

NOTES / AANTEKENINGE

THE INFLUENCE OF HYPNOSIS ON CRIMINAL LIABILITY

1 Introduction

“Sleep. Your eyelids are getting heavy. Sleep. Watch the swinging object. Concentrate. When you awake you will be completely under my power.”

These words are familiar language to almost all of us, from images of the popular media, of a hypnotist attempting to place a subject in a hypnotic state. This subject has proved to be a source of fascination for many, and a source of intense debate in both psychological theory and jurisprudence for over two centuries (for a perspective on hypnosis and the competing theories seeking to explicate this phenomenon in the context of a 19th century homicide, see Harris “Murder under Hypnosis” 1985 15 *Psychological Medicine* 477), largely because of one controversial issue: can a person be induced to commit acts which are against his or her normal prudence and moral standards by means of hypnosis (or its historical antecedent, mesmerism)? The mysterious power of hypnotic coercion has moreover been absorbed into the popular consciousness, as reflected by the issue frequently featuring in fiction. For a single telling example, note the words of the villainous Baron Gruner to Sherlock Holmes (Conan Doyle “The Adventure of the Illustrious Client” in *Sherlock Holmes: The Complete Novels and Stories Volume II* (1986) 462 469):

“You have heard of post-hypnotic suggestion, Mr Holmes? Well you will see how it works, for a man of personality can use hypnotism without any vulgar passes or tomfoolery.”

The notoriety of hypnotic techniques is no doubt in no small measure due to accounts of sexual coercion of hypnotized subjects (Perry “Hypnotic Coercion and Compliance to It: A Review of Evidence Presented in a Legal Case” 1979 XXVII *International Journal of Clinical and Experimental Hypnosis* 187 188), as evidenced in the 1976 New South Wales Supreme Court case of *R v Palmer*, where a lay hypnotist was convicted on charges of rape, attempted rape and indecent assault (discussed Perry 1979 XXVII *International Journal of Clinical and Experimental Hypnosis* 188). (The conviction was quashed on appeal, partially due to the bogus nature of the qualifications of an expert witness for the prosecution – see Perry 1979 *International Journal of Clinical and Experimental Hypnosis* 192.) Evidence that this threat has been regarded as real by the courts even though no such case has arisen in South African law emerges from the declaring

undesirable under the Publications and Entertainment Act 26 of 1963 of the magazine "True Men" for the publication of an article entitled "Amateur Hypnotism ... Ruins 50 Girls a Week" (*SA Magazine Co v Publications Control Board* 1966 2 148 (T), where the effect of the "case histories" was regarded as being "to inform would-be hypnotists that hypnotism is easy to practice, and ... that it is easy to get women under one's influence as a result of hypnotism and so to have sexual relations with them ..." (156B), which was in turn regarded by the court as having a tendency to incite lascivious thoughts and arouse sexual desire in a substantial number of likely readers, and therefore indecent, obscene, and offensive and harmful to public morals (156C-D)).

Gibson ("Can Hypnosis Compel People to Commit Harmful, Immoral and Criminal Acts?: A Review of the Literature" 1991 8(3) *Contemporary Hypnosis* 129) notes that "the idea that one person can dominate the will of another by occult or arcane means" goes back to the dawn of history, and is founded in pre-scientific ideas about magic and witchcraft. It has further been suggested by Gibson (1991 8(3) *Contemporary Hypnosis* 129) that in the present day, "hypnosis" has become a construct which has replaced "witchcraft" in the context of an accused performing criminal acts through an agent by means of coercion (perhaps this statement applies to both Anglo-American and European systems, less so to SA where witchcraft is as yet still a significant issue). This process has been aided by the proliferation of myths which have come to be established surrounding the notion of hypnosis in the public mind. The myths include: that hypnosis is done to the subject (as opposed to being self-induced); that it involves a battle of wills, with the stronger party (the Svengali-like hypnotist) winning over the weaker one; that the hypnotist must be a charismatic person; that hypnotic subjects are foolish or weak; that the hypnotist has unlimited power over the subject; that hypnosis is equivalent to sleep or loss of consciousness; that hypnosis is dangerous and destructive of the will; that hypnosis is a cure-all; that hypnosis confers special powers on subjects; that the hypnotic trance is irreversible; that hypnosis is fakery or sham behaviour; that hypnosis is a "truth serum" and that there are people who cannot be hypnotized (Schefflin and Shapiro *Trance on Trial* (1989) 135ff; and Garner "Hypnosis" in Levinson (ed) *Encyclopedia of Crime and Punishment Vol 2* (2002) 866).

The law is not immune to these myths, and hypnotism has yet to be formally categorized in the general principles of criminal law (Bonnema "Trance on Trial": An Exegesis of Hypnotism and Criminal Responsibility" 1993 39 *Wayne Law Review* 1299 1301 comments that hypnotism "seems lost in the complex matrix of criminal defense law"). The search for a clear and rational explanation of the nature of hypnosis has further not been assisted by the differing theories which have been offered in this regard. As will be indicated later, the courts (rather unsurprisingly) have also found difficulty with the concept.

Kaplan and Sadock state that modern hypnosis originated with the Austrian physician Mesmer (1734-1815), who believed the phenomenon,

known as mesmerism, to be the result of animal magnetism or an invisible fluid that passes between the subject and the hypnotist (Kaplan *et al Synopsis of Psychiatry* 7ed (1994) 857). The term “hypnosis” was first used in 1843 by James Braid (1795-1860), who believed the subject to be in a particular state of sleep (*hypnos* is the Greek word for sleep; although electroencephalogram analysis has revealed “hypnotism to be a misnomer, as the brain of a hypnotic subject is in fact awake” – Sims “Hypnosis” in *Dictionary of Christian Ethics* 472). In the late 19th century the French neurologist Charcot considered hypnotism to be a special physiological state, whilst his contemporary Bernheim regarded it as a psychological state of heightened susceptibility (Kaplan *et al* 857). Freud studied with Charcot, and made use of hypnosis early in his career, before later replacing it with free association (Kaplan *et al* 857).

The varying theoretical explanations for the phenomenon of hypnosis render a single authoritative definition problematic, however, a safe generalization is that hypnosis involves heightened suggestibility and suspension of disbelief (Shaw “Trances, Trials and Tribulations” 1994 11 *Touro Law Review* 145 152; Council on Scientific Affairs “Scientific Status of Refreshing Recollection by the Use of Hypnosis” 1985 253 *JAMA* 1918 1919, cited in Crasilneck and Hall *Clinical Hypnosis: Principles and Applications* 2ed (1985) 439; and Marshall “Relation of the Unconscious to Intention” 1966 52 *Virginia Law Review* 1256 1267-1268, cited in Denno “Criminal Law in a Post-Freudian World” 2005 *University of Illinois Law Review* 601 630).

2 Theoretical aspects

First, a preliminary point. Schefflin and Shapiro (123) point out that many phenomena that occur in daily life have been classified as hypnotic:

“We are regularly exposed to propaganda, advertisements, music, repetitive exercise, mothers rocking or singing their infants to sleep, dramatic performances, and television. The more a person experiences these events as personally meaningful and his or her reactions as self-generated, the more likely an uncritical acceptance is. Whether influence or suggestion of this sort is best defined as ‘hypnosis’ may be open to question. What is clear is that the subjective experience of hypnosis has a great deal in common with a number of other mental events that require intense concentration, altered states of consciousness, and at least a partial suspension of disbelief.”

Suggestion and suggestibility are common elements of everyday life. For example, when one person yawns, another typically follows suit. When one touches his nose to relieve an itch, another imitates the action. When one shifts uncomfortably in her seat, moments later another finds herself shifting uncomfortably. The power of suggestion invades our everyday unconscious actions (Bonnema 1993 *Wayne Law Review* 1300 fn 4).

However, (as Schefflin and Shapiro 123 state) hypnosis is different from personally induced mental events (*eg*, meditation) or engrossing external events in both quantitative and subjectively qualitative ways. Orne (“Can a

Hypnotized Subject be Compelled to Carry Out Otherwise Unacceptable Behavior?" 1972 20 *International Journal of Clinical and Experimental Hypnosis* 101 102) distinguishes hypnotic from normal behaviour as follows:

"Hypnotic phenomena can only be distinguished when suggestions are given which distort his perception or memory. The hypnotized individual can be identified only by his ability to respond to suitable suggestions by appropriately altering any or all modalities of perception and memory."

Whilst a discussion of the differing theories explicating hypnosis goes well beyond the ambit of this note, for the purposes of the discussion which follows it is important to distinguish between "state" and "non-state" theories (for this distinction the author largely draws on Bonnema 1993 *Wayne Law Review* 1302ff, and any reader seeking a more detailed (though not exhaustive) explanation of the theories which fall within this categorization – the different "camps" – is referred to this discussion):

"The 'state' camp maintains that genuine hypnosis renders a hypnotized subject's action *involuntary*. In contrast, the 'non-state' camp removes hypnotic phenomena from the arena of automatism or involuntary action. In addition, a 'non-state' theorist maintains that hypnotized subjects only *act* as if their actions are involuntary. Finally, under the 'non-state' view, the hypnotized person's actions are considered *voluntary*" (Bonnema 1993 *Wayne Law Review* 1302, footnotes omitted, emphasis in the original).

State theories include the neurophysiological model which holds that neurological changes in the brain occur during hypnosis, giving rise to an altered state of consciousness (Bonnema 1993 *Wayne Law Review* 1303). Examples of the physiological changes include decreased blood pressure, slower respiration, and an alteration in brain waves (Bonnema 1993 *Wayne Law Review* 1300 fn 4). There is still no sound evidence, as yet, that hypnosis works specifically on any organ or physical system (however, as Zangwill "Experimental Hypnosis" in Gregory *Oxford Companion to the Mind* (1987) 328 330 points out, although the state of hypnosis lacks definite physiological or biochemical criteria of an altered state of consciousness, it does not necessarily follow that no such criteria will ever be discovered).

Another state theory is the "trance" model, which postulates a trance resulting from the hypnotic suggestion. This theory pervades the scientific community (Bonnema 1993 *Wayne Law Review* 1304, thus "hypnosis" is defined in terms of trance in, eg, Campbell *Psychiatric Dictionary* 5ed (1981) 294; Kaplan and Sadock *Modern Synopsis of Comprehensive Textbook of Psychiatry III* 3ed (1981) 747; and Kaplan *et al* 857-858). Kaplan *et al* (858) explain the trance state as follows:

"Persons under hypnosis are said to be in a trance state, which may be light, medium or heavy (deep). In a light trance there are changes in motor activity such that the person's muscles can feel relaxed, the hands can levitate, and paresthesia can be induced. A medium trance is characterized by diminished pain sensation and partial or complete amnesia. A deep trance is associated with induced visual or auditory experiences and deep anesthesia. Time distortion occurs at all trance levels, but is most profound in the deep trance."

Haward and Ashworth ("Some Problems of Evidence Obtained by Hypnosis" 1980 *Criminal Law Review* 469 470) state that in the induction of a trance, the hypnotist concentrates the sensory input of the subject through the dominant visual channel, usually by fixation on point stimulus, which may be a light or moving signal (similar to the way in which an animal becomes mesmerized by the headlights of a car, or a predator) (Haward and Ashworth 1980 *Criminal Law Review* 470):

"The hypnotist then cuts off his input by forcing the eyes to close, leaving only the auditory channel with which to communicate with the subject and manipulate his experiences. By focusing the whole of his 'stream of consciousness', first on the fixation stimulus, and secondly upon the hypnotist's voice, the good hypnotic subject loses the power to monitor sensation from the outside world or to engage in any mental processes until so directed by the hypnotist."

A host of different characteristics have been used to define the hypnotic trance (for a discussion of these see Schefflin and Shapiro 123-126).

Other "state" models include the ego-psychological model, which holds that hypnosis brings about an altered state of consciousness, and the social-suggestion model, which postulates that once hypnotized the subject is completely within the power of the hypnotist (Bonnema 1993 *Wayne Law Review* 1304-1306).

Non-state models take a more sceptical view of the phenomenon of hypnosis. The socio-cognitive model holds that hypnosis can be explained in psychological terms, in that the subject tries to carry out suggestions so that his responses will be acceptable. The subject "chooses to believe that he was hypnotized even though no actual separate hypnotic state exists ... [and therefore] whatever actions the subject performs are, in fact, voluntary" (Bonnema 1993 *Wayne Law Review* 1307). An example of the interpersonal influence theories is Barber's view that the notion of a trance (or the unconscious) is misleading, and that the crucial factors to be considered are the motivation of the subject, the subject's relationship to the examiner, and environmental conditions. Thus "hypnosis" is:

"nothing more than an example of any social influence situation in which one person actively role-plays a response that is created by a host of predictable antecedent factors, such as prior attitudes towards the phenomenon being investigated" (Schefflin and Shapiro 131).

Other models (amongst the many which could be mentioned) are the social-psychological model, which emphasizes that the hypnotic effect "rests on individual differences among various subjects", and the signal detection model, which relates to the expectancy of the subject concerning the hypnotic event, and in terms of which the greater the expectation, the more the subject will respond to the suggestion (Bonnema 1993 *Wayne Law Review* 1308-1309).

3 Legal aspects

Having not availed ourselves of any of the numerous therapeutic definitions of hypnosis, let us briefly make mention of a legal definition: According to Black's Law Dictionary, hypnosis is an artificially produced condition in which the person hypnotized, apparently asleep, acts in obedience to the will of the operator.

Though clearly imperfect, the definition does focus us once more on the issue at hand: can hypnotic coercion cause crime?

Before considering this issue in some detail, it is necessary to make mention of the fact that hypnosis has been employed as a tool for obtaining evidence, and the bulk of legal literature dealing with hypnosis is directed at this usage. Thus in South Africa, the literature on the topic is principally limited to Professor van der Merwe's articles on the hypnotic refreshing of a witness's memory ("Die Toelaatbaarheid van Getuienis wat met Behulp van Hipnose as Voorverhoor-geheueverfrissingstegniek Bekom is" 1995 *Obiter* 179; and "n Konstitusionele Perspektief op die Toelaatbaarheid van Getuienis wat met Behulp van Hipnose Herwin is" 1996 *Obiter* 1), and the leading case deals with the inadmissibility of the opinion evidence of a hypnotist relating to a case of defamation resulting from an allegation of rape (*Holtzhauzen v Roodt* 1997 4 SA 766 (W)).

Back to the interface between hypnosis and substantive criminal law. In examining this issue, one encounters certain problems. First, the therapeutic (non-lawyer) writers disagree whether hypnosis does indeed have coercive power (once again, this point cannot be traversed in this already bulky note, but see the discussion in Perry 1979 *International Journal of Clinical and Experimental Hypnosis* 204; Bonnema 1993 *Wayne Law Review* 1310-1313; and for an illuminating debate see Gibson 1991 *Contemporary Hypnosis* 129; and Wagstaff "Hypnosis and Harmful and Antisocial Acts: Some Theoretical and Empirical Issues" 1991 8 *Contemporary Hypnosis* 141). It may be noted that the professional organizations of hypnotists all seek to dispel the idea that a person can be induced by hypnosis to lose control over his or her behaviour (see the statements of the Executive Committee of the American Psychological Association Division of Psychological Hypnosis; the American Society of Clinical Hypnosis; the British Society of Medical and Dental Hypnosis and the Australian Society of Hypnosis in *Obadike* (2000 WL 34232676) 14-16). The second difficulty relates to testing this possibility through experimentation, but controlled laboratory experiments inducing criminal behaviour in hypnotized subjects are immoral and illegal. A more subtle problem that must be overcome is that in experiments performed which involved the apparent commission of anti-social and objectional acts, subjects would know "at the back of their minds" that no social harm or scandal would follow, because the experimenters would have certainly taken precautions and would have to abide by ethical guidelines.

There is some support for the hypothesis that hypnosis can result in coercion. The possibility of hypnotic influence founding a defence was noted

by writers in the Common Law tradition (having noted the acceptance of such a defence by jurisdictions in Continental Europe) by the beginning of the 20th century (see, *eg*, Kenny *Outlines of Criminal Law* (1902) 57; and Stroud *Mens Rea* (1914) 244-257). Estabrooks states that almost anyone can be persuaded to do almost anything under hypnosis (*Hypnotism* (1957) 172). However, the evidence supporting such a claim is largely anecdotal. Schneck relates the case of a military offence ("A Military Offense Induced by Hypnosis" 1947 106 *Journal of Nervous and Mental Disease* 186), Deyoub relates an incident of where a reckless remark gave rise to a post-hypnotic bank robbery ("Hypnotic Stimulation of Antisocial Behavior: A Case Report" 1984 32 *International Journal of Clinical and Experimental Hypnosis* 301), and Katz tells of cases of bank robbery, fraud and theft, which occurred in Germany and Denmark (*Bad Acts and Guilty Minds* (1987) 128-133), also Laurence and Perry *Hypnosis, Will and Memory – A Psycho-Legal History* (1988) 273 cite the case of Mme Sauter, who was acquitted of charges of attempted murder and inciting murder when the cause of such behaviour was attributed to a fortune teller. A common problem with all these examples is that the evidence is based on the testimony of the hypnotists who in each case "debriefed" the hypnotized subject, rather than the testimony of the accused hypnotist (Katz 133). Furthermore, this approach (that coercion can take place) is the older of the opposing views, as a result of which there is a paucity of recent research which supports it.

The contrary view, which holds that a hypnotist cannot make a hypnotized person do anything she does not want to do, is more modern. This view holds that hypnotized subjects do not commit anti-social or criminal acts, because even under hypnosis, they are aware of what is transpiring. White (cited in Donnelly, Goldstein and Schwartz *Criminal Law* (1962) 558) expresses this approach as follows:

"[T]he weight of evidence heavily favors the statement that a hypnotized person will not carry out suggestions which are repugnant to him or which awaken any serious motive for opposition. Though hypnotized, he remains aware of the general situation, and we have no reason to assume that he can be fooled more easily than a wide-awake onlooker."

Thus the hypnotized person will not go on a murderous rampage or take her clothes off in public unless the person would ordinarily do such things.

How then should the law respond?

Clearly this begs the question of whether it can be accepted in law that the hypnotic subject can be coerced, and, on an even more fundamental level, what hypnosis is.

The Model Penal Code (MPC) of the American Law Institute (1985) excludes (along with "reflex or convulsion"; "bodily movement during unconsciousness or sleep"; and "bodily movement that otherwise is not a product of the effort or determination of the actor, either conscious or habitual") conduct during hypnosis or produced by hypnotic suggestion from voluntary action (§ 2.01(2)), on the basis that the dependency and

helplessness of the hypnotized subject are regarded as too pronounced for criminal liability (221). Denno ("Crime and Consciousness: Science and Involuntary Acts" 2002 87 *Minnesota Law Review* 269 301) points out that many references in the MPC Commentaries derive from psychoanalytic literature published four to six decades ago (primarily between the 1940s and the 1960s) "when psychoanalysis was particularly forceful", and that the decision to categorize hypnosis as an involuntary act is a particularly striking example of the impact of such literature. It thus follows that the rationale for hypnotically induced conduct constituting automatism is premised on the "state" theoretical approach to hypnosis. The correctness of the categorization has been called into question on the basis that conduct under hypnosis cannot conclusively be classified as involuntary in nature (Robinson *Criminal Law Defences Vol 2* (1984) 437). In addition Robinson, Greene and Goldstein ("Making Criminal Codes Functional: A Code of Conduct and a Code of Adjudication" 1996 86 *Journal of Criminal Law and Criminology* 304 326) note that the provisions of the Code grant a complete defence without any inquiry into the degree of dysfunction present in a given case, despite the fact that hypnosis may create a wide variety of degrees of dysfunction.

The Model Penal Code approach has been followed in Montana (Mont. Code Ann. § 45-2-101(31)(c) (1991)), Kentucky (Ky. Rev. Stat. Ann. § 501.030 (1992)) and New York (N.Y. Penal Law § 15.15 (1992)). Moreover, courts have recognized that an automatism defence is in principle available to an accused who acts involuntarily whilst in a hypnotic state (*People v Dunigan* 421 NE 2d 1319, 1338 (Ill. App. 1981); *People v Marsh* 338 P 2d 495 (Cal App 2d 1959); and *US v Bailey* 585 F2d 1087, 1118 (DC Cir. 1978)), although the defence has yet to be upheld. However, courts have been reluctant to grant an automatism defence based on hypnotism (Denno 2002 *Minnesota Law Review* 349; see eg, *US v Phillips* 515 F.Supp. 758 759-765 (ED Ky. 1981); and *US v McCollom* 732 F. 2d 1419 (9th Cir. (1984)). More recently the Supreme Court of California in the case of *Obadike* (*supra*) dismissed the possibility of hypnosis giving rise to unconscious conduct, quashing the convictions of sexual assault based on non-consensual sexual touching against the defendant, a hypnotherapist. It is interesting to note that in *Horvath v R* (93 DLR (3d) 1) the Supreme Court of Canada excluded an appellant's confession to the police on the basis that the police officer had (inadvertently) hypnotized him, resulting in his being in a "dreamy state of altered consciousness" (38).

Academic opinion has been divided. Bassiouni (*Substantive Criminal Law* (1978) describes behaviour engaged in under the influence of hypnosis as involuntary as "the existence of a conscious mental awareness which [is] at the origin of thought-induced action" is excluded. Delgado ("Ascription of Criminal States of Mind: Towards a Defense Theory for the Coercively Persuaded ('Brainwashed') Defendant" (1978) 63 *Minnesota Law Review* 335 350) characterizes hypnotically induced behaviour as "reflexive, unpremeditated, automatic" and thus properly founding an *actus reus* defence. Gibbons and Skinner ("The Biological Basis of Human Rights" 2003

13 *Boston University Public Interest Law Journal* 51 60 fn 36) state that “the actor during ... hypnosis is an automaton, no more subject to law than a fox”. On the other hand, Robinson (435) states that

“Even if it is assumed that hypnosis can create a compulsion to act, the remaining and greatly debated issue is whether such compulsion is adequate to cause a person to engage in conduct he would not otherwise have engaged in upon a similar suggestion in a non-hypnotic state. In the United States, the general scientific view appears to be that no such degree of compulsion can be created through hypnosis.”

Bonnema (1993 *Wayne Law Review* 1334), in the light of the “numerous fallacies and unsolved debates about hypnotic effect”, the difficulties involved in verifying whether someone can resist criminal (or antisocial) suggestion, and the “overwhelming legal considerations” militating against allowing such a defence, concludes that allowing a hypnotism defence would be “unwise and dangerous”.

It seems that whilst the issue of conduct under hypnotic influence has yet to come before the English courts, it is likely that a similar approach would be adopted to that expressed in the Model Penal Code, (this is the view of Stallybrass “A Comparison of the General Principles of Criminal Law in England with the ‘Progetto Definitivo di un Nuovo Codice Penale’ of Alfredo Rocco” in Radzinowicz and Turner (eds) *The Modern Approach to Criminal Law* (1945) 403; Williams *Criminal Law – The General Part* 2ed (1961) 769; White *Grounds of Liability* (1985) 60-61; Clarkson *Understanding Criminal Law* 3ed (2001) 40; and see *R v Quick* [1973] 3 All ER 347 (CA) 356b-c). With regard to Scots law, whilst there are also not any decided cases in this regard, it seems that if an act was committed under hypnotic influence, it would be regarded as “forms of unconscious actings” (Christie *Gordon’s Criminal Law Vol 1* 3ed (2000) 65).

In South African law, there is no leading case dealing with the hypnotism defence, and the courts have only had cause to make mention of the hypnotic condition being analogous to deindividuation (*S v Thabatha* 1988 4 SA 272 (T) 280E; *S v Motaung* 1990 4 SA 485 (A) 506C; and *S v Matshili* 1991 3 SA 265 (A) 271D-E, cited in *S v Matela* 1994 1 SACR 236 (A) 242h-j) and hysterical dissociation (*S v Edward* 1992 2 SACR 429 (ZH) 432c-d).

It appears that hypnotism has been accepted as a possible cause of automatism (see *R v K* 1958 3 SA 420 (A) 421H). In a number of early cases (*R v Mkize* 1959 2 SA 260 (N) 264B-C; *R v Mokwanazi* 1959 3 SA 782 (W) 786C-D; and *R v Ngang* 1960 3 SA 363 (T) 365A) the courts cited the following definition of automatism from Lansdown *et al* (*Gardiner and Lansdown’s South African Criminal Law and Procedure Vol 1* 6ed (1957) 106):

“Conduct ordinarily criminal is, in general, excused if done in circumstances in which the mind, though not insane or, as in voluntary intoxication, culpably infirm, ceased to control the motions of the body as, for example, in involuntary convulsion, misadventure, sleep, unconsciousness, amnesia, or hypnotism.”

This approach is accurate if hypnosis is regarded as, in terms of the physiological basis for hypnosis, inducing a sleep-like condition, as Gardiner and Lansdown (107) (hypnosis is equated with somnambulism) appear to believe. Their successors, Burchell and Hunt (*South African Criminal Law and Procedure Vol 1: General Principles* 2ed (1982) 111 (latest 3ed by Burchell (1997) 42), and later Burchell and Milton (*Principles of Criminal Law* 2ed (1997) 103); and Burchell (*Principles of Criminal Law* 3ed (2005) 180) have also regarded hypnosis as a possible cause of automatism.

The approach to a defence of hypnosis depends on the accepted understanding of the nature of hypnosis. Thus Candeub states that conduct under hypnosis is intentional but not conscious ("Consciousness & Culpability" 2002 54 *Alabama Law Review* 113 113 and 119); Corrado ("Is There an Act Requirement in the Criminal Law?" 1994 142 *University of Pennsylvania Law Review* 1529 1547) describes such conduct as volitional but not voluntary; Simester and Sullivan describe a hypnotized person as being able to comprehend and implement the hypnotist's instructions at some level of consciousness, and yet being completely lacking in deliberative control (*Criminal Law: Theory and Doctrine* (2001) 102); and Boyd ("Medical Marijuana and Personal Autonomy" 2004 37 *John Marshall Law Review* 1253 1279) that where X's conduct is induced by hypnosis she would be acting freely, but (because her actions are 'not a product of her own desires and choices') not acting autonomously. As indicated above, Robinson is not convinced that hypnosis should be the basis of a defence excluding voluntariness of conduct, nevertheless he states that while the degree of impairment of behavioural control may not be severe, it may nonetheless be sufficient to merit an excuse ("A Functional Analysis of Criminal Law" 1994 88 *Northwestern University Law Review* 857 898-899).

Whichever approach is taken, however, it does seem as if there will be scope for antecedent liability on the part of the hypnotized subject (Burchell 180 fn 16; Christie 65; and Finkelstein and Katz "Contrived Defenses and Deterrent Threats: Two Facets of One Problem" 2008 5 *Ohio State Journal of Criminal Law* 479 489), particularly if the current wisdom is accepted that the subject is not gullible and without will power. Some writers would go even further, and insist that will power is almost always maintained throughout the period of hypnosis. If this view is accepted, the hypnotism defence would either be analogous to that of voluntary intoxication, or would perhaps not be regarded as a "defence" at all, but would perhaps impact upon punishment.

Clearly, if it is accepted that hypnotic coercion can induce crime, this would allow for a hypnotism defence, and concomitant criminal liability on the part of the hypnotist, who could be held liable as a perpetrator, using the subject as an innocent agent if the crime is committed, or on the basis of incitement if the crime is not committed.

4 Conclusion

In conclusion, it is evident that an authoritative answer to the question of whether hypnotic coercion can induce crime is not possible. It is evident that despite the continuing influence of the trance model, the preponderance of modern theorists reject the possibility that the subject is unaware of what he is doing, and can therefore be coerced involuntarily into a criminal (or antisocial) act. In the light of this the writers, including the South African writers mentioned earlier, who simply classify hypnosis as a cause of automatism, without qualification or explanation, do not adequately indicate the complexity of the issue.

Perhaps at this stage a more qualified position can be adopted, to the effect that whether or not hypnosis can be utilised in a coercive fashion, it is clear that in certain patients self-destructive elements can be activated. It is theoretically possible to distort a subject's perceptions in a trance to the extent that he or she believes that a particular situation prevails (Schefflin and Shapiro 137; see also Williams "The *Actus Reus* of Dr Caligari" 1994 142 *University of Pennsylvania Law Review* 1661 1668). If the subject believes in the efficacy of hypnosis as a coercer, the belief may be translated into a self-fulfilling prophecy (Perry 1979 *International Journal of Clinical and Experimental Hypnosis* 215). Thus what is significant is not so much whether the hypnotist can in fact distort perceptions and coerce the will, but whether the subject believes that this can be done, and that this is being done to him or her (Laurence and Perry 318 and 394). Equally, if subjects believe that they are engaged in an experiment, and that consequently all the apparently harmful acts they are told to engage in are in fact safe, this constitutes "a potentially powerful, even lethal, mechanism by which people in hypnotic contexts may be induced to perform harmful and antisocial acts" (Wagstaff 1991 *Contemporary Hypnosis* 144).

Schefflin and Shapiro argue (137) that to expect that a person with typical ethical standards would become a killer because a hypnotist ordered it is absurd. Nevertheless, they continue, if the same person was absolutely convinced that his or her child were endangered by a stranger, the person's desire to protect the child could have serious consequences (Schefflin and Shapiro 137). They argue that such ability to completely alter the totality of perceptions under hypnosis would, however, require extensive periods of time and total environmental control and that trance logic would have to be replaced by an altered conviction (Schefflin and Shapiro 137). However, Haward (Haward and Ashworth 1980 *Criminal Law Review* 476) points out that he has personal experience of subjects behaving under post-hypnotic suggestion some months after the initial trance, and in such a case "what the witness honestly believes to be the truth could be a purely fictitious piece of information planted in the mind of the witness during hypnosis". Moore (*Act and Crime* (1993) 250) affirms that hypnotic and post-hypnotic suggestions are more powerful than the ordinary forms of suggestion, and indicates that this fact was determinative in the MPC and other writers categorizing hypnosis as a basis for a defence of automatism.

If the nature of hypnosis goes beyond suggestion, and does in fact involve dissociation, with the result that the subject is not in direct contact with her dissociated cognitive subsystems (*ie*, not immediately aware of all her actions and experiences), and thus in a state of heightened suggestibility, with reduced reality testing and reduced critical and logical reasoning, then

“there is apparently no obvious *a priori* reason why, at the level of phenomenal awareness, a deeply hypnotized subject should not fully accept, for example, that a rubber dagger is real, and be unaware of, or not bothered by, the immoral nature of actions asked of her, because presumably the reality of the situation could be hidden from her present awareness, along with her “normal personality” and critical and logical faculties, behind an ‘amnesic barrier’” (Wagstaff 1991 *Contemporary Hypnosis* 143).

Given the indeterminacy of the theoretical position regarding the coercive nature of hypnosis, it may be that ultimately the judgment of a particular accused’s criminal responsibility, where hypnosis is raised as a defence is simply dependent on the views of the trier of fact regarding the possibility of automatism through hypnosis (see Roberts and Wagstaff “The Effects of Beliefs and Information about Hypnosis on the Legal Defence of Automatism through Hypnosis” 1996 *Psychology, Crime and Law* 259). In any event, expert evidence will be crucial in determining whether the defence has been established, that is, whether the fact of the hypnosis has resulted in the accused being used as an instrument, or whether he remains an autonomous agent.

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