

Trance on Trial

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To the loving memory of Anthony C. Amantea

For my precious daughter, Hallie Schefflin

For the Bernadett-Shapiros:

Susan Trese

Natasha Leilani

Gabriel Faustino

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Foreword

Just as it is said that truth and falsehood are two sides of the same coin, it is not surprising that hypnosis, a technique that has been associated with the ability to retrieve otherwise unavailable memories, should likewise stand accused of creating false memories. What has this odd phenomenon to do with eyewitness testimony? Does it help or hinder? The authors, law school professor Alan Schefflin and psychologist Jerrold Shapiro, do indeed put trance on trial and admirably fill the roles of both prosecution and defense, skillfully cross-examining the literature for evidence regarding uses and misuses of hypnosis.

By the standards of our modern disposable culture, hypnosis has ancient roots. It began as a formal discipline some two centuries ago and represents the first Western conception of a psychotherapy, a talking interaction between a doctor and a patient that could lead to improvement in symptoms. Over the ensuing two centuries, it has been repeatedly discredited and then rehabilitated. The French commission that investigated the work of the famous Dr. Mesmer, founder of the field, was composed, interestingly enough, of the chemist Lavoisier, our own Benjamin Franklin, and a doctor known for his work in pain control by the name of Guillotin. They reached the then devastating conclusion that hypnosis was nothing but "heated imagination." The report itself, however, took pains to underscore the power of suggestion in maintaining the social fabric as well as in therapeutic interactions. The members of the commission specifically took aim at Mesmer's theories of magnetic influence and some of his methods and claims of success, rather than the principle of suggestive influence.

Sigmund Freud likewise started his psychoanalytic investigations with the use of hypnosis, using it to develop his original idea that unconscious conflicts led to conscious symptoms. He gave it up when he came to believe that hypnosis represented just one form of a more general phenom-

enon, the irrational thoughts and feelings patients have about therapists, drawn from their early experiences with parents and other caretakers, which he called "transference."

What relevance does this have for the courtroom? One need but see one patient who develops a traumatic amnesia, a rape victim who has no memory at all that the crime occurred even though she was fully conscious at the time and gave a report to the police afterwards. She has lost time, is mystified by her inability to recall any details of the event. Hypnotized, she goes back in time to the period just before the rape and suddenly, with vivid and painful detail, relives the assault as though it were occurring again. The whole walled-off, or dissociated, body of memories suddenly becomes available, along with intense dissociated emotions. This warded-off material is accessed through the formal use of hypnosis, a state of intense, focused concentration with a relative suspension of peripheral awareness. Now the victim can identify her assailant, can give a vivid description of the circumstances of the alleged crime, whereas numerous attempts by herself and with the police were unavailing. Can a phenomenon that can be so powerful in such a setting be easily dismissed?

Cases such as this led to widespread training of professionals of various types, psychiatrists, psychologists, and law enforcement officials, in the use of hypnosis to enhance the recall of witnesses, victims, and occasionally defendants. This led to no small amount of concern that hypnosis was being used, not to uncover information, but indeed to suggest it. For while hypnotized people may tap into memory stores they seem otherwise unable to access, they are also unusually responsive to instructions because their attention is so focused that they are less likely to critically judge and evaluate instructions they are given. Thus, the very method that supposedly allows people to bypass their defense against emotional pain and uncover memories may also be used to implant or contaminate memories. The dangers of a leading police interrogation are well enough known anyway: "How tall was the black man when he shot you?" is an example of an unduly suggestive question. The dangers of suggesting rather than eliciting an answer are amplified when a subject is hypnotized and therefore relatively uncritical about the information produced in an effort to comply with the hypnotist.

The adversary approach to ferreting out truth complements nicely the two-edged sword quality of hypnotic influence on memory. The same phenomenon that can focus attention toward the recall of detail surrounded by a storm of emotion may be misused to push a subject to believe in fantasies. The hypnotic state gains its intensity at the expense of critical judgment. Thus, since the hypnotized person utilizes less critical judgment, we must use more such judgment in evaluating what happens during an hypnotic encounter. More than that, our knowledge of the hypnotic state, and how easy it is to enter and exit, makes it clear that hypnotic

phenomena occur spontaneously: during traumatic episodes and in their aftermath; when one is absorbed in reading a good novel; or is transported by a movie to the point where one loses awareness of being in a theater watching a movie and enters the imagined world. Hypnotic phenomena occur all the time and as such are a concern for anyone interested in evaluating the truth. For example, intensive interrogation in the back room of a police station can have its hypnotic components. Subjects have been led to confess to crimes they did not commit with a line of questioning like, "Well if you did something that terrible, you probably would develop an amnesia for it, so how would you have done it if you did it?" This could be a clever way to get a guilty person to confess, but it could also be a subtle hypnotic instruction that an innocent person should confess to a crime he or she did not commit.

When it comes right down to it, studying hypnosis is a lesson in humility. The law cherishes a standard called the reasonably prudent man. We all like to think that we are one. Yet what we observe with hypnosis teaches us that we are not always reasonably prudent, that we sometimes will firmly believe things that are strange or untrue. We become convinced that one hand is lighter than the other, although this is physically impossible. We do not see something that is right in front of us after hypnotic instruction. We sniff ammonia and think it perfume. The massive neocortex that sits on top of the structures at the base of the brain that process perception allows us to do a great deal of work: modulating perception, accessing memory and planning future actions. This is a unique advantage to humans, but it can also be a disadvantage. Our ability to transform signals allows us to reduce or eliminate pain, yet it sometimes makes it hard for us to discriminate between real and fantasy perceptions. Yet accurate perception and memory is often at the heart of the judicial process. Because hypnosis helps us understand these processes, and demonstrates to us our abilities to store and retrieve memory, it represents both our opportunities for improving this process and the risks inherent to it. Hypnosis is thus both entrancing and threatening.

Thus, hypnosis has come to be seen as a two-edged sword, possibly useful, especially in cases where there is traumatic amnesia, and yet potentially dangerous, contaminating the memory or conviction of a witness who goes through the ceremony and therefore somehow comes to believe with more certainty the "truth" of his or her own productions.

Yet, despite the calls of some for the death penalty for hypnosis, it still stands charged but not convicted. Indeed, there is renewed interest in the phenomenon in this context because of the observed association between dissociative experiences and posttraumatic stress disorder. Many aspects of the trauma that victims of crime undergo, suddenly living an event as though it were in the present, the loss of pleasure in usually enjoyable activities, and the sensitivity to stimuli that remind them of the crime,

are reminiscent of hypnotic experiences: hypnotic age regression, dissociation, and suggestibility. Several studies have found that Vietnam veterans with posttraumatic stress disorders are unusually hypnotizable. Thus, even an official sentence of death could not keep hypnosis out of the courtroom, since it may be that individuals vividly reliving a traumatic experience are in a spontaneous hypnotic state. Hypnosis may, in fact, occur when nobody intends its use. An intense interrogation about a traumatic event in the back room of a police station may be enough to induce hypnosis in a highly hypnotizable witness, victim, or defendant. This may account for some of the spurious confessions to crimes exacted from defendants, or well-meaning but erroneous testimony provided by witnesses and victims. If the phenomenon is there, it is a normal part of human nature. Widely distributed in the population and useful for various forms of problem-solving, hypnotic capacity is spontaneously mobilized in many kinds of traumatic responses and will find its way into the courtroom, whether we like it or not. Hypnosis deserves a fair trial. Here it gets one. Remember that defendants are innocent until proven guilty, and enjoy reading this book.

David Spiegel, M.D.
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Preface

For more than half of the 20th century, hypnosis was of little concern to judges, lawyers, and police. In 1897, the California Supreme Court announced that “the law of the United States does not recognize hypnotism” (*People v. Ebanks*, p. 1053). There the matter was to stay until the late 1960s, when a few courts were willing to soften the judicial hard line against the admissibility of hypnotically refreshed testimony. This initial sprinkle of judicial acceptance soon grew into a stream, then a river, and now a flood. Since 1980 more books have been published, more law review articles have been written, and more cases have been decided involving forensic hypnosis than in the entire preceding century. Incredibly, the literature and case law on forensic hypnosis more than doubled in 5 short years!

This renaissance of interest in hypnosis has proceeded at an astonishing pace. Today psychologists, psychiatrists, counselors, therapists, doctors, nurses, and other professionals use hypnosis, meditation, guided imagery, visualization, neurolinguistic programming, and related techniques in thousands of cases and for multiple purposes. Each year the number of professionals who seek training in hypnosis expands enormously. However, despite the vast volume of material now available on the legal aspects of hypnotic interventions and investigations, practicing therapists have been without a handy reference source that details the implications of hypnotherapy on the legal rights of clients. We had to discover this fact the hard way.

In 1981, Dr. Shapiro was requested to provide hypnotherapy for the relief of amnesia blocks suffered by a woman who had been traumatically raped. Because his sole initial interest was in symptom relief, he proceeded in a therapeutically rather than a legally oriented manner. When his client regained her memory, she became aware that she had been molested by a second, previously unidentified perpetrator. Upon her report of this fact to

the authorities, the culprit was subsequently arrested. (This case is described in more detail in Chapter Two of this volume.)

Shapiro found it necessary to address many legal issues involving his use of hypnosis. It was important for him not only to satisfy the clinical needs of the client, but to proceed in a manner that satisfied judicial requirements as well. Although the procedures Shapiro followed were deemed acceptable, he discovered that identical therapy in another jurisdiction could have inadvertently deprived the client of the right to be a witness in court actions against her attackers.

In the late 1970s, Professor Schefflin encountered a parallel problem. Several trial attorneys consulted him for assistance in handling legal cases involving hypnosis issues. In his search through the literature, Schefflin found very little practical information that would be helpful to them. Because hypnosis questions had rarely been raised in courtrooms, lawyers were generally unfamiliar with how hypnosis works and with its impact on memory. Though they were quite conversant with the rules of evidence governing the admissibility of testimony, they were unsure of the nuts-and-bolts issues involving direct examination and cross-examination of hypnosis experts. No available materials addressed the everyday concerns of a lawyer working to put together a case involving hypnosis for trial.

The motivation to write a book that could function as a practical reference handbook was further fueled by our experiences as expert witnesses in court. In the witness chair, one soon discovers that the atmosphere of a trial is unlike any other environment an expert tends to inhabit. As with any mission into foreign terrain, careful advance preparation is one's best ally. For us, such preparation had to be the product of endless hours spent accumulating scattered pieces of information from diverse and often unrelated sources.

Therapists are increasingly called to court to testify as practitioners or expert witnesses. How does a hypnotherapist who is not trained in the law prepare for a court appearance? How does he or she handle direct examination and, especially, cross-examination? What guidelines are recommended for routine therapeutic procedures that will ensure protection of the legal rights and interests of clients, while also meeting the legal and ethical standards of professional codes? It is our desire to equip therapists, hypnosis experts, lawyers, and others with enough useful references and suggestions to save dozens of hours of research. It is also our intention to provide specific and detailed information about hypnosis topics that will enable therapists and lawyers going into court to prepare themselves properly and to perform well.

Naturally, no one text can be expected to function as the sole source of consultation, and this book is no exception. Indeed, the nature of the subject matter discussed requires that other material be examined and read. This book will help professionals to locate that material. We have made an exhaustive search to find and list every hypnosis case decided in this coun-

try and every pertinent hypnosis statute currently in force. (The cases and statutes pertaining to hypnosis are listed in the Appendix of this book; all other material is listed in the "References and Bibliography" section at the end of the book.)

As professionals, regardless of our chosen callings, our first concern must be with the welfare and protection of those entrusted to our care—itself a demanding task. Often it seems as if the client is trapped in a free-fire zone as lawyers, therapists, and police reciprocally undermine one another's best efforts. In such a battle there can be only losers. And, as in a game of Russian roulette, the question of whom the "liability" bullet will strike is left to the hands of fate.

But, as professionals, we can influence the odds. We can do so by making sure that in our zeal to protect one set of our clients' interests, we do not neglect another set normally protected by others. For example, a therapist or police officer who hypnotizes a crime victim without explaining and following the legal requirements for testimonial admissibility is risking a suit for malpractice or deprivation of civil rights. In such a case, the great irony is that the criminal goes free and the helping professional must pay. For the sake of innocent clients, we hope that this book will equip us all to work better in individual situations, and in closer harmony with one another.

The marriage of skills and styles that led to the completion of this book has been, like most fruitful unions, arduous as well as productive. The fields of law and psychology do not easily mesh, and practitioners from each discipline tend to approach problems from distinctly different orientations. When trance goes on trial, even within each discipline sparks fly as conflicting viewpoints rub uncomfortably against one another.

Forensic hypnosis is a volatile field engendering strong opinions. True believers abound. It would not be possible to write a practical book on this subject that would satisfy everyone. Because professional positions on these topics have become so polarized, our first goal to our readers has been to present each perspective as impartially and as fairly as possible. Every effort has been made by direct interview and correspondence to make sure that the views of each major participant in the forensic hypnosis debate have been stated accurately.

To our colleagues in law and mental health we owe a very great debt of gratitude. Over the years we have benefited from discussions and correspondence with many people. We acknowledge them here: Martin T. Orne, David Spiegel, Campbell Perry, Jeffrey Zeig, Ernest Rossi, Martin Reiser, Helmut Relinger, Thomas Worthington, and Howard Varinsky.

We also wish sincerely to thank the Erickson Foundation for allowing us the opportunity to present this material on two different occasions. The warm reception we received convinced us that hypnotherapists were look-

ing for a safe path to provide effective healing without courting legal calamity.

In the course of the preparation of this book, many other people have provided support, help, and assistance. Professor Schefflin would like to express appreciation and affection to his parents, his brother Larry, sister-in-law Toni, and nephew Scott. Dr. Rhona Fisher and Denise Amantea, Esq., provided warmth, encouragement, and strength, especially in the crucial closing months.

Dr. Shapiro gratefully acknowledges the calming, effective advice of his wife, Susan Bernadett-Shapiro. In addition to her inestimable love and support, she also managed to provide an addition to their family in 1988. He also extends his appreciation to many teachers in hypnosis from the American Society of Clinical Hypnosis, Dr. Milton H. Erickson, the Erickson family, The Rape Crisis Center of Honolulu, Hawaii, Mr. Darwin Chang and the Office of the Attorney General of the State of Hawaii, and the staff of the King Kalakaua Center for Humanistic Psychotherapy in Aiea, Hawaii.

Mary Hood and the law librarians at Santa Clara University deserve special thanks for the hours and hours of aid they provided to us over the years. Barbara Norelli, in particular, tracked down obscure journals and articles dating back over a century. Her search for the long-forgotten literature on the legal aspects of hypnosis was conducted with the zest and skill of a Sherlock Holmes.

We wish to thank our research assistants: Barbara Edmonston, who helped us with the psychological issues, and Wini Gross, Elizabeth Harris, Jamie Caploe, Richard J. Davis, and Laura B. Choper, who helped with legal citations.

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Alan W. Schefflin
Jerrold Lee Shapiro

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Part I

Introduction

CHAPTER 1

The Legal Status of Hypnosis: An Overview

INTRODUCTION

In 1987, Andrea H. was sexually assaulted.¹ This experience was so traumatic that in its aftermath she was unable to remember what had happened or who had violated her. Suffering from posttraumatic stress, Andrea sought the assistance of Dr. Mitchell O'Connor, who used hypnosis to help restore her memory and promote healing. Following successful treatment, Andrea regained her memory of the assault. After she presented the police with this information, Mark White was arrested and charged with the crime.

At trial, White's attorney argued that the hypnosis performed by Dr. O'Connor had so tainted Andrea H.'s memory that she would have to be disqualified as a witness. The attorney cited dozens of cases holding that the police use of investigative hypnosis constituted an impermissible tampering with the memory of a witness. The prosecutor acknowledged these cases, but raised a critical distinction between them and the present case. Police hypnosis was not involved, and hypnosis was not used for investigative purposes. The rule disqualifying a witness from testifying, the prosecutor urged, should not be extended to situations where qualified and licensed mental health professionals had used hypnosis for therapeutic purposes unrelated to legal proceedings.

The judge was moved but not swayed by this argument. He was willing to recognize that hypnotic suggestion might be less of a problem in

¹All the names in this case have been changed.

the therapeutic setting, but he was nevertheless persuaded that even in this benign setting the mind of the witness had been altered. Andrea H. was not permitted to testify; White went free.

Andrea H.'s day in court had been denied her. Only one other potential legal remedy was available to her: She might have wanted to sue Dr. O'Connor for failing to protect her legal rights. Her argument would be simple: He had a duty to tell her before he used hypnosis that the treatment might place her legal rights in jeopardy. Although she had no quarrel with the hypnosis as therapy, nor with Dr. O'Connor's competence as a hypnotherapist, if he failed to provide her with complete information, he might have innocently violated her right to informed consent. (We do not know what information Dr. O'Connor provided Andrea H., and we state Andrea H.'s legal remedy as a hypothetical possibility only.) Every hypnotherapist may face the same potential threat.

The therapeutic use of hypnosis can lead to unanticipated legal consequences. This book is about those consequences.

Healing techniques have often been the subject of fierce legal debate. Drugs, psychosurgery, electroshock treatment, behavior modification, and aversion therapy continue to face court and constitutional challenges. Recently, lawyers, legislators, and litigators have turned their attention toward hypnosis and its practitioners. It is quite possible that many mental health professionals who read this book will learn that they have been unnecessarily risking legal liability or unknowingly violating the law.

Today, therapeutic or investigative work with hypnosis will be judged not only by the ethical and performance standards of one's own profession, but also by the legal requirements currently in force in the locality of one's practice. Hypnotherapists are required to exercise extraordinary sensitivity to meet dual, and occasionally conflicting, responsibilities. Furthermore, these obligations do not remain fixed in time. A court ruling on any particular day can dramatically alter the way in which hypnosis may be delivered to the public. Therapists who use hypnosis with their clients cannot afford to be unaware of the legal consequences of their work. Wisdom dictates that an ounce of prevention is worth a pound of malpractice.

For the benefit of everyone using hypnosis, and of everyone upon whom it is practiced, therapists have a right to be completely informed about the legal status of hypnosis and the legal responsibilities of those who utilize it.

Legal Influences on Psychotherapy

It is a contemporary reality for all therapists that work performed in the office may no longer remain strictly limited to that private setting. Evolving trends in law have altered the manner in which therapy may be conducted. For example, the scope and extent of confidentiality and privileged