *Rock v. Arkansas* the beginnings of a retreat from per se exclusion. How far that retreat will go, even in the absence of a decisive ruling by the Court, is unclear.

The situation is complicated by recent changes in the law concerning the admissability of scientific evidence. The *Frye* Rule, in place since 1923, declares that evidence obtained from a scientific technique is admissible so long as there is consensus within the scientific community concerning the validity of the technique. As far as hypnosis and memory is concerned, no such consensus exists; in fact, quite the opposite. But recent changes in the Federal Rules of Evidence may permit juries to resolve such issues themselves, following a battle between expert witnesses for the opposing sides (Huber, 1991). To make things worse, many cases of repressed memory are heard in civil rather than criminal courts, where the standards of evidence are more lenient to begin with.

The problem lies in the joint consequence of two facts: Remembering is an act of reconstruction in which expectation and inference play major roles, whereas hypnosis is ultimately an act of the imagination in which normal reality testing is set aside. The hallucinating subject may believe he sees something, but there is nothing really out there; the age-regressed subject may believe she is five years old again, but she has not shrunk in the chair. Similarly, subjects given suggestions for hypermnesia may believe that they have recovered new memories, but this information may not be accurate. In the absence of objective corroborating evidence, there are no tests that can be applied to determine whether a memory is accurate. The situation is made worse by the fact that suggestion is central to hypnosis, raising the possibility that hypnotized eyewitnesses may be more vulnerable to leading questions and other postevent misinformation effects. Even when no new memories are produced, the popular belief in the efficacy of hypnosis may lead shaky eyewitnesses to become more confident in whatever it is that they do remember. Scheflin and Shapiro review this evidence comprehensively and fairly. They agree that hypnotic memories are inherently unreliable—not necessarily inaccurate, just not reliably accurate. They are uncertain whether hypnotically refreshed

memory is really any worse than nonhypnotic memory in this regard. It seems that the burden of proof is about equally distributed between proponents and opponents.

The topic of forensic hypnosis has been visited before, most notably by Laurence and Perry (1988; for a review, see Kihlstrom & Tobias, 1990). However, Laurence and Perry were psychologists, not lawyers, and they could not offer an authoritative analysis of the current legal situation. *Trance on Trial* is a kind of companion to Laurence and Perry's work. Scheflin and Shapiro make a signal contribution to the debate by reviewing in depth the legal history of this problem, the constitutional background, and the approaches of different jurisdictions. Along the way, they provide a useful discussion of theoretical issues in hypnosis and memory and offer a number of valuable suggestions for the hypnotist who must testify in court. But the core of the monograph lies in the authors' presentation of the legal issues surrounding forensic hypnosis. It is certain that, sometime in the future, the Supreme Court will have to confront directly the scientific issues surrounding hypnosis and memory. In preparation for that moment, when we can hope that the psycho-legal issues will be settled once and for all, everyone who is interested in hypnosis, memory, and eyewitness testimony should read this book.

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