FORENSIC HYPNOSIS

Clinical Tactics in the Courtroom

MILTON V. KLINE

Director, The Institute for Research in Hypnosis and Psychotherapy
Co-Founder, The Society for Clinical and Experimental Hypnosis
Past President, The Society for Clinical and Experimental Hypnosis
Founding Editor, The International Journal for Clinical and Experimental Hypnosis

With Forewords by

William S. Kroger *and* **J. Victor Africano**

This critical evaluation of the current status of hypnosis as a forensic science offers an integration of scientific and clinical points of view within a legal and judicial framework. The author details the issues, controversies, indications, and contraindications for the use of hypnotic strategies in the courtroom, and he examines hypnosis as an investigative tool. The role of hypnosis in the defense of the mentally ill, use of hypnosis in the retrieval of impaired memories, hypnotic amnesia in clinical practice, and considerations in the role of the expert witness also are discussed. Psychologists and hypnosis experts will find the book especially useful; attorneys and judges will appreciate the enlightening information that it provides.

CHARLES C THOMAS • PUBLISHER • SPRINGFIELD • ILLINOIS

FORENSIC HYPNOSIS

FORENSIC HYPNOSIS

Clinical Tactics in the Courtroom

By

MILTON V. KLINE

Director, The Institute for Research in Hypnosis and Psychotherapy

Co-Founder, The Society for Clinical and Experimental Hypnosis

Past President, the Society for Clinical and Experimental Hypnosis

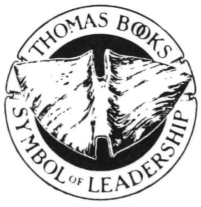
Founding Editor, The International Journal for Clinical and Experimental Hypnosis

With Forewords by

William S. Kroger

and

J. Victor Africano



CHARLES C THOMAS • PUBLISHER

Springfield • Illinois • U.S.A.

Published and Distributed Throughout the World by

CHARLES C THOMAS • PUBLISHER
2600 South First Street
Springfield, Illinois 62717

ISBN 0-398-04852-5
Library of Congress Catalog Card Number: 83-4768

With THOMAS BOOKS *careful attention is given to all details of manufacturing and design. It is the Publisher's desire to present books that are satisfactory as to their physical qualities and artistic possibilities and appropriate for their particular use.* THOMAS BOOKS *will be true to those laws of quality that assure a good name and good will.*

Printed in the United States of America
SC-R-3

Library of Congress Cataloging in Publication Data

Kline, Milton V.
Forensic hypnosis.

Bibliography: p.
Includes index.
1. Forensic hypnotism. 2. Hypnotism.
I. Title. [DNLM: 1. Forensic psychiatry.
2. Hypnosis. 3. Expert testimony. W 740 K65f]
HV8073.5.K55 1983 347'.066 83-4768
ISBN 0-398-04852-5 342.766

In memory of Dr. Bernard B. Raginsky whose penetrating insights into both the nature of human behavior and the dynamics of hypnosis created a new perspective for clinician and research investigator alike. To the many behavioral scientists who have learned and benefited from his outstanding and pioneering contributions this book is gratefully dedicated.

FOREWORD

The author has long been a pioneer in helping hypnosis gain its present healthy acceptance by the contemporary psychologic and clinical disciplines. Now he has directed his vast knowledge to the forensic aspects of hypnosis as it relates to the legal and judicial systems. Again and again he views hypnosis as an important forensic instrument for dealing with the mental status of an individual, particularly as it relates to memory, perception, and cognition.

Full attention is paid to competence and to who should employ this age-old modality within the current burgeoning field of forensic hypnosis. The author points out that mental health professionals often are no more competent in forensic hypnosis than lay hypnotists. Also, to complicate this matter, today there is a great deal of confusion about hypnosis, inasmuch as considerable data are derived from laboratory procedures. These often cannot be equated with clinical hypnosis as it exists in criminal situations. Thus, thoughtful consideration to these points should be given by the clinicians who oppose the use of hypnosis by well-trained lay hypnotists. This is particularly relevant for those law enforcement officers who recognize their limitations and who are thoroughly cognizant of the rules of obtaining evidence for corroboration of investigative leads. A bitter controversy presently is raging over this question. Judgements about criminal behavior and culpability are at stake.

Although the author still conceptualizes hypnosis as an altered state of consciousness—which it is not—he makes an eloquent plea for controlled scientific evidence to better understand the hypnotic situation and intervention in the forensic arena. He succeeds in clarifying these and other issues as they relate to legal and judicial interpretations.

The scope of subjects covering nearly all aspects of forensic hypnosis is awesome. No stone is left unturned. With kaleido-

scopic deftness the meaningful research in nearly all areas of forensic hypnosis is covered in detail by the author.

This volume is a *tour de force* and should point the way for further research and acceptance by the medical-psychologic-judiciary disciplines.

It is indeed an honor and a privilege to write a foreword to this monumental undertaking.

WILLIAM S. KROGER, M.D.
Clinical Professor
U.C.L.A. School of Medicine
Director, Institute for Comprehensive Medicine
Former Consultant to the Federal Bureau of Investigation
Behavioral Sciences Division

FOREWORD

WE WHO LABOR HERE SEEK THE TRUTH

Such a profound promise, or others of similar loftiness, can be found chiseled in the marble of virtually every courthouse in the nation. Since its inception, the polestar of American jurisprudence has been to seek the truth. It is, therefore, a paradox of disturbing proportion that the admission into evidence of the testimony of witnesses whose memory has been affected by hypnosis was the universally accepted rule in the courts throughout the land. The jurists of our nation accepted hypnosis at its face value and while giving lip service to its scientific impreciseness left to the trier of fact the judgment of the credibility of the hypnotically tainted testimony rather than deal with the threshold question of reliability. Attorneys who sought to dispute this presumption of precision met with resistance and failure: resistance at the hands of those who would use hypnosis as a precise investigative tool and failure at the hands of the court, where any attempt to exclude hypnotically refreshed testimony was denied.

Fortunately for those of us charged with the responsibility of attempting to insure that an accused receives a fair trial, the last few years have produced a number of important appellate decisions that take a very critical view of the value of such evidence in the truth-seeking process. Through the efforts of leaders in the field of forensic hypnosis, such as Dr. Kline, the American criminal justice system has become aware of the dangers inherent in hypnotically tainted testimony. I feel that their zeal is not motivated solely by their intellectual honesty about the shortcomings of their science but by their universal commitment that their science shall not be the basis by which an accused person is denied his or her constitutional guarantee of a fair trial.

Milton Kline's well-written book delineates, in a concise and

understandable style, the uses and abuses of hypnosis in the forensic setting. At a time when the use of hypnosis by law enforcement as an investigative tool is becoming a common occurrence bordering on a fascination, Dr. Kline's book points out the dangers of a public too willing to accept hypnosis as a definite and orderly science. Hypnosis, as the reader will discover, is a science as imprecise and chaotic as the human mind. Dr. Kline helps dispel the myths surrounding hypnosis and reveals the truth. For those of us who labor to seek the truth, it could not be more timely.

J. VICTOR AFRICANO

Attorney at Law
Live Oak, Florida

INTRODUCTION

The role of hypnosis in forensic science is at best a controversial issue, and at worst, it is a badly confused, misunderstood, and polarizing debate—that of determining the application of scientific hypnosis to facets of legal and judicial process. The term forensic hypnosis refers to the use of clinical techniques of hypnotic intervention in human behavior that is to be presented, viewed, and interpreted within the framework of the legal and judicial systems.

In this respect, hypnosis as a scientific discipline and as a specific modality in relation to the assessment of various subsystems of human behavioral mechanisms is viewed separately from traditional applications of the role of psychiatry, psychology, and related behavioral and social sciences in relation to court assessment, for example, experts in hypnosis from the standpoint of the courts may be laymen and not necessarily psychologists, psychiatrists, or other health care professionals. In part this is a contradiction in terms, since hypnosis can only be viewed as an aspect of psychological behavior sharing an interface with aspects of physiological behavior. Nevertheless, hypnosis stands as a separate entity when it is viewed as a forensic instrument for dealing with elements of human memory, perception, cognitive functioning, emotional responsiveness, and, in a more comprehensive sense, mental status.

The scientific history of hypnosis is one fraught with controversy among scientists, especially between experimental investigators and practitioners of the therapeutic and healing arts in medicine, psychiatry, psychoanalysis, and psychotherapy. When any aspect of science that in itself has controversy, indecisiveness, and questionable parameters of validity is added to the controversy, interpretation, and evaluation of a group of nonscientists, namely, lawyers and judges, it is not surprising that the result has been a diversity of opinion, a diversity of responsiveness, and in many respects shifting and confusing perceptions of the appropriate place for hypnosis within the judicial system. The law of parsimony would then seem to indicate that hypnosis should be restricted to well-defined, selective, and clinically viable roles in forensic application.

The purpose of this book is not to examine the long history of

scientific controversy in relation to hypnosis but certainly to be aware of it and to take it into appropriate consideration in relation to the lengthy and involved legal-judicial history of hypnosis. Furthermore, the focus of this book will be on clinical issues and not on legal complexities. To attempt in as direct and forthright manner as is possible to delineate those aspects of hypnosis which are consistent with its incorporation and use as an aspect of scientific inquiry that can be employed within the courtroom requires a critical and conceptual evaluation of the current status of hypnosis from scientific and clinical points of view and an integration of these conceptual positions within a legal and judicial framework.

This attempt cannot result in a final or definitive assessment of the nature, role, and extent of forensic hypnosis at this time, but it can provide a perspective on where it stands, where it may go, and what forces and issues have played a role in its past determination. Finally, these forces and issues may be reassessed in terms of shaping the role of hypnosis to its future position as an aspect of forensic sciences.

Although the focus of this book will be on forensic hypnosis as an area of specialization within hypnosis generally and within behavioral science in particular, it is imperative to take into consideration the basic nature of the scientific parameters of hypnosis, its phenomena, clinical utilization, and the effects that it renders as it becomes an integral part of an interpersonal contact designed to assess, evaluate, and at times reconstruct important elements in human behavior.

As mentioned previously, there is not by any means conclusive agreement among scientific investigators with regard to many important aspects of hypnosis today; yet the courts, a nonscientific lay body, have recorded observations and interpretations of segments of that scientific position and used it to construct an opinion of the validity and reliability of hypnosis as it relates to the judicial system. In a sense, this could be viewed as a controversial, subjective statement of scientific opinion, which is viewed by nonscientific perspectives of questionable validity, arriving at a decision that affects the overall use, as well as interpretation, of the role of hypnosis in relation to legal and judicial outcomes.

If it were not for the increasing and widespread use of hypnosis as a technique of the legal and judicial systems, it would not be necessary to focus this much attention on forensic applications.

There are, in fact, in relation to human behavior, much broader and important areas of therapeutic application within which hypnosis has made and is continuing to make significant inroads, inroads that warrant critical assessment and interpretation to therapeutic and research interests. Nevertheless, this widespread expansion of hypnosis as a technique for enhancing individuals' memories, for evaluating their states of mind, for viewing aspects of their cognitive and affective functioning, and for presenting this as evidence for consideration, discretionary judgment, and action by a lay group of jurors constitutes at present a significant clinical use by a variety of individuals with different backgrounds, training, and certainly different, if not questionable, levels of competence. Competence in psychology, psychiatry, or psychotherapy cannot be equated with competence in clinical hypnosis. Virtually no valid measures of clinical competence with hypnosis have evolved, and there is doubt that mental health professionals are more competent than lay hypnotists in this regard. Since in many respects human lives and judgments about aspects of criminal behavior may be at stake, the problem and the issues are significant, and although conclusive positions may be impossible to arrive at at this time, a consideration of these factors is nonetheless of paramount importance.

Historical reviews in themselves are outside the scope of this volume;[1] however, it is important to state certain positions that explain what this book will attempt to examine.

As Chertok (1981) pointed out in his recent review of hypnosis and psychotherapy, American experimental psychologists during the past two decades have essentially been working in a behaviorist and neobehaviorist perspective of hypnosis. A vast amount of research, which has been produced by experimental psychologists working in laboratories with volunteer college students, has for the most part placed no attention on the subject's state of unconsciousness but has attempted within a stimulus-response framework to evaluate reactions to laboratory hypnotic procedures and hypnotic responses. This trend, which began in the 1930s and continues to the present, has in the laboratory been characterized

1. For comprehensive texts on hypnosis in criminal investigations, see Arons (1967), which is an outstanding resource on criminal investigation and forensic hypnosis, and Hibbard and Worring (1981).

by highly refined and sophisticated statistical approaches to data obtained in experimental designs. It has essentially reduced the concept of hypnosis to that of suggestibility. This has led to considerable confusion and conflict with those who utilize hypnosis in clinical situations and clearly see the impact of hypnosis on consciousness and unconsciousness and who do not see hypnosis and suggestibility as interchangeable. In fact, the equating of hypnosis to suggestibility from laboratory data has led to a good deal of confusion; yet it is largely the laboratory data that have been used by the courts for arriving at its judicial position.

One of the leading scientific investigators of hypnosis, Weitzenhoffer, who also was one of the authors of the widely used Scales of Hypnotic Susceptibility known as the Stanford Scales, has made the following observation:

> Speaking of only hypnotism research done during the last 45 years, I find much of it, and the associated writings, to have been of low scientific caliber. There has been far more pseudoscience than science in it. Except for a small minority of investigators in this area, they have been on the whole a pretentious and opinionated lot, basically ignorant in spite of their academic training and frequently poorly grounded even in their very chosen field of inquiry. They have been prone to shallow thinking, the overuse of technical jargon, the abuse of statistics, and various forms of unintentional and intentional intellectual dishonesty. (Weitzenhoffer, 1979, p. 353)

Thus, one leading exponent of research into the nature of hypnosis and hypnotic phenomena believes not only that contemporary laboratory approaches are incapable of explaining hypnosis but that the data derived from these studies do not make it possible to distinguish between voluntary and involuntary reactions. He has severely criticized the quality of the research work undertaken and its pandering to research fashion and the demands of institutions supporting such research.

It is unfortunate that, with such criticism not only by Weitzenhoffer but by others of the validity and meaningfulness of a large body of experimental research with nonclinical populations and with volunteer subjects, the courts have relied so heavily on this kind of opinion for determining their position on hypnosis.

Thus, within this area of conflicting opinions, controversial issues, and definitive opinions, this book examines aspects of hypnosis that are relevant to its forensic applications and attempts

to draw some conclusions on its appropriate and meaningful application to the courtroom. It is necessary to examine many of the fundamental aspects of the hypnotic relationship and the hypnotic influence on mental functioning, particularly on the organization of those mental processes which influence an individual's thinking: perception, attention, and memory.

It is not without significance that one must go back to the observation of Freud (1950) that the unconscious was structured according to a number of fundamental drives. His elaboration of the concept of transference was indeed the first to throw light on relational phenomena in general and on the hypnotic relationship in particular. (Despite a vast amount of experimental research in the past few decades, what has emerged is largely "old wine in new bottles," that is, old concepts with new labels acceptable to the neobehaviorist establishment.) Freud enabled us to understand the role and the power of the hypnotist as it was linked to the fantasies of his patient. This is still a basic consideration in terms of understanding the interactional process in hypnosis and those behavioral mechanisms which may be elucidated and examined in the light of hypnotic involvement.

An important conceptual position of this book is that hypnosis represents an altered state of consciousness for which there is sound, reliable, and consistent clinical verification and that there is indeed a relationship between hypnosis and suggestion but that the two should not be confused. There is also clear evidence of the meaningful interaction between the psychological and the physiological aspects of unconscious mental process, and it plays a significant and profound role in what may emerge as a result of hypnotic intervention. It is also the author's position that the present clinical view of hypnosis is one that clearly reflects the fact that the application of hypnotic procedures and techniques, while based on scientific knowledge and understanding, is in many respects part of a therapeutic art. Moreover, there are varying degrees of competence and skill in such application, and many of the apparent contradictory, conflicting, and unreplicated observations with regard to outcomes produced by hypnosis are indeed the results of varying degrees of clinical competence rather than questionable degrees of scientific validity.

It is the purpose of this book to help clarify and define these issues and to focus upon those facts which may permit a more

systematic and consistent use of hypnosis in the behavioral process, which can then be appropriately presented for legal and judicial interpretation.

There is great danger in accepting interpretations derived essentially from what is viewed as controlled scientific evidence when that evidence may be based on limited perspectives and narrowly controlled observations and in many respects is quite removed from the nature of clinical human behavior and human motivation. It is likewise unsatisfactory to accept simplistic notions about clinical interactions without there being a careful assessment and understanding of the very nature of that process.

Observations about the nature of behavioral interactions with hypnosis have been more meaningful outside of the laboratory, in the treatment and consulting room, than they have within the so-called psychological laboratories in which aspects of suggestion in hypnosis have been confused and have been reported in statistical terms. These tend to add impressions of scientific validity, which in fact may lack the most important aspect of meaningfulness.

To provide an adequate base for further understanding the issues presented and discussed in this volume, pertinent clinical illustrations are interspersed with the forensic issues under consideration. It is hoped that this book will lead to further inquiry both scientifically and legally and that it will raise more questions than it resolves. It will also, it is hoped, lead to more meaningful research into those areas of behavioral organization in which hypnosis can make as valuable a contribution to the judicial process and the legal system as it has to the therapeutic context throughout the history of medicine and psychotherapy.

REFERENCES

Arons, Harry: *Hypnosis in Criminal Investigation*. Charles C Thomas, Springfield, 1967.

Chertok, Léon: *Sense and Nonsense in Psychotherapy, The Challenge of Hypnosis*. Pergamon Press, New York, 1981.

Freud, Sigmund: *Collected Papers*, vol. I–IV. Hogarth Press, London, 1950.

Hibbard, Whitney S., and Worring, Raymond W.: *Forensic Hypnosis*. Charles C Thomas, Springfield, 1981.

Weitzenhoffer, André M.: Hypnotism and altered states of consciousness. In Sugarman, A. A., and Tarter, R. E. (Eds.): *Expanding Dimensions of Consciousness*. Springer Publications, New York, 1979.

CONTENTS

FORENSIC HYPNOSIS

Chapter 1

JUDICIAL PERSPECTIVES

The legal and judicial aspects of hypnosis justify a volume in themselves and, indeed, have produced such publications, for example, Bryan (1962) offers comprehensive judicial and legal concepts within a historical framework. As mentioned earlier, since it is not the purpose of this book to deal in detail with the historical aspects of hypnosis, this book will select specific points in judicial thinking that are bases for a more careful and intense analysis of the *contemporary forensic perspective*, which is the focal point of this book.

Courts have always played an interesting, if peripheral, role in evaluating a variety of scientific contributions to society in general. Courts frequently are called upon to place judgment on the efficacy of certain mechanical devices, to rule on the validity of patents, and at times to express opinions about medical and pharmacological contributions. Although in the long run these positions may not affect the scientific development of medical technology or psychotherapeutic procedures, there is a great deal of pressure on science and scientists who interact with the judicial system. While hypnosis has been under a great deal of scrutiny because of its prevalence within the judicial system, if the courts were to pay as much attention to contemporary aspects of psychoanalysis as they have to hypnosis, one wonders what position they would take about the validity and usefulness of psychoanalysis as a therapeutic approach, particularly since this is an area in which scientists are also heatedly divided.

In the long run, unless a scientific court eventually evolves, we must abide by court decisions as they relate to judicial aspects of the behavioral process, but that does not confirm or deny either its validity or meaningfulness. Scientific commissions in the past have investigated hypnosis as they have investigated issues of

gravity in the solar system, sometimes with results that are later borne out by scientific development and sometimes with erroneous positions and interpretations. It is with that sense of questioning about the current view of the basic nature and forensic application of hypnosis that the author will assess the judicial perspective.

Belli, in Bryan (1962), in discussing hypnosis in relation to legal and judicial thinking, pointed out that by the turn of the century the courts had acknowledged the medical worth but not the legal potential of hypnosis. For example, in 1902 it was recognized that the proper employment of a method that influences the nervous system as powerfully as hypnotism could be an effective means of relieving pain and curing disease (*Parks v. State*). This would seem to be a clear recognition of the clinical view of hypnosis as an effective means of pain control, which by 1982 has been clearly validated both historically and therapeutically. At the present time in pain centers throughout the world hypnosis is one of the major modalities used in treating chronic pain. But, as Belli pointed out, the courts were by no means ready to accept hypnosis as a legal tool, for in 1905 in the decision *State v. Exum*, the court crassly stated, "While the subject of hypnotism has received to some extent judicial recognition in the language of one of the briefs, the sources of its power and the extent of its influence are in the main unknown and we must hesitate to enter on such a field in the search for evidence."

The clinical history of the use of hypnosis in treating posttraumatic syndromes, dissociated states, and significant lapses in memory, with the eventual recovery of patients, is a matter of clinical fact. That the memories elaborated under hypnosis are in fact precisely the way the patient recalls them is not necessarily connected to the therapeutic outcome. Thus, it is quite correct for the courts to question the validity of the retrieval of memories under age regression, time regression, or any other aspect of hypnotic intervention simply because these procedures have in clinical situations resulted in therapeutic gain and, in fact, cures. In considering this point, we will see that the dynamics of psychotherapy and the ramparts of healing do not always attest to the evidentiary validity of memories but to the contextual process that is involved in dealing with aspects of memory, attention, and perception. This is indeed a knotty and difficult area wherein one can see without question the validity of a therapeutic device

but can question its exactness with regard to its evidentiary role.

It is of interest, for example, that some patients suffering from epilepsy and showing typical electrocortical patterns of epilepsy on an EEG will under age regression, which obviously involves time alteration, show no signs of convulsive behavior and will when examined in that state present a normal EEG tracing. Likewise, normal, healthy subjects selectively involved in hypnotic experiences and regressed back to very early ages may show Babinski reflexes. While this is without question factual and demonstrable, it should under no circumstance lead to automatic acceptance of the validity of that process with regard to demonstrating evidentiary issues in relation to functioning, memory, or response capability. It should, however, not be ignored as a basis for understanding and evaluating the meaning and dynamics of such profound behavioral alterations.

As early as 1897, the court in *People v. Ebanks* had rendered a decision, which in effect said, "The law of the United States does not recognize hypnotism. It would be an illegal defense and I cannot admit it." Recognition by the agents of any established society is primarily a political rather than a scientific expression and should be so viewed.

Many courts have expressed divergent opinions from the Ebanks decision, and in fact, there has been during the past decade a decided trend toward admitting hypnosis in virtually every instance, even where guidelines supported by scientific groups with regard to standards for the admissibility of hypnosis have been grossly violated. Lay hypnotists have been admitted as expert witnesses to testify about hypnosis. Techniques have been utilized which have clearly been manipulative and coercive, leaving the eventual determination of their meaningfulness to the discretionary judgment of a lay jury. Confusion has been created by divergent expert opinion and by a proliferation of court decisions that lawyers use to buttress whatever position they wish to take with regard to hypnosis.

From a tactical point of view, one might contrast the 1959 California case of *Cornell v. Superior Court* with *Ebanks*. The court in the *Cornell* case declared that a defendant's right to counsel includes the right to be hypnotized for the purpose of calling forth facts that the defendant is unable to recall because of retrograde amnesia. There are numerous other cases that elaborate on this

position, so in viewing this, one might say that the court has come virtually 180 degrees from *Ebanks*.

However, in 1982, the supreme court of the state of California in the *People v. Donald Lee Shirley* produced perhaps one of the most comprehensive decisions about hypnosis which occurred after other significant decisions (*State v. Mack, State v. Hurd, State v. La Mountain*). In this decision, the state of California, in viewing the problem, stated the following: "The principal question on this appeal is whether a witness may be allowed to testify after he has undergone hypnosis for the purpose of restoring his memory of the events in issue. The question is new to this court but has been often litigated in our sister states and extensively studied by medical science. In accordance with recent and persuasive case law and the overwhelming consensus of expert opinion, we conclude that the testimony of such witness should not be admitted in the courts of California." Thus, in 1982 we have gone back to *Ebanks*.

The issues are, however, not as simplistic as stated in *Ebanks* and perhaps not as elaborated as in this detailed California decision. It is necessary to use the *Shirley* decision as a model for looking critically at the basis for this decision by this court both in light of other court decisions and in light of the ways the judicial and legal system may view hypnosis in the future. It is clear that hypnosis cannot be considered simply as an element to be admitted for court evaluation but rather as a means for delineating those specific functions and attributes which are relevant for future court consideration.

To begin with, the initial paragraph of the *Shirley* decision emphasizes that the issue of restoring memory through hypnosis has been extensively studied by "medical science." It is not clear what the court means by this. There are a large number of experimental investigations dealing with the retrieval of memory in laboratory situations, frequently with material that is not of relevance to an individual's life history in any respect. This stands in contrast to the clinical use of hypnosis in dealing with patients whose memories have been impaired and in which the restoration of that memory has been part of a therapeutic process. *The results, procedures, approaches, and conclusions are not the same.* The California court decision is based largely on its incorporation on what it views as the overwhelming consensus of experts, which in fact represents a very specific and perhaps divergent position. For example, the Northern California Society of Clinical Hypnosis

(1982), made up of physicians and psychologists competent in the use of *clinical hypnosis*, in response to the *Shirley* decision state, *"We believe there is insufficient scientific evidence to support such a broad conclusion and we believe the California Supreme Court was not properly informed."*

Thus, at least one segment of the scientific community feels strongly that the consensus is not what the court feels it to be. Whether this consensus is to be viewed in relation to the *Frye* rule (*Frye v. United States*) or just a generalized consensus position, it is clear that its existence must be questioned.

There is also the question of expert qualifications: competence and skill, knowledgeability, and standards for evaluating these factors are all important, yet in many respects indecisive and somewhat vague. The courts may set one level for standards for competence and expertise, and the professions may set very different standards and may within themselves have different opinions about the validity of these standards. As an example, the issue of what constitutes competence with regard to the practice of psychotherapy is still a moot point in our society. The question of what constitutes expert knowledgeability with regard to aspects of human behavior and the evaluation of human behavior is also highly controversial and fraught with divergent "expert" opinion (Szasz, 1961).

Chertok (1981), in commenting on the vagueness of defining clinical competence in relation to both hypnosis and psychotherapy, states, "Contact with clinical work is becoming increasingly vague. It is a common thing to meet psychologists capable of producing learned dissertations on the etiology of such and such neurosis, and who have never seen a patient." It is likewise not uncommon for academic experts in some areas of psychology to produce elaborate experimental work with hypnosis that relates to aspects of pathological behavior, memory, and personality functioning who by virtue of training and experience do not treat patients with problems, impairments, and illnesses relating to mental health, memory, and coping skills. These are factors that frequently are not fully taken into account in understanding the current scientific picture with regard to hypnosis, in which clinical and experimental parameters are quite different. The courts, therefore, must be very careful in the assessment of the data that are presented for their consideration.

Based on the combined data from extensive clinical observations

and research in the scientific literature and from the selective experimental studies that are relevant to this issue, the author believes that the use of hypnosis for improving eyewitness memory in relation to eyewitness observation and for permitting a witness to an event to alter what was recalled or retrieved without hypnosis is of questionable validity and indeed should not be permitted within the court system (Kline, 1982). On the other hand, there is adequate and sufficient basis for considering that hypnosis could well be used with any witness to help retrieve memories, perceptions, and feelings, which in turn might lead to the discovery of evidentiary material that by itself, quite apart from the witness, would constitute corroboration. This requires no court rulings and is well supported by the depth of experience from which individuals are capable of retrieving identifiable information that is then easily corroborated and documented, and that documentation serves as the evidence.

Hypnosis as a state of altered consciousness, one that involves spontaneous regression in ego functioning, is not consistent with an untainted witness and does in fact preclude the effective cross-examination of that witness without the influences of not only hypnosis but the hypnotic transference. For that reason the scope of forensic hypnosis in relation to the courtroom should by definition exclude the use of hypnosis for eyewitness testimony, except where the witness is the defendant. Its primary meaningful role in relation to courtroom testimony is in the evaluation of the mental status of individuals charged with violent crimes. In addition, it can be used to assist in the evaluation of their competence to stand trial and the evaluation of their degree of self-regulatory behavior and ego control in the comprehensive analysis of personality functioning as regards the behavior at issue.

It is, therefore, the major purpose of this book to examine those aspects of hypnosis which relate to its role in the defense and examination of individuals accused of criminal behavior, where the question of mental functioning, mental status, responsibility, and competence play some role in the overall determination of the issues to be judged. In doing so, the author naturally must focus upon all of the considerations that have gone into judicial thinking regarding the understanding of how the courts view hypnosis. The areas of validity and reliability that they have identified need critical reexamination. The problem of expert

testimony as the courts perceive it and the evidence upon which they have built their decisions create a number of problems. We have noted the move from the *Ebanks* nonrecognition of hypnosis as a legitimate instrument for court presentation to a long series of cases in which its admissibility was virtually unquestioned, to the contemporary decisions paralleling *Ebanks*. The California decision does not relate to defendants, and it was later clearly stated that defendants would be permitted to testify in their own behalf even though they had been hypnotized.

The issue of hypnosis and all of its ramifications is at the present time judicially and legally being viewed through the *Shirley* and similar decisions. One must examine from the perspective of the defense in criminal cases the status of hypnosis and its effective appropriate role.

It is noteworthy that in the *Shirley* decision the witness who was hypnotized had been hypnotized by a deputy district attorney in the courthouse and observed by other law enforcement personnel, at which time the witness made statements under hypnosis that would cause her testimony at trial to be significantly different from her testimony at the preliminary hearing.

It has become customary to think of hypnosis in relation to its use by health care personnel who have appropriate training in their area of professional functioning in addition to training in hypnosis. The question has never been fully confronted whether or not district attorneys, police officers, correction officers, and other members of the law enforcement team may properly use hypnosis in their own professional functioning. If so, then the same delimited use of hypnosis by lay hypnotists for many areas of behavioral management should be recognized and perhaps certified.

There is here also a marked diversion of professional opinion. The Society for Clinical and Experimental Hypnosis in setting standards for the forensic use of hypnosis has indicated that in this area only qualified psychiatrists and psychologists should be utilized. Other professional groups take different opinions about this, and certainly many professional psychologists have collaborated in the training of police officers and prosecutors in the use of hypnosis and would express the opinion that they are properly trained and appropriately qualified to use hypnosis in their fields of competence. *The courts have certainly not denied expertise in the field of hypnosis to anyone who is not a qualified psychiatrist or psychologist.*

The courts have admitted as experts in the field of hypnosis lay hypnotists, without any professional designation, as well as a variety of health care personnel. It has set no standards with regard to the type of training that should be involved in preparing a person to use hypnosis. Yet, as we know from clinical experience, competence and skill are related not only to the caliber of training but the amount of supervision and the nature of clinical experience. There is such wide disparity of competence in using hypnosis at clinical levels, even among qualified physicians and psychologists, that it must be recognized that this disparity is even greater when used as a technique by police officers, prosecutors, and lay hypnotists. Later some of the crucial issues regarding competence will be discussed.

In considering the impact of the recent court decisions, focused now on the *Shirley* opinion, one must note that many previous court rulings have emphasized that the role of hypnosis in connection with an eyewitness affects the weight but not the admissibility of the testimony. The *Shirley* decision, however, shifts from this position to one in which testimony of a hypnotized eyewitness is not admissible; therefore, the question of weight of testimony, which must be determined by jury, is no longer the focal point. In the defense of criminal cases where the question of admissibility of testimony obtained by hypnosis will not be the decisive point, the *issue of weight* becomes most important, and the parameters of determining what weight constitutes requires careful formulation.

The courts have certainly recognized a fact that clinical scientific research has for a long time reported, i.e., that statements made under hypnosis may not prove to be the truth and that under no circumstance can hypnosis be used as a means of verifying the truthfulness of what is being reported. *This, however, should not be construed to mean that what individuals may bring forth under hypnosis is, in fact, not truthful, and there is considerable evidence that it has a very high degree of meaningfulness* (Kline, in press). *However, truthfulness as defined and considered within the legal system is very different than truthfulness experienced as a corollary of meaningfulness within the therapeutic context.*

The fact that patients believe initially what they report and then may during the course of analysis refine, modify, and, in some instances, completely change what they have uncovered leads only to an eventual verification of what is indeed for them the factual

and meaningful basis for their retrieval of experiential components. From the point of view of truthfulness of evidentiary presentation uncovered by direct hypnotic intervention in nontreatment situations, the courts have generally concurred in the statement cited previously, which is essentially reported in the case of *Chambers v. Freeberg, Mississippi.*

In the same vein, the *Virginia Supreme Court, Greenfield Commonwealth*, stresses that "most experts agree that hypnotic evidence is unreliable because a person under hypnosis can manufacture or invent false statements. A person under hypnotic trance is also subject to heightened suggestibility."

In subsequently denying habeas corpus relief to the same defendant in this case, the federal district court stated that "the very reason for excluding hypnotic evidence is due to its potential unreliability." The summary position is that most courts have rejected hypnotic evidence because of its lack of reliability, while others have simply declared such evidence inadmissible. *Most of these have been based upon clear recognition of its lack of truthfulness.*

For the most part, courts have been influenced toward admissibility of hypnosis on the grounds of the well-known *Frye* rule (*Frye v. United States*). That rule conditions the admissibility of evidence based on a new scientific method, on a showing that the technique has been generally accepted as reliable in the scientific community in which it developed. While ostensibly relating to devices, the *Frye* rule has been interpreted by the courts to reflect the consensus of scientists with regard to medical and psychological procedures and other aspects of scientific work about which that so-called scientific community is generally in agreement.

What constitutes general acceptance is the prevalent positions by experts selected or designated by the courts and by the prevalence of that position or attitude in the scientific literature. This is again a conflict of political versus scientific issues. Established scientific journals resist divergent medical and psychological contributions on political grounds, as well as scientific ones. Although one may not question the general soundness of this, in looking at it in more detail one may find that there are many aspects of scientific procedure that, while meaningful and effective, do not generally have the consensus of that community. There is much controversy about the role of certain drugs in the treatment of specific illnesses, about the role of shock treatment in the treatment of

mental illnesses, and about the role of psychosurgery in relation to treating severe mental aberrations. In virtually every aspect of clinical consideration, there are divergent opinions, even in diagnosis and diagnostic procedures.

Since it is so difficult for experts themselves to agree, it is debatable whether an outside nonscientific body will be able to extract from the diverse opinions and publication data a *position that is indeed consensus, and consensus regarding hypnosis unfortunately is, at its best, debatable and, at its worst, confusing.*

What clinicians would tend to view as acceptable psychotherapeutically and hypnotically, experimental investigators might tend to reject and to claim has little or no scientific validity. As mentioned earlier, if psychoanalysis were subject to the *Frye* rule, one might say that "the scientific consensus" is that psychoanalysis has no scientific validity or reliability. Yet, we know that psychoanalysis is the cornerstone upon which contemporary psychotherapy has been built. It is fundamental for most of the psychodynamic thinking in the elaboration of emotional disturbance and mental illness, and as a scientific tool it has, when properly and selectively used, a real degree of reliability.

In 1976 in *Rodriguez v. State*, the Florida court excluded evidence obtained under hypnosis under its version of the *Frye* rule, indicating that the reliability of a new method of proof must be generally accepted by scientists or "have passed from the state of experimentation and uncertainty to that of reasonable demonstrability." Applying this aspect of the test, the court held the evidence inadmissible because it was "unconvinced of the reliability of statements procured by way of hypnosis." Nevertheless, subsequent Florida courts have admitted hypnosis in the form of eyewitness testimony (*State v. Bundy*). Courts may, therefore, take one position, which may in general concur with scientific opinion, and other courts may reinterpret that opinion and may, in fact, violate the very standards that they use for such determination.

In one respect hypnosis has passed far from the level of experimentation and has reached, on a clinical level, the position of recognized therapeutic demonstrability. The day-by-day practice of psychotherapy clearly reflects its reliability and validity in the hands of properly qualified practitioners of the healing arts. Something beyond the *Frye* rule must be considered carefully by the courts in determining the usefulness, as well as the reliability, of

any kind of material elucidated through hypnosis, i.e., competence in specialized aspects of technical and scientific (professional) practice (*Dyas* test).

In 1978 the Ninth Circuit Court of Appeals stated, "We are concerned however that investigatory use of hypnosis on persons who may later be called upon to testify in court carries a dangerous potential for abuse. Great care must be exercised to insure that statements after hypnosis are the product of the subject's own recollections rather than a recall tainted by suggestions received while under hypnosis."

Although a number of guidelines have been devised to limit the extent to which suggestions of the hypnotist during the process of hypnotist-subject interaction may play a role in cuing or structuring the responses elicited, and although those guidelines may in fact achieve that purpose very well, there are other considerations. The hypnotic process, in its tendency to produce regression in ego functioning, spontaneously brings about fantasies and distorted perceptions and recollections more in keeping with an individual's symbolic representation of his or her own dynamic functioning. This gives rise to statements that, while not the result of suggestions from the hypnotist, are the elaborations of unconscious ideation and affect, which, although meaningful in relation to an individual's personality, are clearly divergent from any aspect of retrieval of accurate memories in relation to observational experience. For this reason, as stated earlier, there is little doubt in this writer's opinion that the use of hypnosis for eyewitness recall should not be permitted in the courts but that the use of hypnosis in evaluating response mechanisms as part of the mental status examination is not only useful but should be admissible because it constitutes important segments of the diagnostic appraisal of an individual's personality functioning.

Where techniques of induction are limited either by ineptness or by intent, regressive episodes may be produced, and behavioral responses so obtained are highly tainted. Not only is the material tainted, but the state obtained is one in which confabulated material is likely to emerge as a dynamic process. If it were during the course of analysis and properly handled, it might be of great value, but in the course of trying to determine observational reliabilities, it is useless. Nevertheless, certain courts have permitted the use of such material where indeed the procedures used to obtain it have

been appallingly deficient (*State v. Bundy*) and clearly in keeping with producing the kind of regression referred to previously.

A number of courts have clearly indicated that the reliability of ordinary eyewitness recall has severe shortcomings and that, as elaborated by the New Jersey Superior Court (*State v. Hurd*), the testimony produced by hypnosis is in fact no greater in relation to shortcomings than that produced by ordinary procedures, and for that reason it declined to hold such testimony inadmissible.

Perhaps the flaw in this reasoning is that while the reliability of recall under hypnosis and under ordinary conditions is the same, no regression is likely in nonhypnotic attempts. In a specific instance, hypnosis is much more likely to produce a regression in ego functioning and, as such, intensify and elaborate those elements which lead to confabulation, fantasy, and the evocation of images, which give rise to associations that then are quite sincerely perceived by the witness as being legitimate recollections. This is a much more complex process, one that is in many ways very similar to dream material in which the dreamer is fully convinced of the reality of the situation. It is only upon awakening and being able to recall it as a dream that the individual is able to distinguish it from reality.

In many clinical instances where patients have failed to recall dreams, they have reacted to the content of the dream as if it were in fact an experience, and it has influenced and fixed aspects of their everyday behavior until the contents or the substance of that dream has been retrieved and properly interpreted (Kline, in press). For this reason, equating limitations in eyewitness reliability on the waking or nonhypnotic level with the use of hypnosis is not a sufficient basis for admitting hypnotic testimony. Hypnosis is a much more seriously complicated and potentially distorting process in relation to perception and the actualization of images, which give rise to what are perceived as memories. There are, in fact, no reliable means of regulating the degree to which regression may take place within hypnosis in terms of ego functioning. Such regression is frequently an aspect of spontaneous rather than planned maneuvers clinically and is something that a clinician is experienced to both recognize and deal with but has no real way of limiting or restricting, except by removing the patient from hypnosis. Even at that point, if hypnotic regression has been stimulated, it may continue on a nonhypnotic level if not confronted strategically in some therapeutic manner.

To sum up the *Shirley* decision in relation to eyewitness testimony, the court's opinion that "the game is not worth the candle" succinctly states the situation for which there is at the present time very strong scientific concurrence. It is not at all unlikely that throughout this country the courts will continue to abandon any pretense of devising safeguards for hypnotically induced testimony and will in fact consider safeguards only in relation to evaluating the interpretations and the opinions with regard to motivated behavior. Such safeguards are of a different order and may in fact have to be totally reevaluated and differentiated from the so-called guidelines and safeguards devised for eyewitness testimony.

There have been implied, as well as stated, attempts by the courts and by experts to differentiate testimony about hypnosis as an investigative rather than a therapeutic tool. This would then presume that there are, as there should be, experts of a different sort in relation to investigative procedures or therapeutic procedures. In general this would hold; however, one cannot, in viewing the dynamics of hypnosis, the hypnotic transference, and the intrapsychic changes that take place as a result of the alterations of consciousness within the hypnotic framework, differentiate hypnotic process simply because it is being used in an investigative sense as opposed to a therapeutic. By analogy, one could then state that if a hallucinogenic drug is being used for investigative or diagnostic purposes, the safeguards or the considerations of the expertise in its administration and assessment would be different than in its therapeutic application. While the considerations might be different, the amount of expertise would be precisely the same. For that reason, any attempts at using hypnosis in an investigative manner would have to meet the same standards of clinical proficiency, competence, and skill as when it is used psychodiagnostically or clinically.

It must be reiterated and recognized that the involvement of a patient-subject in the process of a hypnotic relationship produces profound alterations in personality functioning, in ego functioning, in ideation, and in cognition regardless of the setting, circumstances, and personnel who may be involved in such an undertaking. The greater the degree of competence and skill on a clinical level, the greater the degree of reliability of the interpretation of whatever behavior is being investigated, evaluated, and reported. The lesser