

Forensic Hypnosis

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Abstract

Hypnosis has long generated controversy as a recall enhancement method. Concerns about hypnosis are warranted by findings of a tradeoff between the number of memories recalled and memory accuracy. Moreover, witnesses often express confidence in hypnotically augmented remembrances, regardless of their accuracy, increasing the risk jurors will be biased based on convincing yet inaccurate information. Although misleading questions appear to be equally or more problematic, raising concerns about singling out hypnosis as a uniquely prejudicial technique, other recall improvement methods (e.g., cognitive interview and asking individuals to do their best to recall target events) appear to pose less memory risks than hypnotic procedures.

Main Text

Hypnosis has generated heated controversy over its long history. Since Franz Anton Mesmer's claims about the healing powers of animal magnetism rocked the medical world in the late 18th Century, hypnosis has fascinated and intrigued the public as well as luminaries of the scientific (e.g., Janet, Freud, Hull) and nonscientific (e.g., Shelley, Hawthorne, Poe) communities. In the forensic setting, hypnosis has fallen in and out of favor over time, and legal

decisions about the admissibility of hypnotically elicited testimony have vacillated between outright rejection and uncritical acceptance.

The 1897 landmark decision of *People v. Ebanks* established the precedent of *per se inadmissibility* of hypnotically augmented testimony in the courtroom. This restrictive ruling reflected the views of professional organizations, which refused to recognize hypnosis as a legitimate scientific tool. Because of this situation, much expert testimony about hypnotically elicited testimony was excluded by *Frye v. U.S.*, 293 F. 1013 (D.C. Cir, 1923), which ruled that scientific information must be “sufficiently established to have gained general acceptance in the particular field to which it belongs” (p.1014).

Yet by the late 1960s, opinions about hypnosis shifted from extreme skepticism to greater acceptance, as it became popular to use hypnosis in psychotherapy and police interrogations to retrieve forgotten, repressed, or dissociated memories, and the technique enjoyed endorsements by the American Psychological Association (APA) and the American Medical Association (AMA). The 1968 legal decision in *Harding v. State*, which ruled that hypnotically elicited testimony was admissible because the procedures were neither necessarily leading nor suggestive, set the precedent for rulings in four states that currently adopt the *per se* admissibility standard. This standard considers hypnotically facilitated testimony as no different from any other type of direct testimony, with no “preadmission” requirement of corroboration or evaluation of the quality of the testimony.

When researchers discovered that many recovered memories were wildly inaccurate, and experts in the 1980s testified to the unreliability of hypnotically elicited memories, opinions about hypnosis shifted again, and *per se* inadmissibility became the norm. Today, 27 states bar hypnotically elicited testimony from the courtroom.

Alongside the current wave of skepticism, all Federal, and 13 state courts adopted a slightly less critical position with regard to hypnosis in which they consider the reliability of hypnotically facilitated testimony in light of the totality of circumstances on a *case-by-case* basis. This standard is grounded in the assumption that hypnotically enhanced testimony is reliable when elicited by a professional, and not unduly prejudicial to the jury when pre-established standards or guidelines for conducting hypnosis (e.g., sessions are videotaped for subsequent evaluation, nonleading questions are used) are followed (*State v. Hurd* 1981).

The *per se* inadmissibility standard is supported by studies indicating that hypnosis increases the sheer number of memories recalled, but often does so at the expense of accuracy (Stebly & Bothwell 1994). Hypnosis appears to produce a shift in the criterion for reporting memories, such that hypnotized participants trade accuracy for quantity when attempting recall. The tendency to adopt a liberal report criterion is not surprising in that high rates of college students and psychotherapists believe that hypnosis permits access to otherwise buried recollections, thereby lending credibility to memories brought forth by hypnotic methods (Whitehouse et al. 1991; Yapko 1994).

The fact that many individuals believe hypnotically augmented memories to be credible probably accounts for the well-replicated finding that eyewitnesses often report unwarranted confidence in such memories. Inflated confidence is of particular concern in the forensic arena,

as eyewitness confidence can exert a powerful influence on a jury's verdict (Wagstaff et al. 2008). Although unwarranted confidence may preclude effective cross-examination, and thereby a "fair trial," hypnotized individuals do not exhibit unique or extreme resistance to cross-examination. Still, the combination of hypnosis and routine trial preparation of witnesses to resist cross-examination results in a high rate of resistance to changes in testimony, regardless of memory accuracy (Lynn, Barnes, & Matthews 2012).

The effects of hypnosis on recall appear to be moderated by hypnotic responsiveness (i.e., the degree to which an individual is responsive to hypnosis). Although not all research has obtained uniform results, multiple studies have shown that medium and high suggestible participants (who pass 4-8, or 9-12 out of 12 possible suggestions on standardized scales, respectively, and represent 75-90% of the population) report more inaccurate memories than do their low-suggestible counterparts (who pass 0-3 suggestions). Furthermore, highly suggestible participants generally express more confidence in their memories when compared to low suggestible subjects. Importantly, researchers have occasionally observed increases in false memories after hypnosis even in low suggestible participants, warranting concerns about a broad swath of the population (Lynn et al. 2009).

The effects of suggestibility extend beyond hypnosis: researchers have found that highly suggestible participants are vulnerable to false memory suggestions in non-hypnotic contexts. Because it is well established that asking leading questions in court, and coaching witnesses before they testify are standard practices, the fact that some witnesses may be more suggestible than others is cause for concern independent of the debate over the use of hypnotic recall techniques.

With respect to legal decisions, findings that hypnotically elicited testimony is unreliable and inflates confidence lend support to decisions barring such testimony from the courtroom. Still, some have expressed concerns that per se inadmissibility rulings infringe on the defendant's right to testify in legal proceedings. Moreover, leading and suggestive questions, and other recall procedures, may be equally or more biasing, raising concerns about the fairness of singling out hypnosis from among a panoply of recall enhancement techniques. However, alternative recall enhancement techniques, such as the cognitive interview, and simply encouraging individuals to try their best to recall as much as they can, may yield more accurate remembrances than hypnosis with less risk of false recall (Wagstaff 2009).

The less conservative approach of considering hypnotically elicited testimony on a case-by-case basis relies on the assumption that the quality of hypnotic testimony can be evaluated, and that it is possible to reliably discriminate biased from unbiased testimony. Unfortunately, none of the safeguards recommended for adjudging the reliability of such testimony — such as the Hurd rules, or the guidelines advanced by the American Society of Clinical Hypnosis (ASCH, 1995) — has been systematically evaluated. Moreover, even when researchers provide people with pre-hypnotic warnings about the fallibility of memory in general, and hypnosis-related memories in specific, studies are at best inconsistent in supporting the protective effect of warnings on recall errors and inflated confidence.

The most liberal standard -- per se admissibility -- flies in the face of a corpus of

scientific research regarding the negative effects of hypnosis on memory. Researchers have found, however, that the risk of false memories and unwarranted confidence in these memories can be successfully mitigated when the importance of reporting accurate memories is emphasized (e.g., a more stringent report criterion is emphasized). Still, these studies have yet to be replicated independently (Lynn et al. 2012). In courts in which per se admissibility is the standard, non-hypnotic testimony, like hypnotically-induced testimony, is subject to scrutiny under cross-examination, and its credibility can therefore be judged by the jury after considering expert opinions, corroborating evidence, and so forth. However, given the popular belief that hypnosis can be used to excavate buried memories, it is conceivable that jury members might give such testimony greater credence than is warranted, and that the mere presentation of such evidence may bias the jury. In closing, courts are justifiably wary of admitting hypnotically-elicited recall to the bar, and professional interrogators would do well to consider alternate recall-enhancement techniques to obtain evidence pertinent to forensic matters.

SEE ALSO: Eyewitness identification and lineup; Expert Testimony and Cross-Examination; Hypnotherapy; Repressed memories; Recovered memories

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