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# **Cross-examining Suggestibility: Memory, Childhood, Expertise**

## **Children's testimony between psychological research and juridical practice.**

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### *Abstract:*

Although research into children's eyewitness testimony has become more and more refined findings do not translate smoothly into practice. While competing scientific approaches produce complex results, practice is haunted by polarised debates that divert attention away from child witnesses or even undermine their position. In this paper I argue that an overall lack of concern for the reciprocal relationships between juridical, psychological and public discourses is responsible for this dynamic, which is furthermore fuelled by the fact that the concept of suggestibility has always remained an ill-defined entity. To address this problem I will introduce a multidisciplinary research perspective that is aimed to add transparency to the field by analysing the counterproductive dynamics between theory and application on an international level. Child witness research and practice in Britain and Germany are examined as comparative 'case examples' via in-depth interviews with academic, psychological and juridical professionals who work in the field.

*Keywords:* Suggestibility, Child witnesses, Expert witnesses, Child abuse

### *Introduction:*

Over the past few decades research in the field of child witnessing has taken several huge steps forward, generally affirming children's ability to give evidence in courts of law. At the same time there has been persistent wariness about the reliability of children's testimony. Intense controversies around memory development, children's suggestibility and the influence of different interview styles have continued to dominate both research and practice. In particular, the question of children's suggestibility has sparked an immense research interest, resulting in a number of studies that have produced valuable insights into the possible developmental, circumstantial and personal factors underlying children's propensity to succumb to suggestions. However, research in this field faces various problems. When the findings are subject to close scrutiny, it becomes clear that suggestibility research is riddled with what appear to be contradictory results. Furthermore, there are persistent difficulties in translating scientific findings about children's testimony into juridical practice: Interviewers tend to veer from the recommended questioning procedures; courts seem unable to appreciate the full complexity of the balanced and rather tentative messages that psychiatric or psychological experts are promoting and the scientific community itself is frequently drawn into polarised and heated public debates about child witnesses' credibility and suggestibility in the most unhelpful manner. Hence rather than creating a more circumspect framework for the evaluation of children's

testimony, research itself becomes entangled in a contentious dynamic and thereby diverts attention away from the concrete child witnesses who should be at the centre of concern. So in a very real sense children's testimony is suspended between theory and practice, neither of which seem to get to the heart of the problem.

I would like to show that a productive way to depict and analyse this problem is to look at the field from the perspective suggestibility. Thus, in the following I would like to explore suggestibility --and respectively suggestion -- (1) as a *notion*, (2) as an *ambiguous theoretical concept*, (3) as a *contentious issue in experimental psychology*, (4) as a *focus of media reporting*, (5) as a *cause of juridical suspicion* and (6) as *backdrop of psychological expertise* offered to courts. Hence I will explore the phenomenon of suggestibility from every possible angle, and thereby ignore disciplinary or conceptual boundaries in order to trace it all the way from its theoretical conceptualisation to its impact on practice. The research perspective I would like to introduce aims to empirically examine and use the tensions arising around the concept of suggestibility in order to add transparency to the whole field. This should facilitate a less polarised and more balanced debate, which will finally help to refocus on the concrete concerns of child witnesses.

### *1. Suggestibility as a notion:*

Those scientists seen as the founding figures of psychology around 1900, , regarded both suggestibility and memory as central topics for the new discipline such as Wilhelm Wundt (1892) and Albert Binet (1900)e. Yet while memory research was soon established as a core issue for the science of the human mind, the interest in suggestibility waned quickly after an initial period of intense investigation. Yet, it is worth taking note of two early findings that are still remarkably relevant.

*Firstly*, the French scientist Albert Binet (1900) who conducted a range of experiments around different forms of suggestion, voiced considerable doubts as to whether it was at all possible -- or useful -- to conceptualise general techniques of suggestion or to search for personality traits that would correlate with certain degrees of suggestibility. His central finding was that the degree of uncertainty experienced by a person in a specific situation and with regard to a certain issue in question, is directly linked to their susceptibility to suggestions relating to this particular issue.

*Secondly*, the German scientist Wilhelm Stern (1904) pointed out that the notion of suggestion is incomplete. While we can name the activity of suggesting (to suggest) and the predisposition to succumb to suggestions (suggestibility) there is no term to denote the state of a person while under the influence of suggestion. On the basis of his own findings Stern introduces the differentiation 'active suggestion' to denote the activity of suggesting, and 'passive suggestion' to denote the psychological state of a person while under the influence of suggestion. Yet his most

important finding is that active and passive suggestion are entirely independent phenomena with no necessary causal connection. While they might well coincide, they are as likely to prevail on their own, hence the occurrence of active suggestion does not cause passive suggestion, and the existence of passive suggestion cannot be taken as a direct indicator for a preceding suggestive influence.

Neither Stern's nor Binet's findings had much influence on later research, which is unfortunate, as their considerations might have made a crucial contribution to modern research into children's suggestibility<sup>1</sup>.

### *2. Suggestibility as an ambiguous theoretical concept:*

Suggestibility was no longer pursued as a central and circumscribed topic after this initial period and the definitional problem remained unresolved. Regardless of this, suggestibility in the meantime lingered in psychological research as a sub-phenomenon linked to such diverse topics as: hypnosis, imitation, social contagion, conformity, compliance, decision making, imagination, changes in attitude, bias, expectancy, self-fulfilling prophecy, placebo, dissociation, coping and defence to name but a few. In fact this versatility and equivocality produces constellations in which the number of theoretical concepts seems to exceed the number of actually observable phenomena. Pavlov even considered that suggestion could be the simplest form of a conditioned reflex with the 'word' being a universally applicable substitute for any other stimulus (Gheorghiu, 1989 for a summary). Suggestibility only re-emerged as a circumscribed research topic in the late 1970's, when due to societal changes in many northern American and European countries, a growing number of children were admitted as witnesses in courts (Bruck & Ceci 1999). Accordingly, modern suggestibility research resumed with a central focus on children's suggestibility and testimony in applied forensic settings.

### *3. Suggestibility as a contentious issue in experimental psychology*

One of the most frequently used definitions in modern suggestibility research is the one established by Ceci and Bruck (1993). They state that suggestibility is...

“...the degree to which children's encoding, storage, retrieval, and reporting of events can be influenced by a range of social and psychological factors.” (Ceci, S. J., Bruck, M., 1993, p. 404).

This is a useful, but rather functional definition that clearly points to the diversity and complexity of the factors that are to be considered. For example a strong memory trace for an event can prevent suggestive effects, and existing prior knowledge and help create a stronger and thus more robust memory trace (Ornstein, P. 2002). Yet “...knowledge can be a double edged sword” (Ornstein, P. 2002, p. 38), as Ornstein notes with reference to a finding that existing script knowledge can also lead to omissions or false additions to a report. The same applies for stress,

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<sup>1</sup> German research is an exception here, as it has always drawn extensively on the work of William Stern.

which has been shown to enhance, but also to impede encoding. Age is an equally ambivalent factor. While it was initially stated that susceptibility to suggestion decreases with age, Goodman (1991) was for example able to show that three to four year old children could be as resistant to suggestion as six to seven year old children. More recently Pool and Lindsay (2002) found that varying the interview script cannot just level out age differences, but can also reverse the trend in favour of younger children. Hence they conclude that...

“...processes that make testimony more accurate (...) and factors that make testimony less accurate (...) both increase with age. (Poole, S. A., Lindsay, D. S. 2002, p. 372).

Considering more complex and contextual factors Ceci and Bruck (1995) for example identify strong sources suggestion in the questioning techniques used by biased interviewers: They tend to ignore inconsistencies, repeat specific and leading questions, encourage speculation and imagination, produce an accusatory or confirmatory atmosphere and induce stereotypes. These are valuable insights, yet critics have pointed out that suggestion may even occur in the absence of bias.

“Interviewers can inadvertently introduce ambiguity or bias into forensic conversations even when they do not have a strong agenda to collect evidence of abuse” (Poole, D. A., Lindsay, D. S. 2002, p. 358).

Additionally Pool and Lindsay highlight the possibility of a reverse dynamic. They “found various ways in which the children might influence interviewers” by introducing ambiguous information into the conversation, because they fail to identify the topic or drift the topic without prior notice (Ibid., p. 358). So children can be as suggestive as they can be suggestible, and interviewers might succumb to these suggestions as well as they might inadvertently introduce suggestive elements just by asking neutral questions. Considering this reciprocity and the possibility of inadvertent suggestion, it becomes clear why it is important, but not entirely sufficient, to instruct interviewers to avoid suggestive questions: Interviewers can hardly be asked to avoid something they are not actually doing.

#### *4. Suggestibility as a focus of media reporting:*

Ceci (Ceci, S. J. et al 1994) conducted a study that investigated the impact of neutral but repetitive questioning by asking children, in ten consecutive interviews, whether or not they had experienced four specific events (two of these were fictitious events and two were events the children had in fact experienced). This study attracted huge public interest because not only did it show that in the final interview children would assent to have experienced 34% of the fictitious events. Additionally, 27% of these falsely assenting children persistently clung to their assent after the de-briefing and could not even be dissuaded by their parents. This unexpected additional outcome lead to the claim that quite possibly permanent false memories had been implanted by the repetitive questioning.

This study featured in the US-media and, among diverse reactions, it sparked a heated debate about the ethics of implanted memory research with children. One of the central issues raised by the critics was that "...this research violates children's rights to create their own memory." (Herrman, D., Yoder, C., 1998, p. 204). Additionally the deceit that was revealed to the children in the debriefing procedure was seen as a threat to children's development because it would "...diminish appreciation of authority, decrease self-concept and (...) increase the sense of helplessness." (Ibid. p. 200). Ceci (1998) replied by denying that children could have been harmed and clarified that his experiment did not involve a deception (Ceci, S. J. 1998). However, a further contribution made to this debate by Goodman is interesting to my argument. She resolves the ethical dilemma by stating that quite probably no false memories had been implanted anyway.

"We still cannot say with certainty whether we successfully implanted false memories (...) because they may have assented to the questions for a variety of reasons, a false memory being only one of them. In sum it is possible that no false memories have been created in children in implanted-memory studies". (Goodman, G. et al. 1998, p. 210).

She suggests that in fact children might well have continued to assent to fictitious events for a variety of reasons.

"...children may maintain that a false event occurred for reasons other than a false memory, such as to save face, to avoid the possibility of punishment, appear knowledgeable, or continue to play the game." (Ibid. p. 211).

According to Goodman two ethically far more concerning issues become apparent in this debate: Firstly results in false memory research have been overstated and have thus fuelled a dramatised and simplified public understanding of the actual phenomenon of false memories. And secondly the critics in this debate have gathered their information from third hand reference, thus promoting a distorted view of the false memory experiments.

"Herrman and Yoder are referring to a conference talk given by Ceci (1994) that was cited in the New York Times that was cited in an undergraduate textbook." (Ibid., p. 210).

Finally she stresses that all of these unaccountabilities, irrespective of their well-intendedness or origin, will feed into the public with...

"...a chilling effect on (...) child sexual abuse investigations and prosecutions (e.g. those involving young children) by creating a general atmosphere of disbelief of children's testimony." (Ibid., p.208).

She finds this reflected in a decreasing number of reported abuse cases which could well be an effect of a recurring fear in children or parents to report abuse because nobody will believe them. Additionally she points to studies that suggest jury members will take the false memory debate as a clear sign of children's unreliability as witnesses.

This debate marks a crucial point in my cross-examination of suggestibility, because it demonstrates clearly how suggestibility transgresses disciplinary boundaries and pervades from theory into societal practices and opinions even on an international level, since Goodman's warning does not just apply for the United States. The dynamic depicted above proves paradigmatic and contagious for scientific and for courtroom practice in Europe as well. With a slight delay Britain has seen high profile cases around child abuse (e.g. involving allegations of

satanic-ritual abuse)<sup>2</sup> that resemble those controversial cases in the US. The debate around implanted memory has also featured in the UK media with potentially similarly dubious effects on judges, police officers and jury members.<sup>3</sup> Furthermore, despite the implementation of new guidelines that are designed to support and facilitate children's testimony in court, decreasing prosecution and conviction rates for alleged cases of child abuse were reported in England over the past years, while there was little reason to assume that the prevalence of actual child sexual abuse had decreased at a similar rate (Kelly 2002).

Striking parallels can also be observed in Germany, which is remarkable, because Germany has an inquisitorial legal system that differs hugely from the adversarial British and US-American system. Yet, in Germany media and science are strongly influenced by anglo-american debates and research literature. During the late 80's in Germany a heightened awareness for child abuse culminated in what has frequently been termed an 'abuse hysteria'.<sup>4</sup> As an effect of this the atmosphere reversed in the late 90's and turned into what can be called an 'abuse of abuse hysteria': Now a strong generalised scepticism against any abuse allegations prevailed.

##### *5. Suggestibility as prompt for juridical suspicion:*

During this time, and corroborated by US-American research literature, German authorities and scientists voiced intense concern that the legal system might be facing an epidemic of false allegations of sexual abuse in contentious custody cases. It was argued that a growing number of mothers were making accusations of sexual abuse, and even coaching their children into making accusations, in order to deprive their divorced partner from custody. I have worked in credibility assessment of child witnesses around this time in Germany and thus I can report from my own experience that this debate had a considerable effect on the way judges, police officers and psychologists approached these cases. This is even more disquieting when considering the results of a retrospective study of court files that was conducted in Berlin by Busse et al (2000), to establish the actual numbers of false- and true abuse allegations linked to divorce and custody cases in Germany. For this study a total number of 1500 court files (500 each from 1988, 1992 and 1995) from Berlin family courts were subjected to an in-depth analysis to determine the numbers and the nature of abuse allegations in contentious custody cases. The results showed that between 1988 and 1995 there had been no increase of abuse allegations at all, in fact the total number of abuse allegations that were brought up during custody battles was generally rather low. Most importantly, the files analysed for this study did not contain any cases that featured a founded suspicion of deliberate 'false' abuse allegations. Additionally a close review of the

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<sup>2</sup> See for example the 'Broxtowe Case', Nottinghamshire, or the 'Shieldfield Case', Yorkshire.

<sup>3</sup> See for example Lee, N. M. (1999), Bell, S. (1988), Burman, E. (1997) for Britain. Ceci, S., Bruck, M. (1995); Ceci, S., Hembrok, H. (1998) for the United States.

<sup>4</sup> see for example Steller, M. (2000); Steller, M., Volbert, R. (1997).

relevant literature, that was conducted in the context of this study, revealed that some of the US studies, which had initially fuelled the debate in Germany, contained rather general or overstated results or had in fact been misinterpreted by the German readers.<sup>5</sup>

*6. Suggestibility as backdrop of psychological expertise:*

Considering these examples from Britain and Germany, it is obvious that Goodman makes a valid and internationally relevant point when she warns against the possible pragmatic repercussions of the implanted memory debate. Yet, her warning might not have the intended balancing effect because she – and most of the other contributors in this debate are always pragmatically reabsorbed into the adversarial dynamic of the legal context: Either they are reabsorbed personally when serving as experts in court, or indirectly when being quoted as scientific authority to support a certain claim or decision. Thus any statement in this debate may be challenged for being instrumental to promote a particular scientific approach. This is an abstract but also personal dilemma for those engaged in research and expert practice around child witnesses, as Ceci captures quite pointedly.

“What it [*suggestibility research*, J.M.] suggests is that the biases of researchers rather than the credibility of children should be investigated.” (Ceci, S.J. et al 1993, p. 133).

So, finally it seems that suggestibility is itself suggestive, and in this sense my exploration has apparently produced an even more complex picture of the problem. It seemingly ends in a deadlock rather than offering a solution. So why did I trace suggestibility all the way from Binet’s early considerations via modern experimental approaches to current legal debates in Germany? Was this to show that suggestibility research is doomed to failure? Was it an attempt to underline that this research is too complex to produce clear results or to instruct court practice in a predictable and productive manner? On the contrary; my rather brief exemplary sketch of modern suggestibility research was by no means intended as a methodological critique or a refutation of experimental approaches. By tracing suggestibility through time, disciplines, theory and practice I wanted to demonstrate that it is not only a complex but also a pervasive issue. Suggestibility transgresses scientific, pragmatic and personal levels of engagement and thereby causes reciprocal effects between the scientific and the applied context. In the light of this knowledge it now seems obvious that suggestibility will always evade the deliberate control of researchers and that it continuously betrays experts’ attempts to ensure the balanced application of their knowledge. And it does this, always at the cost of child witnesses.

Yet, how could this problem be addressed? As there is no way to avoid or prevent the effects of this pervasiveness, I would argue that there is an urgent need to investigate these complex

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<sup>5</sup> See McGleughlin, J. et al (1999) for a critical review of this debate in the United States.



repercussions in order to gain more transparency for the whole field and thus to facilitate a circumspect debate beyond accusation and polarisation. This is the aim of the research perspective I would like to introduce now.

#### *7. Investigating Complexity to create transparency:*

In a very real sense I would like to pick up Ceci's suggestion to investigate researchers and interviewers, whereas my approach is not aimed at evaluating suggestive demeanour and bias or at exposing instances of bad practice. I would like to focus on researchers, interviewers and experts because they are operating at the pragmatic junction of the complexity that is so characteristic and crucial for issues around child witnesses and suggestibility. This complexity features, and can thus be explored, in the considerations, decisions and actions, of professionals pursuing the paradoxical task of mediating between disciplines, contexts and institutions on an every day basis. They have to found their own expertise on complex and ever changing scientific findings, while giving advise to – or respectively working within - a juridical system that does by principle not appreciate contradictions and ambiguity. And above all that they are expected to ensure that the well-being and wishes of the child involved in a concrete case are paramount. Hence I would like to explore this pragmatic complexity by conducting in-depth interviews with all those professions involved in creating, applying or dealing with knowledge about child witnesses and suggestibility: psychological and psychiatric experts (researchers and practitioners), juridical professionals (courts and police), social service professionals.<sup>6</sup> This way I hope to gain a very complex and very concrete picture of the factors that create the conditions under which child witnesses give evidence. Furthermore, to illuminate the effects of different institutional and legal practices, interviews and observations are conducted in Britain and in Germany, to enable a systematic comparison of the position and current situation of child witnesses in these two countries.

Presently the interviews are still in progress and I cannot offer any final results at this point, but to underline the nature and the aim of my approach I would like to give a brief example from the data collected so far.<sup>7</sup>

An English police officer described an uncomfortable and significant experience he had during an investigation where the alleged victim was a learning disabled twelve year old girl, who lived in a care home. He got involved in the case because according to one member of the care staff the girl had reported being victim of sexual misconduct by another member of the care staff. The accused generally denied the allegations and in the course of repeated questioning the girl

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<sup>6</sup> Additionally there will be observations of courtroom and assessment practice.

<sup>7</sup> Some details in this account were altered to guarantee anonymity while preserving the genuine and crucial aspects of the example. The authentic details are known to the author.

appeared unwilling to disclose any details about the alleged abuse to the police officer. As the initial report by the staff member appeared convincing, the police officer grew increasingly concerned he might not have conducted the interview with the girl in the correct manner. He thought he might not just have failed to facilitate a disclosure but even devalued any later statement she might give by having subjected her to repeated questioning already. The case was finally resolved by a lucky coincidence: An unrelated chance remark of another child who had seen that the person accused of sexual misconduct had accidentally hurt the girl with a food trolley. In the light of this information, it was possible to clarify with the girl beyond any doubt that this in fact was the incident she had initially complained about. Retrospectively, it became clear that, even though the reporting member of staff had not been entirely convinced about the accusation, she had –after consulting her colleagues- decided to report to the police, rather than clarifying with the girl first. She had done this because she feared her clarifying questions might have suggestive effects on the girl, or she might at least be suspected of having suggested something to the girl by the police in the course of a possible investigation. The police officer for his part had been confronted with an abuse allegation reported by an experienced member of the care staff, which accordingly he felt obliged to take very seriously.

This is a very brief and superficial sketch of a concrete and singular, but by no means unusual example. I cannot offer a detailed analysis here, so instead I would like to close by emphasising three salient aspects that come to mind in the light of the above example:

**Firstly**, Binet's claim that experienced uncertainty is a central factor for the occurrence of suggestive effects is relevant here. In this example the staff members' collective uncertainty about the accusation produces (and thereby also exposes) uncertainty about their own professional position, as well as the adequacy and legitimacy of the actions that need to be taken. This uncertainty is partially resolved by passing it on to the police officer where it multiplies even further when he is left to wonder about his own professional conduct and expertise. Hence, as the basis of the professionals' own expertise grows uncertain, all of the involved parties become increasingly prone to follow implicitly available suggestions and assumptions to resolve this uncertainty. To make this point very clearly: What I am saying is that even though none of the individuals involved here is acting unprofessionally at any point, or could be accused of showing a lack of consideration, the overall structural uncertainty produced by this type of case (child witness, allegations of sexual abuse, fear to suggest) destabilises their positions and makes it very difficult for them to decide what action should be taken. **Secondly**, and closely linked to the first aspect, Stern's differentiation of active and passive suggestion, and his claim that they need to be seen as independent phenomena is important: Suggestion in this example proves to be a rather diffuse dynamic. None of the involved persons can be accused of having caused the

suggestive influences to which staff members and the police officer succumb when following the hardening suspicion that an abuse must have happened. While the girl, who is in fact subjected to a form of suggestion when being interviewed repeatedly about the event in question, persistently clings to her sparse but accurate account.

**Thirdly**, I would like to return to my initial claim that children's concrete testimony is suspended between theory and practice: This example shows how the professionals are struggling to reconcile their own expert roles and their awareness of sexual abuse and suggestion, with the demands of the concrete case. As stated above, none of the involved are acting unprofessionally or hastily, but clearly, amidst the paradoxical obligation to reassure and legitimise the own actions, attention is diverted from the girl. Those dealing with the case are less and less able to focus on demands of the concrete situation: Finally the girl and her account end up being implicitly removed from the centre of attention, bearing little weight for the decisions taken during the investigation. In this sense I claim that her testimony was suspended between theories about abuse, suggestion and disclosure, and the ambiguous nature of the practical obligations and considerations of those who tried to help her. Luckily, and thanks to everybody's alertness, this particular case could be solved. Yet it is quite obvious that whatever the exact outcome of the ensuing polarisations and diversions might be in other, less fortunate cases, they are most likely to be at the cost of the involved children.

I thus hope that my attempt to introduce an interdisciplinary approach that investigates the concrete complex interdependency of theory, research and practice via practitioners' accounts, can add transparency to the whole field and de-polarise the debate. Finally, it might even help to add certainty to the positions of those dealing with child witnesses without taking an accusatory stance towards them, because it is quite clear that translating findings into practice is neither a simple matter of 'good instructions', nor is there such a thing as straightforwardly 'correct application'.

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