Cross-examining suggestibility: memory, childhood, expertise

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Additional Information:

- A Doctoral Thesis. Submitted in partial fulfilment of the requirements for the award of Doctor of Philosophy of Loughborough University.

Metadata Record: https://dspace.lboro.ac.uk/2134/16106

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Cross-Examining Suggestibility:
Memory, Childhood, Expertise

Doctoral Thesis

by

Johanna Franziska Motzkau

Submitted in partial fulfilment of the requirements for the award of PhD
Loughborough University
04.12.2006
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Abstract:

Cross-Examining Suggestibility: Memory, Childhood, Expertise

Initially a central topic for psychology, suggestibility has been forgotten, rediscovered, evaded definition, sabotaged experimentation and persistently triggers epistemological short-circuits when interconnecting psychological questions of memory, childhood and scientifcicity, with concrete legal issues of child witnesses’ credibiltiy, the disclosure of sexual abuse and psychological expertise in courts of law.

The aim of this study is to trace suggestibility through history, theory, research and practice, and to explore its efficacy at the intersection of psychology and law, by examining and comparing the concrete case of child witness practice in England and Germany.

Taking a transdisciplinary approach the study draws on two interrelated sources of ‘data’ combining historical, theoretical and research literature with the analysis of empirical data. A genealogy of theory and research is combined with the results of reflexive interviews, conducted in England and Germany with practitioners from all those professions involved in creating, applying or dealing with knowledge about child witnesses and suggestibility: judges, prosecutors, lawyers, police officers, psychologists (researchers, experts) and social workers.

Drawing on the work of G. Deleuze and I. Stengers this study shows how practical tensions around reliable witnesses, evidence and expertise merge pragmatically with theoretical movements employed to adjust the discipline, thereby causing frictions and voids. In this sense suggestibility provides a liminal resource: It transgresses disciplinary boundaries and pervades pragmatic and theoretical, global and personal, historical and actual considerations, creating voids that allow us to reconsider the pragmatics of change and to redefine the issue of critical impact, as well as to reformulate the problem of child witness practice and children’s suggestibility.

The study hopes to make a concrete contribution to facilitating the just prosecution of sexual abuse by adding transparency to the complex and at times unhelpfully polarised field of child witness practice. By exploring the ‘pragmatics of change’ the study furthermore hopes to give an unsettling and productive impetus to theoretical debates within critical approaches to psychology.

Keywords: Suggestibility, Memory, Childhood, Deleuze, child sexual abuse, child witnesses, children’s testimony, credibility, child protection, expert witnesses, critical psychology, post-structuralism, child witness practice.
Acknowledgements:

First and foremost I would like to thank the police officers, barristers, judges, the psychological practitioners, academics, researchers, experts, the social workers and witness supporters who have participated in this study. They have made invaluable contributions and without them this study would not have been possible. I am grateful for their openness and thoughts, for their willingness to challenge, be challenged and for providing feedback beyond the initial interview. I gratefully acknowledge the co-operation of the Royal Courts of Justice, the Crown Prosecution Services, the Landgerichte, the Staatsanwaltschaften, and the English and the German police forces.

While conducting the study I have benefited greatly from presenting the work in various research groups. For discussions, comments and critique I would like to thank the members/participants of the Discourse Unit (Manchester Metropolitan University), the Discourse and Rhetoric Group (Loughborough University), the ‘Law-in-Action’ research group (Emmy-Noether Gruppe, Freie Universität Berlin), the Institut für Forensische Psychiatrie (Freie Universität Berlin) and the ‘Culture, Psychology, Development’ Group (Freie Universität Berlin).

A number of people have supported this work in their own various ways, providing inspiration, challenges and friendship. I would like thank the SCAR group at Loughborough University, Erik Axel, Barbara Biglia, Erika Burman, Jude Clark, Maarten Derksen, Chris Duncker, Dennis Howitt, Andrew Jefferson, Tine Jensen, Ian Law, Clare MacMartin, John Morss, Ilana Mountain, Marek Musial, Maria Nichterlein, Morten Nissen, Ute Osterkamp, Dimitris Papadopoulos, Ian Parker, Jacinta Tan, Anne Unckel, Sam Warner and Alexandra Zavos. Thanks to Kopano Ratele for an untimely remark and to Fred Aranowski for a timely correction. Special thanks to Malcolm Ashmore for continuous reflexivity and hospitality!

I am very grateful to those who have taken the time to read and comment on earlier drafts of the thesis with a critical eye on language and plausibility. Thanks to Tine Jensen and Helen Westcott. My very special thanks to Nick Lee who has not just provided words, but who generously shared spirit, analytic sanity and groove when needed most.

The existence of this thesis owes a lot to the inspiration, analytic versatility and boldness of my supervisor Steve D. Brown. Thanks Steve!

Cross-examining Suggestibility:

Memory, Childhood, Expertise

"The identity of words – the simple fundamental fact of language, that there are fewer terms of designation than there are things to designate – is itself a two sided experience: it reveals words as the unexpected meeting place of the most distant figures of reality. (It is distance abolished; at the point of contact, differences are brought together in a unique form; dual, ambiguous, Minotaur-like.) It demonstrates the duality of language which starts from a simple core, divides itself in two and produces new figures. (It's a proliferation of distance, a labyrinthine extension of corridors which seem similar and yet are different.)" (Foucault, M. 1963 [2004] p. 16).

"The two projects I have indicated (an infinite vocabulary for the series of natural numbers, and a useless mental catalogue of all the images of his memory) are senseless, but they betray a certain stammering grandeur. They permit us a glimpse or infer the nature of Funes' vertiginous world. (...) Not only was it difficult for him to comprehend that the generic symbol dog embraces so many unlike individuals of diverse size and form; it irritated him that the dog at three fourteen (seen from the side) should have the same name as the dog at three fifteen (seen from the front). (Borges, J. L. 2000, p. 93-94).
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Introduction


"'It is only suggestion!' (...) As if we understood what is being condemned!" (Chertok & Stengers 1992, p. xvii).

To pose the problem of suggestibility is not at all straightforward. Initially a central topic for the emerging discipline of psychology, suggestibility has been forgotten, rediscovered, evaded definition, sabotaged experimentation and persistently triggers epistemological short-circuits when interconnecting psychological questions of memory, childhood and scientificity, with concrete legal issues of child witnesses’ credibility, the disclosure of sexual abuse and psychological expertise in courts of law.

The aim of this thesis is to trace suggestibility through history, theory, research and practice, and to explore its efficacy at the intersection of psychology and law by examining the concrete case of child witness practice in England (and Wales) and Germany.

There is a concrete and a theoretical dimension to this agenda. On the basis of this complex picture I would like to show how the tensions and paradoxes arising around suggestibility could be used to gain a less polarised and more productive perspective on questions of detecting and prosecuting child sexual abuse, children’s credibility and ability to testify in court, and the issue of psychological expertise in legal practice. At the same time this exploration of suggestibility exposes theoretical questions about the emergence and constitution of psychology as a science and thereby opens a new and subversive perspective onto issues of applied knowledge.

In this sense suggestibility will simultaneously be the subject, and the method of enquiry. It provides a liminal resource: Suggestibility transgresses established disciplinary boundaries, pervades and connects pragmatic and theoretical considerations and thus creates a complex and contextualised perspective on the issues of memory, childhood and expertise.

Situating the Problem

First let me situate the problem of suggestibility in some more detail and explain why there is a theoretical and at the same time concrete dimension to my agenda.
(1) Suggestibility as a dubious notion: Discontinuous research history

At the beginning of the 20th century suggestion and suggestibility were among the central topics investigated by those who are seen as founding figures of the discipline (Wilhelm Wundt, 1892; Albert Binet, 1900).

Initially featuring as by-product of hypnosis suggestibility was by some regarded as a dubious and bizarre topic but soon it enjoyed an enormous vogue in psychology and across the social sciences. Here findings range from specific social psychological insights as the one reported by Ross (1908) who states that “the French and the Slavs are more suggestible than other ethnic groups, e.g. the Anglo-Saxons.” (translation JM) (quote as Gheorghiu 2000, p. 3); to fundamental insights such as that “Not sociability, nor rationality but suggestibility is what characterises the average specimen of humanity, man is a suggestible animal” (Sidis & James 1898).

However there are numerous lingering double-binds around the notion of suggestibility. Suggestion and suggestibility are global terms that always had various connotations. Suggestibility alludes to such undesirable characteristics as naivety, lack of self-determination or critical thinking, while suggestion alludes to manipulative behaviour. Both however seem to be related to almost any aspect of human behaviour in a quite ubiquitous way. Furthermore the relation between the notions of suggestion and suggestibility appeared dubious: Does one presuppose, determine or cause the other, or are they independent phenomena? The initial preferred solution was to assume that the effects of suggestion are to be found in the realm of the irrational or non-rational. Hence the influence of suggestion was seen to make people react without critical reflection. But this definition proved far too parsimonious, as it was also argued that attitudes, beliefs or actions induced by suggestion need not be opposed to reason. On the contrary the effectiveness of suggestion could be enhanced by argumentation. Those few accounts that attempted to provide definitions or sought comprehensive explanations for the phenomenon of suggestibility, remained heterogeneous and produced a pattern of rather contradictory and overlapping frameworks.

The initial enthusiasm for suggestibility waned quickly in the following decades. Suggestibility vanished almost entirely from the psychological research agenda and was never established as an independent topic. Even today, V. A. Gheorghiu, one of the very few contemporary experimental psychologists who have continually conducted research into suggestibility, remarks that suggestibility has always been the step-child of psychology, the Cinderella of the discipline (Gheorghiu 2000).
(2) **Suggestibility as an ambiguous theoretical concept**

The difficulty carried by the notion of suggestibility is reflected in the multitude of definitions, terms and concepts that have been related to it. Despite being temporarily absent from the explicit research agendas, suggestibility continues to subsist within ongoing research. Here it is variously related to concepts as diverse as hypnosis, imitation, social contagion, conformity, compliance, decision making, imagination, changes in attitude, bias, expectancy, self-fulfilling prophecy, placebo, dissociation, coping and defence to just name a few; additionally it has been linked to such diverse phenomena as undergoing major surgery without anaesthetics, succumbing to a leading question, or achieving breast enlargement by repeated guided imagination (Eysenck, J. 1991). Again it is Gheorghiu who, in view of such a confusing diversity has recently found it necessary to issue a call for “logical hygiene” (Gheorghiu 2000) around suggestibility. The equivocality and versatility of the concept of suggestibility indeed leads to a situation where the number of theoretical concepts appears to exceed the number of actually observable phenomena. Additionally a methodological intricacy has to be considered. The experimental investigation of suggestibility is dealing with “influences on influencing processes” (Gheorghiu, 1989, p. 29) and thus, on top of all categorical ambiguities, has to take into account a meta-level of possible artefact production. So we can see that suggestibility not only carries a certain conceptual ‘indeterminacy’ but also sparks some interesting reflexive dynamics that resonate with debates around Rosenthal’s enquiries into the experimenter effect (Rosenthal 1966) and research around demand characteristics (Orne 1962). Both could be characterised as ‘experiments on experiments’ potentially raising a multitude of reflexive angles and problems for the experimenter as well as their experimental set up (Ashmore 1989, p. 74).

(3) **Suggestibility as a paradox catalyst interrelating child sexual abuse and applied psychology…**

Since the late 1970’s, when an awareness of child abuse resurfaced, children have been more frequently admitted as court witnesses. At the same time there has been persistent wariness about the reliability of children’s testimony, and those high-profile cases of miscarriage of justice seen through the 80’s and 90’s in the US as well as in Britain and other European countries seem to corroborate this scepticism. These issues sparked an intense interest in questions of children’s memory and suggestibility. It is in this context that suggestibility re-emerged as a distinct research topic, but it was now investigated as a specific question of experimental child psychology. However, research in this field remained riddled with contradictory findings and the scientific community is fragmented
into a multitude of approaches and theories. Additionally the scientific community itself is frequently drawn into fierce debates which have fed into an increasingly polarised and heated series of public debates with the net effect that a circumspect evaluation of child witnesses has grown more and more difficult. These debates fuelled a simplistic and scandalised understanding of suggestibility research that again filtered into legal decision-making, and promoted a general atmosphere of disbelief in child witnesses. In view of suggestibility's ambiguous legacy there is reason to suspect that this dilemma is rooted in the fact that suggestibility has remained a peculiarly ill-defined concept. Additionally such dynamics seem to be fostered by an overall lack of concern for the complex and dynamic interdependency of juridical, psychological and public discourses.

Clearly, the complex issues emerging around suggestibility bear a theoretical and a concrete dimension. The theoretical dimension is comprised of the epistemological and methodological questions of how to capture and define suggestibility within psychological concepts. The concrete dimension is comprised of questions of applied psychology, relating to issues of child witness practice, children's credibility, and child sexual abuse. However, these two dimensions are intricately linked around suggestibility. Where the question of how to define and investigate suggestibility affects, and thus merges with the question of how to evaluate and assess the case of a specific child witness, these two dimensions grow indistinguishable. This is why I have referred to suggestibility as a 'liminal resource': It transgresses established disciplinary boundaries, pervades and connects pragmatic and theoretical considerations and thus creates a complex perspective on the issues of memory, childhood and expertise.

Suggestibility is 'liminal' in that it operates on the borderline between, or constitutes the demarcation line between theory and practice in this concrete context, thereby separating and at the same time connecting these issues.

Suggestibility is a 'resource' because it opens a critical and reflexive perspective onto the complex dynamics at play between these juridical, psychological and public discourses. Situating this thesis broadly within the theoretical framework of foucauldian discourse analysis, I will illustrate that suggestibility can be seen to exert a subversive analytic, or indeed 'deconstructive' force. In this sense cross-examining suggestibility means to enquire into and take seriously the questions asked about, and by suggestibility. It means to explore it as a notion, as an ambiguous theoretical concept, as a contentious issue in experimental psychology, as a focus of media reporting, as a cause of juridical suspicion, as an issue in child abuse investigations and as
the backdrop of psychological expertise offered to courts. This inevitably means to trace it across time, across disciplines and across theory and practice.

Topology of the Problem: Why Compare England/Wales and Germany?

In order to follow suggestibility into practice, that is, into the concrete context of child witnessing and suggestibility research, the focus has to be narrowed down to a particular context.

I have decided to compare child witness practice in two different countries because the juxtaposition helps to illuminate the particular reciprocity between theory and research in the context of particular legal and institutional practices.

Although there is an international debate in this research field, remarkably little consideration has been given to the fact that statistics, research results and research settings are intimately linked to the very specific circumstances and requirements of the national juridical systems they refer to. While research is international, practice itself is strictly local and disregarding the significance of these national differences when discussing and applying research to practice, has led to misrepresentations and confusion, adding further uncertainty to the field. This implies that countries such as the USA and Canada, who play a pertinent role for the overall development, could be the focus of a future inquiry. However due to the logistic and practical limitations of the present project, and the aim to enable a detailed look into the procedures and circumstances, I have decided to focus mainly on two European countries: England (and Wales)\(^1\) and Germany.

There are numerous reasons for choosing to juxtapose English and German child witness practice. Most crucially recent statistics show that there is a vast discrepancy between each of the legal system's performance in prosecuting and convicting cases of child sexual abuse. The prevalence of child sexual abuse is similar in England and Germany and the legal systems in both countries have over the past two decades introduced significant changes to child witness practice in order to accommodate children's needs as witnesses, and to guarantee better access to justice. Despite these similarities, according to a study by Kelly (2005) the conviction and prosecution rates in Germany have increased significantly over the past two decades. In contrast to that the English legal system has seen a steep drop in the number prosecutions and convictions, alongside a significant increase in the number of reported cases. This is particularly remarkable on the background of the improvements that

\(^1\) In the following I will refer to England and Wales as 'England'.

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were implemented in England during the same time period. In European comparison Kelly’s study indicates that Germany is among the countries with the highest prosecution and conviction rates for child sexual abuse while England (alongside Ireland) is at the bottom of the list. Statistics should always be read with caution and I cannot hope to disentangle or even explain the complex dynamics behind these numbers. However, the sheer discrepancy between Germany and England indicates an interesting dynamic worth investigating.

Looking at England and Germany additionally provides the opportunity to get an insight into the workings of two very different legal traditions. Germany has an inquisitorial legal system (a varying number of professional judges examine a case and adjudicate) while England has an adversarial -or accusatorial- legal system (a judge referees the presentation of the case which is decided by a jury consisting of twelve members of the public).

My personal background as a researcher and practitioner is another crucial factor informing the focus on England and Germany, as well as the way I have come to conceptualise and investigate this question. I am from Germany and I have studied and completed my psychology degree in Germany (Diplom at the Freie Universität Berlin). The postgraduate part of the ‘Diplom’ requires specialisation and training in one applied area of psychology and I chose forensic psychology. While specialising in forensic psychology I have worked in the field of credibility assessment of child witnesses for criminal courts, assisting experts to prepare cases (i.e. interviewing child witnesses, writing and presenting expert testimony to criminal courts).2 Additionally I was involved in ongoing research into child witness practice, interviewing techniques and children’s suggestibility (Institute of Forensic Psychiatry, Freie Universität Berlin). This internship provided me with a very concrete insight into assessment procedures, encounters with the witnesses and the interaction with the courts. At the same time I followed the theoretical debates that underpinned the research conducted at the Institute of Forensic Psychiatry. Occupying this position between theory, research and practice, I was fascinated by the complexity of the relationship between research and theory, and the amount of work that needed to go into making the concrete assessment (the actual interview with the child and the resulting findings) ’presentable’ and comprehensible to the court. Additionally I observed that research from an Anglo-

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2 The assessed witnesses here are almost exclusively victims of an alleged sexual abuse.
American context often dominated the German debates in an uncritical and thus unhelpful way.

While my existing practical knowledge and experience with the workings of the German legal system provided a good background for the investigation, this 'insider'/'practitioner' position might be seen to collide with the 'researcher' position I assumed for the present study. I am aware of this tension and I have aimed to turn this very tension into an explicit and productive aspect of my research agenda. My position towards and within the research, and the nature of my stakes and interests, were made explicit to the interviewees. Hence my agenda and position was open for challenge, reflection and debate, while I also offered to answer questions the interviewees had about child witness practice. Following this agenda I have conceptualised the interviews accordingly as 'reflexive interviews'.

**Pragmatics of Investigation**

Data was collected in three different modes. The background for the whole investigation was provided by a *multidimensional review* of information from multiple primary sources: historical sources, textbooks, scientific journals, policy reports, guidelines, codes of law, codes of practice, newspaper articles and media reports. Secondly I conducted *interviews* with psychological and legal professionals and thirdly I attended police training courses and observed relevant court cases in both countries.

To gain a concrete and contextual perspective onto child witness practice I conducted semi-structured in-depth interviews with practitioners from those professions involved in creating, applying or dealing with knowledge about child witnesses and suggestibility. I interviewed a total of 35 legal and psychological practitioners in England and Germany (psychiatrists, psychological experts and researchers, social workers, judges, police officers, prosecutors, lawyers). The aim was to gain an individual experiential insight into the specificities and potential problems of their practice and thereby to establish a concrete and complex picture of the factors that create the conditions under which children give evidence. Following the spirit of a reciprocal exchange and a transparent research agenda, I have conceptualised these interviews as *reflexive interviews*. The interviews followed the explicit aim to create a space for discussion, live analysis, and for mutual exchange that rendered the research project itself and my position within it open for challenge. This approach realises the conceptualisation of practitioners as operators at *nodes of complexity*. Legal and psychological practitioners operate at the pragmatic junction, the node, of the complexity that is so characteristic for issues around sexual abuse, child witnesses and
suggestibility. This complexity features in the paradoxical task of mediating between disciplines, contexts and institutions on an every day basis. This complexity can thus be explored by inquiring into, discussing and reflecting about the concrete considerations, decisions and actions they take when pursuing the paradoxical task of mediating between these diverse disciplines, contexts and institutions. Practitioners in this field have to found their own expertise on complex and ever changing scientific findings, while giving advice to, or working within, a juridical system that does by principle not appreciate contradictions and ambiguity.

More observational and contextual data was collected by attending a number of criminal trials, and paying general visits to courts to see victim protection arrangements. I also attended police training courses for interviewing child witnesses.

**Analytic Position and Mode of Demonstration**

"The project of these disorderly and tattered genealogies is to reactivate local knowledges – Deleuze would no doubt call them minor – against the scientific hierarchicalization of knowledge and its intrinsic power effects."(Foucault, M. 1997 [2003], p. 10).

It is clear from my earlier elaborations on suggestibility as a liminal resource that I am taking a critical position towards traditional approaches in psychology. My own background and current research position situates me firmly at the peculiar intersection of three ‘critical’ psychologies that represent very different denominations (versions) of ‘criticality’: Marxist oriented German Kritische Psychologie (Holzkamp, 1985, 1992) (Berlin), critical discursive research (Parker, 2002, Burman 1994) (Manchester), and discursive psychology/conversation analysis (Wetherell & Potter 1987) (Loughborough). While the first of these three approaches will only be present in spirit, the latter two are crucial points of reference and will explicitly inform my analysis in Part C of this thesis.

However, these critical perspectives do not constitute the overall theoretical framework that underpins this thesis. I have integrated them at the level of data analysis, considering and analysing them as part of the field (i.e. the discipline of psychology) that is transgressed and problematised by suggestibility. At various points these perspectives’ own relation to their subject of inquiry and to the way they constitute this subject of inquiry will be examined. Ultimately the specific tension between these two critical perspectives will in itself inform the analysis.

My overall theoretical framework is informed by the work of Michel Foucault, Gilles Deleuze and Isabelle Stengers. Most prominently, the movement of tracing suggestibility
through history, theory and research will employ Foucault’s version of a genealogical method. It is a genealogy of suggestibility, aimed at capturing the moments constitutive of the emergence of new concepts, as well as collating those irregularities and moments of subversion where something escapes the ordering power of the dominant discourse, capturing the discontinuities, ‘subtle contours’ and ‘minor shifts’ (Foucault 1971; 1997).

It is a way of playing local discontinuous, disqualified or non-legitimised knowledges off against the unitary theoretical instance that claims to be able to filter them, organize them into a hierarchy, organize them in the name of a true body of knowledge, in the name of the rights of a science that is in the hands of the few. (...) Genealogies are, quite specifically, antisciences. (Foucault, M 1997 [2003] p. 9).

Even though genealogy is one of the central critical methods informing my analysis, I will not elaborate on this overall theoretical framework within the thesis. The thesis is an attempt at letting a combination of foucauldo-deleuzian ‘manners of problematisation’ resonate within the issue under scrutiny without explicitly referring to or elaborating on the nature of their presence or the specific concepts involved.

This mode of demonstrating and unfolding the analysis follows the plan to structure this ‘cross-examination’ of suggestibility in such a way that the very exposition of its structure will at the same time demonstrate, i.e. expose its problematic nature from within. It is a specific ‘mode’ of demonstration that explores the way in which, for example, experimental research into suggestibility renders itself problematic, encounters and takes note of the limits of its operations in its own terms. Again this form of critique from within is inspired by Deleuze (1972) as well as Foucault (1997); it is an ‘insurrection of knowledges’ as Foucault puts it or indeed a way of bending force, making it impinge on itself.

This mode of demonstration also serves to highlight the specific efficacy of suggestibility as a liminal resource, because it can be seen to provide such ‘bending’ dynamics. In the spirit of ‘research perspectives rendering themselves problematic’ one could describe this as a ‘paranoid’ dynamic. As the main body of the thesis unfolds, this aim materialises as what could be termed a ‘paranoid mode of demonstration’. A mode that unsettles the way problems are constituted and questions are posed within the dominant discourse of psychology and that helps to reformulate, or indeed create, a new way of constructing problems. This analytic lay-out implies that the main body of the analysis unfolds on the basis of its own explanatory dynamic, and is thus largely free of theoretical explanations. It is strictly speaking self sufficient and only contains a single more elaborate reference to the theoretical framework (in Part C).³

³ There are two more reasons for not including a theoretical chapter or elaborating on the theoretical debate. Firstly, given the interdisciplinary trajectory of the thesis, its focus on the concrete problem of child witness practice, and the aim to feed back the analysis into practice, the thesis is addressed to a heterogeneous audience of legal and psychological practitioners and academics. Obviously, it is impossible to meet the level
Following the spirit of such a 'mode of demonstration' this thesis does not contain a 'theoretical chapter' in the strict sense. Theoretical issues are weaved through and where necessary they are elaborated in extensive footnotes. In this sense these footnotes can be considered as a chapter in their own right, they constitute what could be called chapter 'n'.

An entity that can in principle be positioned anywhere in the thesis. It is a chapter that is distributed across the thesis or, to use a Deleuzian term, a chapter that 'subsists' within the thesis. Chapter 'n' hints at issues around the concepts of 'genealogy' and 'problematisation', and it provides the basis for a theoretical argument that is developed and raised within this thesis, but that also projects beyond this thesis. I will show how the convergence of Deleuzian and Foucauldian ideas, as utilised in this thesis, might inspire what could be called an 'untimely conspiracy'. I suspect that it is the specific tension between Foucault's concept of 'pleasure' and Deleuze's concept of 'desire' that enables this productive convergence. However, within this thesis it is not my intention to examine and analyse this subsisting theoretical tension in detail. This is a matter for a wider theoretical debate.

"And it was all very well to invoke points of resistance as 'counterparts' of foci of power, but where was such resistance to come from? Foucault wonders how he can cross the line, go beyond the play of forces in its turn. Or are we condemned to conversing with Power, irrespective of whether we are wielding it or being subjected to it? He confronts the question in one of his most violent texts, one of the funniest too, on 'infamous men'. (...) Crossing the line of force, going beyond power, involves as it were bending force, making it impinge on itself rather than on other forces: a 'fold', in Foucault's terms, force playing on itself." (Deleuze, G. 1990 [1995] p. 98).

of understanding, the expectations and interests of all of those potentially concerned and interested. But by avoiding frequent excursions into theory, this 'mode of demonstration' at least attempts to resonate as widely as possible with the different discourses and perspectives it explores. Secondly, while it would have been possible to write this thesis taking an inverse focus, I decided not to do so. I could have explicitly built the analysis upon the resonances between the work of Foucault and Deleuze and devoted as much (or even more) space to the philosophical framework, as to the issue of suggestibility and child witness practice. But this would have meant to degrade the serious problem of child witness practice to being little more than an interesting example for a point made about the resonances between the work of Foucault and Deleuze and the pragmatics of change. This is why my mode of demonstration gives precedence to the examination of suggestibility and child witness practice. The work of Foucault and Deleuze informs and permeates every layer of the analysis, but my theoretical agenda around their work subsists within the demonstration, and features on the margins as an issue that will have to be elaborated in more detail in another context.

4 The denominator 'n' is an allusion to Deleuze's conception of 'planes of immanence'. The plane is, roughly speaking, the 'plan' that subsists within, and that is only existent as a supplementary dimension, as the manifestation of its execution. "It ensues that the plan(e) itself will not be given. It exists only in a supplementary dimension to that to which it gives rise (n+1). This makes it a teleological plan(e), a design a mental principle. It is a plane of transcendence." (Deleuze & Guattari 1980 [2004] p. 293). In itself chapter 'n' could be titled "Towards an Untimely Conspiracy: Against regimes of psychological knowledge – tracing the pragmatics of change".

5 See Deleuze's letter to Foucault, about 'desire' and 'plaisir' (Deleuze 2006).
The Rhythm of Problematisation: Organi/ASLSP

This thesis consists of three separate parts that are closely interrelated and draw on the same theoretical and empirical resources. However, the three parts follow very different agendas and take very different analytical and methodological perspectives. This difference should not be understood in terms of 'scale' or as a difference between 'data chapters' versus 'analytic chapters'. The three parts constitute data for each other, and each of them follows its own analytic moves. As a result of this 'suggestibility' will at times appear to be submerged, absent from the explicit elaborations. This is because the three parts provide different angles towards-, or analytical slices of the same complex issue, each of them focussing in on another specific quality or formation of the same problem. One could describe them as three different 'leaps' into the same complex matter. Inevitably suggestibility will be more explicit in some of these than in others. At times it will subsist as an implicit dynamic. But even when apparently not present, it resonates within the issues discussed.

Part A – Suggestibility: Genealogy, Efficacy, Reciprocity

This part provides a genealogy of suggestibility, tracing and establishing its nature and resonances within theory, research and practice, and demonstrating its efficacy as a liminal resource. Part A serves as an introduction to-, and analytic outline of the issues raised by suggestibility. At the same time it delivers the contextual backdrop for Part B and it provides 'data' for Part C, which takes an analytic perspective towards Part A.


Part B could be described as mapping the structures of practice in England and Germany. This part mainly serves to 'populate the field', it serves to provide the depth and complexity of understanding that is required to move into the analysis performed in Part C. It also contextualises and enriches the issues raised in Part A, adding a practice based diagnostic, and an experiential perspective to the issues raised in Part A.

In the course of the analysis it has become clear that the fundamental asymmetry between English and German child witness practice, makes the detailed analytic comparison a dubious, if not futile project. I have thus taken the conscious decision to create an explicit and mutually informative juxtaposition, but to limit the detailed critical analysis to English child witness practice. While Part B delivers a fully comparative experiential account of child witness practice in England and Germany, Part C will focus predominantly on...
English child witness practice, using the German side as a point of reference to inform the analysis, and to create resonances and contrasts.

**Part C - Creating Reliable Witnesses**

Part C is the part most explicitly concerned with analysis. Drawing on some of the analytic tools of discourse analysis and critical discursive research, Part C provides a detailed analysis of the whole field, examining some of the concrete juncture lines and paradoxes of child witness practice. Here the aim is to provide a critical analysis that employs but at the same time develops an analytic vocabulary that could help to gain a less polarised and more productive perspective on questions of children’s suggestibility and credibility, as well as the pragmatics of expert practice and the issue of ‘applying’ psychological knowledge in courts.

This means to finally turn to the wider theoretical resources. Drawing explicitly on the work of Deleuze and Stengers I will show how practical tensions around reliable witnesses, evidence and expertise merge pragmatically with theoretical movements employed to adjust the discipline, thereby causing frictions and voids. These voids can be understood as incisions into the fabric of the scientific and legal structure, they provide a glimpse at something that escapes. In this sense they constitute ‘untimely’ moments, or ‘events’. I would like to suggest that these voids could be pockets for change, or passages for change, because they connect to an evasive force that always already escapes the ordering movements of power.

Looking at the broader analytic structure of this thesis one could say that each part of the thesis has its own analytic rhythm. But at the same time they all resonate with a broader ‘analytic groove’ that is simultaneously abstract and concrete, particular and general, personal and a-subjective, stretching across time and contracting into singular moments.

This kind of dynamic is illustrated in the performance of John Cage’s piece ‘Organ² /ASLSP’ that is currently being staged in Halberstadt, Germany.⁶ ‘ASLSP’ refers to the tempo at which the piece should be performed and it is the acronym for ‘as slowly as possible’. Most musical instruments impose certain physical limits on how long a sound can be sustained, but with reference to an organ such an instruction (to be played ‘as slowly as possible’) opens infinite, ‘exponential’ durations. The Halberstadt performance is set to last exactly 639 years, the organ used to perform the piece is built specifically for the purpose

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of this performance, and it is set up ‘pipe by pipe’ as the piece unfolds and more notes are required. While chord changes are played by a musician, the organ is then played by sandbags that are suspended from the keys to sustain pressure on the relevant keys. The performance started in 2001 with one and a half years of silence (the moment of silence before a performance resumes) and in January 2003 the first three notes sounded. (The illustration on the front cover of this thesis shows an excerpt of the original score. The dates and durations of notes and chords are indicated in red.) The performance is supported by a scheme that invites the general public to ‘buy’, i.e. to sponsor any one year of their choice for a donation of at least 1000 Euro (donations are made via the organisation’s web page).

This is a concert stretched out, scaled up so immensely that no one person, no one generation can experience the whole piece, let alone even grasp the rhythm of any one movement (Organ²/ASLSP consists of eight movements that may be repeated in random order). Still, there is something to be heard for any one listener who attends the concert, and what they hear is not just noise. Or is it? How can we relate to such a performance, what is it that makes this a concert? Moving away from the issue of scale for a moment we can see that this ‘concert’ expresses a peculiar sense of duration. As time is stretched the quality of what can be heard changes dramatically, even though it is still the same piece being performed exactly as noted on the score. Firstly, by aiming the performance at this peculiar and distant point in the future, by projecting it into the future, it also condenses the imagined experience. It fits 639 years into one singular yet abstract ‘pocket of rhythm’, one singular moment. It does this by lending intensity to those ‘chronological’ 639 years in such a way that they can now be imagined as the singular duration of the piece from beginning to end. These 639 years now constitute a ‘unity’, with certain characteristics, rhythms, intensities, where beforehand they represented a random interval on the chronological timeline. This event lends an abstract and at the same time particular ‘groove’ to this interval of time. On the one hand time is ‘sped up’, is condensed into the understanding of the piece bridging across centuries, creating a singular sustained line of music (with a multitude of individual listeners). On the other hand time is stretched, slowed down, by the implication that for example a single upbeat could last for more than a year. Secondly, there is a peculiarly personal and at the same time abstract sense of agency. Who is playing this piece? Who is listening? Obviously a multitude of individuals are engaged in

7 The performance in Halberstadt is designed to last 639 years because this is the exact time passed since in 1361 the famous ‘Blockwerk Organ’ was constructed in Halberstadt. The ‘Blockwerk Organ’ was the first organ built with a keyboard of 12 notes, a system still used on keyboards instruments today, making Halberstadt the ‘cradle of modern music’ as the organisers of the event put it.
calculating the silences, the exact point at which notes are to be played and contribute to building the organ. But what about the sandbags and their persistent gravitational effort? And what about those people who have purchased a year and have thus added to the overall generalised agency that makes this endeavour possible? It is a collective financial, logistic, imaginary effort that provides a sense of an a-subjective agency being at play. One could say that this performance exemplifies a purely generalised yet specific agentic dynamic.

In a very similar way my analysis aims to join up apparently distant moments in time to illustrate how they resonate within one singular moment, how they share resonances and intensities. This is implied in Foucault’s concept of a genealogy that aims to assemble the irregular intensities and unsettling forces of moments that might appear distant when considered in terms of a chronological history. Simultaneously my analysis aims to show that within the different resonances around suggestibility, there is a sense of a-subjective agencies, a sort of subsisting dynamic that drives things in a peculiarly general, abstract, but at the same time specific, even personal sense. In this sense my analysis, like Organ, is a slowing down. It slows down experimental or child witness practice to capture the very concrete resonances, movements and dynamics implied in these practices. But my analysis is also a speeding up. It aims to condense the history of suggestibility research in order to capture the insisting dynamics and resonances between particular problematic instances and singular moments, to capture the specific singular dynamic quality of their problematicity and to join them up. These moments are otherwise obscured by the dominant structure of history that forms the overall grid of representation, constituting a powerful system of orderings that dominates the traditional history of psychology.

Suggestibility, like Organ, is an anti-representational force. Suggestibility is a search engine for epistemological problems and it traces them into the very concrete fabric of application. It exerts intensities that subvert the ‘score’ that notes the dominant history of psychology as a science. In this sense suggestibility could be described as creating ‘untimely’ dynamics, it invokes something that is outside of history.

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8 The web page shows that many have 'sponsored' years so far in the future that they will surely not be around to listen to the 'concert.'
Part A: Suggestibility: Genealogy, Efficacy, Reciprocity

"Suggestion: Psychol. a the insinuation of a belief etc. into the mind. b such a belief etc." (Oxford Compendium, Concise, ninth edition)

The aim of this first part is to give a historical account of 'suggestibility' following the development of this concept in psychology (genealogy). Furthermore I will seek to analyse its role for and within the discipline (efficacy), and to depict the current dynamics evolving around the topic of suggestibility (reciprocity). My aim is to show that whilst suggestibility has been forgotten by the discipline for a long period of time, it is also intricately linked to such ubiquitous topics as memory, childhood and psychological expertise. On the basis of this complex picture I would like to show that the many tensions and paradoxes arising around the concept of suggestibility could be used to gain a less polarised and more productive perspective on questions of children's ability to testify in court, the feasibility and improvement of credibility assessment by psychological experts and, ultimately, children's status in society.

In this sense 'suggestibility' will become visible as a liminal resource: suggestibility transgresses established disciplinary boundaries, pervades and connects pragmatic and theoretical considerations and thus creates a contextualised and complex perspective on the issues of memory, childhood and expertise.

This first part is the attempt to create a broad, integrative and transdisciplinary perspective on the concept of suggestibility. To point out the significance of this aim and to acquire the analytical means by which such a perspective could be productive in addressing the current difficulties arising around the phenomenon of suggestibility, it is necessary to examine the ambiguous and paradoxical role suggestibility has continuously played in the history of psychology.

In chapter 1 I will give a general outline of the initial research activity around suggestibility. Chapter 2 will describe key characteristics of modern suggestibility research to show that when eventually in the early 1980's societal changes sparked a renewed and intense interest in suggestibility, the longstanding contentiousness and the ambiguous history of the concept had been forgotten and research became dominated by an application friendly pragmatism. When at this point suggestibility re-emerges, it is closely entangled with issues
of child sexual abuse. The history of suggestibility has become the history of the attempt to understand, prevent, detect and prosecute child sexual abuse.

Chapter 3 explores the contribution of critical psychological perspectives to capturing the phenomenon of suggestibility.

This review of the onset of suggestibility research is not aimed to be an exhaustive summary, an exercise in chronology or the creation of a historical account in a traditional sense. It is an opportunity to disentangle and re-integrate the immense number of highly particularised and strangely polarised trajectories of current research around suggestibility. In its function as a genealogy this review is simultaneously aimed to collect, map and inspect the minimal disturbances and continuous irregularities that seem characteristic for the attempt to grapple with the phenomenon of suggestibility.
1. Suggestibility: a historical sketch

"...what distinguishes suggestion from other kinds of psychic influence, such as a command or the giving of a piece of information or instruction, is that in the case of a suggestion an idea is aroused in another person’s brain which is not examined in regard to its origin but is accepted just as though it had arisen spontaneously in that brain." (Freud, S. 1888, quote as: Jahoda, G. 1989, p. 255).

1.1 Mesmer's Legacy – or - the 'Mesmer-Effect'

On the 12th of March 1784 Louis XVI, King of France, appointed an investigative commission consisting of four doctors from the medical faculty of Paris and five members of the Royal Academy of Sciences (among them Benjamin Franklin). This commission was ordered to put under scientific scrutiny the method of Animal Magnetism, as practiced by its founder Franz Anton Mesmer and his disciples, who claimed that almost any disease could be cured by the forces of a universal magnetic fluid. Mesmer, a Viennese physician, had appeared in Paris in 1778 after having failed to build his practice in Germany, and had instantly gained great fame and popularity for treating a diverse range of diseases in his clinic with apparent success. The treatment was often performed publicly in group settings and Mesmer is said to have treated many patients, particularly the poor, free of charge (Hull, C. L. 1933). Yet his cure, which threatened societal distinctions and convention, clearly struck the medical and political authorities as a potential threat to the social and political order. The treatment could cause women of even the best society to break out in hysterical laughter, faint or have convulsions, spreading such phenomena across a whole group of patients under treatment climaxing in the chaos of a collective convulsive crisis. Hence when a dispute arose between Mesmer and some of his disciples over the right to reveal his secrets in public lectures, the French government intervened and demanded scientific proof to be generated for the existence of the magnetic fluid and its curative effects. The government appointed a scientific commission that was to examine the case. The commissioners needed much deliberation to devise an approach they felt was sufficiently rigorous to scrutinise the phenomenon that was described as an impalpable gas or fluid, whose distribution and action could be controlled by the human will.

"Trained somnambulists were supposed to behold it streaming forth from the eyes and hands of the magnetizer, though they disagreed as to whether the color was white, red, yellow, or blue! It was agreed

\[9\] Some sources also refer to these as two interdependent commissions, a medical and a scientific one (cf. Chertok & Stengers 1992).
however, that the fluid could be confined in a bottle, and transported thus to exert its marvellous power in distant places.” (Hull, C. L. 1933, p. 7).

While the commissioners initially observed the spectacle of the magnetic crisis during public treatment sessions, conceding that “if one has not seen a crisis, it is impossible to imagine it” (quote as in Chertok & Stengers 1992, p. 5), they decided that the multiplicity of effects in treatment sessions posed an obstacle to scientific scrutiny and thus found that further systematic observation of the treatment was unnecessary. Interestingly, and contrary to what the final report suggests, this decision was not entirely unanimous. One member of the commission, the naturalist and botanist professor Antoine L. de Jussieu, was adamant that the whole phenomenon could only be understood by examining in detail the very conditions under which it is apparently present, because “a great many things” (quote as in Chertok & Stengers 1992, p. 6) could be observed at the public sessions.

“Was it not necessary to establish a primary site of observation in treatment rooms where many patients are brought together, where one can see much, learn successively all the details of the procedures, seize all the nuances and contradictory sensations and their results, in a word, note all the effects that deserve to be methodologically verified.” (quote as in Chertok & Stengers 1992, p. 6).

Yet, Jussieu, who following his scientific conviction was the only commissioner who systematically observed treatment sessions, was unable to convince his fellow scientists and ended up submitting his own findings in a counter-report that was attached to that of his colleagues.

The commissioners initially decided to expose themselves to the influence of the magnetic fluid in a series of controlled experiments. Crucially they placed much emphasis on trying not to pay any close attention to what was happening to them because, there “is no individual, even in the best state of health, who, if he wishes to listen attentively, does not feel within him an infinity of movements and variations” (quote as Chertok & Stengers, 1992, p. 12). Hence the phenomenon, if it existed, needed to be able to assert itself against inattentiveness. While the evidence accumulated in these experiments was mostly unfavourable, three commissioners did report some perceptions. Yet, the commission’s later report interprets and dismisses these sensations as the result of ‘background noise’ that is prevalent in any experience.

Deslon, a reputable Parisian physician and disciple of Mesmer who cooperated with the commission, advised the commission to focus on patients, because he insisted that the existence of patients who had been treated successfully should be taken as proof of the beneficial effects of the magnetic fluid. During two initial experiments, performed with patients, those patients who reported to feel the effect of the fluid, aroused the commissioners’ suspicion and were given closer scrutiny. It was found that these particular subjects could not be trusted to reliably testify to the effects of the magnetic fluid because
they were poor and deemed dependent and impressionable, particularly when ill and expecting a cure in an august setting. Accordingly the commission decided that only an experimental setting, organised in such a way that the phenomenon could be examined and manipulated in an isolated and controlled fashion, could be a reliable way to test the existence and effectiveness of the fluid. Following this rationale, rather than analysing the treatment sessions or examining patients, they designed a number of experiments that tested isolated effects of the magnetic fluid on what were seen as reliable test subjects: healthy, cultivated volunteers from the social middle classes, who had never sought a magnetic cure. During these controlled experiments subjects were magnetised with and without their knowledge, and with and without the magnet being present. The results showed that convulsive crises and sensations would only occur when the subject was aware of being magnetised, and that they could occur independent of the actual presence of the magnet, as long as the subject was convinced of its presence. Concluding that mere imagination was causing the purported effects of magnetism, the commission declared that there was no independent proof of a magnetic fluid, and that the whole phenomenon was simply the result of deliberately orchestrated expectations and mass hysteria. They were satisfied that Animal Magnetism had no curative effects and was no more than a dangerous and irresponsible con, exploiting peoples imagination. 

“Finally they have demonstrated by decisive experiments that imagination apart from magnetism, produces convulsions, and that magnetism without imagination produces nothing. They have come to the unanimous conclusion with respect to the existence and utility of magnetism, that there is nothing to prove the existence of the animal magnetic fluid, that this fluid since it is non-existent, has no beneficial effect; that the violent effects observed in patients under public treatment are due to contact, to the excitement of the imagination, and to the mechanical imitation which involuntarily impels us to repeat that which strikes our senses...”

(Commissioners' official report, 2, 17, quote as Hull, C. L. 1933, p. 8).

The report did not go unchallenged. Deslon, one of its harshest critics, pointed out that the commissioners had totally failed their subject, because they had evacuated the phenomenon. Furthermore, he criticised their failure to even specify what exactly they meant by imagination, imitation or contact. According to Deslon imagination or imitation could hardly account for all the phenomena and curative effects he had witnessed in his practice. However, the commissioners’ report was binding in its verdict and more than that, it also elaborated and defined the experimentalist view of how the set up, that is, the circumstances under which the putative phenomenon was to make its appearance, must be designed. Indeed, following the commissioners’ proceedings it is remarkable to see how the question ‘does animal magnetism exist?’ seems to become secondary to, or in fact

10 “From a curative point of view animal magnetism is nothing but the art of making sensitive people fall into convulsions. From a curative point of view animal magnetism is useless and dangerous…” (The Royal Society of Medicine, Report, quote as Hull, C. L., 1933, p. 8).
indistinguishable from the question of the correct circumstances under which the phenomenon can be examined, and thus should make an appearance. Ultimately it is not the explication or rejection of the phenomenon itself, but it is the denigration of Deslon's and Jussieu's set up and the discrediting of their witnesses that denounces their observations as irrelevant and establishes the position from which the truth about the phenomenon can be judged. This trope of the 'set up' governing the 'phenomenon', reverberates through the history of suggestibility research, and thus is just as pertinent a part of Mesmer's legacy as his famous (and repeated) exposure as a dangerous charlatan.

As a result of the commissioners investigations Mesmer was charged with fraud in a criminal court and mesmerism denounced. The Faculty of Medicine forced those of its members who had been initiated into magnetism to sign an act of abjuration by which they not only promised never to practice it again but also renounced their belief in the cure by magnetism. Finally the publication of 80000 copies of the commission's report was to ensure the message was widely heard (Chertok & Stengers 1992).

Following this intense period marked by sensation and scandal, scientific interest in issues around suggestibility and hypnosis, which were part of the varying terminology surrounding animal magnetism, ended abruptly. The following hundred years saw very little interest in such phenomena, but this changed around the turn of the 20th century. This is where I will resume my investigation of suggestibility, but first let me clarify Mesmer's role within my overall trajectory.

Mesmer's teachings and the events surrounding his exposure as a fraud should not be misunderstood as a point of 'origin'. I cannot and do not mean to imply that this is where suggestibility 'emerged', was 'invented', or first 'recognised'. Nevertheless, the complex occurrences surrounding Mesmer's activity and his denunciation offer a good point of departure for 'cross-examining suggestibility', because they strongly exemplify a dynamic complex set of circumstances that we will see recurring continuously in different shapes and forms throughout the history and theory of suggestibility research. We will see how this could indeed be described as the form of 'friction' suggestibility carries into the formal practices of scientific inquiry. I called this dynamic 'Mesmer's legacy' in order to put a name to it, but this does not necessarily mean that this is the first time this dynamic occurs. The structure of the events surrounding Mesmer's denunciation may already constitute a recurrence, a repetition. In this sense, and to escape these unwanted connotations of a 'historical origin', it could be termed a 'Mesmer-Effect'. Mesmer's name can be set to denote a specific set of complex circumstances and occurrences, in a manner similar to
physics or meteorology. Here certain effects in the field (Joule effect, Kelvin effect), or complex weather situations, atmospheric and topological specificities like a hurricane, are given names that denote their specificity as a dynamic effect, whilst having no causal relationship to these complex occurrences, the names are not their origins. In this sense it is a ‘proper name’ as Deleuze and Guattari (1980) would put it. 11

For my trajectory I would like to designate the complex way in which the phenomenon and its examinability have been established and have instantly become entangled as the ‘Mesmer effect’. In Mesmer’s case the courts of law have ultimately approved what was to be considered as the appropriate way for science to relate to the phenomenon. Regardless of this, in the case of suggestibility, the question of the phenomenon and the question of the ‘appropriate’ way to examine it, that is, the ‘set up’, form a complex relationship that is not easily disentangled. The complex relationship between these two continues to reverberate within the emerging discipline of psychology causing interesting ripples and effects. We will see, as with Mesmer, these effects continuously betray and expose the societal and political specificity of the respective scientific agendas, and repeatedly involve legal intervention.

1.2 Suggestibility and hypnosis

Suggestibility and techniques of suggestion certainly played an important role in Mesmer’s therapeutic methods. Yet the mechanisms of hypnosis and the influences of animal magnetism were held to be of a physical nature and thus were not examined as distinctly psychological phenomena. One early mention of suggestion as a quasi psychological phenomenon can be found around 1820 in the writings of the Scottish scientist T. Brown who advocated the use of the term ‘suggestion’ as a synonym for ‘association’ and attempted to account for human behaviour in general according to the ‘Laws of Suggestion’ (Brown, T. 1820). Suggestibility per se was first described as a circumscribed scientific and foremost psychological subject around 1880 in the work of H. Bernheim, whose 1888 published book “Suggestion und ihre Heilwirkung” (“Suggestion and its

11 “The proper name does not indicate a subject; nor does a noun take on the value of a proper name as a function of a form or a species. The proper name fundamentally designates something that is of the order of the event, or becoming or of the haecceity. It is the military men or meteorologists who hold the secret of proper names, when they give them to a strategic operation or a hurricane.” (Deleuze & Guattari, 1980, p. 291). “The theory of proper names should not be conceived of in terms of representation; it refers instead to the class of ‘effects’: effects that are not a mere dependence on causes, but the occupation of a domain, and the operation of a system of signs. This can be clearly seen in physics, where proper names designate such effects within fields of potentials: the Joule effect, the Seebeck effect, the Kelvin effect. History is like physics: a Joan of Arc effect, a Heliogabalus effect – all the names of history and not the name of the father.” (Deleuze & Guattari, 1972, p. 86). See also Brown & Lunt (2002).
Curative Effects) contained a sympathetic foreword by Sigmund Freud. Freud supported Bernheim's attempt to introduce suggestion and hypnosis as therapeutic devices to cure for example hysteria. The so called ‘New Nancy School’ around Bernheim developed a ‘doctrine of suggestion’, defining suggestion loosely as the act by which an idea is aroused in the brain and accepted by it. Hence Suggestion was seen to be more than just a vehicle for the induction of hypnotic states. Bernheim regarded increased suggestibility as the central feature of the hypnotic state, and in this sense defined hypnosis as a special manifestation of the broader phenomenon of suggestibility: he defined hypnosis as a state of enhanced suggestibility. Furthermore Bernheim was among the first to assume that the phenomena traditionally observed during hypnosis could also be elicited independent of a hypnotic context. Herewith suggestion was for the first time defined as a general and normal psychological phenomenon.

This new definition caused a heated debate with the neurologist J.-M. Charcot (Parisian ‘Salpetrière School’) who regarded all types of hypnotic phenomena as indicators of psychopathology, namely hysteria, and had accordingly defined suggestibility as one of these indicators. Charcot had rehabilitated hypnosis as a scientific topic when linking it to the neuropathology of hysteria, thereby positioning it firmly within the framework of medicine and anatomy. He effectively cleared it of the suspicion held by most of his colleagues, who regarded it as a mere product of illusion, simulation or imagination. This also meant that his interest was exclusively focussed on the somatic, neurological aspects of hypnosis and its relation to hysteria. In contrast to this, Bernheim, referring to the overall psychological phenomenology of the human mind as his framework, insisted that suggestibility was a normal psychological phenomenon that could manifest itself in various forms and degrees, some of which could be pathological. So for him hypnosis was only one of the numerous effects of suggestion. Bernheim’s theory did not offer a consistent distinction between hypnosis and suggestion and he was widely criticised for the circular attempt to explain two contentious concepts by conceptualising one to be the effect of the other (Gheorghiu 1989). Additionally his theory was seen as problematic because it attempted to conceptualise suggestion as a general explanation for a quite heterogeneous set of hypnotic events. However, regardless of this criticism Bernheim’s ‘doctrine of suggestion’ has remained a central reference.

Bernheim’s perspective pervades modern theorising about hypnosis and thus the vague but persistent and methodologically quite problematic relation between hypnosis and suggestion remains unresolved. On the one hand suggestion was seen as an instrumental aspect of hypnosis. It could either induce the hypnotic state, or it could be the sort of
I Suggestibility: a historical sketch

a person is susceptible to while in a hypnotic state (cf. Wundt, W. 1892). On the other hand it was stressed that hypnosis and suggestion should not be confounded, and that there are hypnotic phenomena independent of suggestion. To underline the possibility of hypnosis independent of suggestion, reference is made to suggestion-like imagination processes, dissociation, belief, delusion, expectancy, hallucinations and states of trance which involve a tolerance for logical incongruity. Gheorghiu (1989) points out that depending on the specific context and on the terminology used, any one of these phenomena could also be regarded as the result of indirect forms of suggestion. Following Gheorghiu, hypnosis could then be defined as a form of influence without explicit suggestion. So in spite of ongoing attempts to establish hypnosis as a circumscribed phenomenon in its own right, even modern research into hypnosis has not succeeded in fully agreeing on a concept. This problem is most salient with regard to assessment procedures developed to measure hypnotisability or the depth of a prevailing hypnotic state: on the one hand the compliance to suggestions during hypnosis is taken to indicate whether or not a person is hypnotised. Accordingly, to determine a person's general degree of hypnotisability, their responsiveness to suggestions is assessed. But on the other hand responsiveness to suggestion is also used to assess possible differences between the susceptibility to suggestion during hypnosis, and independent of the hypnotic context. This implies that suggestion and hypnosis are somewhat distinct phenomena. Yet, in fact most of the current assessment procedures for hypnotisability use suggestion as a central device, and do not assess suggestibility independent of hypnosis. Thus experiments that seek to differentiate responsiveness to suggestion with and without hypnotic treatment, employ similar techniques within both conditions, and merely instruct participants differently as to whether any hypnotic experiences are to be expected or not. Hence Bernheim's problem prevails, hypnosis and suggestion remain entangled.

"Among other factors, there is still a general lack of procedures enabling us adequately to assess waking suggestibility, hypnotic susceptibility (without explicit suggestion tests), and the phenomenological experience of hypnosis itself." (Gheorghiu, V. A. 1989, p. 10).

Regarding these difficulties it is important to note that even though hypnosis has always been the subject of much research activity, researchers have never managed to establish a consensus about a useful definition for the phenomenon. In fact this was such a contentious issue that at one point the Hypnosis Division of the American Psychological

12 "Because of the lack of suitable procedures to record waking suggestibility (...) suggestion items are taken from hypnotic suggestibility scales that subjects can easily relate to the hypnotic tests." (Gheorghiu, V. A. 1989, p. 10).
Association resorted to simply vote for a common definition that had to be accepted by all members (Schumaker, J. F. 1991, p. 10).

Regarding the longstanding and overall confusion within this field and considering the central importance of suggestibility for the concept of hypnosis, remarkably little has been done to define suggestibility or to distinguish hypnotic suggestibility from waking suggestibility. Gheorghiu (1989) considers different ways to achieve a distinction between hypnosis and suggestibility, but concludes that the ambiguity within the notions of suggestibility and suggestion will betray any clear depiction.13

"We are uncertain, for instance, whether suggestion is a stimulation conditioner, a trigger for special forms of behaviour, merely a context in which hypnosis can be produced, a method of deception and/or a placebo, a self-fulfilling prophecy, a dimension of personality and so on." (Gheorghiu, V. A. 1989, p. 5-6).

I would like to put these more current concerns aside for now and return to the late 19th century because Sigmund Freud, who conceptually positioned himself between Bernheim and Charcot, deserves a special mention in this context.

Sigmund Freud

Hypnosis and suggestion played a crucial, if not notorious role within Freud’s development and establishment of psychoanalysis as a therapeutic method. Charcot had established Hysteria (previously dismissed as malingering), as a serious medical condition. However, Charcot conceded that it was a condition that could neither be explained by anatomical lesions, nor by simulation. Freud, who had been an enthusiastic student of Charcot in Paris in 1885, took this apparent paradox as the point of departure to develop the thesis that the lesion in hysterical paralysis must be an alteration of the conception, the idea, of the paralysed limb. A leg for example, is not affected according to its anatomical structure, but the idea of the leg, the part of the body represented by the word ‘leg’, is affected. Hence he argued that the lesion must be the result of a subconscious association of the affected organ with the memory of a significant event, a past trauma. Drawing on experiences from earlier collaborations with his mentor Joseph Breuer, who had experimented with hypnosis and a ‘talking cure’ that he called the cathartic method, Freud concluded that if paralyses was the result of dominant ideas, it must be possible to undo it by way of influencing, changing those ideas. In taking seriously the medical/physiological significance of the lesions but relating them to a psychological phenomenon that could be treated by means of

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suggestion and hypnosis, Freud had integrated Charcot's and Bernheim's apparently incommensurable approaches.

In the years following 1887 Freud began to practice and develop forms of hypnosis to be used in treatment. Initially the aim was to 'impress' the curative idea into the patients mind by means of deliberate suggestion. Yet, this 'suggestive' technique failed to produce the desired long term effects, as symptoms often receded quite instantly but then returned just as quickly. Additionally Freud found that this 'suggestive technique' appeared dubious and unethical because it equipped the therapist with such enormous powers over the patients. Hence Freud decided to move towards a technique closer to hypnosis and away from deliberate suggestion. But with suggestion and hypnosis being so closely enmeshed, suggestion was still an inevitable part of the technique. He conceptualised hypnosis as an investigative instrument helping the patient to remember the past trauma and to relieve its emotional content. Even though later he was to abandon this form of recollective hypnosis, it was an incident around 1892, triggered by this very technique, that according to Freud led him to 'discover' the sexual nature of hysteria (Chertok & Stengers 1992). This was the point of departure for his development of the “Aetiology of Hysteria”, in which he, based on what his patients had told him under treatment, put forward the thesis that hysteria was foremost the result of sexual abuse that his patients had suffered during childhood. The events that followed the publication of this thesis in 1896, the denigration he suffered from many of his colleagues and the scorn of a public that sternly rejected the implication of child sexual abuse being a common phenomenon of all social classes, have since been subject of numerous publications. There is an ongoing fiercely contentious debate as to why only a year later in 1897 Freud was to publicly abandon his “seduction theory”. Revoking the central aspects of the “Aetiology of Hysteria” Freud declared he had mistakenly been led to believe the sexual victimisation reported by his patients were true incidents, while he now realised it was unlikely that they had actually suffered a sexual trauma. He now conceptualised their reports as the result of a specific kind of pathological fantasies that emerged from unresolved developmental conflicts, but also conceded that patients may indeed have been lying to him (Chertok & Stengers 1992).

14 “...therefore put forward the thesis that at the bottom of every case of hysteria there are one or more occurrences of premature sexual experience, occurrences which belong to the earliest years of childhood, but which can be reproduced through the work of psycho-analysis in spite of the intervening decades. I believe that this is an important finding, the discovery of the caput Nili in neuropathology.” (Freud, 1896/1962, p. 203, quote as in Dalgleish & Morant, 2001).

15 Cf. Masson (1984), Dalgleish & Morant (2001). For an intriguing account of these events, closely related to mine, yet very different in its analytic approach see also Billig (1999).
Most crucially for my trajectory, this is also the point at which suggestion and hypnosis take on a reversed meaning for Freud, and here I closely follow Chertok and Stenger's (1992) analysis. Freud abandoned hypnosis “because the very meaning of recollection and of the therapeutic setting had changed.” (Chertok & Stengers, 1992, p. 41). He had realised that however early or affectively charged, a memory could still be a “lie”, or a product of early childhood fantasies triggered by specific unresolved developmental conflicts. For Freud, from this moment on suggestion no longer has potential 'curative effects', because it is 'impure', it puts the possibility of a truth about experiences in question. Simultaneously it dangerously blurs the boundary between the therapist and the patient, which can lead to dangerous and uncontrollable affective transferences onto the therapist, as Freud observed. Similarly hypnosis can no longer be seen as the instrument to facilitate true recollections, it is instead a dangerous, uncontrollable technique that will mislead and obscure the kind of rational analytic insight that was going to become the paramount goal of the psychoanalytic therapeutic technique Freud now proceeded to develop. With this theoretical move Freud defended the unstable ground between Charcot and Bernheim by seeking to establish an unambiguous and distinctly objective and scientific basis for his analytic practice, which would thereby also consolidate his theory. He endowed the analyst with the distanced and disinterested gaze of a scientist guiding the patient on a distinctly rational and objective journey to understand the fantastic nature of some of their apparent memories.

It is this decisive change in Freud’s attitude towards suggestion and hypnosis, which irrevocably changed the nature of the relationship between the analyst and patient that became the basis of Freud’s famous fall out with one of his favourite disciples, Sándor Ferenczi. Ferenczi insisted on the value of suggestion and hypnosis for the analytic relationship, which he found should indeed be of an affective nature. Much to Freud’s dismay and against his repeated advice, Ferenczi continued to develop his own analytic theses based on Freud’s original “Aetiology of Hysteria”. Ferenczi in fact tried to prove that many of the abuse narratives were in fact true memories of sexual trauma and thus should be treated as such. Yet the fall out between Freud and Ferenczi was a slow and long term process that did not culminate in an open break up until the time shortly before Ferenczi’s death in 1932. Freud’s apparent indecision in relation to Ferenczi was related to the fact that the issue of suggestion and hypnosis could not simply be eliminated from the analytic practice (and theory). They remained inseparably linked to the developing theory of psychoanalysis in the following years and kept troubling Freud’s ongoing refinement of the therapeutic technique. He was continuously forced to reconsider suggestion and hypnosis,
the ways in which they could be understood and how and to what degree they could be controlled and contained.\textsuperscript{16}

\textbf{Suggestibility in the broader context}

Considering the broader societal background, the ubiquity of ‘suggestion’ could also be attributed to the fact that suggestion did not remain within the circumscribed boundaries of clinical psychology and psychiatry, but commencing in the 1880s enjoyed “an enormous vogue” (Jahoda, G. 1989, p. 255). Jahoda describes how suggestion attracted the interest of philosophers and sociologists and how it soon became an all-purpose tool suitable to explain almost any social phenomenon, be it crime, war or religion, and inspired theorisation about the nature of mobs, mass upheavals and the factors that constitute the success of charismatic leaders (cf. Le Bon 1895; McDougall, W. 1911).\textsuperscript{17} Like many of his contemporaries, in his “Introduction to Social Psychology”, first published in 1908, William McDougall defines suggestion and suggestibility as an expression of the irrational, fundamentally linked to an absence of logical thinking.

“Suggestion is a process of communication resulting in the acceptance with conviction of the communicated proposition in the absence of logically adequate grounds for its acceptance.” (McDougall, W., 1911, p. 97).

While he finds that most adults remain suggestible throughout their lives, McDougall points out that children, due to lack of knowledge and confronted with the superiority of their elders, are inevitably suggestible. He also attributes children’s ability to “absorb knowledge, beliefs, and especially the sentiments of their social environment” to the “virtue largely of their suggestibility” (McDougall, W., 1911, p. 100). Children and adults, he furthermore elaborates, can also display “contra-suggestion”.

“By this word it is usual to denote the mode of action of one individual on another which results in the second accepting, in the absence of any logical grounds, the contrary of the proposition asserted or implied by the agent. There are persons with whom this result is very liable to be produced by any attempt to exert suggestive influence, or even by the most casual utterance.” (McDougall, W. 1911, p. 101).

McDougall seems undeterred by the peculiar logical twist, or indeed ambiguity that the definition of ‘contra-suggestion’ could be seen to add to his elaborations.

Regardless of assertions about the irrational character of suggestibility, C. Baudoin, predecessor of J. Piaget in Geneva, considered the pedagogical value of suggestion and autosuggestion, and recommended that children should be taught the techniques of auto-

\textsuperscript{16} In 1912 Freud conceded that the results of psychoanalysis rest upon suggestion insofar as Ferenczi and he had defined it: “...the influencing of a person by means of the transference phenomena which are possible in this case.” (quote as in Chertok & Stengers 1992, p. 56).

\textsuperscript{17} It is important to note that this is also the time of massive social upheavals in France and the onset of the newly expanded and unified German Reich under Bismark’s leadership, following the victorious war in 1871 that reorganised vast parts of central Europe.
1. Suggestibility: a historical sketch

Suggestibility to enhance their learning achievements (Baudoin 1921). One of the most impressive examples for the versatile and highly generalised use of suggestibility can be found in the work of B. Sidis who elevated suggestibility to be the basic characteristic of humanity.

"Not sociability, nor rationality but suggestibility is what characterises the average specimen of humanity, man is a suggestible animal." (Sidis & James 1919, p. 17).

Suggestibility clearly fascinates the social sciences at the turn of the century and even with respect to these few examples, it is interesting to observe the manifold sentiments and frameworks that organise the ambiguous ways in which suggestibility is represented. It is suggestibility’s apparent ability to operate within all of these frameworks that inevitably creates the peculiar logical tensions that emerge for example in McDougall’s considerations, while leaving the plausibility of every single one of his assertions perfectly intact. These are but a few examples of the continuous resonances of the Mesmer effect.

1.3 Suggestibility independent of hypnosis: ‘waking suggestibility’

Alfred Binet

Binet was among the first to systematically investigate ‘waking suggestibility’ as a normal psychological phenomenon independent of hypnosis and beyond the concerns of clinicians and physicians. He stressed that suggestibility should be understood in a far broader sense, taking into account varying attitudes, expectations and imagination. However, his crucial and pioneering work on suggestibility, published in “La Suggestibilité” (1900) did not receive much attention at the time of its first appearance and this did not change in later decades. In view of his international and long-standing fame, it is indeed odd that “La Suggestibilité” has never been published in any language other than French.

Binet tried to gain an integrative and contextual understanding of the complexity surrounding the phenomenon of suggestion. He went into great lengths to analyse everyday observations and techniques of psychologists, teachers, doctors, writers, artists and magicians. Binet’s approach was to find experimental proof for the fact that individuals could be influenced by suggestive techniques, not unlike those used for hypnotised individuals, but when being in a normal ‘wake’- psychological state. Binet was among the first to study suggestibility within a controlled experimental set up, explicitly designed to examine isolated effects of suggestion on randomly chosen subjects. Following his experiments he developed the concept of the guiding idea (idée directrice). The ‘guiding idea’ is a specific element of suggestion that he found manifest in various experimental
procedures such as the progressive lines test, the weight illusion test or leading question procedures. The weight illusion test for example uses a series of identical looking weights that have to be estimated by the participant. At first the items constantly increase in weight (20, 40, 60, 80 and 100 grams) but then all the following items weigh exactly 100 grams. The first series of weights is supposed to introduce the implicit suggestion, the ‘guiding idea’ (idée directrice), of steadily increasing weight, which can be accepted or rejected by the participant depending on his or her suggestibility. Hence where accepting the suggestion the participant will continue to name increased weight estimates (e.g. 120g, 140g), even though the weights they are handed now all weigh the same (100g). The second central principle Binet discovered in his experimental work is the effect of uncertainty on individuals’ susceptibility to suggestion. He conducted a series of experiments that did not introduce suggestive effects by offering an unstructured or ambiguous stimulus (e.g. weight illusion), but by suggestively manipulating the circumstances under which the experimental answer had to be given. He created a general state of uncertainty by asking the participants various forms of leading question. Participants were confronted with ‘disjunctive questions’ (questions that offer two alternatives, both of which are wrong) to see whether they would succumb to the inherent suggestion that either of the alternatives had to be correct. Furthermore he operationalised different degrees of uncertainty by instructing some experimenters to increasingly challenge the correct answers of the participants, to ask the same question repeatedly, or to even propose incorrect answers. Binet found that the degree of certainty a person experiences concerning the aspect in question, stands in an inverse relation to the degree of suggestibility this person will show with respect to this aspect. This is hardly a counter-intuitive finding, but it is one of the few basic findings that have remained undisputed.

Following his insight that suggestibility could have various sources (a perception: weight; an interaction: a question) and forms, Binet also observed that unconscious motor reactions induced by suggestion can be independent of individuals’ responsiveness to other forms of suggestion. Following this observation he raised one of the most crucial questions of suggestibility research: Are there different types of suggestion and how is it possible to distinguish them? Is it possible to find any kind of correlation between one individual's susceptibility to different types of suggestion, and can characteristics of the person or other factors predict the degree to which an attempted suggestion will be successful?
"But since there is not one unique and absolute aptitude for suggestion and since one is prone to suggestion from all possible directions and through every way in which one perceives and reasons, whether one is conscious of it or whether one wishes it, there are grounds for wondering whether a person's suggestibility, when verified by process A becomes probable as a result of process B, C... D, and so on (Binet, A. 1900, p. 389; my translation)." (Gheorghiou, V. A. 1989, p. 12).

Binet had then begun the crucial work of establishing an experimental framework to examine suggestibility, and in the course of this he had put his finger on a central problem within the concept of suggestibility; a problem that today is still characteristic for modern suggestibility research: there is a fundamental ambiguity, or indissociability, amongst the factors that are identified for suggestibility, that makes it difficult to clearly distinguish different types of suggestibility.

William Stern

William Stern is another pioneer of suggestibility research. He followed Binet's trajectory closely, but operated in the more circumscribed area of forensic and applied psychology. Stern introduced 'Aussagepsychologie' ('statement psychology') as a new area for applied experimental psychology and in 1904 published the programmatic article "Die Aussage als geistige Leistung und Verhörprodukt" ('The Statement: A product of interrogation and cognitive performance'). This article offers the first comprehensive definition of suggestibility and describes an elaborate memory experiment with children between 7 and 18 years of age. Piloting a relatively new form of 'real life' experimental investigations (set up), Stern had already conducted a number of what he called 'Wirklichkeitsexperimente' ('Reality-experiments'). In these experiments that were set in 'real life', an accomplice would for example pay an insignificant visit to a seminar room during a normal lecture and the unwitting students would subsequently be asked to submit a written report about the details of this visit. Stern hereby broadens the experimental framework to make settings that are closer to real life situations accessible for the controlled observation and deliberate variation of factors that characterise an experiment. Stern was surprised to discover that the reports he received from the students, did not just prove the malleability and partiality of the students' involuntary observations, but unexpectedly their reports revealed the creative and constructive nature of memory. The students did not just omit details, but they actively introduced logical additions to fill the gaps. This happened in the absence of any external pressure that could have accounted for the student's eagerness to deliver 'complete' reports, and there were no other motives that might have explained an explicit wish to add details to the report.

In the experiment Stern describes in his 1904 article, he tried to combine these findings around the inadvertent constructiveness of memory with Binet's method of leading
questions. He thereby hoped to get a deeper insight into the relation between age, recall, free report and responses to various degrees of suggestive questioning. In this experiment children between 7 and 18 years of age were shown a picture and briefly afterwards were encouraged to freely recall and describe the picture. Consecutively they were asked about the contents of the picture using neutral open, closed- and various types of suggestive questions (i.e. leading-, false forced choice- and repeated questions). Stern’s central finding was that the interrogation would produce far more details than free recall, but interrogation would also lead to a six fold increase of incorrect answers compared to free recall. Analysing the answer patterns he concluded that even the mere fact of being asked a presumably neutral question does obviously exert some kind of suggestive influence, which becomes increasingly effective as soon as deliberately leading questions are introduced.18

Stern accordingly distinguishes between general distortions that are caused by any kind of questioning, because questions always trigger what he calls ‘reactive remembering’ – ‘reaktives Erinnern’ – (as opposed to the spontaneous recall processes that occur during a free narrative), and special distortions caused by suggestive questions. Stern furthermore highlights a linguistic peculiarity that impedes a clear description of the phenomena around suggestion. He points out that we have a term for this specific form of manipulation (‘suggestion’), an adjective/adverb relating to this (‘suggestive’), and a word depicting the predisposition, that is, the ability to be influenced by suggestion (‘suggestibility’). But even though suggestion is usually seen as something happening between two people, there is nothing to denote the actual state of a person who is currently under the influence of suggestion. Stern notes that this terminological insufficiency derives from the original interconnectedness of suggestion and hypnosis. Here ‘hypnosis’, or ‘being under hypnosis/hypnotised’, describes the state of a person that is currently under the influence of suggestive techniques and thus hypnosis is the passive counterpart to the activity of ‘suggesting’. Yet meanwhile the aim is to conceptualise hypnosis and suggestion as distinct phenomena, and to re-conceptualise hypnosis and hypnotic suggestion as special forms of

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18 "Zunächst kann schon die allgemeine Tatsache des Gefragtwerdens an und für sich, abgesehen von der speziellen Frageform, zu mannigfachen Wirkungen in Verhören führen; sodann aber ruft die besondere Art der Fragestellung eine Stufenleiter verschiedener Reaktionen hervor." (Stern, W. 1904, p. 63). "Initially even the very fact of being asked as and for itself, and regardless of the specific manner of questioning, can have manifold effects during interviews; but then the specific kind of questioning will summon a series of different reactions." (my own translation).
the more general, normal psychological phenomenon of suggestion. So now a term is needed to describe the state of a person while under the influence of suggestion, which is as Stern remarks, the most intriguing aspect of the phenomenon anyway. To establish a workable definition of suggestion he proposes to differentiate between ‘active suggestion’ and ‘passive suggestion’. Here ‘active suggestion’ is defined as the suggestive influence exerted by a person or a thing. ‘Passive suggestion’ is defined as the psychological state of a person while under the influence of suggestion.\(^{19}\) Stern goes on to define passive suggestion more closely and depicts three distinct criteria: 1. The suggested content takes the shape of a ‘complex statement’, or account. A complex statement is not merely a fact that is accepted, but it is a fact that is simultaneously associated with, or indeed inseparably connected to a distinctly attributed belief about this fact, which simultaneously also becomes part of the suggestee’s thinking. 2. This integration happens instantly, without any critical evaluation. It can be described as the instant imitation or adoption of a third person’s complex attitude or belief about a certain fact. 3. For the suggestee this ‘complex statement’ (the suggested content) has the semblance of a genuinely personal creation and will accordingly, in the future be presented with the confidence of someone acting or speaking from their own unique point of view.


“Hence passive suggestion is the integration of an other mental statement [account] in the guise of making an own statement [account]; it is an act of imitation masked as a genuine act or, as we can finally conclude: passive suggestion is receptivity taking the form of spontaneity.” (translation JFM).

Stern elaborates his definition of active suggestion alongside a closer analysis of the questions used in his experiment, and accordingly describes active suggestion more narrowly as a form of ‘interrogative suggestion’. He remains tentative about potential other types of active suggestion.

Crucially Stern defines active and passive suggestion as what we can call ‘a-causal’ components of a communicative dynamic. So it is important to note that even though active and passive suggestion will usually be observed as two closely related aspects of one interactional dynamic, Stern defines them as two entirely distinct phenomena that can in principle occur independent of each other. On the one hand the presence of suggestive influences (active suggestion) does not necessarily determine the presence, or subsequent occurrence of passive suggestion. Hence considering the type of ‘active suggestion’ that has

\(^{19}\) Thus, suggestibility is the disposition, that is, the ability for passive suggestion.

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been used does not allow to reliably predict whether and how another individual will be or has been affected by the active suggestion. In turn examples of expectational or auto-suggestion underline the fact that passive suggestion can prevail without any prior or simultaneous, distinguishable influence from an external source. With this distinction Stern unmistakably states that there is no simple causal connection between 'active' and 'passive suggestion' and that either one of them can exist in the absence of the other. By depicting the potentially 'a-causal' nature of suggestibility, Stern makes what ought to have been an absolutely crucial contribution to suggestibility research, since the assertion of a-causality will inevitably collide with an emerging experimental science that aims to isolate factors and correlate them in terms of cause and effect, and that is geared towards identifying generalised rules which allow predictions. Yet, it turns out to be an untimely discovery.

Even at the time of its publication Stern did not receive much international attention for his theses. Despite the conscientiousness, precision and practical value of this early research, Stern's work, similar to Binet's work on suggestibility, was almost entirely forgotten over the following decades. The intricacies and problems Binet and Stern had pointed out were largely ignored by the investigations to follow in the field of suggestibility research. Still, as we will see, the peculiarities expressed within Binet's and Stern's central findings, were not going to vanish either.

In the following years the overall interest in suggestibility waned quickly. The advances in establishing psychology as a scientific discipline and the concomitant widespread interest in refining experimental methods as such produced an increasing number of more specialised approaches to different subject areas of psychology. This lead to a disintegration of the initially holistic and complex way in which Binet and Stern had tried to approach the experimental investigation and interpretation of suggestibility. A small number of researchers who still took an interest in suggestibility were eager to follow their own very specific trajectories rather than investigating a broader phenomenon. They focussed on strictly isolated aspects of suggestibility, trying to establish sub-classifications and aiming to find correlating factors that could predict susceptibility to various types of suggestion. Hence despite Binet's and Stern's warning that more basic research was needed to get a grasp of the overall phenomenon and to establish a clear cut definition for suggestibility, we will see in the following that in later years there was a persistent tendency to create a

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20 The only exception here is Germany, where W. Stern's work played a central role for the development of modern 'statement psychology' (Aussagepsychologie), and is still held in high regard (cf. Steller & Volbert 1997; Volbert 2000). This connection will be elaborated in chapter 7.2.
disparate set of overlapping or colliding concepts and terminologies, and to continuously intermingle aspects of hypnosis and suggestion without arriving at a clear differentiation. As a result of this, test procedures continued to work on the basis of a circular juxtaposition of hypnosis and suggestive techniques, while the attempts to generalise findings remained riddled with categorical problems that still persist in modern suggestibility research.

"Not surprisingly the ongoing attempts to sub-classify suggestibility are an ongoing source of debate. Some argue for the merits and potential applications for these sub-classifications, while others insist that these will not be meaningful until we have a better understanding of the general principles involved in suggestion processes. In some ways, it does seem that we have raced ahead of ourselves in this respect, given that we are still battling to co-ordinate ourselves with regard to the more basic concepts and terminology in this area of study." (Schumaker, J. F., 1991, p. 9).

In the following I would like to illustrate this development by giving an outline of the most salient accounts and topics that emerged in the first half of the 20th century. It is possible to roughly distinguish three main areas of interest: firstly sensory processes or sensory and perceptive judgements that are influenced using temperature or light stimuli. Secondly changes are induced to motor behaviour via persuasive, repetitious direct instructions. And thirdly memory processes are manipulated in experimental settings using for example leading questions. Yet, while within Binet's and Stern's approaches these three aspects were treated as interdependent elements of a more complex overall phenomenon, they now become singular topics in their own right. Indeed, in the first half of the 20th century the focus rested almost exclusively on the first two aspects (sensory processes and motor behaviour), while suggestions relating to memory processes were hardly investigated at all (this trend will be reversed towards the end of the 20th century when suggestions relating to memory become the exclusive focus). While this distinction captures the three main aspects that were seen to be related to suggestibility, the fact that at closer inspection these three aspects are not really mutually exclusive is indicative of the problems implicit to the research unfolding from here.22

21 Obviously research into memory, which remained a central topic for psychological research throughout, did investigate paradigms that could be seen as related to issues of suggestion (e.g. Bartlett 1932). But they were not explicitly conceptualised as problems of 'suggestion' (see also chapter 2.1).

22 The distinction between sensory processes and sensory judgements already reveals part of the fundamental problem implicit to this kind of research: In order to collect data the researcher will inevitably have to rely on the participants' verbalisation of their perception, and thus will be left to wonder as to how accurately they have responded and whether the specific response was triggered by the persuasive nature of the question itself.
1.4 Further developments in suggestibility research during the early 20th century

Ivan Pavlov

Pavlov did not systematically investigate suggestibility but he made some intriguing references concerning its potential significance for sensory and somatic processes, providing another example for the widespread appeal, but also elusiveness of suggestibility. In 1927 Pavlov expressed the opinion that suggestion is the simplest form of a conditioned reflex in man. He conceptualised the ‘word’ as a comprehensive stimulus that can signal everything, replace every other external or internal stimulus and thus on behalf of these, may induce any reaction that is conditioned for these stimuli. In this sense the word functions as an ‘as-if’ stimulus, making suggestion a universal substitute stimulus condition, and providing Pavlov with an explanation for the well known phenomenon that verbal suggestions can exert an influence on somatic functions. Even though frequent reference is made to Pavlov’s idea, it has remained contentious and has never been elaborated.

Eysenck (1991) for example found that suggestibility is intimately related to numerous important psychological concepts. With regard to Pavlov’s considerations he states that ‘conditionability’ could indeed be substituted by ‘suggestibility’, because it is plausible to say that Pavlov’s bell has suggested food to the dog and has thereby produced the conditioned response. Still, Eysenck argues, one would need a measurement that could differentiate between the effects of suggestion and those of conditioning to reveal the real nature of their correlation. Yet this is impossible as long as the two phenomena cannot be distinguished in an unambiguous way, and Pavlov does not provide definitions that would allow such a distinction (Eysenck, H.J., 1991, p.77). Various studies have tried to prove that suggestion is based on higher order classical conditioning. But it has so far been impossible to show any significant correlations that could prove Pavlov’s hypothesis (Lohr, J. M. & Souheaver, G. T. 1981).

This alludes to, and might be illuminated by, a related story told by the cyberneticist and systems theorist Heinz von Foerster. He recounts the story of a Polish experimental psychologist (Konorski), who had replicated Pavlov’s classic experiment with the dog. After the dog had successfully been conditioned following Pavlov’s paradigm, Konorski one day secretly removed the clapper from the bell that was used to trigger the conditioned response and sent his unwitting assistant into the room to perform the conditioning. The assistant entered the room, approached the dog and moved the bell, and despite there being no sound at all, the dog salivated. Konorski concluded, von Foerster states, that obviously the sound of the bell had been the conditioning stimulus for Pavlov, and not for the dog! An important discovery as von Foerster stresses. Interestingly though, von Foerster concludes his anecdote, other than Pavlov, Konorski did not get the Nobelprice for this finding (Foerster, v. H. 1992, p. 273).
Clark L. Hull

Clark L. Hull is regarded as the pioneer of experimental research into suggestibility. His declared objective was to demystify hypnosis and suggestibility and to show that they are accessible to strictly scientific methods. Considering the broader historical and scientific context Hull was situated in, Chertok and Stengers (1992) point out that Hull’s agenda was to establish the power and validity of a scientific method against the unsettling implications psychoanalysis had carried into the scientific arena, with its introduction of an ‘unconscious’ and the seemingly unnatural powers attributed to hypnosis and suggestion.24

With his book “Hypnosis and Suggestibility, An Experimental Approach”, published in 1933, Hull set the standards for a strictly controlled experimental approach that isolated and retained only those aspects of the phenomenon that would guarantee the comparable nature of the results across different groups. This translated into examining and manipulating only the most basic and clearly observable aspects of the phenomenon in an objective fashion within the laboratory and with the assistance of specially designed procedures and apparatuses.

Interestingly Hull develops his experimental method on the basis of a detailed discussion of the techniques used by the Royal Commission that examined Mesmer’s magnetic fluid. Hull harshly criticises the commissioners’ grave mistake not to have ensured Mesmer’s co-operation and their failure to establish control groups for their experiments. With reference to later studies by Bernheim, whom Hull recruits to underline his point, Hull outlines that, had the commission conducted control experiments, they would have realised that the ‘magnetic powers’ were indeed not connected to the actual magnetic properties of the magnet. Hull argues that the commissioners would have understood that the powers were part of the realisation, i.e. the relationship between magnetizer and patient, in form of habit formation. Hence it is still a physical cause of sorts but, as Hull puts it, one that entails a mechanism very different from those mechanisms that explain the workings of a conventional magnet (Hull, C. L. 1933, pp. 7-21). So while embracing and refining a strictly experimental approach Hull seems to implicitly agree with Deslon and Jussieu, in saying that the commissioners have evacuated and overlooked the phenomenon. But again the set up is interlinked with the phenomenon, because crucial for Hull’s distinction is the

24 Examining Hull’s objective Chertok and Stengers find that “It goes without saying that Hull’s primary aim was to affirm the validity and power of a method that would ‘at last be scientific’ with regard to a phenomenon that not only was freighted with fascinating beliefs, including the attribution of ‘unnatural’ powers to both the hypnotist and the subject, but also seemed to prove the existence of an unconscious.” (Chertok & Stengers, 1992, p. 236). Hence at the time it was psychoanalysis that was, for Hull, the unscientific that needed to be contained or opposed.
construction of a new apparatus, a ‘set up’ that is to prove the ‘real’ nature of the phenomenon.

Hull’s methodological argument also includes a stern rebuttal of an early study by Binet and Frére, published in a book called “Animal Magnetism” (1888), who had also claimed to have proven the non-existence of animal magnetism. Giving much praise to Binet’s later work, Hull declares that...

“...the fact remains that there has rarely been written a book containing a greater aggregation of results from wretched experiments, all put forward with loud protestations of impeccable scientific procedure and buttressed by the most transparent sophistries, than this work by Binet and Frére.” (Hull, C. L. 1933, p. 16).

Hull’s (1933) main body of work investigated the phenomenon of motor suggestibility, and he is best known for inventing the ‘Body-Sway-Test’, which isolated the motor aspect of suggestibility by measuring the effect of very simple suggestive instructions on changes in his participants’ posture.

The Body-Sway-Test:

Participants were instructed to stand as steady and upright as possible, while being blindfolded. Then, regardless of their actual behaviour, they were randomly and repeatedly challenged in a neutral tone with the words: “You are swaying forward...” or respectively “You are swaying backwards”. A thin thread, attached to the participants’ collar or shoulder, was connected to the aluminium pulley of a recording device (the postural movement recorder) that would, via an aluminium pin, engrave a graph on a rotating drum, thereby continuously recording changes in posture in half inches and across time. The experimenter would add signal markers onto the record to indicate at what exact point in time the participant had been given a particular suggestion. Hull varied the procedure having an unwitting subject observe another person falling forward (imitation), asking them to imagine falling forward, having an experimenter speak the words or respectively playing a voice from a recording device. Most of these settings worked with full or partial deception. The participants had no idea that their sway was going to be measured (the thread was attached secretly) and they were unaware that the experimenter’s challenging comments came from a ‘phonographic apparatus’, because it had been brought into the room after the participants were blindfolded already. Yet in some settings Hull also gave participants the explicit instruction to resist the suggestions.

Hull describes the results of this particular experiment as phenomena of direct waking suggestibility, or as direct and indirect prestige suggestions. Here he differentiates Whispered Autosuggestion (the participant would be told to continuously whisper “I am swaying forward, I can’t help myself...”), Impersonal Heterosuggestion (a phonographic apparatus would play the suggestions); Personal Direct Heterosuggestion (the experimenter would directly give the suggestive comments). With regard to this last form Hull reports that during this procedure some subjects would indeed sway forward, lose balance, and eventually even stumble forwards. Yet many “persons, however, appear nearly or quite unresponsive to such suggestions.” (Hull, C. L. 1933, p. 54). He also reports a third mode of responding to
this form of suggestion, which he terms Negative Suggestibility. Here the change in posture is exactly adverse to the respective suggestion given (e.g. swaying backwards, when the suggestion was “forward”). Hull reports that counter to his expectation to find this form in around 10% of his participants, he had very few cases where it could actually be observed. Yet he adds that there are quite a few cases of Transitory Initial Negativism, where a very slight initial negative reaction gives way to a movement following the suggested direction, but he concedes that these phenomena are difficult to distinguish from the general postural tremors that are always present. Hull also differentiates Indirect Heterosuggestion, but this form is observed in experiments similar to Binet’s weight illusion test and not in the body-sway-test. Hull provides a very brief and tentative overall interpretation of his research. He concludes that non-reactiveness is most likely due to voluntary resistance, that is, the subject’s own symbolic processes become active to inhibit the tendencies to action naturally arising from the experimenter’s words. Thus a “true suggestion response is one in which the subject’s own symbolic processes (…) remain passive so far as the particular act suggested is concerned” (Hull, C. L. 1933, p. 397). Clearly alluding to Pavlov’s theories, he elaborates that a word, a “dominant idea”, uttered by another person or even by the subject themselves, could by way of association or conditioning acquire the capacity to work directly upon the “neuro-muscular equipment of the organism” (ibid. p. 399) and could thus indeed invoke the reactions of which they are the names. Herein, Hull stresses, ideomotor suggestion becomes visible as a fundamentally normal habit phenomenon that anyone can learn to control and that has no ‘supernatural’ properties. Yet, pointing to the limitations of his findings, Hull concedes that even these results in the circumscribed area of motor-suggestions should only be seen as a very early and partial attempt to address these issues in a strictly scientific manner, because the “the fundamental elusiveness of the phenomenon” (ibid. p. 403) poses great difficulties for the experimental method and these still wait to be overcome.

“These difficulties are so great that to enter seriously on a program of investigation in this field is a little like tempting fate; it is almost to court scientific disaster. Small wonder that orthodox scientists have usually avoided the subject!” (Hull, C. L. 1933, p. 403).

25 "It is quite common for records to show a fairly marked depression immediately after the beginning of “forward” suggestions. This soon gives place to an extended rise which not infrequently terminates in the subject’s actually falling forward. It is difficult to be certain of the genuineness of this apparent preliminary negative reaction in most cases because of the presence of the postural tremors which frequently attain a size of comparable magnitude.” (Hull, C. L. 1933, p. 56-57).
Hans J. Eysenck
Hans Jürgen Eysenck was among the very few who seriously pursued and developed experimental research into suggestibility from this point on. He sought to establish different types of suggestibility in relation to his theory of personality dimensions. Eysenck (1947) picked up and elaborated Hull’s body sway test, but in contrast to Hull’s deceptive experimental arrangement, Eysenck explicitly informed his participants about the test procedure and about the fact that a recording was going to be played to them. Eysenck intended to produce an explicit tension between the instruction and the subsequent automatic suggestion. This he hoped would allow him to measure suggestibility in the way he conceptualised it, as ‘sway despite maximum resistance’. Eysenck used a set up that was quite similar to that devised by Hull. It is worth taking a closer look at some of the concrete details of the operationalisation and the actual circumstances under which his initial experiments took place, because Eysenck’s work in this field is considered central, and he too encountered some interesting difficulties with suggestibility. The first series of experiments were conducted in 1944 in the Mill Hill Emergency Hospital in London. Eysenck recruited patients as participants, i.e. the British soldiers, who were treated here during the Second World War. After an initial induction to the experiment the soldiers would be led into a room and instructed to stand as upright and still as possible, hands to the sides and feet together. They would be blindfolded with goggles and a thread was attached to their collar. The thread ran via two hooks on the wall to a pointer that indicated on a scale marked in half inches. Then, for two and a half minutes a record player would play a loop of an authoritative male voice with a strong German accent randomly uttering either the words: “you are falling forward, you are falling all the time, you are falling forward now you are falling...” or “…you are falling backward, you are falling all the time…” It was Eysenck’s own voice delivering the suggestive cue. 26 He had experienced various setbacks with different female assistants he had employed to deliver the cue and who had caused significant divergences in the results, which according to Eysenck varied relative to their attractiveness.

“The subjects were soldiers, and again we had two female testers. One was an elderly spinster, not very attractive; the other a rather buxom young woman, very pretty.” (Eysenck, H. J., 1989, p. 59).

He had thus decided to record the suggestive cue himself in order to neutralize any possible influence of the tester’s personality and to guarantee that the experiment was conducted in an objective fashion. The total body sway, as indicated by the thread,

26 It is reported that during that time Eysenck still had a noticeable German accent (Gibson, 1981, p. 181). See also Derksen (2001) for further discussion of the test procedures.
measured over the two and a half minute interval while the recording was playing, was taken as the direct measure of the person's suggestibility.

Eysenck conceptualised the form of suggestibility measured in the Body Sway Test as 'primary suggestibility', which he defined, similar to Hull, as an ideo-motor type suggestibility with a direct character. In his war time experiments (1944, 1945) he found that this primary suggestibility correlated significantly with the personality dimensions hypnotisability and neuroticism. Eysenck suggested the Body Sway Test as a screening instrument for neurosis, because the less neurotic patients proved able to follow the instruction and resisted the suggestion, while the more neurotic ones were swayed by the incantation on the record (Eysenck, H. J. 1945). Yet despite this initial success he was never able to replicate these impressive results, as in all of the studies conducted in later years the correlations dropped dramatically (Eysenck, H. J., 1989, 1991). Eysenck speculated whether the different recording device used for the recording in the later experiments or the rather soft and persuasive intonation of the assistant who recorded it, could have been responsible for the disappointing results. Yet, with regard to the specific set up and the time of Eysenck's initial experiment one could certainly also wonder about the effect his German accent might have had on the soldiers at Mill Hill hospital (Derksen, M. 2001). So regardless of Eysenck's potential ignorance for this factor, in a peculiar way one could say contemporary politics have expressed themselves within this specific detail of the experiment; they have invaded the scientific arena via suggestibility.

Eysenck differentiated primary suggestibility from 'secondary suggestibility' which he conceptualised as an indirect form of suggestibility wherein the suggested content or direction is not explicitly mentioned. This secondary form of suggestibility is related to the one Binet had investigated with his weight illusion experiments. Eysenck found that this secondary type correlates negatively with intelligence and does not correlate with hypnotisability. Eysenck and Furneaux (1945) also allude to a 'tertiary' type of suggestibility in which attitudes are influenced by interpersonal factors such as the prestige or status of the suggester, but they remain inconclusive about this third type which is said to rest on anecdotal proof only.

Eysenck's terminology is still used quite frequently and in various contexts, but it is also criticised for the confusing distinctions it has introduced. Gheorghiu (1989) argues that mere semantic plausibility and the ubiquitous zeal to establish a functional terminology have obscured the actual vagueness and arbitrariness of this distinction: primary suggestibility has become linked to motor processes and thus to the direct suggestion mode, whereas secondary suggestibility became associated with sensory processes (e.g. the
ink blot test and the heat illusion test) because these appeal as rather indirect modes of suggestion. This awkward distinction conceals the fact that, as Hull had already pointed out, indeed both motor and sensory suggestions can be induced by direct or indirect forms of suggestion, and that social aspects like various forms of peer influence (persuasiveness, prestige of the suggester or leading questions) are of central importance for all of these (Gheorghiu, V. A., 1989). Now, considering the specific difficulties Eysenck encountered at various points with replicating his results, one could say that he has indeed made some findings with regard to aspects such as ‘persuasiveness’. Only he considered these to be artefacts, rather than findings.

‘Secondary suggestibility’ attracted especially intense criticism in later years. Eysenck had initially planned to assess suggestibility as a feature of personality (as a distinct trait), so his taxonomy was an attempt to operationalise different forms of suggestion in order to construct tests which could variably assess isolated or heterogeneous techniques of suggestion. In view of the peculiar difficulties he faced in his experiments when trying to replicate results, or when attempting to control the experimentally applied degree of suggestion, Eysenck in later years abandoned the thought of a unitary personality trait of ‘suggestibility’.

“...‘Is Suggestibility?’ must be answered in the negative. There is no single unitary trait of suggestibility, no one, uniform type of reaction to different kinds of suggestion in human subjects. There are several, possibly many different suggestibilities which bear no relation to each other. These are uncorrelated and, in turn, correlate differentially with other cognitive and emotional variables.” (Eysenck, H. J., 1991, p. 87).

Eysenck delivers a detailed, context sensitive analysis of his past experiments, considering the various situational and individual factors that might have influenced the results stating that there is “a good deal of subjectivity about the general arrangement” (Eysenck, H. J., 1989, p.58), that might finally force experimental psychology in general to acknowledge a necessary differentiation between ‘aptitude’ and ‘attitude’ (Eysenck, H. J. 1991, p. 84). In a peculiar way this strikes as a reiteration of the distinction Hull had introduced much earlier with regard to ‘voluntary resistance’ that, following the ‘symbolic processes’ of a person, will inhibit actions compliant to respective suggestions.

“In other words attitudes determine very largely what the subject’s reactions will be, and these attitudes are formed by the behaviour of the experimenter, the general environment of the department and the laboratory, what the subject knows about the department, about people who work there, about psychology in general, etc.” (Eysenck, H. J. 1989, p. 59).

Eysenck uses the rather narrow term ‘attitude’ to capture the problem. Still, a wider reading of this statement makes for a rather perplexing declaration. In its open-endedness and its appeal to ‘common sense’, it seems to dissolve the conditions of possibility that an experimental psychology is built on.
Yet, clearly this is not how Esenck would have understood it, as he does not abandon the idea of suggestibility. On the contrary he recommends that the multitude of distinct and possibly unrelated suggestibilities be acknowledged. He finds that further research needs to focus on distinguishing and naming all those multiple, different, undiscovered suggestibilities. This way, as Eysenck concludes, it should be possible to construct a comprehensive taxonomy of suggestibilities around those types that are already validated: besides primary and secondary suggestibility he points to the more recent concept of 'interrogative suggestibility' which he depicts as a sub-type of his tertiary suggestibility.27

So while Eysenck is undeterred by suggestibility's ambiguity, we are left with a rather ambiguous impression. How could the attribution of more 'names' to dynamics of suggestion solve the problem, when we are still unclear about the phenomenon itself? From a distanced perspective and in the light of this persisting ambiguity it is hardly surprising that the search for distinct traits, or factors correlating with suggestibility, remains inconclusive as well. Let me just offer a few examples for this.

Factors related to suggestibility

Eysenck's difficulties in tackling suggestibility as a single factor are reflected in most of the later studies that tried to relate suggestibility to specific features of the personality. Studies investigating correlations between suggestibility and neuroticism, hysteria or schizophrenia produced persistently contradictory results and even when significant tendencies could be shown, findings remained inconclusive as to whether lack of confidence, situational influences, anxiety, uncertainty or feelings of inferiority might have influenced the results (cf. Fournearux, W. D. 1952; Stukat, K. G. 1958).

Various studies proved that there is no significant relationship between the IQ score of a person and their performance in a suggestibility test. Even at the extreme ends of the continuum little significance could be shown (cf. Coffin, 1941; Wegener 1961; Eysenck 1947). Furthermore there were no significant correlations with dimensions such as anxiety, extraversion or neuroticism, as assessed by personality questionnaires (cf. Gheorghiu 1989). Conflicting results are reported for correlations to gender. Concerning age early studies reported unanimously that responsiveness to suggestion decreases with age (cf. Coffin

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27 'Interrogative suggestibility' is a concept more recently elaborated by G. Gudjohnson. It is defined as: "...the extend to which, within a closed social interaction, people come to accept messages communicated during formal questioning, as result of which their subsequent behavioural response is affected." (G. Gudjohnson, 1984).
Standardised tests to measure suggestibility

Due to the continuous entanglement of hypnosis and suggestion, most of the scales that have been developed to measure suggestibility have a clinical background and are conceptualised around hypnotic susceptibility. They include lengthy step wise procedures that induce a kind of hypnotic sleep and then administer a series of motor suggestions or statements about the participant. As there is a very limited range of tasks that can be performed when in a hypnotic state, participants are usually asked to hold something more or less tightly (e.g. a rubber ball), to perform certain movements with their arms, or they are given adverse instructions and comments (e.g. that they are not able to say their name). Some of the most established procedures include the Stanford Scale of Hypnotic Susceptibility (SHSS) by Weitzenhofer & Hilgard (1959); the Revised Stanford Profile Scale of Hypnotic Susceptibility (SPSHS) by Weitzenhofer & Hilgard (1967); or the Harvard Group Scale of Hypnotic Susceptibility by Shor & Orne (1962). Most of these tests are difficult to administer and take an average of three hours, which prohibits their frequent use or the use on large populations of test subjects. To solve this problem Morgan and Hilgard (1979) developed the Stanford Hypnotic Clinical Scale (SHCS) that can be administered in about twenty minutes and is fairly simple to understand. However, these procedures are meaningful mainly in a specific clinical setting and clearly suffer from the lack of a clear definition for suggestibility.

1.5 The forgetting of suggestibility, self-fulfilling prophecy and placebo

Eysenck maintained his interest in suggestibility after his early experiments, yet within the discipline the interest waned and during the 1940s and 1950s suggestibility, as an explicit research topic, gradually vanished completely from the scientific agenda that was now dominated by experimental psychology. Issues of suggestibility remained implicit until the late 1970s, when it re-emerged under very different circumstances. However interestingly issues closely related to suggestibility now emerged as part of different frameworks, for example in the work of R. Rosenthal and his colleagues. Rosenthal did not explicitly

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28 For a larger range of factors considered in more recent studies see Gudjohnson (2003). Yet Gudjohnson focuses exclusively on the correlation between various factors and 'interrogative suggestibility', which is his own specific concept of suggestibility.
investigate suggestibility, which is peculiar because his concept of the self-fulfilling prophecy, and his studies that showed how experimenters' implicit or explicit expectations could influence participants' reactions ('Rosenthal Effect'), alludes directly to the mechanisms and dynamics of suggestion (Rosenthal, 1966). Even though there are references to this thematic link, neither Rosenthal nor others in this field seem to have been interested in exploiting this association at the time. So despite this potentially interesting link, the 'Rosenthal Effect' initially remained a rather circumscribed aspect of psychological test-construction, encapsulating suggestibility as an artefact.  

In a similar vein a phenomenon traditionally associated with a medical framework strikes as being closely related to the topic of suggestibility: the 'placebo effect'. Around the mid and late 20th century there are numerous studies examining the 'placebo effect', investigating the mechanism of psychosomatic diseases and the efficacy of placebo medication, but regardless of the intriguing connection to issues of suggestibility, only very few studies have explored this path (cf. Evans, F. J. 1985). It seems that the placebo effect still lingers in the grey area between disquieting issues of hypnosis, hallucinations, illusions, psychosomatic phenomena and issues of simulation and malingering, making this a rather diffuse unappealing and thus unpopular area of research.

1.6 Concluding remarks on the early development

Before I go on to describe the onset of modern suggestibility research I would like to recapture some of the dynamics observed in the development so far.

The history of suggestibility up until this point is a peculiar story of beginnings, inversions and inflections. Mesmer was denounced as a fraud but the phenomena he seems to have summoned prevailed and continued to perplex the medical and social sciences. As we have seen the complex dynamic, the oscillation between the question of the phenomenon (and what it is), and the problem of the appropriate means, the appropriate set up to capture it, persists. As the ubiquitous fascination for suggestibility at the end of the 19th century gives way to more and more circumscribed attempts to capture its nature, it seems suggestibility itself has acquired a rather bad reputation. McDougall, Binet and Stern for example took a holistic and positive stance. In different ways, and tentatively, they all highlighted the ubiquity and inherent ambiguity with which suggestibility inevitably pervades the entire

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29 Gheorghiu (1989, p. 34) mentions that Rosenthal had planned to give a paper titled: "Suggestion as Self-fulfilling Prophecy" for a conference on suggestibility in the late 80's.
fabric of human communication, perception and memory. Freud however began to turn against suggestion. In his quest for a scientific technique of analysis, Freud grew more and more convinced that suggestibility represented the irrational, manipulative and illusory aspects of the human mind, making it an obstacle to rational scientific insight. In the context of psychoanalysis suggestion does appear to be a particularly perfidious obstacle because it imposes illusions that so perfectly resemble true recollections (they seem to bear the attributes of true recollections). It is interesting to see how in Freud’s account it is not the precise insight into the nature of suggestibility that enables him to avoid and exclude it. Freud rather attempts to rule suggestibility out by rigorously reorganising the relationship between analyst and analysand. So for Freud it is not the distinct nature of the phenomenon of suggestion, of the phenomenon itself, that defines it, but it is the distinct nature of the circumstances under which suggestibility is assumed to occur or be absent. The circumstances are to define the crucial difference between what Freud called the ‘gold of analysis and the copper of direct suggestion’ (Freud, S. 1919 [1975] p. 249). Hence again the set up, the circumstances, define the phenomenon.

On a different level but in a very similar vein the experimental approaches towards waking suggestibility provide a rather disparate picture. They operate around very different sets of conditions and circumstances under which they hope to isolate the phenomenon. Hull and later Eysenck do not pick up Binet’s and Stern’s attempt for a complex grasp of the phenomenon. In order to steer clear of what they perceive as a rather mystic complexity surrounding suggestibility, they whittle the phenomenon down to isolated, and in their view approachable aspects. Hence they focus exclusively on, and operationalise what they consider the visible, the observable. While this approach seems to make suggestibility more manageable, the ‘phenomenon’ also becomes more and more derivative of the respective apparatuses and procedures designed to extract and examine it. As an effect of this, sensory and motor processes are at the centre of attention while the third aspect, memory processes, becomes less and less important. Similar to Freud, but following an entirely different agenda, Hull and Eysenck attempt to gain control over a phenomenon that seems prone to contaminating scientific reasoning, or indeed likely to cause ‘scientific disaster’, as Hull put it. Yet, in different ways they all concede that something escapes their grasp, and persistently endangers the stability of their paradigms as such. It seems ‘complexity’ is to blame here. So this might be why, rather than following Binet’s and Stern’s initial attempts to explore the morphology of the phenomenon itself, ongoing research tried to slice the phenomenon into ever smaller digestible and controllable chunks. Ultimately research now ended up being more concerned with discussing, reinventing and refining the conditions of
experimentation and examination. As an effect of this there is remarkably little overlap between different approaches and every new approach seems to demarcate a genuinely new beginning of the history of suggestibility research, preoccupied again and again with overcoming the initial hurdle of devising the tools by which best to capture the phenomenon. This is by no means to say it is a history of failure. It would indeed be difficult to see 'what' exactly has failed. It seems more like a rich history of consistent 'non-accomplishment'. Each approach bears its own plausibility and is able to produce results according to its very own standards, but simultaneously there is little in the way of progress or accumulation of knowledge. This is why I called developments in suggestibility research a reiteration of beginnings. The efforts of scientists in early suggestibility research resemble those of the scientific commission assessing animal magnetism. Similar to the commissioners' approach there still is a constant renegotiating of the conditions under which suggestibility can be explicated and examined while the phenomenon remains obscure, unattended to, or indeed seems to be dismissed for the sake of rescuing the scientific structure, the set up that was to capture it. It is this dynamic that represents the reverberations of what I have called the 'Mesmer effect'. And, as Gheorghiu remarks, the problem of disparate, particularised and incommensurable approaches even persists among more recent approaches.

The variety to be found in procedures used to measure suggestibility is quite impressive but no less impressive is the creativity of the ideas on which they are based. The results obtained – which sometimes strongly contradict each other – are in contrast to this however. We know far too little about the phenomenology of suggestibility and even less about its psychological phenomena. " (Gheorghiu, V. A. 1989, p. 20).

It is interesting to see how during the growing accomplishment of the experimental method in psychology during the 20th century, suggestibility seems to have escaped capture. Or indeed, rather than being 'defined' or explicitly dismissed, it has simply vanished from the agenda only to return still carrying the same ambiguous dynamics, as Gheorghiu's account demonstrates.

Unable to really pinpoint the problem Gheorghiu (1989) criticises his fellow experimental psychologists for always having intensively investigated the general mechanisms of human perception, while remaining surprisingly disinterested in the potential influences of suggestion in this domain. In his article "Suggestion und Suggestibilität. Stiefkinder der Psychologie" (Suggestion and Suggestibility. Stepchildren of Psychology) Gheorghiu (2000) calls suggestibility the 'Cinderella' of psychology, a topic decried and misunderstood, constantly dismissed as being 'only' suggestion, while very little is known about the phenomenon itself. While Gheorghiu's analysis unpicks a number of crucial problems, his metaphor of suggestibility as a 'neglected step child' only captures part of the picture.
Considering the peculiar self-confessed difficulties the experimental investigation of suggestibility has caused for Binet, Stern, Hull and Eysenck, the ‘forgetting’ of suggestibility is clearly more than just the dismissal of an unpopular topic. Looking back at the history of suggestibility research so far, it has become clear that suggestibility has not just been neglected and overlooked but wherever it emerged it has made its presence felt to psychological theory and research in a quite powerful and resistant manner, even if in a rather peculiar and subliminal way. Binet and Stern captured a crucial aspect of this problem concisely by pointing to the difficulty of finding ‘fixed’, correlating types of suggestion (Binet) and explicitly faced the issue of suggestibility’s diffuse relation to causality (Stern). Even though their line of inquiry was not picked up, it seems this precise problem emerges continuously within the experimental operationalisations. Suggestibility neither allows itself to be ‘fitted’ into the experimental framework nor to be entirely ignored. This is what I mean by saying suggestibility escapes, but ‘makes its presence felt’ in a resistant manner. It can neither be dismissed nor captured and ultimately appears in danger of disassembling the experimental rationales of Pavlov, Hull or Eysenck. So there is good reason to suspect that this unwieldiness and the paradoxicality of suggestibility seeds into the experimental rationale, a rationale that became the fundament of psychology’s success as a scientific discipline throughout the mid 20th century, must have played a central part in its intermediate ‘forgetting’ (or avoidance). This dynamic will be a crucial analytic point in my inquiry. Additionally I will turn to some critical approaches to psychology in chapter 3. These will provide the framework for a more complex understanding of the specific development of psychology as a scientific discipline. However, I would like to leave this as a tantalising hint for now and move on. The nature of the peculiar efficacy of suggestibility will become even clearer throughout the next chapters. Indeed, the same dynamic repeats itself, only this time through a wider and more complex set of societal dynamics which cross and recross psychology’s disciplinary boundaries as well as the space between research and practice.
2. Modern suggestibility research: developments and trajectories

"Isn't it absurd that, with respect to suggestion, which has always been the symptom that we are perhaps not in control of ourselves, we have remained at the level of judgements whose Manichaean naivite returns us to the era of witch-hunts?" (Stengers, I. 1997, p. 106).

In the following I would like to give an introduction to modern suggestibility research. Unfolding my genealogical line of inquiry further and tracing the efficacy and reciprocity of suggestibility research, this will not be a conventional review of literature and research, but a sketch of important interrelated paradigms and debates. Hence I will not follow the usual path of depicting theoretical frameworks, experimental paradigms and contextual factors as separate topics, but I will try to crosscut these categorical boundaries in order to juxtapose theoretical concepts with their experimental operationalisation and their application to practice. This pursues the specific circumstances under which theoretical concepts have emerged, in order to explore the context in which research is conducted and, most of all, to examine how research findings affect the various societal practices they refer to and inform. In this sense the following is an attempt to describe and to simultaneously demonstrate the interconnectedness between theory, research and practice in order to illustrate the reciprocal dynamic that prevails around issues related to suggestibility.

2.1 Situating suggestibility in the late 20th century

"It is fittingly ironic that the decade of the recovered memories controversy was also the vaunted "Decade of the Brain" in the United States." (Lindsay, S. D.; Read, J. D. 2001, p. 73).

From the late 50's onwards the overall interest in suggestibility waned. Suggestibility as a circumscribed topic virtually vanished from the scientific agenda and apart from very few exceptions where suggestion featured as a marginal aspect of other social psychological phenomena or as an implicit aspect of memory research, there was no interest to address the questions Binet, Stern or Hull had raised (cf. Gheorghiu, V. A. 2000). Suggestibility research returned in the 1980s with a powerful momentum, but it then bore little resemblance to earlier research. In order to understand the nature of suggestibility research when it returned, and to put its recurrence into perspective, it is necessary to take note of the two interrelated developments that characterise the circumstances of suggestibility's re-emergence. One of these is related to advances in memory research and the other one related to societal developments around issues of child sexual abuse.
Before proceeding with a more detailed depiction of modern suggestibility research I will trace out the intricately intertwined paths of issues around child sexual abuse, suggestibility, memory, and the relevance of psychological knowledge and expertise for courts of law. *Firstly* I will take a brief look at the development of memory research and at the specific way in which the now dominant perspective of cognitive psychology conceptualised memory processes, making the issue pertinent for forensic questions. *Secondly* I will explore how a growing awareness of child sexual abuse and related issues of children’s reliability as court witnesses shaped the nature of suggestibility research.

**Cognitive memory research and suggestibility**

In contrast to the decreasing interest in suggestibility, issues around memory continued to play a central role for theories of information processing that lay at the heart of cognitive psychology, which in the course of the 20th century became a dominant psychological discipline. While there are crucial links to clinical and psychiatric theories, the German psychologist Herman Ebbinghaus (1885/1964) is univocally named as the founding father of experimental cognitive research into memory processes (Schacter, D. L. 1995). Ebbinghaus’ crucial contribution was the exclusive use of statistical methods to analyse his data and the invention of a procedure that allowed him to exert experimental control over the input into memory. He thereby overcame the problems of philosophical or clinical approaches to memory which had so far concentrated on people’s experiences or patients’ reports, and thus could never be sure about the exact true nature of the events remembered or forgotten, because these were past life experiences of the reporting person. Ebbinghaus aimed to explore the pure, uncontaminated workings of memory by devising a set of nonsense syllables that he himself, as a typical human being, attempted to memorize. The use of nonsense syllables was meant to ensure that the information was as ‘pure’ as possible in that it did not collide or associate with anything the memorising person could have known in advance. Controlling the input allowed Ebbinghaus to precisely compare his later output with the record of what he had initially studied. Ebbinghaus was a pioneer in this field, as he offered the first sustained study of recall and the first sustained use of statistical analysis in psychology (Hacking, I. 1995).

Freud’s clinical work and Sir Frederic Bartlett’s monograph “Remembering” (1932) are also frequently mentioned as cornerstones of memory research. Yet during the first half of the 20th century the experimental study of memory was more and more dominated by cognitive stimulus-response-oriented studies of verbal learning. A rather “behaviouristic *Zeitgeist*” (Schacter, D. L., 1995, p. 9) directed the attention away from approaches such as Bartlett’s,
who had tried to establish a notion of memory as a fundamentally social activity that is inevitably linked to the social context, attitudes and needs of the rememberer.

The focus of cognitive psychology was the information processing capacity of the brain itself and here ‘memory’ had become the central research focus. Closely following the example set by Ebbinghaus half a century earlier, by using abstract syllables, lists of words or objects as test material, the aim was to experimentally examine the visible patterns of input and output in order to determine, by help of statistical methods the general laws according to which information is included, retained and retrieved within the brain. The cognitive approach was based on a container model of memory. Memory was seen as a vessel or a containing entity situated in the brain, operating via a three stage information processing dynamic. A stimulus/information would be perceived and thereby enter the sensory register. Depending on attention processes, this information would be transferred from the sensory register into short-term memory where it is available to consciousness, and can be rehearsed, but will be lost after a short period of time if it is not transferred further into the long-term memory, where it can be retained almost indefinitely. Retrieval, that is remembering, is conceptualised accordingly as a similar process that operates in the opposite direction. Following a cue to short term memory, information will be searched in the long-term memory and then be made available to short-term memory. With reference to this model memory processes are commonly referred to as having three different phases: encoding, storage and retrieval of information.

Alongside a growing fascination for the peculiar distortions and flaws of memory that can be observed in everyday life, research based on this model was expanded and refined. A crucial reference here is Ulrich Neisser’s work (1967; 1982). In his monograph on cognitive psychology Neisser pointed out that remembering is not a simple matter of reawakening a dormant encoded piece of information, but that “past events are constructed by using pre-existing knowledge and schemas to piece together whatever fragmentary remains of the initial episode are available in memory” (Schacter, D. L. 1995, p. 10). Drawing on some of Bartlett’s ideas, Neisser established the view that all memories are inevitably constructions because they include general knowledge, or indeed draw on schemata that were not part of a specific event, but are necessary to reconstruct it. Conceptualising memory as having such a fundamentally constructive nature also cast an entirely new light on issues of memory distortions and inaccuracies, because errors could now be seen as more than just results of incomplete encoding or passive decay of information, but needed to be understood with regard to the conditions under which encoding, storage or retrieval happened, and with regard to the state of the specific person who was engaged in it. Hence some approaches
now also began to focus specifically on the influence of experiences prior to the memorised event, experiences during the retention interval (time that elapses between storage and retrieval of information), and the conditions under which the information was retrieved (which implies the idea of suggestion).

Following this trajectory of cognitive constructivist memory research Elisabeth Loftus and her colleagues in the mid 70s published their famous and pioneering studies examining the fallibility of eyewitness testimony. They showed how leading questions can systematically alter memory reports (cf. Loftus & Palmer, 1974) and demonstrated how post-event information can alter memory for an original event (Loftus 1979). Loftus conducted a series of experiments in which participants were implanted with false information about an event they had witnessed (video or pictures that had been shown). In some experiments the false information was conveyed via misleading questions the participants had to answer immediately after witnessing the event. For example false information was introduced by asking 'Did the car turn left or right after it passed the barn?', when the video had not shown a barn at all. After some time had passed the participants were asked to freely recall what they remembered about the original event (e.g. a video they had watched) and a significant number of participants would now report to have seen those details (e.g. a barn) in the video that had in fact only been part of the initial misleading question. While Loftus does not explicitly draw on Binet or Stern her paradigms about leading questions and post-event information clearly touch upon issues that had preoccupied Binet and Stern in their suggestibility experiments. Yet now these issues emerged as incidental discoveries within the broader framework of memory research. Hence aspects of suggestion are reconfigured as peculiarities of memory functions.

Loftus' contribution marked the beginning of a sudden and powerful renaissance of suggestibility as an explicit topic for psychological research. Her research had a strong impact because she established the relevance of this kind of memory research for applied forensic questions, and made it accessible to courts of law, giving it huge publicity and valence for a range of social and political issues (Loftus & Ketcham 1991). Following Loftus' focus, research into the topic formerly known as 'suggestibility' was now seen to be intricately linked to the applied forensic context from which it had emerged, and it is this context that provides the pragmatic definitions. It seems that by taking its questions and concepts directly from forensic practice, modern suggestibility research has implicitly side-stepped the problem of defining suggestibility, which nonetheless remains a vague entity. The consequences of this 'side-stepping' will become evident throughout this chapter.
Coinciding with the impact of Loftus’ research there was another development that strongly shaped the further course of suggestibility research. In the early 80s, due to societal changes, there was an increased awareness regarding issues of child sexual abuse across Europe and Northern America resulting in the legal systems becoming more willing to hear child witnesses, which again caused a growing concern with children’s performance as eyewitnesses. This sparked an intense research interest in children’s suggestibility, producing what could be called a fast growing ‘research industry’. The single mindedness and intensity of the focus on children’s suggestibility is reflected in the overall ignorance regarding the few studies that investigated adult’s suggestibility. Even though Loftus’ initial experiments and further research clearly indicated that there was little reason to believe suggestibility applied to children only (cf. Loftus 1997; Mazzoni & Loftus 1998), suggestibility grew to be an issue that was considered to be predominantly linked to childhood.

In the following I would like to outline this second aspect (childhood and the issue child sexual abuse) in some more detail in order to capture the overall historical and societal dynamics surrounding this dynamic conflation of suggestibility’s re-emergence, childhood sexual abuse and the issue of children as witnesses in courts of law.

Children, sexual abuse, suggestibility and the law

Children have always enjoyed a dubious reputation as witnesses in courts of law. One of the most notorious cases that is still quoted with an astonishing frequency as a warning tale about the dangers of children giving evidence in court, are the Salem witch craft trials held in the 17th century. These trials, held in Salem Massachusetts in 1692, have since acquired the status of an emblematic (and infamous) example for the unreliability of children’s evidence. Salem saw 19 villagers executed as a result of the evidence given by a group of children, even though the children had at later stages of the trial recanted their accusations. Ceci and Bruck (1995) suspect that this emblematic event is partly responsible for the long standing and deeply rooted distrust against child witnesses, that can cause considerable difficulties for the prosecution of child sexual abuse. Spencer and Flin (1993) emphasise that references to the Salem trials are very problematic because they often give a very
partial view of the events and central contextual factors are entirely forgotten or misrepresented.  

The concept of child sexual abuse, perceived as a social phenomenon, has only formed within the last few hundred years and, as Haaken (1998) puts it, has since had a long history of being forgotten and remembered. Throughout the 16th and 19th century there are numerous documented cases and scientific references that reflect awareness for the problem of sexual abuse all over Europe. In Britain, for example, in the middle part of the 18th century, some 25% of capital rape prosecutions at the Old Bailey in London involved victims younger than ten, and in France thousands of documented cases of child sexual abuse prosecutions are reported (Dalgleish & Morant, 2001, p. 7). Yet around the turn of the 20th century, and coinciding with Freud’s public abandoning of the ‘seduction theory’ in 1897 (see chapter 1.2), there was a sudden distrust in reports of child sexual abuse and the general concern and awareness for the problem waned completely. This only changed in the late 1960’s and 70’s, when the campaigning effort of the growing feminist movements gained political momentum and managed to put issues like domestic violence, rape and child sexual abuse back into the public arena (Haaken, J. 1998; Levett, A. 2003).

The growing awareness for child sexual abuse and violence against children ultimately forced a reconsideration of the general distrust that had so far largely excluded children from testifying as witnesses in court. In most European countries and Northern America children’s testimony had not been considered admissible evidence, or at least would be looked upon with great suspicion. The United States and England for example had strict corroboration laws that allowed children’s testimony only if it was corroborated by an adult eyewitness (Spencer & Flin, 1993). This longstanding tendency to exclude children from giving evidence was underlined by frequent references to the Salem witch trials and was

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31 Spencer and Flin (1993) point out that during that time similar trials are recorded all across Europe, yet they also remind us that those cases involving child witnesses represented only a small fraction of the huge number of witchcraft trials taking place everywhere during that period of time. Spencer and Flin furthermore criticise the common practice to use this as an example for the sheer bizarreness of the stories children can come up with, because considering the common beliefs of the time (17th century), children’s stories were in no way bizarre, they merely reflected what most people believed. Finally most of those who quote Salem as a warning tale, seem to forget that children very frequently were subject to accusations themselves, were forced into making accusations against their parents, or were incarcerated or punished after having served as witnesses because they were seen to be afflicted and thus complicit with witchcraft. Considering these harsh consequences there is little reason to believe children had carelessly or even deliberately made up such accusations (Spencer & Flin 1993, p. 309-312).

32 The concept of ‘childhood’ itself is a product of more recent times (cf De Mause 1974; Aries 1978). Clearly, as Hacking (1995) puts it, the idea of child sexual abuse takes for granted the idea of the child.

33 “With the exception of Ferenczi’s work there is almost no published work on the consequences of child sexual abuse in the first 60 years of the 20th century.” (Dalgleish & Morant, 2001, p. 8).

34 Legal systems differ considerably all over the world, and while the distrust in children’s evidence was widespread, some countries have never had explicit corroboration laws (e.g. Germany). France is also reported to form an exception here, treating child witnesses slightly more favourable (Spencer & Flin 1993).
broadly supported by contemporary paradigms of developmental psychology and memory research.\textsuperscript{35} Yet, due to the changing climate towards sexual violence against children, it was now widely acknowledged that corroboration laws presented a systematic problem for such cases. The fact that sexual abuse particularly is very rarely witnessed by anyone except the child and the perpetrator meant that it was almost impossible to prosecute perpetrators, as long as children's evidence was not admissible. This resulted in changes in the juridical systems in Northern America and some European countries, which now allowed for example children's uncorroborated testimony in cases of alleged sexual abuse. As a result of this during the 1980s courts were faced with an increasing number of child witnesses who were predominantly testifying as the presumed victims of alleged sexual assaults.

In the following years Northern America, but also Europe (e.g. England and Germany) saw a number of high profile miscarriages of justice around alleged child abuse cases. In some of the most notorious cases children reported the most bizarre scenarios of ritualistic abuse by multiple perpetrators. Yet, their accounts were later identified as the product of coercive and suggestive interviewing techniques used by investigators and parents. Driven by the climate of intense concern for child abuse, parents and professionals had been absolutely convinced something must have happened, and this spurred their (well intentioned) eagerness to get a disclosure. These cases sparked a sudden and intense research interest in children's suggestibility, a topic that had so far not been on the scientific agenda at all.\textsuperscript{36} Hence despite Loftus' more general approach, children became the predominant focus for the newly emerging suggestibility research.

From this point on, research into children's suggestibility and memory on the one hand, and societal and legal issues around child sexual abuse on the other hand, appear to have become inseparably linked. In the following years issues around children's memory, suggestibility and sexual abuse triggered waves of polarisations and backlashes all across Northern America and Europe.\textsuperscript{37} Fostered by massive media coverage, during the 70's and 80's sexual abuse grew a pervasive and almost omnipresent topic. As time passed the awareness transformed into an eagerness to actively detect abuse, culminating in what

\textsuperscript{35} As mentioned in the first part of this chapter, early research into children's memory and suggestibility mostly agreed that children's memory was unreliable and particularly susceptible to forgetting and distortions. Yet while early studies reported unanimously that younger children are most susceptible to suggestion and that this susceptibility decreases with age (cf. Coffin 1941), more recent studies, commencing from the middle 80's started to undermine this consensus considerably (Ceci & Bruck 1993).

\textsuperscript{36} Greuel (2001) reports that a general search in the data bases 'PSYNDEX' and 'PsychLit', limited to the years '90-'99, brought up around 700 references to this topic.

\textsuperscript{37} The first cases were reported in the US during the 80's and with a slight delay similar cases were seen all over Europe and Canada. (cf. Ceci, S., Bruck, M. 1995; Ceci, S., Hembroke, H. 1998; Lee, N. M. 1999; Bell, S. 1988; Steller, M. 2000).
should later be referred to as an 'abuse hysteria'. Captured by the general atmosphere a number of over-enthusiastic researchers and psychologists contributed to this trend by providing dangerously vague indicator lists according to which child abuse could be diagnosed and by promoting so called ‘disclosure therapies’ that recommended extremely leading interview strategies, designed to facilitate abuse disclosures from children who persistently denied to have been abused (for a more detailed discussion see Steller & Volbert 1997; Ceci, S. et al 1995). While the exact specificities of the cases and developments differ between countries, they are of a similar nature and it seems the trend spread from the US to Europe. I cannot go into too much detail here, but I would like to give an example from an early case reported in the US and describe some interrelated developments in Germany.

The MacMartin pre-school case (California, USA) is one of the earliest of a series of very similar high profile cases that are quoted as paradigmatic examples for the dangerous combination of over-awareness for sexual abuse and the zealotry of well-meaning professionals to detect and prove it.

The MacMartin Pre-School Case:

On the 12th of August 1983, the mother of a two year old boy who attended the MacMartin nursery school, reported to the police that her son had been sexually molested by one of his teachers. After a lengthy investigation that involved multiple questioning of all the nursery’s children, 7 teachers were arrested and indicted on what amounted to 321 counts covering a series of bizarre events involving sexual abuse, satanic rituals and animal mutilation. The indictment was based on the accounts of 14 former students of the nursery. The defendants sternly denied all of the charges. The whole case, closely covered by the media, lasted over 8 years, with some of the child witnesses being interviewed up to 30 times. After various acquittals, retrials and hung juries, the case ended in a final mistrial for the last remaining defendant. None of the accused was convicted (cf. Ceci & Bruck 1998).

The characteristic features of this and numerous other cases were that extremely leading and at times coercive interviewing techniques were used and children had to endure repeat interviewing for sometimes months and years. 38 Under such questioning children’s stories would typically acquire more and more bizarre details, sometimes including practices of so called ‘Satanic Ritual Abuse’, 39 and they would name an ever growing number of potential

38 "...one 10-year old was in the stand every day for over a week. Seven defence attorneys questioned him. He was only one of many child witnesses to be called to testify. Worse yet, this seven-day ordeal occurred during preliminary hearings. The trial itself had not yet begun!" (Goodman & Helgeson 1985, p. 202). See also Spencer & Flin (1993).
perpetrators, none of which would ultimately be convicted. In the following years a number of very similar cases, always broadly covered by the media, could be observed in North America and with a slight delay also across Europe.

As a result of such scandalous mistrials a more reflected debate took hold, attitudes slowly changed and people started to become more reserved about allegations of sexual abuse. Yet, instead of balancing the views, during the 90’s the bizarre and unreliable witness statements children had given during those high profile mistrials, triggered a backlash that culminated in what has been termed an ‘abuse of abuse hysteria’ (Osterkamp, 1997; Haug 1994; Holzkamp 1994) which again spread from North America to Europe. An atmosphere manifested itself in which any mention of sexual abuse would inevitably be suspected to be an exaggeration or even a deliberate false accusation meant to damage somebody’s reputation. For example, numerous North American studies indicated that there was an increasing number of mothers who would, during contentious custody battles, make deliberate false allegations of sexual abuse against their divorced partner in order to obtain exclusive custody for their children (e.g. Green, A. H. 1986, 1991; Wakefield, H. et al 1991.)

In Germany these American studies sparked an interest in its own situation, leading to a debate in which some researchers and representatives of the legal authorities claimed that the German legal system was also facing an epidemic of false allegations of sexual abuse (Deberding, E., Klosinski, G. 1995; Kluck, M.-L. 1995). Inevitably this debate caused concern among legal practitioners who were confronted with such cases and it may well have influenced decisions of family court judges or psychological experts assessing such cases. In order to establish how far this concern actually reflected the true situation Busse et al (2000) conducted a retrospective study based on an in-depth analysis of files from Berlin family courts (from each year 1988, 1990 and 1995, 500 case files were examined).

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40 Cases obviously differ with regard to central elements, and it cannot be ruled out that some of the children involved had actually suffered sexual victimisation. Yet, in many cases those who had been accused were later proven innocent, and large groups of people, often family members, could spend years in prison on remand while their trials were pending, causing great distress and in some cases the total break up of families. Finally the coercive and leading questioning, even though performed in the best of intentions, would make it impossible to finally judge what the children had initially complained about. Furthermore the interviews caused such distress in many of the witnesses that they needed psychological treatment, or in some cases were unable to return to their families even though all the charges had been dismissed.

41 For the USA see Ceci & Bruck (1995); Ceci & Hembroke (1998). For England see Bell (1988); Lee (1999); Bull (1998). For Germany see for example Steller (2000).

42 This marked backlash against children’s and also women’s credibility, also produced heated public debates in Germany. For example a publication by Rutschky (1992) titled ‘excited enlightenment’ ("Erregte Aufklärung") that advanced theses about the strategic and malicious use of false abuse allegations by women, caused much debate. Challenging Rutschky’s thesis Osterkamp (1997) coined the term of the ‘abuse of abuse of abuse’.
Busse et al were able to show that there was no increase in the number of abuse allegations related to custody cases (numbers were dropping rather than increasing). And more importantly, even though many of the respective allegations had been found inconclusive, there was not a single case featuring a founded suspicion of a 'false' allegation that had been made deliberately. Furthermore the overall number of abuse allegations related to divorce cases was quite low.\(^43\) Clearly, following these numbers there was no 'epidemic' of false abuse allegations. Additionally a close review of the relevant literature conducted for this study revealed that some of the US American studies, which had initially fuelled the debate in Germany, contained rather general or grossly overstated results or had in fact been misinterpreted by the German readers. Still, in the 90's the supposedly inflationary increase of false allegations was a common concern among psychologists, psychiatrists and legal professionals (McGleughlin, J. et al 1999).\(^44\)

In the meantime ongoing research had delivered some evidence in favour of the general reliability of child witnesses, disqualifying the simple assumption that children had a general tendency to lie or confabulate, yet this put children's suggestibility even higher up on the agenda. In a peculiarly circular way, some researchers in Germany now began to warn against the potential danger of suggestibility research itself. It was suggested that as a result of the intense scientific focus on children's suggestibility, public and scientific opinions might well drift towards a 'suggestibility hysteria' which could again undermine children's status as witnesses (Greuel, L., 2001; Goodman, G. S. 1998).

Looking back to the point where this dynamic initiated in the late 70's with a growing concern for child sexual abuse, we can see how scientific, societal as well as legal issues around childhood memory, child sexual abuse and children's suggestibility get more and more entangled, reciprocally affecting each other. And while the exact national topics and debates (e.g. in the US, England or Germany) might differ to a certain extent, there are peculiar international resonances and dynamics interlinking different legal systems.

\(^43\) An important insight brought forward by this study is that the family dynamic during a divorce and the circumstances around newly agreed visitation arrangements can directly contribute to both the first disclosure of an ongoing sexual abuse and the first occurrence of sexual abuse. On the one hand it can contribute to the disclosure of an ongoing abuse, because the abuser has left the family and cannot threaten the child anymore or the child feels freed of the obligation to 'consolidate' the marriage. But on the other hand it can also contribute to the emergence of an abusive relationship between a child and a parent because of the emotional neediness of the divorced parents, and the unusual amount of time that is spent with the child alone during visiting weekends. These considerations show that a correlation between true abuse cases and divorce cases should indeed be expected rather than criticised. Still, the emotional stress and upset of a divorce situation may also elicit those symptoms of physical and mental distress in children that are commonly held to be indicators of abuse: sleeplessness, bed wetting, depressed mood, remoteness, attention deficit or sexualised behaviour.

During the 90s new concepts like the ‘Parental Alienation Syndrome’ (Gardner, R. 1992),45 ‘Post Traumatic Stress Disorder’ (PTSD)46 and the onset of the ‘memory wars’ around the ‘False Memory Syndrome’ (Loftus, E. et al 1994) fuelled the distrust in children’s credibility even further, causing heated debates about children’s memory and suggestibility.47 In the 70’s clinical psychologists saw a significant increase in the number of, mostly, female patients who disclosed that they had been raped or sexually abused during childhood. Yet more and more of these cases also included recovered memories of abuse, that is, a previously forgotten memory of childhood sexual abuse is recovered during adulthood, after a long period of total unawareness (Herman 1992). The ‘False Memory Syndrome’, a term coined by Elisabeth Loftus, came into being as a counter-reaction to cases in which women had reported to have recovered, often during therapy, previously forgotten memories of child sexual abuse. The accused often were close family members, and the accusations led to family break ups or even legal action. Again, this huge international debate about the existence and nature of such recovered memories, which has rightly been termed the ‘memory wars’, can be traced back to a very concrete personal event. In the winter of 1991 Jennifer Freyd (who herself is by profession an academic cognitive psychologist), confronted her parents with the revelation that she had recently recovered the memory of her father sexually abusing her. Her father denied the accusations and within months her mother Pamela Freyd, also an academic, had started a campaign of personal defamation against her daughter. Early in 1992 Pamela Freyd founded the ‘False Memory Syndrome Foundation’ that quickly grew into a powerful international campaign group for families accused by relatives who had recovered memories of childhood sexual abuse. Members of the group include not just concerned families but also a sizable number of academics. Professor Elisabeth Loftus for example is among the founding members (cf. Haaken, 1998; Davies & Dalgleish, 2001). The European sister organisation is the “British False Memory Syndrome Foundation” (BFMSF). Apart from legal cases resulting from the disclosure of recovered memories, there have been cases where the accuser has recanted the allegations resulting in some convictions being overturned again, as well as malpractice

45 The term ‘Parental Alienation Syndrome’ was coined by Gardner (1992) who used it in contentious custody cases to describe a technique (emotional pressure) one parent would deliberately use to deprive the divorced partner of visitation rights and custody. It is the systematic and deliberate influence (emotional pressure, persuasion, suggestion) one parent exerts on the child to produce a sincere and finally genuinely felt and expressed aversion towards the other parent. As a result of this the child will autonomously and sternly refuse any contact with the other parent. Gardner was subjected to intense criticism and the ‘syndrome’ remains contentious.

46 In the late nineties the discovery of the so called ‘post traumatic stress disorder’ (PTSD), suggesting that there are neuro-physiological reasons for the fact that particularly traumatic events could be entirely forgotten, or suppressed, added a new twist to the debate (cf. Cordon et al 2004).

47 See also Raitt et al (2003).
charges against therapists accused of implanting false memories. Following my own trajectory I cannot go into detail here, but clearly the complex dynamics surrounding this long-standing and polarised debate warrants analysis in its own right (for an intriguing analysis see Ashmore, Brown, McMillan 2005; Ashmore et al, in press).

Recapitulating the re-emergence of suggestibility: memory and child sexual abuse

Let me recapitulate the overall dynamics surrounding the re-emergence of suggestibility research. There are two sets of intersecting concerns. Firstly the way the whole question of suggestibility is set up as a research question is shaped by the paradigms of cognitive psychology which again has established itself as an experimental approach. Here memory is modelled as a container, a storage facility in the head that encodes information, and retrieval is conceptualised as a more or less constructive process.48 Suggestibility has emerged as a special case of cognitive memory research, it is seen as a peculiarity or an anomaly of memory, and hence the memory aspect of suggestibility now becomes the exclusive research focus. With Loftus' contribution, this research is now furthermore endowed with special forensic relevance and takes its inspiration from legal practice. Secondly the vexing and polarising issues arising around the prevention, detection and prosecution of child sexual abuse, clearly position child witnesses and thus children's suggestibility at the centre of concern. Hence suggestibility research now in effect meant research into children's suggestibility; the two had become almost synonymous. This context strongly determined the way in which suggestibility was approached experimentally. Children's suggestibility had emerged as a topic with immediate forensic relevance and thus research was explicitly aimed to model problems arising in legal settings and to directly cater for the needs of the legal system. Yet, despite, or indeed because of this clear and applied focus, the ambiguous and ill-defined nature of the concept of suggestibility that had dominated much of the early research efforts was overlooked, side-stepped or indeed not considered at all. Little or no notice was taken of early suggestibility research and rather than addressing the fundamental definitional problem that had remained unsolved, experimental approaches were now directly and pragmatically constructed around the questions that emerged from the forensic context.

48 This is a simplified capture of the dominant paradigm that guides the mainstream of memory research during the late 20th century. Following the emergence of various critical perspectives in psychology, this model is challenged and a diverse range of alternative concepts of memory emerged. See for example Middleton & Edwards (1990), Edwards (1997), Middleton & Brown (2005). I return to these critical accounts in chapter 3.
Taking a step back and considering suggestibility in the wider political and scientific context we can see that suggestibility as a concept now also fulfilled a strategic function. Considering the politically delicate applied context within which the concept of suggestibility emerged we can see that it served a very specific structural function for psychology. When children's testimony first became an issue in the 80s, the debate had fluctuated between two apparently antagonistic poles: 'Children do not, and cannot lie about abuse', was one of the paradigmatic phrases that served to reconcile the dilemma of the new found trust in children's testimony with the bewilderment that followed the shocking disclosures of satanic rituals and epidemic numbers of abuse cases. One simply had to believe children. At the other extreme end of the spectrum it was argued that 'children are generally unreliable because they cannot yet distinguish between fantasy and reality, truth or lie'. Yet these are not just antagonistic statements but they also contain an implicit paradox, because both of these opposing theses refer to the same body of psychological knowledge: paradigms of developmental psychology.

In the first case children's disposition serves as a natural source of authenticity. Children's immaturity and lack of experience is seen to make them incapable of lying about something that happened to their body. Accordingly the denial of an actual abuse, a dissimulation, was also held to be unlikely. In the second case children's disposition serves as a natural source of unreliability, because their immature cognitive and meta-cognitive abilities are seen to make them prone to inadvertently mingle fairy stories and fantasised anxieties into a chilling narrative of abuse.

Still despite this paradoxical disposition, in yet another respect these explanations are also quite similar: as both of them place the dilemma within the child's body, i.e. their physical functions (as opposed to their 'mind', intentions, motivations), the child is not the potential source of agency (a lie) anymore, but the dilemma is conceptualised as a physiological, a cognitive problem. So both assumptions pass the question back to developmental psychology without having to name the child as the agent of a deliberate lie.

And here suggestibility as a concept is crucial. Suggestibility provides a thought structure, a concept, that can explain a lie, or indeed an erroneous statement, that nevertheless is not motivated (but still performed) by the child. So suggestibility solves the dilemma of having to mistrust children again following the undeniably bizarre and scandalous revelations. Suggestibility helps to justify the coexistence of both assumptions and delivers the possibility of a physiological/biological reason as to why a child might not tell the truth - might not tell what really happened - while being subjectively and sincerely convinced to do so. This is why one initial and central aim of research in this area was to identify the
underlying physiological developmental correlate for a heightened susceptibility to suggestion: children's memory processing.

This is where I would like to commence with a more detailed outline of the course taken by modern suggestibility research. I will follow a broad trajectory illuminating salient tropes, topics, and debates, in order to give a sense of the reciprocity and the inherent dynamics driving this research. Hence this is not a systematic review of research into suggestibility, but an attempt to examine its broader structure and to understand the problems faced by this scientific endeavour that is undertaken on such ambiguous and shifting societal and political grounds.

Let me clarify my perspective towards this kind of research. Following the specific trajectory I have outlined in the introduction to this thesis, that is, following my specific mode of demonstration, I would like to explore modern suggestibility research from 'within'. That is, my aim is to explore it on the basis of its own paradigms leaving alternative critical accounts and explicit critique aside. Hence in chapters 2.2 to 2.8 I will broadly follow the researchers' own construction and operationalisation of the phenomenon and capture the debates and issues that arise from within this research perspective. This will allow me to outline, on their own terms, what these approaches aim to do, which problems they create and acknowledge, how they address these problems and to what effect. This way it will be possible to capture the implicit efficacy of suggestibility as it presents itself to researchers within this cognitive-experimental framework. It will be possible to explore the effects of, and the nature of their appreciation for the peculiar frictions that arise around suggestibility in a manner similar to the frictions observed in chapter 1. This mode of demonstration allows us to see how this research folds back against itself, how it appears to impinge on itself. This is why I have earlier called this a paranoid mode of demonstration (see overall introduction).

As outlined in the introduction this 'mode of demonstration' should not be misunderstood as an attempt (or the pretence) to deliver a 'neutral' or objective account of this research. Following my own theoretical framework I am critical of this research and my aim is to peel out problems within it. Still, I would like to unroll and deliver my critique by working 'through' experimental-cognitive suggestibility research, following and appreciating their trajectory, and thereby simultaneously demonstrating the paradoxes that reside within. Hence while my account of this research might appear descriptive, simply following it's rationales and aims, the way I have arranged my description is deliberately aimed to expose it's problematic structure. It is deliberately designed to expose the efficacy of suggestibility within it and thereby demonstrate how suggestibility does the critical work. For theoretical background see for example Deleuze (1986), Deleuze (1990, p. 98-99).

I will explore perspectives that are critical of this kind of research in chapter 3.
2.2 Definitions and research paradigms in modern suggestibility research

Having side-stepped the issue of an overall definition for suggestibility, modern suggestibility research operates on a multitude of overlapping and, at times, contradictory paradigms and approaches.\(^{51}\) This makes it difficult to describe the overall focus of modern suggestibility research. However, on the basis of its pragmatic link to cognitive memory research and forensic practice it is plausible to determine a broad form of ‘interrogative suggestibility’ as a central focus of modern suggestibility research. That is, suggestive influences during any kinds of questioning and interrogation. However, there is a more narrow definition for ‘interrogative suggestibility’, a concept associated with the work of Gisli Gudjohnson (1984). His research is focussed predominantly on the problem of false confessions by adult suspects, but he has more recently extended his focus to investigating witness suggestibility. He defined ‘interrogative suggestibility’ as...

"...the extent to which, within a closed social interaction, people come to accept messages communicated during formal questioning, as result of which their subsequent behavioural response is affected." (G. Gudjohnson, 1984).

More broadly and with regard to children’s suggestibility, one of the most influential definitions is the one offered by Maggie Bruck and Stephen Ceci. 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 rather operational definition is quoted frequently, regardless of its vagueness and despite the lack of a theoretical framework to support it.

Overall there are three main experimental paradigms in modern suggestibility research. **Firstly**, most of the experiments follow a ‘post-event misinformation’ paradigm, according to which originally encoded information can be altered by additional false information that is encountered during the retention interval. This is the strategy used in Loftus’ initial leading question experiment. Experimenters will stage an event for participants and during the time elapsing between the event and the later recall task, the unwitting participants will be exposed to misinformation about this event (e.g. via questions or stories that contain false details, or via repeated interviews that implicitly ask for such additional false details or by related pictures that contain false details). In a final interview participants will be asked to report the initial event and some will be seen to mix up details of the event with what they have subsequently seen or heard.
Secondly, 'interrogative suggestibility' will be investigated by exposing participants to for example leading or coercive questions or peer pressure during a single interview to determine whether they will alter their statements or stories during a conversation.

The third general paradigm is that of 'implanting false memories'. Here a variety of methods is used to persuade participants to remember events that have never happened to them. The proposition is that a false memory could be implanted into a person's mind. Loftus' 'Lost in the mall study' is a famous example for this kind of research.

This is a very rough distinction. Most experiments implicitly use more than one of these paradigms and employ a mixture of suggestive techniques.

2.3 Children's suggestibility and memory processing

Investigations of children's memory processing circulate around the different phases, encoding, storage and recall of information, and try to determine how and at which of these stages errors, shifts or omissions may occur. Experiments using events that range from memorising 'word/item lists' to recalling brief insignificant encounters with confederates show that younger children usually remember fewer details and are more likely to go along with suppositional misleading questions. So cognitive development, and thus age proves to be a central factor: The less mature cognitive abilities are and the less basic knowledge exists, the less information seems to be encoded. This results in a weaker memory trace for an event. Hence younger children are assumed to be more prone to accept misleading information, because they have weaker memory traces for the real event and thus might not recognise the contradiction with the misinformation. Furthermore the misleading cues are likely to be unwittingly integrated to fill memory gaps.

However experiments that support this 'trace strength hypothesis' also show that more knowledge can heighten the danger of succumbing to erroneous suggestions, because "...knowledge can be a double edged-sword..." (Ornstein, P. 2002, p. 38). For example children's existing script knowledge about a visit at the paediatrician was on the one hand shown to help them recall a specific visit in greater detail. But on the other hand this prior knowledge increased the danger of omitting something that had happened exclusively at this particular visit, but was not part of the child's script. Additionally children would be more likely to report details that had not happened at this particular visit but that indeed were part of their script, and thus, of their expectations.

A visit at the paediatrician is certainly not exactly equivalent to experiencing sexual abuse, but it is assumed that the physical involvement and the child's lack of control and knowledge of the situation represents a reasonably close experience. Hence this experiment
was also based on the hypothesis that the examination of children’s body, being a physically significant personal experience, would result in more authentic and thus less corruptible memory traces. Yet counter to the researchers’ expectations the results indicated that in this case physical involvement did not make any difference to the fallibility or robustness of children’s memory at all.52

Ornstein (2002) points to similar difficulties arising around other memory-factors that are frequently studied: memory decreases when not reinstated but the act of reinstating can itself be very problematic as it might alter the stored information. **Stress** is found to increase vigilance during an event which can enhance encoding and thus increase the amount of information stored. But stress has also been reported to impede encoding. Researchers also highlight that the degree of **plausibility** children attribute to the misinformation they are given, directly determines whether they will accept it or not. Yet again it is remarked that the degree of plausibility cannot be assessed in general because it depends on the individual child’s prior knowledge about and attitude towards a particular topic. Finally it is observed that even neutral cues and non-suggestive questions can make a huge difference to children’s memory performance.

„Instructions that promote completeness have also been criticised for fear that they promote speculation, fostering the perception that more is better.“ (Saywitz, K. 2002, p. 98)

This is a crucial insight, because ‘asking’, in some way or other, is acknowledged to be the only possible way to find out what is actually represented in the memory.

“**We recognise that there is no direct readout of the status of an underlying representation, but we suggest that memory performance immediately after an event has been experienced can be taken as a proxy measure of what has been encoded**” (Ommstein, P. et al 2002, p. 40).

In the light of these findings the long-standing and so far unchallenged thesis that **age** is one of the main factors influencing the susceptibility to suggestion, is found to turn ambiguous as well. A study by Goodman (Goodman, G. S. et al 1991) showed that children as young as 3 or 4 can be just as resistant to suggestion as 6 or 7 year old children. Poole 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. They come to the ambiguous conclusion that...

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52 This example refers to an experiment conducted by Clubb, P. A. et al (1993).
"...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).

Meanwhile ambiguity seems to be taken for granted in this field. Even authors like Ornstein who support the 'trace strength hypothesis', are willing to make general concessions to completely opposite views, inviting a complex and more context sensitive perspective.

"These findings are consistent with a view of age related changes in the nature of children's underlying representations. Alternatively, however, it may be the case that there are minimal or no developmental changes in memory, trace strength and organisation. Indeed it is possible that the elevated performance of older children can be attributed to other factors, such as age related differences in children's skills in (...) using narrative forms to discuss what is remembered and in understanding the social dynamics of the interview situation." (Ornstein, P. et al 2002, p. 34).

It is clearly difficult to argue for a general susceptibility to suggestion and the characteristics of cognitive processes alone cannot explain the dynamic underlying suggestive processes. These paradoxical results have indeed helped to highlight the importance of contextual factors and thereby underlined the need for a more complex perspective. Looking at social psychological factors there is a consensus that interviewer behaviour, and thus interviewer bias is the most crucial contextual factor to explain the paradoxical findings of the memory approach. Hence I will now turn to considerations around interviewer bias.53

2.4 Interviewer bias

Again court reality gives the cues here. Analysing the interviews conducted with the child witnesses in the MacMartin pre-school case, Ceci (Ceci, S. J., Bruck, M. 1995) named interviewer bias as a central source of suggestion. He defines interviewer bias as a prior belief that manifests in the single minded attempt to gather only confirmatory evidence. The interviewer does not challenge the child as long as its report is consistent with his own opinion, they do not explore alternative explanations, uses repeated leading questions, encourages speculation and imagination, induces stereotypes about the accused and creates an accusatory or confirmatory atmosphere.

An experimental elaboration of this paradigm by Leichtman and Ceci (Leichtman, M. D., Ceci, S. J. 1995), showed that when pre-schoolers who had been induced with a negative stereotype about a fictional character introduced to them as Sam Stone, and were

53 I would like to acknowledge a central problem that is the topic of ongoing debates and that applies to all experimental research in this field. Trying to create an ecologically valid experimental setting for children that simulates anything even vaguely equivalent of an experience of child sexual abuse or the experience of giving testimony in court, inevitably raises serious ethical and technical problems. While my outline will feature a variety of ways to address and tackle these problems, it is not meant to be a methods critique or a contribution to the internal ecological-validity-debate. Bearing in mind the difficulties inherent to this research, I have chosen an exemplary set of experiments that I consider to be among the most circumspect and transparent experimental operationalisations.
additionally interviewed about a visit of this character in a suggestive manner several times, they would pick up and freely report suggested information. For the experiment the children had been divided into two groups one of which heard a story describing Sam Stone as a very clumsy person, while the other group did not hear the story. Resonant of the set up Stern had used in his ‘reality experiments’, about a week later a confederate, introduced to the children as Sam Stone, visited each of the kindergarten groups for a few minutes, doing nothing in particular. Consecutively both groups were split in half again and half of those children who had heard the stereotyping story, and half of those who had not heard the story, were interviewed repeatedly using various suggestive techniques (leading questions, accusations, inviting speculation), indicating that Sam had soiled a soft toy and damaged a book. The remaining children (again, half of these were stereotyped and half of these were not stereotyped) were interviewed repeatedly, but only received an open invitation to report what Sam had done during his visit. Then there was a final neutral interview that was conducted in an identical fashion for all children.

The result was that in the group of children who had been stereotyped and were additionally questioned in a suggestive manner, 30% of the 3-4 year olds and 46% of the 5-7 year olds, freely reported they had seen Sam Stone destroying a book or soiling a teddy bear. In the control group and in the stereotype-only conditions no allegations were made.

In the ‘suggestive interview only’ group that contained those children who had not heard the initial stereotyping story about Sam Stone, very few children made allegations. Hence this experiment delivered impressive experimental proof of the fact that stereotyping combined with massive suggestive questioning by the interviewer can be shown to have considerable effects. But again equal relevance is accorded to the reverse side of this outcome, because the experiment also reveals the remarkable resilience of most children in all the other conditions and of a large number of children who were in the highly influenced group. Still, it is argued that for court reality even the existence of a few suggestible children is worrying.

So it is plausible to see the interviewer as an effective source of blatant suggestion. Yet this does not answer the question of where such a strong interviewer bias originates. Furthermore, it seems reasonable to conclude that once the maliciousness of these techniques is known, they could be banned. Interviewers could be instructed to refrain from using these techniques, and to be aware of their own prior assumptions. However another analysis of interviewer behaviour, which draws on data from less sensational cases, found that there is a more subtle dimension to this problem. Poole and Lindsay (2002) point out that the majority of forensic interviews are in fact not overly coercive and that
interviewers usually see themselves as well-intentioned and free from bias. Their study underlines the fact that...

"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).

Hence biased influence is not a straightforward issue after all. Following Poole and Lindsay it is neither as obvious as in those scandalous cases Ceci (Ceci, S. J. et al 1995) analysed nor is it necessarily a motivated or deliberate act of the interviewer. It is nonetheless somehow regarded as caused by the interviewer. This creates a paradox for the possibility of instructing interviewers, because they can hardly be asked to avoid something they are not actually doing. This also means that strictly speaking hereby suggestion becomes implicitly recognised as what could be called an act without an agent, a sort of 'non-agentic act'. But Poole and Lindsay's analysis leads us a step further even. They "...found various ways in which the children might influence interviewers" (Poole, D. A., Lindsay, D. S. 2002, p. 358) by introducing ambiguous information to the interview. Following an in-depth analysis of interviews with children that had been conducted for earlier studies on source monitoring, Poole and Lindsay concluded that very often children fail to identify the topic of a conversation, drift the topic without prior notice, and that they are at times quite difficult to understand.

In an attempt to improve interview techniques Poole and Lindsay assumed that an open question asked at the end of every interview could be particularly helpful to avoid suggestion and to get a complete report. The final question they used in one of their studies was: 'Think about what you told me. Is there something you didn't tell me that you can tell me now?' Poole and Lindsay assumed that this would encourage children to address misunderstandings and to elaborate on omissions and things they had not yet reported. But in their study this question was prone to elicit the most bizarre responses. An eight year old girl replied: "Well I touched Sophie and I thought I could make my cold disappear if I, I thought somebody was dead back there." The interview had so far circulated around a science demonstration that neither featured anyone by the name of Sophie nor had it death or a dead person as a topic (Poole, D. A., Lindsay, D. S. 2002, p. 358).

These are singular case examples, and it cannot be concluded that every child would get this open question equally wrong, but it is a striking example of how easily and how fundamentally questions can be misunderstood and it shows how differently children might perceive conversational cues that may appear to be absolutely straightforward to adults. Crucially for modern suggestibility research these considerations allow the casting of new light on the complexity of conversational dynamics.
It is furthermore very disquieting to imagine the irreversible misunderstandings that could ensue if this particular case had been a forensic interview in which the interviewer, having no knowledge about the real event, might ask follow up questions to investigate this obscure answer, because the interviewer will most likely assume that it is related to the topic of the overall interview.\textsuperscript{54}

This paradoxical finding does not invalidate what has been said so far, but instead of clearly naming factors and causes of suggestion, the problem seems to have dispersed and proliferated further into the complex dynamic of the conversation. One could even say that the direction of suggestive influence has reversed: according to these new findings children must be seen as the source of suggestion. Yet, as we have seen, they are the potential source of a suggestion that might subsequently turn back against them, because as soon as the misled interviewer tries to enquire further into what he mistakenly believes to be the problem, the child might go along with this not noticing the misunderstanding. In the light of this one could say that suggestibility does indeed engender an implicitly reciprocal dynamic, it stretches both ways. On the one hand interviewer influence may well be a 'non-agentic' act, an effect exerted or expressed unwittingly, and on the other hand children can also be the source of suggestion via the answers they give. I would like to pursue the latter issue first: Are children's answers suggestive, and is it possible to investigate 'children's suggestiveness' as a factor?

2.5 Children's suggestiveness

A number of studies have investigated the answers children give to various types of questions. It has so far been established that children will rarely reject a question saying 'I don't know' or 'I don't understand', but will readily provide answers even to bizarre questions or to questions where they obviously cannot know the answer. This has been found to be particularly true for specific, closed or forced choice questions. It thus was assumed that children are unable or unlikely to reflect on the appropriateness of their knowledge source and therefore would answer thoughtlessly, or would provide any reply simply out of anxiety and/or compliance (cf. Hughes, M., Grieve, R. 1980).\textsuperscript{55}

\textsuperscript{54} For another complex example involving children's reciprocal reasoning within suggestibility experiments see Robinson & Whitcombe (2003).

\textsuperscript{55} It should be noted that Margret Donaldson's research into children's understanding and reasoning forms an exception from this general assumption. Her research delivered an early and, at the time, exceptionally original and insightful account that could have informed later research into suggestibility (Donaldson 1978).
In the context of the unfolding complexity around suggestibility research, researchers took a renewed interest in these classic experiments concerned with children's reply patterns. Waterman et al re-examined earlier studies and conducted further experiments, which show that the replies children gave in earlier studies had most likely been misinterpreted (Waterman, A. et al. 2002). For example in the earlier studies the answers 'no' and 'yes', given in reply to a question that was constructed as a 'bizarre' question (e.g. 'Is a jumper angrier than a tree') were rated 'wrong' because these answers seemed to accept the question as a reasonable one, rather than recognising and rejecting it as bizarre and meaningless. Waterman (Waterman, A. et al. 2002) conducted experiments similar to the classic setting, but she additionally asked children to elaborate on their answers. A significant number of those children who initially answered 'no' to the bizarre question, now clarified that their 'no' in fact meant that they regarded it as a silly and unanswerable question, which they meant to indicate by saying 'no'. Hence their 'no' was not an answer to the question but was meant to dismiss the question altogether. Among those who had replied 'yes', some lengthy reasoning could be found about the anger of trees. So even among those who regarded the question as answerable, most children were able to reflect about their answers and were aware of their knowledge source. Additionally these new experiments showed that adult's and children's perception of what can be regarded as a 'silly question' differs dramatically, a factor that had been given little consideration so far.

Furthermore the authors point out that this insight into the diverse meanings of children's answers throws a very odd light on the entire field of memory research. Traditionally experiments in this field, following the experimental paradigms of cognitive psychology, have relied on forced choice or closed yes-no questions, without allowing an elaboration as to if and how the question was understood and what the answer was supposed to mean. Again it is quite disquieting to realise that this is exactly the kind of interview scenario children usually face when being questioned in court, where closed yes-no questions are asked most frequently. So depending on the interviewers knowledge base, children's answers can in fact be suggestive. Hence once again the notion of suggestion has

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56 In an attempt to find out whether children and experimenters shared attributions of bizarreness, Waterman et al asked children what they would consider a bizarre or a silly question. It turned out that for example some children regarded questions as silly, when they suspected that the answer was already known to the interviewer. So rhetorical questions are silly questions!

57 Most studies on the questioning of children mention that specific, closed 'yes-no' and forced choice questions are more useful because they elicit more information than free recall (cf. Ornstein, P. A. 2002). Yet, the equally common insight that these questions will not just produce more answers, but also more false answers has been widely ignored until recently. (This had been a central insight of the study W. Stern reported in 1904).
proliferated even further, the framework of meaning has become even wider with regard to the complex effects that can be attributed to children's answers. What about the other question that emerged from the research into the more contextual factors of suggestibility: the apparently 'non-agentic' influence of the interviewer, and hence the question of whether well-intentioned, neutral questioning can be suggestive?

2.6 The suggestiveness of asking

A study by Ceci (Ceci, S. J et al 1994), which attracted huge public interest, was designed to investigate the more subtle and involuntary influence of interviewers, by using repeated but neutral questioning. Over a period of ten weeks two groups of children aged 3-4 and 5-7 (n = 96) were repeatedly (once a week) asked about four events (two positive and two negative events) that had supposedly taken place within the last twelve months. Two of these events were true and had been confirmed by the parents, but the other two were false and had been invented by the experimenters. One of the false events described how the child went on an excursion in a hot air balloon and the other false event referred to an accident where the child's finger had been caught in a mousetrap and the child had been taken to hospital to remove the trap. These false events were identical for all children. All four events were read out to the children and they were asked to decide which of these events they really experienced. In the initial interview they also learned that the list was prepared with assistance of their parents but that some of the events might not have happened to them. In the final interview the result was that children assented to 34% of the fictitious events. This underlines that even non-coercive, repeated questioning can have a considerable impact.

Yet the most remarkable finding of this study was obtained as a by-product. After the study a different interviewer tried to debrief those children who had assented to a fictitious event by telling them the previous interviewer had made a mistake and that they had not actually experienced the events. But not all of the children went along with this debriefing, and 27% persistently clung to their assent and did not even change their mind when challenged by their parents. It was concluded that these children may well have developed false memories. Stephen Ceci received huge international media attention when claiming to have proven that it is possible to implant false memories into children's mind.
"Last month Professor Stephen Ceci announced the results of a series of experiments that demonstrate for the first time that children in certain circumstances can be led to believe in events that never happened, false memories. (Tomorrow's World, BBCII 11. November 1994; my transcription)" (Burman, E. 1997, p 298).

This claim sparked criticism from various directions and still is the focus of an ongoing debate. At this point I would like to outline two noteworthy reactions. Firstly the experimental set up was the target of critique. Some critics argued the results could have been a mere result of children's compliance, and there was considerable doubt as to whether true alterations of encoded memory had occurred. Secondly the overall gesture of this kind of research was attacked. The trope of experimentally implanted false memories sparked a heated debate about the ethics of memory research with children in general. I would like to deal with the former criticism first and describe a study that altered Ceci's experimental design in order to investigate the question of compliance versus actual changes in memory.

2.7 The suggestiveness of implanted memory

In Ceci's 1994 study children were merely asked to assent to the false events, which leaves the question unresolved whether they were just complying with the task, or whether an actual memory alteration had occurred. A study conducted in Germany by K. Erdmann (2001) sought to investigate the possibility of actually implanting 'real' false memories. She conducted an experiment similar to Ceci's, but instead of seeking consent, the children were asked to deliver elaborate narratives about the events. This was to ensure that the respective memory had formed and that children were not just compliantly consenting to the question.

67 children between six and eight were interviewed suggestively four times over a period of eight weeks, and then questioned neutrally in a final fifth interview by a different, uninformed interviewer. For each child the false and true events were individually chosen with assistance of their parents. To balance the set of events both the true and the false events were chosen to represent a positive and a negative event each (Ceci also used positive and negative experiences). The events also represented topics that were designed to have some personal and bodily significance (e.g. being badly injured after falling with the bike; getting a bee sting). This strategy followed the assumption that events with physical involvement are particularly difficult to implant as false memories because the memory for painful experiences is assumed to be less corruptible than other memories. These events furthermore operationalise what is assumed to be an ethically acceptable correlate of an abuse experience, which is meant to increase the ecological validity of the experiment: all of
the events chosen bear the main characteristics of an abuse experience. They are negative experiences that involve distress, physical pain and a feeling of loss of control.

In the first interview children were told their parents had told the interviewer these events had happened to them, and they were instructed to report as many details as they could remember about these events. If they denied any memory of an event they were persistently assured they would be able to remember it and asked to think about it really hard and to try again. This exact same structure applied to all four interviews. In the fifth interview a new, uninformed interviewer asked the children about the events in a neutral and open fashion. They were now instructed to freely report all they truly remembered about the events.

In the final interview 58% of the children delivered and maintained detailed descriptions of false events, even when challenged by the neutral interviewer. This clearly supports the claim that false memories can be implanted. But again, a remarkable side effect of the study adds complexity to the overall result: some of the narratives depicting false events had grown so detailed, and were delivered so willingly, that the researchers suspected the 'false memory' cues might have elicited the true memories of real events, that had previously been forgotten, and were now recovered. To resolve this uncertainty the researchers went back to the parents to confirm whether or not these events (that had previously been invented as 'false events') might after all have happened. Confronted with the accounts of their children some of the parents now stated they also remembered that the events in fact had happened and others were at least unwilling to disconfirm. This is quite remarkable because the parents had initially helped to invent the false events by confirming that they had not happened to their children.

So once doubt had invaded the scene, there was no straightforward way to distinguish truth and falsehood anymore. Children's narratives had somehow authenticated themselves, because, following the underlying paradigm that detailed accounts of bodily experiences are most likely to be authentic, it was not possible to brush aside these well formed narratives about unpleasant physical events without simultaneously disqualifying the assumptions about the body-authenticity link. Furthermore an unknown number of truly remembered details from similar real events could have been intermingled within the children's narratives about the false events in an attempt to produce the account they were asked to give. This would make the narratives hybrid false accounts comprised of an unknown

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58 Following the aim of this chapter I only present some of the basic aspects of this experiment, which is in fact constructed around a much more complex agenda. It for example also included a 6th, 'partly-debriefing' interview in which a new interviewer told those children who had given testimony about the false events, that the former interviewers might have made mistakes and that some of the events could have been entirely false.
quantity of true details. Yet this ultimately also reflects back on the other children’s answers, highlighting that any of those could have contained an unknown quantity of true details.

Obviously, this does not invalidate the study as a whole, but following the complexity that has emerged as a result of this experiment, one can add that the researchers conscientiousness has in this case helped to add another level of complexity to the framework and thereby elicited another paradox: either parents and researchers have been outsmarted by the successfulness of their own techniques, hence they have become suggestible to the product of their own suggestions; or alternatively the accounts could be regarded as conglomerates constructed alongside the false memory cues and saturated with recovered details of real events, which thus bear an unknown degree of veracity. To escape these inconclusive alternatives one could also accept the outcomes as true recovered memories, yet this is as speculative a solution as the other two.

Considering this experiment alongside the earlier examples, suggestibility stands revealed as a rather circular topic. It continuously transgresses the boundaries of the theoretical and experimental framework. Where the experimental framework is widened to follow up on the new factors that arose, the results end up referring to yet another factor outside the respective framework, adding yet another layer of complexity. With this last experiment suggestibility has even begun to explicitly draw in and affect the more concrete aspects of the inquiry, as well as invading the basic structure of the experimental set up itself. It explicitly makes those operators that are meant to be outside the experimental set up to control it (i.e. experimenters and parents), part of the scenario and thus part of the problem they are trying to investigate. So what goes wrong in these experiments? Is this purely a methods problem?

The latest research does suggest improvements in experimental procedure that address some of the technical problems implicit to the studies I quoted so far. To ensure for example that a false event is in fact false and does not turn out to be a formerly forgotten real experience, Mazzoni and Memon (2003) invented a minor medical procedure that does sound plausible even to an adult with lay medical knowledge, but is definitely a false event that can never have happened to anybody in the past, because it was confirmed to have no

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59 It is peculiar to observe how language is at odds with itself as a result of this experiment and the attempt to capture the emerging problem in its own terms. How can we talk about ‘true experience’, ‘true false memory’ (is there a false true memory?), ‘false recall’, truly and falsely recovered events (if they are ‘recovered, where do they come from?’); or should it be ‘real experience’ versus false ones and ‘real memories’ versus false ones?!
medical use or indication whatsoever. Furthermore prospective field studies like the one conducted by Williams (1994) or Goodman et al (2003) are attempts to deal with the problem of ecological and internal validity. Goodman et al investigated how and whether real traumatic events are forgotten and remembered by interviewing acknowledged abuse victims many years after they had given evidence in court. In a similar vein other experimental intricacies could certainly be addressed.

Let me recapitulate what is at stake here. My point here is not about incongruities within the methods used or about improving experimental procedure. What we can observe here is a dynamic similar that in chapter 1. Suggestibility seems to systematically escape the experimental set up, and the more complex the investigation the more explicit it’s undermining of the experimental structure. This leads me to suspect that the ambiguous and very informative complexity that results from Erdman’s study could only emerge because the experiment was indeed designed so carefully, and because the results were reported minutely and analysed in a transparent fashion. In this sense I would argue that, beyond the results the researchers lay claim to, this experiment did in fact highlight some crucial characteristics of suggestibility. However, it does this in a manner that does not conform to the traditional expectations of the experimenters. The experiment illuminates that those diversions, complexities and contradictions, that the experimenters might consider peculiar forms of artefacts or effects of insufficient experimental planning or control, are indeed recurring and significant characteristics of suggestibility; they are effects of the friction suggestibility carries into the experimental framework. Crucially this friction does not just render the experimental set up ambiguous, but it also clearly highlights, in a fashion that cannot be (and evidently is not) ignored by the researchers, the problem implicit to the ‘container’ concept of memory this research is based on.

The problems encountered in this experiment point to the ubiquitous ambiguity of ‘memory contents’. If we have to consider invented ‘false’ memories to be at danger of ‘turning’ into, triggering, or even ‘melting into’ true ones, the distinction between those two entities (true/false) becomes useless; disquieting even were we to call them ‘real’ versus ‘false memories’ (can the ‘real’ melt into the false?). Even more so if we consider that after the experiment it is not quite clear anymore who or what exactly is the source of the ‘true’ and ‘false’ events. Neither are the researchers sure what exactly they implanted and what

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60 They suggested to their participants that a skin sample had been taken from their little finger when they were three or four years old. It was confirmed that there is no general medical indication for this procedure, which implies that it is very unlikely anybody has ever experienced this as a child.
was ‘recalled’, nor can the parents tell with any certainty if not, after all, the ‘false’ events they confirmed to be false might be true. So the various ‘containers’ involved in designing and participating in the experiment blend into each other, their contents and their efficacy for one another, while clearly evident, has no distinct direction. Similar to Eysenck in chapter 1, this dynamic is something the researchers cannot but acknowledge in some way. So inadvertently the researchers have produced an effect that spirals out of control, creates a slightly paranoid dynamic, engendering (paradoxical) meaning beyond the experimental framework. Crucially the experimenters cannot easily ignore this effect or brush it aside, even if they might ultimately call it an artefact. This is a dynamic very similar to that observed in chapter one.

Before I return to this crucial point in more detail I would like to step back into the experimental framework of modern suggestibility research and explore the second noteworthy effect of Ceci’s 1994 ‘mousetrap’ experiment (see chapter 2.6). It sparked a heated debate about the ethics of implanted memory research with children.

2.8 The suggestiveness of suggestibility

Herrman and Yoder (1998) harshly condemned Ceci’s 1994 experiment and highlighted the serious ethical flaw of the experimental implantation of permanent false memories in children because “...this research violates children’s rights to create their own memory.” (Herrman, D., Yoder, C. 1998, p. 204). With regard to the immaturity of children’s cognitive abilities they fear that participation in these studies could impede children’s development because the deceit which is revealed to the children in the debriefing procedure will...


Furthermore they warn that the reputation of psychology as a discipline might be damaged by these kinds of experiments because “...deception can result in less trust in psychological experimenters.” (Herrman, D., Yoder, C. 1998, p. 203). Hence they demand the immediate suspension of these experiments, remarking that they are not just dangerous but also redundant. Herrman and Yoder regard the frequently quoted anecdote of Jean Piaget, who reported to have been convinced of a false memory between the age of two and fifteen, as

Piaget reports that until the age of 15 he held memories of an incident where someone had tried to abduct him from his pram as a small child. It was only uncovered as an untrue story when years later his then retired nanny remorsefully returned a watch, a present that Piaget’s parents had given to her for defending the baby, and confessed that she had invented the whole event.
a sufficient proof for the existence such false memories. No further empirical investigation is needed according to Herrman and Yoder, as the mechanisms and circumstances of the phenomenon are already exhaustively described in the literature (Yoder, C., Herrman, D. 1998).

Ceci replies to this criticism by giving a detailed description of his experiment, clarifying that he did not deceive children, but debriefed them by explaining the interviewer had erred. Furthermore he considers the children's refusal to retract their assent to the false events as proof of their confidence, underlining the robustness of their self-esteem. They "...were not cowed into submission" (Ceci, S. et al 1998). Ceci does not specify whether he believes permanent false memories had been implanted during his experiment or not, but his remarks leave the matter explicitly unresolved. 62

Another contributor to this debate, also a central figure in the field of suggestibility and false memory research with children, is Gail Goodman. She resolves the ethical dilemma by claiming that quite probably no false memories were implanted during Ceci's experiment 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 depicts numerous methodologically obscure details within Ceci's account of his study, which, as she claims, prohibit straightforward conclusions anyway. 63 Yet beyond that, she points out that there are many alternative ways to plausibly account for the children's assent to the false events.

"...children may maintain that a false event occurred for reasons other than a false memory, such as to 'save face', avoid the possibility of punishment, appear knowledgeable, or continue to play the game" (Goodman, G. et al. 1998, p. 211).

Goodman states that the true ethical problem is to be found in the fact that researchers like Ceci have overstated their results in false memory research, and have thereby fuelled a dramatised and simplified public understanding that could finally lead to improper

62 An interesting aside is that this is the first article in which Ceci delivers a full description of the experimental procedure including the instruction children were given. The original article does not include these details. Furthermore some of his later references and summaries of this experiment quote percentages and numbers that do not match those stated in the original article. See for example Erdmann (2001, p. 17) who points out these numerical irregularities.
63 In return it should be mentioned that Ceci for his part has, in an earlier publication, presented a very critical view on Goodman's experiments. Examining data from two of her experiments, that are frequently quoted to support the view that even young children are resistant to suggestions, he comes to much less favourable, if not contrary conclusions (see for example: Ceci & Bruck, 1995, pp. 68-74). Pezdek (1998, p. 323) points to the peculiarly contrary conclusions drawn from apparently similar studies conducted by researchers around Goodman on the one, and researchers around Ceci on the other side and concedes that any conclusion at this state would be premature.
application in the legal context. Yet she also challenges the critics Herrman and Yoder for basing their critique on very superficial knowledge of the experimental literature and on vague third hand references.

"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." (Goodman, G. et al 1998, p. 210).

Goodman stresses that any of these unaccountabilities, irrespective of their origin, aim or well-intendedness, will finally feed into the public with...

"...a chilling effect on certain categories of child sexual abuse investigations and prosecutions (e.g. those involving young children) by creating a general atmosphere of disbelief of children's testimony." (Goodman, G. et al 1998, p. 208).

Referring to the situation in the USA she finds this reflected in decreasing numbers of reported abuse. One could argue that these are due to a decrease in false allegations, or a result of an actual decrease in the prevalence of child sexual abuse, but Goodman stresses that experience shows that decreasing numbers of reported abuse can more plausibly be blamed on a recurring fear in children or parents to report abuse because nobody will believe them. A further negative repercussion of implanted memory research she mentions is the noticeable effect the public debate will have on the decisions of jury members, as can be observed in actual cases and in mock juror studies.64

So these studies are not just seen as methodically 'untidy', ambiguous in themselves and with results open for all kinds of interpretations, but above and beyond that, these studies and debates around them spill into the public debate with adverse effects.

These are strong and considered caveats, but there is an additional layer of complexity to this debate. Goodman, who investigates the false memory paradigm herself, is by no means a less ambiguous voice than any of the other commentators. It is a widely acknowledged intricacy that all of these 'central figures', who are experts in the various fields of suggestibility research, are always pragmatically reabsorbed into the adversarial dynamic of the legal context: either physically, when serving as experts in court; or indirectly when they are referred to as authorities to bolster or discredit a certain claim. This is an abstract but at the same time explicitly personal dilemma, captured pointedly by Ceci himself.

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64 Jurors take the false memory debate as a clear indicator for children's unreliability. Additionally the 'common sense' of jury members expects obvious signs of distress as natural concomitants of an authentic abuse narrative (crying, stammering and a medium nervous breakdown). Hence diminishing stress by giving children the opportunity to give testimony by video link, or by preparing them for court appearance has lately been considered undesirable because it ruins their performance of authenticity, and raises suspicion of suggestion. Thus lately the problematic tendency is observed that some experts in the field counsel a 'no preparation strategy' to preserve the children's performance as credible witness (cf. Cashmore, J. 2002; Vrij, A. 2002; Quas et al 2005).
“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).

Following this remark we can conclude that after all it seems that suggestibility itself is suggestive.

2.9 Recapturing the course of modern suggestibility research

Let me pause here to consider the overall dynamic implied in my description, because at this point my outline of modern suggestibility research has led straight back to the societal issues I described in chapter 2.1. When looking at Goodman's final comment on the ethics debate and her warnings regarding the unfavourable repercussions these discussions will have on child abuse investigations, it seems as if twenty years of modern suggestibility research have led back to where it started in the 80's: a general distrust in children's testimony. Yet now it is not children's (or indeed adult's) vivid fantasy or their assumed inability to recall and testify, but their assumed susceptibility to an obscure variety of suggestive influences that threatens to create an atmosphere of generalised suspicion.

Hence, as already pointed out in the brief excursion that followed chapter 2.7, the more elaborate investigation of children's suggestibility has become, the more it has ended up adding ambiguity to the problem and thereby it has ultimately undermined children's testifying in court rather than supporting it or otherwise clarifying their status. Herein research has, to some extent ended up feeding into what could indeed grow into a 'suggestibility hysteria'.

Yet, looking at the different forms of experimental operationalisation employed to capture suggestibility, and the problems each of them faced, another very familiar dynamic has become visible. Suggestibility proves to be a pervasive, 'slippery' topic, it evades capture in a manner peculiarly reminiscent of the problems faced by researchers at the beginning of the 20th century (see chapter 1). We can see even more clearly now how suggestibility has a tendency to spill over, to seep out of the experimental set up within which it is being examined. Suggestibility is itself suggestive, infecting every layer of the inquiry with a dynamic of increasing complexity and uncertainty. It betrays efforts of experimental control and differentiation, ultimately casting explicit doubt on the researchers themselves when scientific and societal issues grow indistinguishable for them within the very concrete results of their experiments. In this sense I would argue, suggestibility carries a critical dynamic into the explicit layers of modern suggestibility research. With reference to my critical theoretical framework one could say that suggestibility carries a deconstructive dynamic into this research. Suggestibility communicates the historical, societal and personal
specificity of these experiments to the researchers in a very concrete manner. Let me explain what I mean by that by recapturing the dynamic of modern suggestibility research as described in chapters 2.3 to 2.8 briefly. I began at what could be described as the ‘basic’ level, by looking at research around singular factors of memory processing, then following a trajectory to more and more complex and contextual factors.

When investigating suggestibility by analysing the memory processes of children, the categories of cognitive development have turned out to be ambiguous. While apparently relevant, they exposed a paradoxical dynamic: memory trace strength, script knowledge and meta-cognitive strategies for encoding and retrieval proved to work both ways. Depending on the circumstances they could enhance, but also diminish susceptibility to suggestion. Additionally they proved to be age related, yet it had to be acknowledged that ‘age’ itself is not a distinguishing factor. Results of different studies were contradictory and minor contextual changes in the experimental setting were seen to level out or even reverse the age differences (see chapter 2.3).

Approaching the problem from the other side, by trying to systematise the features and techniques of the suggester proved to be a valid trajectory as well. Leading questions, an accusatory or confirmatory atmosphere, authority, encouragement to speculate or the induction of stereotypes could be proven to have significant effects. Yet, on the other hand the same studies showed that many children remained remarkably resistant to these blatant techniques, without offering any systematic explanation for these interpersonal differences (see 2.4). Furthermore, taking into account that strong biases and blatantly coercive interview techniques have become quite rare, the focus had to be adjusted to examine the more subtle, implicit and rather ‘non-agentic’ forms of interviewer influence (see 2.5). And here, when taking a closer look at the significance of the answers children give, the direction of suggestibility reversed. Now children turned out to be the source of suggestive influences (see 2.6). When considering the false memory paradigm, and the question of whether entire memories can be implanted, even more ambiguity emerged and suggestibility proved contagious to the overall experimental set up (see 2.7). Suggestibility apparently infected parents, who were wondering about the true fictitiousness of supposedly false autobiographical narratives; and it infected researchers, who were left wondering as to whether the deliberately implanted false memories might have triggered the recovery of true memories. With regard to the ethics debate it finally became obvious that suggestibility could be contagious to the overall methodological framework of experimental research (see 2.8). It could be seen to transgress the scientific community as a whole, inciting debates that in a peculiar way exposed implicit conceptual paradoxes and
the ambiguous basis of the research paradigm, as well as the societal implications of such research and such debates. Ultimately it exposed the political and personal stakes inevitably resonating within this research.

Crucially we could see that to some extent this ambiguity communicates itself to the researchers within the experimental framework. The debate in chapter 2.8 showed how ultimately nobody can be regarded (or see themselves) as a neutral and faithful contributor, and any claim to a certain truth must appear highly suspicious in one context or another. And this dynamic is difficult to ignore because simultaneously, in a regressive loop of paradoxicality, researchers themselves are confronted with the unexpected domino effects of their own claims, which suggestively feed back into the pragmatics of applied science and resonate in concrete decision making processes. That is, facing the wider societal implications of this research and the debates around it, researchers are confronted with the uncontrollable side-effects their research may have on concrete decision making processes: be it the decisions of judges, jury members, psychological experts and lawyers who have to assess a concrete case, or those of parents and children who wonder whether it is worth reporting or respectively disclosing an abuse.

Following the trajectory of my demonstration from chapter 2.3 to chapter 2.8 we can say that by investigating suggestibility, modern suggestibility research has implicitly destabilised, rendered paradox its own conceptual and scientific framework. It grows into an almost paranoid proliferation of meanings and issues that point to ever more complex implications and reciprocities. This is what I meant when saying earlier that suggestibility carries a 'deconstructive' dynamic into this research. It communicates the historical, societal and personal specificity of these experiments to the researchers in a very concrete manner.

Peculiarly we can also see that the definition Ceci and Bruck (1993) offered for suggestibility has not lost its pertinence. In its ambiguity it still applies.

"Suggestibility concerns 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).

Yet, with regard to the subversive dynamic suggestibility introduces into this framework one could juxtapose Bruck and Ceci's definition to a slightly altered version that captures the overall dynamic as well.

'Suggestibility concerns the degree to which children's encoding, storage, retrieval and reporting of events can influence a range of social and psychological paradigms.'

Clearly this definition is an ironic inflection of the actual definition, but it expresses nicely what is at stake here. Following my demonstration we could see how the dynamic reversed and it was the paradigms and theoretical presuppositions themselves that were affected,
influenced and unsettled by the way children performed in the experiments. This again is a distant reminder of the 'Mesmer effect'. It is the point where the question of what the phenomenon under investigation is, gets entangled with the question of the set up, the procedure that is supposed to investigate this phenomenon. And this is where the inner workings of experimental cognitive psychology are exposed as they grow problematic to itself (both, the 'container' model of memory, as well as the structure of the experimental method grow ambiguous).

2.10 Concluding remarks on modern suggestibility research

At the end of chapter one I qualified early suggestibility research as a story of beginnings and inversions. It seems that this is even truer for modern suggestibility research, where the problem of overlapping settings, diverse approaches and contradictory results has become even more pronounced. Hence again there is a sense of suggestibility being resistant, exerting a peculiar subversive power. What is new to the dynamic though, is the way in which issues of the law have become interdependent with suggestibility research. There are undeniably serious and uncontrollable reciprocities between research into children's suggestibility and legal practice, meaning that researchers, and thus psychological theory and practice, have (involuntarily) become an explicit part of the problem they are trying to solve. Crucially, researchers are aware of this. It is evident how the disquieting autonomous effect this research can have, to some extent forces researchers in this field to take a more and more contextualised perspective, to explicitly acknowledge blind spots and to critically reposition themselves towards their own research continuously. Hence it is not at all easy to ignore these ambiguities or to gloss over them.

However, this does certainly not mean that researchers in modern suggestibility research were suddenly turning away from an experimental framework. Looking at the way the difficulties are discussed, it is clear that something crucial is being systematically overlooked. Bruck and Ceci for example issue a clear warning about the pitfalls of instrumentalising scientific findings in the courtroom. But they come to a rather naive conclusion.

"Research on this topic has been fast finding its way into courts of law, used by one side or the other to bolster or discredit child witnesses' testimony. (...) a need exists for practitioners to sift through this research carefully, making certain that the studies they call upon resemble the case at bar in terms of the type of acts, the severity of suggestions, and so on. Failure to do this could lead to miscarriages of justice." (Bruck, M., Ceci, S. 1999, p.436-437).

In view of the number and heterogeneity of approaches, studies and paradigms on offer in this field, this is a reasonable but also paradoxical and slightly disquieting recommendation.
We have seen how difficult it was even for researchers to define or distinguish different types of suggestion, let alone to experimentally isolate and simulate them. Hence attempts to identify the occurrence of any one type of suggestive influence in a concrete case, where the exact circumstances cannot be reconstructed with any certainty, will prove even more difficult, if not impossible. In this light Ceci’s well-intentioned recommendation for practitioners to ‘...make certain that the studies they call upon resemble the case at bar...’ represents a virtually insoluble task. Reviewing this literature is time absorbing, cumbersome and confusing. And particularly a sincere and circumspect reading would almost certainly leave a practitioner in a very tentative and ambiguous position. Indeed, Ceci himself makes this very point in a later article that summarises the current state of knowledge in suggestibility research. Enigmatically he states that under certain conditions children can be suggestible.  

“We emphasize the word ‘can’ because these same studies also demonstrate that not all children succumb to the baleful effects of these conditions; some are quite resistant to suggestive interviews, and, as yet, we have not been successful at identifying who these children are. (…) Hence not all children are equally vulnerable to suggestive influence and we have no sure method of knowing whether the children involved in a given case are the rule or the exception.” (Ceci et al 2002, p. 118).

Given Ceci’s earlier warning this is a slightly perplexing statement. Clearly both statements indicate that Ceci is not just aware of some of the ambiguities, but that he also (unsurprisingly) positions himself firmly within the experimental framework. Regardless of how he might view the tension between the two statements, it is evident that the forced awareness combined with remaining within the experimental framework does create an explicit paradox. If viewed from the perspective of a legal or psychological practitioner this is a disquieting paradox and it is one that is difficult to ignore even from an experimental perspective.

A similar awareness is reflected in other researchers’ statements. Saywitz and Lyon for example take note of it with regard to the vague recommendations that are given to practitioners for the assessment procedure itself.

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65 Ceci lists the following ‘approved’ conditions under which children can be suggestible: when they experience repeated erroneous suggestions and hold pre-existing stereotypes (Leichtman & Ceci, 1995). When they are repeatedly asked to visualise fictitious events (Ceci et al. 1994). When they are asked about personal events that happened a substantial period of time ago and there has been no ‘refresher’ in the interim (Bruck et al. 1995). When they were suggestively asked to use anatomically correct dolls (Bruck, et al. 1995; Bruck, M., Ceci, S. J., Francoeur, E. (in press). When they are questioned by a biased interviewer who pursues a hypothesis single-mindedly (White et al. 1997).
"Interviewers are often cautioned that too little and too much rapport development is deleterious, but some illusive poorly defined level of rapport is optimal. The experimental literature is practically silent on this fundamental question." (Saywitz, K. J., Lyon, T. D. 2002, p. 102).

Even so, suggestions about how to solve such problems remain firmly within the experimental framework. Lately most researchers in the field have become convinced that to overcome the existing problems, the research focus needs to shift from the child to the interviewer, taking a more systematic look at the effect their demeanour has on children’s evidence.

"With regard to the recent data, the question, "How suggestible are children" seems overly focussed on children’s behaviour, because error rates are influenced so dramatically by interviewer’s behaviour (e.g. preliminary instructions they provide and whether they structure opportunities for children to clarify their responses..." (Poole, D. A., Lindsay, D. S. 2002, p. 368-369).

Bruck and Ceci agree with a shift in focus, even though it remains unclear what exactly constitutes the ‘skill of the interviewer’, which makes this a somewhat unsatisfactory conclusion.

"In a very real sense, the reliability of young children’s reports has more to do with the skills of the interviewer than to any natural limitations on their memory." (Bruck, M., Ceci, S. 1999, p.436).

Further, the authors of the study that analysed German family court files to investigate a suspected epidemic of false accusations of sexual abuse come to a similar conclusion.


"Hence the problem of suggested false statements is not a problem persisting on the children's part: there is no deficit on the children's part, but inadequate diagnostic strategies combined with the biased perception and the selective evaluation processes of adults create the problem here."

Yet despite such more contextually oriented suggestions, and despite the apparent ambiguity of suggestibility, more recent approaches have also aimed to develop scales that can measure suggestibility as such.

Echoing Eysenck’s research, attempts are made to discover individual differences in susceptibility to suggestion, as well as its qualities as a distinct trait or measurable state. Gudjohnson (2003) for example has developed his concept of ‘interrogative suggestibility’ further and refined the ‘Gudjohnson Suggestibility Scale 1’ (GSS1) (Gudjohnson, 1983), putting forward the GSS2 (Gudjohnson, 1997; 2003). This test aims to allow a general measure of witnesses’ or suspects’ interrogative suggestibility. Parallel to this Scullin & Ceci (2001) have developed a similar scale that aims to provide a standardised measure of children’s suggestibility. While such scales are not currently being used by courts of law (e.g. in the USA or the UK), legal professionals in both countries view these developments
with interest. Clearly the development of such a scale creates a tension with Ceci’s earlier concession to the fundamental ambiguity of the phenomenon of suggestion.

Goodman’s contribution to the ethics debate and her strict warning not to underestimate the uncontrollable dynamic interaction of every aspect in this system springs to mind again: she clearly pointed to the fact that new approaches to research and the way research results are launched and discussed are linked to the acquired and attributed positions and the demeanour of academics/experts, which again interact with the appreciation of legal professionals, media coverage, public opinions etc. So reconsidering Goodman’s point, the shift of focus from the child to the interviewer can be identified as a mere reshuffling of factors. Unable to address the full complexity, research focuses on another causal centre.66

In this context we can see pertinence and relevance of Binet and Stern. Reconsidering their work it becomes obvious that their experiments do not just bear a striking resemblance to what has lately been accomplished in modern suggestibility research, but taking into account their analysis of the problem at hand could make a crucial contribution to the current debate. Most importantly Binet and Stern delivered the crucial analysis of the fundamental definitional vagueness underlying the concept of suggestibility and pointed to the need to establish a general concept and close definitions before investigating the phenomenon any further. Following Binet’s definition of suggestibility as ‘experienced uncertainty’ and integrating Stern’s conceptualisation of ‘active’ and ‘passive’ suggestion as not bearing any direct causal connections, it is quite clear that any operationalisation that presupposes a distinctness of the phenomenon and a causal connection, will achieve ambiguous results (see chapter 1.3). Hence modern suggestibility research has not just been reluctant to draw on already existing knowledge about experimental designs and the intricacy of questioning and interviewer behaviour, but modern suggestibility research has also persistently ignored or side-stepped the fact that suggestion and suggestibility are ill-defined, vague and over-inclusive concepts that have already caused considerable problems in earlier years.

It is a common move in modern suggestibility research to explain the ambiguous and deeply contentious variety of approaches by pointing to the supposedly short history of this research. Pezdek (2002) for example apologetically concludes her review with the remark that this research is still in its infancy. But regarding the intriguing farsightedness

66 Examining child witness practice in England in the later part of the thesis we will see that this is exactly what happens. The new focus shifts pressure onto interviewers. Their demeanor and questioning techniques are now the focus of polarised critique and intervention. As a result of this dynamics incur that are just as detrimental as the singular focus on children and their suggestibility.
and complexity of those accounts offered by Binet or Stern a hundred years earlier, it is seems more appropriate to argue that modern suggestibility research, rather than being in its infancy, is suffering from infantile amnesia.

However, I need to capture the issue at stake here more precisely, because clearly I do not mean to say that it is enough for modern suggestibility research to ‘remember’ and draw on some ‘forgotten’ knowledge. Considering the resistant dynamic suggestibility causes within modern suggestibility research, we could see that there is much more at stake than just a missing piece of information. It is not just about a forgotten aspect, a result that could simply be salvaged from Binet’s or Stern’s work and used to fix modern suggestibility research.

What I have tried to demonstrate via this specific mode of demonstration, is that suggestibility causes a structural paradox. As it manifests throughout the history of psychology this structural paradox of suggestibility relates to, exposes and unsettles the principles of experimentation. This is what I meant earlier when I said that it carries a deconstructive dynamic into the experimental framework. In a more abstract sense we could also say that suggestibility makes experimentation express its own impossibility; it makes it express its own paradox. Chertok and Stengers (1992) spell this out with regard to the commissioners’ attempt to examine animal magnetism. While the context and some of the underlying assumptions have certainly changed, the overall problem matches the one Chertok and Stengers describe.

“In other words, the bodies examined by the commissioners could not, like chemical substances, be abstracted from their past. One cannot expect reactions from them determined solely by the momentary action they are subjected to. This problem of articulating the notion of “cause”, as it is used in physics, with that of memory has yet to be solved by experimental sciences operating on living subjects.” (Chertok & Stengers, 1992, p. 17).

At first glance one could say that modern suggestibility research does not take their participants to be ‘chemical substances’. It does acknowledge them to be social and historical beings. Yet, the cognitive conceptualisation of memory as a ‘container’ in the head that contains and processes the information inserted into it following general principles that can be detected, inevitably reduces this outwardly acknowledged historicity to just another factor affecting these principles. Furthermore the principle of an experimental approach is to stage controlled expositions of cause and effect. Hence the aim of modern suggestibility research is indeed to control this historicity, to purify and isolate factors relating to a specific participant, in order to detect general patterns of cause and effect. The notion of ‘cause’ is, in a fashion very similar to the commissioners’ difficulties, at the centre of the problem, initiating endless re-negotiations of the circumstances that will allow its unequivocal identification. So while suggestibility’s protean character was always
seen to necessitate the continuous reinvention and questioning of the conditions under which suggestibility should be examined, researchers have not realised that these very conditions, these experimental ‘set ups’, are part of what is creating this protean character of suggestibility as researchers chase ever new possibilities of ‘causation’.

Suggestibility expresses and exposes the problem of ‘cause’ within experimental psychology, or as I said above, it makes experimentation express its own impossibility. Additionally we could see that it explicitly communicates this paradox to the researchers, who are forced to alter, widen and readjust their perspectives. And while this does not necessarily lead to a fundamental reflection about the theoretical and methodological frameworks as such, the researchers are provided with continuous disquieting reminders about their own uncontrollable position towards the concrete efficacy of their research within practice.

At the same time it is clear that these are not just theoretical or methodological questions. These questions have a concrete relevance because suggestibility has grown inseparably linked to a range of serious, complex and pressing social issues. Hence these questions directly concern the lives of a large number of children and adults, and they polarise and perplex the scientific community and the legal system just as much as the general public. So suggestibility is present as both an effect or a dynamic, and a topic or a phenomenon for investigation.

How are we to deal with this ‘double presence’ of suggestibility and its intricate connection to issues of child sexual abuse? How could the intertwinedness of memory, childhood and expertise be explored and addressed in a field that is so volatile and delicate that it seems impossible to avoid becoming part of the polarising dynamic that (however good the intentions) has so far always ended up being at the cost of those children or adults who are victims of sexual abuse or of the over-enthusiastic activity of legal or psychological professionals, campaigners and therapists.

The next chapter will address these questions by tracing the problem of suggestibility research further into a critical psychological perspective.
3. Critical perspectives in psychology - Suggestibility as a liminal resource

"Suggestion is impure; it is the uncontrollable par excellence. (Chertok & Stengers, 1992, p. xvii).

In this chapter I will trace suggestibility within a critical psychological framework and explore the possible contribution of these perspectives to understanding the complex links between sexual abuse, suggestibility, memory, childhood and expertise.

Following the overall trajectory from Mesmer to Freud, to Eysenck and finally Loftus, Ceci and Goodman, we could see how the history of suggestibility research has gradually become the history of trying to understand prevent, detect and prosecute child sexual abuse. It thereby engendered multiple connections to related legal, societal, scientific and psychological issues such as memory, development, true recovered or indeed false memories of sexual abuse, children’s credibility and psychologists’ credibility as witnesses in courts of law, the dynamics of disclosure and secrecy, and ultimately issues of trauma, therapy and cure. Inevitably the history of suggestibility thereby also became part of the gendered history of the marginalisation of women and children.

I would like to introduce a number of critical approaches to psychology that have examined these very issues and analysed minutely why and how they are inherently misconstrued within traditional experimental psychology.

Finally I would like to invert the perspective of my inquiry and examine what suggestibility does to psychology. This means to take a closer look at the frictions and epistemological short-circuits emerging around suggestibility as it becomes visible as a liminal resource. It transgresses disciplinary boundaries, pervades and connects pragmatic and theoretical, personal and general considerations offering a complex perspective at the issues of memory, childhood and expertise. On this basis it will be possible to reconsider what it means to ask the question of suggestibility and how it could be asked in a relevant manner.

3.1 Critical developments in psychology

Given the seriousness and notoriety of issues around childhood sexual abuse, suggestibility and legal practice, and considering the apparent problems faced by the experimental method, it is not surprising that some of the very same intricacies and paradoxes I am encountering have already been subject to systematic criticism. During the 70s an initially small number of researchers from within and outside of psychology had begun to turn
away from- and harshly criticise experimental methods in psychology, arguing that they systematically fail to capture the complexity of human life (Holzkamp, 1985; Shotter 1975; Gergen; 1973).

Critical developments in psychology were driven by the aim to highlight the way in which the discipline of psychology had come to be structured as an experimental science, systematically obscuring what is most relevant about human thinking, speaking and interacting, namely its social contextual nature. The overall aim of 'critical psychology' was to uncover the powerful ideological, rhetorical and discursive dynamics that were seen to be instrumental in obscuring the fact that psychology itself (and 'science' in general) is a distinctly social practice that always has a political dimension. Inspired by the work of philosophers and social theorists such as Marx, Wittgenstein, Barthes, Foucault, and Derrida, and sometimes following explicitly political (e.g. Feminist, Marxist) agendas, critical approaches have shown that the production of knowledge in psychology is always inseparably linked to historically and socially specific webs of power relations that assert and perpetuate an existing societal order. Commencing in the early 70's and linked to feminist (cf. Henriques et al, 1984; Haaken, 1998; Burman, 1994; Walkerdine 1988) and marxist critique (cf. Holzkamp, 1985; Osterkamp 1975; Parker 1992) or in various ways following what has been termed the 'turn to language' in psychology by focussing on issues of ideology, rhetoric and conversational patterns (Billig, 1991; Potter & Wetherell 1987; Edwards 1997), these approaches have highlighted the central importance of intersubjectivity, language and discourse for understanding human life and human interaction.

"There are many strands to the turn to language in the discipline. One of the influential forces here has been the group of writers who participated in, and exacerbated, the 'crisis' in the late 1960s and early 1970s. The self-styled 'new paradigm' psychologists – a group which includes Ken Gergen (1973, 1982), Rom Harré (1979, 1983) and John Shotter (1975, 1984) – drew attention to the importance of meaning and the accounts people gave of their actions." (Parker, I. 1992, pp. xi-xii).

Looking back at the history of suggestibility research, there can be little doubt that from the beginning the question of the scientific truth of the phenomenon has simultaneously been a question of political power, closely enmeshed with broader societal dynamics. There is for example the case of Franz Anton Mesmer and Animal Magnetism. It does not matter whether we want to consider Mesmer a fraud or a true genius who fell victim to the ignorance or envy of his colleagues, and the political establishment of his time. Either way, when looking at the manner in which his case was handled it is impossible to disentangle negotiations about scientific criteria of truth and knowledge from those negotiations organising the politics of power relations, and the interests of institutions or individuals.
representing them (e.g. the Faculty of Medicine\textsuperscript{67} or Louis XVI of France). Or looking at Freud, who had, by first launching and then recanting the seduction hypothesis, inspired the persisting link between child sexual abuse, memory and suggestibility, we can see a similarly dense enmeshment of scientific and societal/political dynamics. Beyond the intriguing, but ultimately insoluble, question of what exactly made Freud recant the seduction hypothesis, there is no doubt that the ‘Aetiology of Hysteria’ and its recantation emerged from, and incited far reaching societal effects way beyond the realms of the scientific debate.

Over the last three decades critical approaches in psychology have produced a huge body of work unpicking the way psychological knowledge and expertise relates to and informs power structures. Critical approaches have problematised the cognitive concepts of memory, critised conceptions of childhood and development and highlighted the manifold implications these have for issues of child sexual abuse and children’s position in society in general.

In the following I would like to introduce these critical approaches, particularly focusing on their contribution to issues of memory, childhood and expertise. My introduction will focus on the Anglo-American context, concentrating on two agendas that can roughly be distinguished by their different epistemological and methodological presuppositions. As we will see, they are based on very different views about the role of language and discourse and their relation to what should be considered the ‘real’. In consequence they differ with regard to the way in which they conceptualise the position of the analyst and their subject matter of research as such. Given the diversity of critical perspectives this distinction inevitably simplifies the complexity of the whole field. Nevertheless, this distinction generally characterises the relationship of the two perspectives I would like to focus on and thus serves my own analytic trajectory.

Since these two agendas along with their analytic focus and methods, will also inform my own data analysis in the last part of this thesis, I will introduce their theoretical framework and rationale in some detail. In order to simultaneously capture their perspective towards suggestibility, I will introduce each of the approaches by drawing on a specific exemplary article that directly addresses issues of child sexual abuse, disclosure and suggestibility. I

\textsuperscript{67} With explicit directive power the Medical Faculty does not just order their members to stop practising a disqualified method, but directly orders them to abjure from any personal belief in the method, proof of which is their signature. So here the power of scientific knowledge is exercised directly upon the individuals’ belief. And regardless as to whether the scientists ‘really’ stopped believing in animal magnetism, the order to not exercise or even hold this belief, inevitably and powerfully invades their belief system. In turn such a measure reflects the fact that the Medical Faculty evidently saw the need to exercise some sort of control over the beliefs held by their practitioners.
have chosen these two specific examples out of a multitude of undoubtedly important articles because they explicitly link into the topic of my enquiry and can thus serve as exemplary cases.

3.2 Social constructionism and discursive psychology: disclosure as discourse

In her article “Disclosure as Discourse. Theorizing Children’s Reports of Sexual Abuse” Clare MacMartin (1999) introduces a number of different discourse psychological research traditions, and exemplifies how research into children’s suggestibility and disclosure of abuse can benefit from each of their particular perspectives. She positions herself within the “broad context of the social constructionist movement (e.g. Gergen 1985; Sampson, 1993; Shotter, 1995), wherein language is constructive of reality; hence sexual abuse and its disclosure are viewed as social constructions.” (MacMartin, C. 1999, p. 504-505).

Drawing mainly on the work of the philosophers Wittgenstein (1992) andAustin (1962), social constructionist approaches have pointed to the constructive nature of language, arguing that words should not be seen as representations of inner psychological states, but are in themselves actions; “words are deeds” (Wittgenstein, L. 1992, p. 46) that need to be examined in the immediate context of their emergence and for the effect they have within conversational exchange. Hence the subject-matter of psychology should not be conceived of as inner, unobservable states (as sought after in traditional experimental psychology), but language itself is central for the conduct of social life and should thus be understood as, and examined as in itself constituting what are then seen to be psychological phenomena. The basic idea is that people continuously produce and reproduce themselves and their relationships to others via language, via the stories they tell about themselves and the ways they address themselves to others making use of the narrative resources, engaging in the ‘language games’ (Wittgenstein, 1992) that are available to them. It is in this sense that language is understood not as a ‘transparent reflection’ of reality, but as constructive of reality. Thus every day speech, language and discourse bear the key to understanding human action and interaction. Following this agenda the study of social psychology therefore examines how language is used in social life, where the latter is understood as primarily structured by naturalistically occurring talk-in-action. ‘Talk-in-action’ is seen to be the primordial social interactive occurrence.

Conceptualisations of memory that have emerged in the context of the social constructionist and discourse psychological framework form a crucial backdrop for MacMartin’s conceptualisation of disclosure as discourse. Challenging the agenda of cognitive memory research they have re-conceptualised memory and remembering as a
product of collective conversational interaction and thus a constructive social and communicative phenomenon. Following this concept memory needs to be understood in relation to the specific social and interactional context in which remembering is demanded or takes place and this implies that issues of rhetoric and ideology play a crucial role for the way memories are presented and negotiated (Middleton & Edwards 1990; Edwards & Potter 1992; Edwards 1997).

More recent developments, only loosely related to the social constructionist framework, or following a more distinct political and critical discourse analytical agenda (see chapter 3.3), have taken the re-conceptualisation of memory even further. Middleton and Brown (2005) for example explore issues of remembering and forgetting in the context of what they term the "Social psychology of Experience". Drawing on the work of Henri Bergson (1908 [1991]), they demonstrate the importance of duration, experienced time and individually lived experience for the understanding of memory as more than just a linear chronology of occurrences, 'items', or 'pictures' stored in the brain. Driven by a distinctly feminist agenda that problematises issues around sexual abuse and memory of sexual trauma in particular, Haaken (2003) and Campbell (2003) for example explore different paths to an understanding of remembering. Haaken considers remembering as an ongoing reconstruction and transformation of a present lived self while Campbell conceptualises memory as a dynamic that is crucially driven by relational aspects, with both, the literal aspects of the memory and the transformative reconstructive work which is involved, happening whenever remembering is demanded.

Disclosure as discourse

MacMartin acknowledges that making claims about the socially constructed nature of sexual abuse has inevitable moral ramifications, not least because it can produce certain misunderstandings. Hence she takes great care to underline that this position does not deny the material reality of child sexual abuse and that it indeed allows her to maintain a clear moral stance against any such harm done to children.

"...epistemic constructionism 'is about the constructive nature of descriptions, rather than of the entities that (according to the descriptions) exist beyond them' (Edwards, 1997, p. 48). It does not, therefore, deny the material reality of child sexual abuse, which, at its most basic level of description, involves people as physical beings. In extreme cases, sexual abuse can involve bodily insults, such as lacerations and impregnation. Yet this material reality is ultimately constructed in and through discourse, which is not to insist that child sexual abuse is reduced to words. Sexual abuse is no less real for being viewed as a social construction.“ (MacMartin, C. 1999, pp. 505-506).

Accordingly she stresses that this talk of ‘construction’ must not be mistaken for ‘fabrication’ (MacMartin, C. 1999, p. 506). MacMartin’s conceptualisation of abuse as ‘construction’ and of disclosure as the ‘co-construction’, applies to all reports (and to any
other interaction), so the notion of 'construction' is not intended to qualify the validity or possible contamination of such reports (and it would hardly make sense to classify all reports as 'by definition' false or fabricated).

MacMartin argues that instead of examining disclosure as an individualistic phenomenon, with the individual child (as the provider of information) at the centre of attention, children’s reports of sexual abuse could be captured more productively when conceptualised as “socially situated collaborations”, that is, as socially specific “co-construction” between a child and an other person.

“Conventional models of children’s disclosures of sexual abuse not only fail to stress their linguistic basis; there is a concomitant lack of emphasis on the intersubjective, regulatory aspects of reports of child sexual abuse. In contrast, a discursive approach to children’s reports treats disclosure as talk, emphasising the historical and communal processes involved in its production. […] Rather than depicting disclosure as the transparent medium by which the facts of sexual abuse are transmitted, we may reformulate it as social practice by which the meanings of past actions and feelings are collaboratively constructed as sexual abuse.” (MacMartin, C. 1999, p. 505).

MacMartin illustrates how the concept of co-construction directs the gaze away from the child, as the individual (self-contained) ‘vessel of information’, and towards the way the dynamic interrelation of the child and the interviewer shapes what is being said. This means to take into account that the child and the interviewer are inevitably positioned towards each other according to (in this case almost exclusively) asymmetrical relations of power, knowledge, conversational skills and access to resources. These relations are reflected in positions that speakers find available to them whenever they enter a specific discourse. The nature of these positions, their availability to discourse participants, and the way they are taken up and negotiated, are crucial for the way children and adults (and any two people) jointly produce and interpret talk.68

With particular reference to Conversation Analysis (Nofsinger 1991), MacMartin goes on to demonstrate how this line of thought can explain phenomena of suggestion by analysing the way turn taking takes place between conversants. Conversation analysis examines the patterns of naturally occurring speech, focussing on the way the meaning of an utterance is determined by the micro rules and conventions that structure turn taking and sequence in joint discussions (see also Sacks 1992). The shared routines of everyday conversation will make us responsive and inevitably guide our expectations as to how one turn in a

68 An interesting comparison resulting from this line of thought is the collision of the way adult/parent child interactions are commonly organised in everyday play situations as opposed to a forensic interview situation. In an everyday setting the adult will often structure and scaffold the interaction for children, establishing linguistic routines in which the child participates (see for example Wood, Bruner and Ross 1976). The child thus comes to expect such assistance from adults. In contrast to that such scaffolding would, in a forensic interview, be seen as leading questioning, undermining the credibility of children’s subsequent statement, and would thus be strictly avoided. Yet, thinking of the linguistic routines, this could also mean that children enter a forensic interview with expectations based on their everyday experience (of being helped along).
conversation follows another, so that a certain initiation will make certain responses more likely than others. For example a question is typically followed by an answer, so participants will, orienting to that, be likely to feel compelled to provide an answer when confronted with a question. Following this thought suggestibility could be re-conceptualised as a certain form of responsiveness to shared patterns of conversation, and hence a situationally specific, normal feature of language and conversation rather than an inner characteristic, feature or trait of an individual person.

"Suggestibility, which has been conventionally depicted as a property of individuals (e.g. a child), can be reformulated as a property of the structure of language and of the responsiveness that characterizes joint actions emergent in conversation." (MacMartin, C. 1999, p. 514).

Concentrating on the situated micro-rules of co-construction in language and in a specific situation allows a move away from regarding suggestibility as a deficiency, a failure of memory, and directs the attention to the fine reciprocal and acutely conversational dynamics that can influence response patterns.69

Furthermore drawing on discursive psychology (Potter 1996) MacMartin shows that it is worthwhile analysing the way a report is presented by a child, with regard to the way issues of interest and stake, and thus, agency and accountability are negotiated. The way a report is shaped and the way a child manages its own position within the report by using particular expressions, phrasings and formulations, is crucial for understanding why reports may change or appear ambiguous or inconsistent. At different times of reporting and maybe when reporting to different people, the child will have to manage different, possibly conflicting or ambiguous relationships to family members, the accused (who may be a family member) or to the person it is reporting to. Hence inconsistencies or ambiguities in different reports need not be indicators of lying or confabulating.

Here positioning theory (Brockmeier & Harré 1997) delivers further insights into how self-positioning within the report is used to manage obligations, (moral) duties, rights, and relationships as they are perceived by the child. For example children might use certain specialist terms to appear knowledgeable, and thus credible; or they might remain silent or suddenly recant accusations in order to position themselves as loyal towards the family or to protect siblings.

Finally MacMartin also points to critical approaches that fall outside the narrower framework of social constructionism and discursive psychology. I will turn to these

69 Looking back at chapter 1.2 and for example 2.3 to 2.6 it is quite clear that this perspective would be able to offer a plausible explanation for the peculiar difficulties faced by the experimental approaches. Yet it also appears to repeat what Stern had already concluded: Every question if first and foremost an 'order', it demands remembering and thus has the potential to suggest (see 1.2).
approaches in the next chapter in more detail. They often follow an explicitly political agenda, taking into account how people are positioned within the context of (and make use of) historically given cultural discourses. That is, complex conceptions, or “metanarratives and interpretative repertoires about sexuality, families, parenting, childhood and mental health, ‘regimes of truth’ about sexual abuse (Levett, 1995, p. 299), children’s disclosures, institutional practices…” (MacMartin, C. 1999, p. 521). Looking for example at the conceptions of childhood (that is, the implicit way we understand and talk about childhood), it becomes clear that the way in which we have come to implicitly associate the ‘child’ with innocence, makes it difficult and ambiguous to picture them as associated with, or even knowledgeable about, sexuality. Additionally the way children are also qualified as vulnerable and dependent, spurs an almost unchallengeable zeal to protect them.

“Stainton Rogers and Stainton Rogers (1992) argue that North American liberal humanism after Freud has reaccorded innocence to the child, the price of which has been the desexualisation of the child and collective unbridled anxiety about adult sexual misuse of children.” (MacMartin, C. 1999, p. 522).

This, MacMartin stresses, is not to propagate the ‘sexualisation’ of children, but the notion of ‘desexualisation’ is meant to sensitise us for the way in which society has come to see any link between children and sex as so unthinkable that a reflected debate or recognition of child sexual abuse become almost impossible. Looking back at chapter 2.1 we can see how this kind of ‘unbridled anxiety’ is indeed reflected in the dynamic of forgetting, polarisation and hysteria that has been so characteristic of the history of child sexual abuse. Ultimately, MacMartin concludes, there is a need to recognise that each disclosure is not just co-constructed within the specific encounter of a child with a family member or professional. But that disclosures also articulate, and thus reflect, the varying social requirements that exist across different discursive contexts and will thus have different effects on the particular way each person involved is positioned towards each other (as ‘perpetrator’, ‘hearer’, ‘victim’, ‘accomplice’ etc.). Hence MacMartin concludes, a discursive approach in the spirit of social constructionism, disinterested in the ‘absolute truth’ of the claims made, is best suited to gain a fully social understanding of disclosures of child sexual abuse.

“A discursive approach, impartial towards the material truth claims of reports, encourages close investigation of the structural features of such reports and the possible functions of variability within and across reportings.” (ibid. p. 523).

Reconsidering the recurring problems faced by the experimental approaches it is quite clear that the approaches introduced by MacMartin make extremely relevant contributions to the issues at stake. By moving away from the ‘cognitive’ model of memory as a ‘container’, and from suggestibility as located within or in some other way specific to the individual, it could
be possible to explain the paradoxes of experimental research. These could now be considered as specificities of conversational interaction. Yet, while this could contribute generally to interviewing practice, there is a conceptual problem within. Looking at ‘disclosure as co-construction’ in a conversation analytical framework would only make sense if we had tape recordings or verbatim transcriptions of the disclosures and such recordings are usually not available. Obviously MacMartin never claims to aim for a ‘suggestion’ detection technique, or even pretends to be interested in the ‘truth’. Indeed, the whole point is to be ‘impartial towards material truth claims of reports’, which is congruent with her self-positioning within a social constructionist framework. However, stepping outside this framework we would have to recognise that these ‘material truth claims’ are exactly what matters most to all those involved in such practices as victims, witnesses, interviewers, judges, barristers, defendants, jury members. Clearly these people hold a material personal, or what could be called a ‘forensic’ concept of memory, truth and fact that collides with the social constructionist framework. But then, to put it bluntly, how can this approach become relevant to these people? Have we stepped too far outside the framework to legitimately ask this question? What is ‘the real’ to those whose ‘reality’ is contingent with what a police officer understands or what a court decides and what does this approach communicate to them? I will return to this question.

The second approach I would like to introduce is represented by Erica Burman’s work. MacMartin has already hinted at this approach at the end of her summary when referring to historically given cultural discourses and metanarratives.

3.3 Critical discursive research and the power of psychological knowledge

In her article “Telling Stories, Psychologists, Children and the Production of False Memories”, Erica Burman (1997) analyses the scientific discourse around children’s suggestibility in order to make visible the persuasive and reconstructive dynamics by which

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70 Reavey and Brown (2006) are pursuing a closely related issue when examining the relational, practical and collective qualities of remembering for adult survivors of sexual abuse, drawing on-, and juxtaposing the approaches to memory offered by Campbell (2003), Haaken (2003) and Bergson (1933). They state that “It is necessary to believe that survivors can bear testimony, can speak the truth of their past experience, without denying that such memories are also co-constructed in an ongoing succession of relationships. But we also think that it is necessary to assume that remembering can (...) be a matter of reconstructing and elaborating past experience in ways that can express ambiguity and conflict.” (Reavey & Brown 2006). While making a crucial contribution to the framework of this debate, and via Bergson widening the parameters of what needs to be understood when considering ‘remembering’, what is still absent from Reavey and Brown’s discussion is the issue of the very concrete and momentous dynamics of memory as it emerges, is told, in one specific moment and how it manages to manifest ‘as’ credible or indeed fails to do so.
this discourse warrants its own knowledge claims. Burman’s analysis is situated within the broad framework of discourse analysis, or more specifically, critical discursive research as Parker (2002) terms it. Inspired by philosophers such as Barthes (1973), Foucault (1980), and Derrida (1976), and following an explicitly political (e.g. Feminist, Marxist) agenda, approaches operating within this framework have shown that the production of knowledge in psychology is always inseparably linked to historically and socially specific webs of power relations that assert and perpetuate an existing societal order. As the structure of language is seen to mirror such power relations and to structure ideologies, the central aim here is to analyse the existing dominant discourses of psychology, in order to show how they operate as powerful instruments of normalisation and control; how they operate as ‘regimes of truth’ (e.g. about ‘madness’ or ‘development’), implicitly maintaining the dominance of a white, male, western culture, based on enlightened rationality and logical thinking.

Basically speaking discourses are “practices that systematically form the objects of which they speak” (Foucault 1972, p. 42). Following the work of Michel Foucault discourse analysis conceptualises discourses as historically specific, complex systems of meaning (e.g. about ‘madness’, ‘family’, ‘childhood’) that literally create and shape the material reality of their objects by organising in what terms, if and when they can be spoken about and thus become meaningful (and thus existent) within social life. Discourse denotes the socially organised frameworks of meaning that define categorise and specify domains of what can be said and done (Burman 1994).

Following Foucault’s (1980) conceptualisation of power as always bound up with knowledge, discourses are seen as the realm within which (and by which) “those who are subject to power continually remake it and their subjection to it as they participate in discourse and regulative practice” (Parker 2002, p. 313). What makes such discourses and regulative practices so powerful is the way in which they assert themselves as to be ‘taken for granted’, as matter of fact and thereby obscure their own constructedness, historical specificity and political valence (e.g. the discourse around ‘childhood’ and ‘development’ asserts itself by appealing to the natural sciences and biology in particular and thereby conceals that its concepts have emerged from and feed into very specific historical and political circumstances). It is the aim of critical discursive research to examine such discourses and to reveal the dynamics of power implicit to them in order to interrupt the ‘ordering’ and ‘normalising’ powers of such discourses.

71 "Discourse constructs ‘representations’ of the world which have a reality almost as coercive as gravity, and, like gravity, we know of the objects through their effects." (Parker, I. 1992, p. 8).
Based on the work of Derrida (1976), and broadly following what he termed 'deconstruction', the aim is to expose the structuring of power in texts and to unravel the implicitly established privileged status that is given to some terms over others. This again relates to Derrida's paradigmatic statement "there is nothing outside of text" (Derrida, 1976, p. 158), because the analysis will treat all objects of study as text exploring the connotations, allusions and implications it evokes. Yet here 'text' relates to the definition of discourse and means 'all things meaningful in the world' as well as 'the way they are meaningful', i.e. the practices that make them meaningful. Hence it should not be misunderstood as limited to 'words' as such, but it means things expressed within, and drawing their meaning from a certain discourse. Hence 'text' in this sense can be writing as well as for example gestures, speech, films, train tickets, or any other conglomerate/form of meaningful signs. So to 'deconstruct' broadly means to render visible the power relations obscurely operating within discourses by showing how their apparent factuality and self-evidence is always based on historically specific and politically valent structures of power (for a comprehensive summary see Parker 1992; 2002). Crucially, as Parker clarifies with reference to Derrida, deconstruction does not imply a relativist or nihilist stance, i.e. it does not "entail moral undecidability, because it is a moral-political endeavour in which certain key concepts, such as justice, are 'undeconstructible.'" (Parker 2002, p. 230). Let me exemplify deconstruction and critical discursive research by outlining an example that is central for my own analytic trajectory and will also play a crucial role in my later analysis.

Discourses of childhood: deconstructing developmental psychology

"...the figure of the child - with its appeal to the natural, the divine and the taken for granted - has flourished precisely to the extent that it obscures its cultural and ideological origins." (Burman, E. 2003, p. 41).

Within this wider discourse analytical framework a number of authors have engaged in a critical examination of discourses around childhood and development, and have undertaken what can be termed the 'deconstruction of developmental psychology'. Hence they examine what exactly is said in a specific moment when speaking of development or childhood. That is, how such a reference gains legitimacy and what is obliterated by it. And

72 It is important to note that 'deconstruction' is neither a specific technique nor a generally recognised method of critique, but a philosophical term first introduced by Derrida, who has explicitly acknowledged its versatile nature and applicability (Derrida 1999).

what it means for persons in a specific context to be referred to as developing or as child and thus to be positioned within a developmental discourse. The critics point out that the traditional notion of development gains it’s apparently unchallengeable and unproblematic stance by presenting itself as a biological concept and by appealing to theories of evolution. Yet, the critics’ analysis shows that the notion of development used within developmental psychology has emerged from very specific historical and political circumstances and employs a conglomerate of concepts that are by no means based on, or even in line with for example the work of Charles Darwin, who is referred to frequently.

"Thus Darwinism is used rather loosely as a category for positively-toned attributions of biological influence. All in all it would seem fair to describe developmental psychology’s appeal to Darwin as a myth: A myth of origin and a myth of legitimacy." (Mors, J. R. 1990, p. 2).

On this view, developmental discourse gains its power by obscuring its historical incongruencies and establishing this link as a scientific necessity. Thereby it cannot just refer to the facticity of the natural sciences, but developmental psychology can also imply the processes related to ‘biological maturation’ and ‘evolutionary origins’. Unravelling the key notion of development the critics dissect its implicit components: linearity (development is seen as following linear chronological stages), directionality (developmental processes are seen to operate towards a predefined goal), and progressiveness (developmental processes are seen as transgressing from inferior to superior states).

"'Progress offers a linear representation of change from a position of deficit or inferiority to one of advancement, improvement or maturity. As an abstract, apparently scientific term shot through with evolutionary nuances, it is easy to forget the profound values that structure what counts as progress, and even more, how it came to be conceived of as a line of transition from one state or place to another. (...) Progress thus came into being as means of regulating diversity and change." (Burman, E. 1999, p. 7).

Following this notion of development children are implicitly conceptualised as little more than a structure of deficits. They are inferior and have to undergo a distinct set of known stages to ‘mature’. The notion of ‘maturation’ implies ‘natural growth’ hence the specific shape and path it takes is again rendered unproblematic because parents’ activity can be regarded as mere support of a process that occurs inevitably; parenting in this sense is ‘natural’, just as natural as growth and progress. Hereby developmental psychology implicitly defines children by their deficits, i.e. by what they cannot do, and it judges them by what they should be able to do, while the appropriateness of their growth can be assessed and guarded alongside the detailed timetable of purportedly natural maturation that minutely describes what is to be anticipated as a further sign of growth.

Implicitly the predefined ‘natural’ goal of this development is the specific prototypical ideal of the enlightened, western, rationally thinking ‘normal adult’. As an implicit result of this
children are not visible as full participants in this present society, because they are positioned as provisional and incomplete ‘becomings’, not yet capable of occupying a serious position as ‘beings’ in the here and now (Morss 1996). The traditional developmental discourse textualises them as constantly shifting between having to be protected, to be guided and to be spoken for on the one hand, whilst on the other hand children are expected to provide their well meaning guardians with the anticipated indicators of healthy maturation. This practice ultimately makes developmental psychology into a powerful tool of ‘normalisation’ and control, creating ‘governable’ citizens.

“Development is presented towards a goal, indeed a goal that not all reach, but which is surely the logocentric pinnacle of advanced, reactional abstract thought. It is this goal which is understood as the most civilized, in the move from animal, savage, primitive and childlike towards the adult and civilized. (...) The goal is a rationally ordered social order, one in which democracy can function on the basis of a citizenry who obey the moral and political order of their own free will because of their advanced stage of development.” (Walkerdine, V. 1993, S. 455-456).

This notion of development renders the work of teachers and parents invisible, it lets us forget that school curricula and parent child interactions are intrinsically social and political issues and not mere ‘growth’ plans that systematically answer to children’s ‘natural neediness’. Following this deconstruction we can also see that what is defined as ‘normal’, ‘natural’ and ‘healthy growth’, and as ‘playful’, ‘happy’ development is a precise capture of a wealthy, western, male childhood, that applies to only a minority of the world’s children, rendering all other constellations of growing up invisible and deficient.

**Deconstructing modern suggestibility research**

From this background in critical discursive research it is clear that Burman is not aiming for a general rebuttal of traditional research by qualifying ‘correct’ methods versus ‘incorrect’ ones. Her aim is to explore how the currently ‘dominant account’, the dominant ‘story’ about the truth of memory and suggestibility is structured and how it operates within the scientific as well as the popular arena. Hence Burman takes a reflexive position towards suggestibility research as a whole. She reverses what she calls the ‘specular apparatus of the psychological gaze’ towards children and examines what it says about psychology as a discipline and a social practice. She examines how psychology warrants its own knowledge claims and thereby structures the institutional parameters and investments that inform our own (including her own) practices as ‘psychologists’ ‘researchers’ and ‘social actors’.
"... in a deconstructivist spirit, I want to treat the objects of our discourses as a resource to inform us, the purveyors of such discourses, of our status (both as psychological 'experts' and as social actors) as its subjects. Thus by turning the focus from the stories (we make) children tell, to our own storytelling practices as psychologists, I am engaging in a practice of critical epistemic relativism to address the ways knowledge is affected by social and cultural forces (Bhaskar, 1978), and in this context to open the terms of developmental psychological inquiry up for critical scrutiny." (Burman, E. 1997, p. 292).

Broadly referring to the critique of developmental psychology described above, Burman outlines how the dominant concepts of 'Children' and 'Childhood', function as a powerful currency within psychological and cultural practices in general because they appeal to 'core cultural assumptions about goodness and immanence' and thus strongly appeal to the need to protect children. Furthermore following the dominant story of development, where 'origins' are constructed as providing truth, for research in this field the 'child' functions as a 'guarantor' of scientific authenticity. Childhood is perceived as the 'origin' per se, the authentic (biological) starting point of all human functions, and will thus be investigated to understand the general mechanisms and processes of development and memory. Implicitly it will thereby also lend credibility to the resulting claims. Herein children become, as Burman puts it, 'methodological devices' by which adult claims about the past can be understood, and can be classified as 'normal' or 'abnormal', true or false. Hence research into children's memory and suggestibility hereby gains great significance for the concrete issues surrounding the question of the true 'recovered' or 'false' nature of individual adults' memories.

Drawing on a research synopsis by Ceci and Bruck (1993), Burman goes on to outline how the overall development of suggestibility research reflects the political and institutional interests at stake for the construction of psychology as a discipline. While she acknowledges Ceci and Bruck's point that the proliferation of research into suggestibility around 1970/1980 was sparked by the courts' increasing appreciation of psychological expertise and by psychologists growing awareness for the pressing problems around child sexual abuse, Burman offers a more 'cynical reading'. She elaborates that investing in the topic of children's suggestibility was indeed highly beneficial for the status of psychology as a discipline, because it helped to increase its scientific standing as provider of superior expert knowledge, and thus boosted its credibility and institutional influence.

"...the 'reasons' for research interests in this topic can respectively be reframed: as (i) claiming greater credibility for psychology; (ii) its role in state activities; and (...) the pressure to find new permutations for old paradigms – with 'going developmental' as a classic fix for a saturated research area: to find a new population onto whom to apply the same theoretical framework or technological apparatus to see if/how the results differ." (Burman, E. 1997, p. 298-299).

This also explains the discipline's, as Burman puts it, 'motivated forgetting' of much of the relevant earlier research in this area, and it furthermore puts into context the tendency to make rather banal claims, or indeed to recycle common sense as scientific knowledge. And
this analytical move is characteristic for discourse analytical work: Burman identifies the bidirectional discursive dynamic by which psychology as a discipline manages to implicitly attach a particular value, a particular significance to a certain piece of information, and simultaneously manages to assert its own expertise and thus powerful influence on our everyday understanding.

"...it tells us what we already know (...) that children do not always tell the truth, that how we talk with children affects what they feel able to say (...). In one sense what this highlights is the role of psychology in marketing the every day as expert knowledge; in another it reflects the role of psychology in informing that everyday understanding." (Burman, E. 1997, p. 299).

Hence Burman concludes that this whole ‘research industry’ in psychology “devoted to disputing the claims of what children know” (Burman, E. 1997, p. 300), also exemplifies the power relations that legitimise psychologists’ expertise about children’s claims. Hence while this same research industry presents itself as guarantor of truth and justice by exposing and denouncing practices of power, suggestion and coercion, Burman’s analysis reveals that these very practices also lie at the basis of its very own discursive structures.

And here Burman points to the fundamental paradox in the research procedure of e.g. implanted memory experiments. She finds it paradoxical that, when inviting children to comment on the status of their own beliefs, e.g. about events they may or may not have experienced, children’s assertive answers to false events should be taken at face value, i.e. as proof for the successful implanting of false memories. This is paradoxical because research into suggestibility is designed to throw this very procedure of assessment, and even the possibility to objectively assess anyone’s convictions, into question. Consequently, why should we, Burman asks, believe children’s assertions at the end of the experiments? Yet, Burman points out, this uncertainty is carefully shored up and concealed by experimental psychology’s moves to avoid such destabilizing relativity in order to secure its own credibility as the prime determinant of truth and falsehood, of science and non-science.

"By such means psychology secures its own credibility, along with that of science and reason, in separating truth and falsehood, knowledge (as justified belief) and folly (unjustified belief). It functions ultimately to manufacture a distance between psychology and other misinformed or abusive practices." (Burman, E. 1997, p. 306).

It is these ‘certainties of psychological truth’ that need to be opened for scrutiny even further, Burman says, in order to understand how studies on memory and children’s suggestibility operate in a context of increased anxiety about sexual abuse on the one hand, and about miscarriages of justice on the other hand.

Similar to MacMartin, Burman concedes that her critique does not and cannot contribute towards actual methods of authenticating children’s testimonies.
3. Critical perspectives in psychology - Suggestibility as a liminal resource

"...it is beyond the scope of this paper, and contrary to its relativist mode, to offer corresponding claims about how children's memories can be authenticated." (Burman, E. 1997, p. 306).

But like MacMartin she underlines that this systematic distance towards claims to an absolute authenticity of experience, may help to understand the complex problems posed by interviewing children, and may thus foster a healthy suspicion towards some of those truth claims that are frequently made. Above all both authors stress that, what they share with experimental psychology, is the sincere concern for the determination of, and just prosecution for, child sexual abuse.

Burman has provided a very different critical take on the agenda of modern suggestibility research; one that delivers a sharp analysis of the political discourses and agendas that drive and maintain the dominant focus of experimental research into children’s suggestibility. Looking back to chapter 2 in the light of this analysis it is not surprising that researchers in that field should make every effort to hold onto their framework even in the face of paradoxicality and contradictory results, because ultimately this framework guarantees the recognition as a 'science' (even if this is at the cost of ambiguous results). Hence Burman also provides valuable analytical tools for my own analysis.

Yet, similar to MacMartin, even if on a very different level, there is an unsatisfactory vagueness with regard to issues of truth. From within Burman’s framework it is clear that any claim to ‘truth’ must in itself become the object of analysis, Burman has made this point quite elaborately.

But taking a step back one might wonder how such a critique could gain relevance for concrete legal practices when it cannot quite refer to what is the most crucial and defining issue at stake for those involved in those practices as victims, witnesses, interviewers, experts, barristers, judges, jury members; when it cannot in their terms refer to what is (for them) ‘the truth’? This seems a naïve question to ask because obviously ‘the truth’ has many denominations and it seems unfair to challenge critical discursive research for something it does not claim to be able to address. But then, what does this critique mean for experimental practice, for legal practice, for victims, for witnesses if it can only talk about such issues outside their framework? How can this critique become meaningful for those within these practices and ‘speak’ within, or address itself to the legal discourse in order to problematise for example Ceci’s research where it is most powerful and problematic?
In different ways the principles of ‘narratively constructed truth’ and ‘discursive impartiality’, as embraced by social constructionist side, as well as the sceptical agenda of resistance against the political power of dominant scientific and legal discourses, will inevitably sit uncomfortably with the legal (forensic) notion of truth and factuality and the law’s inevitable preoccupation with finding out exactly ‘what really happened’. But it will also collide with the very concrete personal relevance of ‘what really happened’, that is likely to form the backdrop of the material, literal approach to truth and reality of those whose narratives, stories, accounts come under the gaze of the law, therapists and researchers.

In a certain sense we can say that both approaches fail to take practice seriously ‘as’ concrete practice, and not just as a ‘setting’ where various discourses or interactional sequences are played out. Neither of the approaches appears sensitive to just what appears to escape from their critical grasp, i.e. the necessity of being able to engage with the truth and its management as and where it occurs.

3.4 Re-capturing the different critical gestures – two approaches to the ‘real’

Such brief sketches can certainly not do justice to all of the, in certain respects very divergent approaches outlined in chapters 3.2 and 3.3. In different ways both of these approaches are highly relevant to the problems that have arisen during chapter one and two. They address the socially constructed intersubjective, as well as the concrete material, historical and political implications of the intersecting issues around memory, childhood and expertise.

Both authors have furthermore presented strong arguments as to why these issues are escaping experimental psychology, and are indeed systematically misconstrued by it. MacMartin highlights its failure to recognise and consequently address the linguistic and social-interactional nature of issues around disclosure, while Burman illustrates that experimental psychology can be seen to have a stake in catering for the legal system with specific kinds of knowledge and is thus complicit “in producing those preoccupations and moral panics from which they then claim to save us” (Burman, E. 1997, p. 303).

As I have pointed out, these two examples also represent very different critical gestures. They operate on the basis of very different assumptions about the subject matter of their analysis, i.e. the kind of ‘reality’ that is open to analysis.

Positioning herself within the social constructionist agenda MacMartin recommends paying attention to the linguistic and social reality of children’s reports as they occur, focussing on talk as social action with goals, functions and effects for the lived reality of those involved.
In this approach 'reality' is considered as accessible only via the language constructions that occur in social context; it is in this sense 'socially constructed'. Crucially this is not meant to imply that there 'is' nothing beyond language; but this approach states that whatever might or might not 'be' there is always accessible only via language. Accordingly here suggestibility features as a property of language, as a dynamic effect of the way conversational practices and routines have come to structure our social interaction. This is why the approaches MacMartin introduces focus largely on the micro analysis of talk and the specificities of conversational, social interaction.

Burman in contrast to that, following the agenda of critical discursive research, moves beyond the question of what suggestibility 'really' is. By engaging in what she calls 'critical epistemic relativism', Burman examines the cultural-political role of psychology as it is reflected within the existing discourses around suggestibility. For Burman the particular way in which suggestibility is presented and examined by experimental psychology is a resource about psychology itself. Its analysis reveals psychology's disciplinary interests, its work of persuasion and its historical warrants, offering clues as to how psychology constructs its own credibility as a science and revealing the powerful mechanisms of normalisation and control operating on the material lives of those who are subject to this knowledge. While Burman's term 'critical epistemic relativism' bears an apparent resemblance to 'epistemic constructionism' that forms the basis of the discursive approaches MacMartin introduced, there is a fundamental difference between the two with regard to their relation to the 'real'. Burman examines discourse as an expression of the prevailing relations of power and knowledge that must always be considered with regard to the very real consequences they have for peoples' material lives. So her analysis has a distinct political agenda and is anchored in what Parker (2002) termed 'critical realism'. While matters of rhetoric and conversational interaction are clearly relevant to this approach, they would always be considered in relation to-, and as part of the broader political and social 'regimes of truth' that govern what can be said, when and by whom.

Following MacMartin the question of suggestibility gets detached from the individual and can be asked with respect to the way language structures can construct social interaction and thus what we can grasp of reality, while for Burman the way the question of suggestibility has traditionally been asked is in itself a discourse that needs examining with regard to its broader political alliances and the material consequences it has for those it is applied to.

However we could see how at this very point a problem emerges. When following these critical approaches the different levels of the issue, the epistemological and the pragmatic
levels of my inquiry become indissociable. Issues of experimental reason, scientific truth and legitimacy (credibility) inevitably become interlinked with issues of a very concrete, 'literal' personal, and what is more, legal truth and the acute question of witness credibility. So in a peculiar way it seems these critical approaches are 'not concrete enough' while at the same time they are 'not abstract enough'. There is a sense of a very abstract epistemological issue reverberating within, or arising from the very concrete instance of reporting and accounting. There is something specifically abstract arising around the issue of suggestibility, and the way it makes us ask such questions, that has escaped these critical approaches. I would like to trace this issue further and present a perspective that embraces, but also goes beyond the considerations of the critical approaches I have outlined above.

3.5 What suggestibility does to psychology: suggestibility as a liminal resource

Throughout chapter 1 and 2 there was a sense of suggestibility being a peculiar form of subversive power in its own right. I would now like to follow up this phenomenon by inverting the focus on the description of early and modern suggestibility research. Rather than looking at the way psychology addresses suggestibility, or examining what the manner in which psychology has addressed this question can tell us about the positionings and alliances of psychology as a discipline (as is Burman’s agenda), I will now examine very literally what suggestibility does to psychology. Let me explain what I mean by that.

When suggestibility first emerged as a scientific topic in its own right in the 1880’s, it was one of the central issues addressed by the equally new discipline of Psychology. However, until today suggestibility has successfully evaded definition. Yet remarkably, this has never led to it being totally abandoned from the sphere of scientific enquiry. In fact, throughout the history of psychology suggestibility has managed persistently to make its way back into the scientific agendas, and whenever the question of suggestibility had to be asked, the sanity of the discipline, or in fact the scientific order itself seemed to be at stake.

This may appear a strong expression, but in all of those instances described as part of the history of suggestibility research, suggestibility ended up being contained, deferred or suspended, rather than being investigated in its own right or even explained (or for that matter being 'declared explained'). The ongoing attempt to tie suggestibility into an experimental framework, in order to extract factors, correlations and causal contingencies, has persistently revealed the complex and evasive nature of a phenomenon that proved itself to be utterly incompatible with the principles of experimental reason, or even the respective scientific criteria. The more refined and intense the efforts, the more evasive and diverse the phenomenon turned under scrutiny.
This clearly speaks in favour of MacMartin’s suggestion to focus on the dynamic of language and conversation, and it does certainly not contradict Burman’s point about the way the dominant scientific discourse reflects power relations, regulates and shapes its subject. As Burman’s analysis has shown, the evasiveness of suggestibility indeed incurred a lot of such ‘shaping activity’. Yet taking a closer look at the history of suggestibility research it is apparent that this covering over or ‘shoring up of uncertainty’, as Burman put it, by which, as she says, the discipline re-asserts its own credibility, is not very successful in the case of suggestibility. Indeed the very activity that should assert psychology’s expertise in separating truth and falsehood, reason from illusion, and that should help to ‘manufacture a distance between psychology and other misinformed practices’ (Burman 1997), has in this case ended up questioning and blurring this very distance; it mocks the very distinction between reason and illusion.

Looking for example at the spiralling, almost paranoid, domino effects around implanted memory research I described in chapter 2.9., it seems the issue gets out of hand rather than being ‘shored’ back into a rational framework by the researchers. Not only had the scientific inquiry into suggestibility become increasingly complex, constantly undermining its own results, but researchers themselves ended up being confronted with the unexpected, and indeed uncontrollable, effects of their own claims, which suggestively feed back into the pragmatics of applied science and legal decision-making. Despite the broad disclaimers researchers were now peculiarly eager to issue about their own research results, the overall dynamic meant they had ended up undermining children’s credibility yet again. Thereby creating “a fin de siècle sense of déjà vu” as Dalgleish and Morant put it with reference to the way in which the current debate around children’s suggestibility, recovered and false memories echoes the events around Freud’s publishing and subsequent recantation of the ‘seduction theory’ one hundred years ago. Attempts to control uncertainties, to control suggestibility, backfire systematically, making the notion of ‘moderate debates’ and ‘balanced application of research results’ sound just as paradoxical as the notion of a controlled, powerful and systematically shaped ‘research industry’. It indeed looks as if suggestibility itself has taken up the work of deconstruction, generously seeding scepticism and double-binds amongst the discriminative order of science. And here it is again Chertok and Stenger’s analysis that, even though relating to a different context, provides a poignant hint as to what might be at the heart of this dynamic.

3. Critical perspectives in psychology: Suggestibility as a liminal resource

“Suggestion is capable of integrating knowledge, but, at the same time, suggestion strips this knowledge of the power it claims of defining a radical opposition between reason and illusion.” (Chertok & Stengers, 1992, p. 145).

Knowledge without the power of reason also means knowledge without an exclusive direction, it means excessively growing webs of meaning and relevance without the means of prioritising some aspects over others or the possibility of selectively obscuring some while underlining others. This in itself sounds slightly obscure but with reference to suggestibility research this kind of dynamic seems familiar. In chapters 1 and 2 we have seen how research itself turned into a complex and growing web of potential explanations, an indeterminate accretion of causes that might be effects and effects that could as well be causes, all of which were relevant but none of which definite, while the associations continued multiplying even further. Hence suggestibility can indeed be seen to undermine attempts at moulding it into the dominant scientific discourse.

Interlinking the general and the personal: a ‘ceci-machine’

What makes things even more complicated here is that suggestibility has also invaded the personal. The whole dynamic has connected questions of scientific reason and truth with questions of concrete legal credibility and truth; which again transforms questions of scientific reason and practice into apparently personal matters of responsibility and accountability. This gives a peculiarly personal twist to all of these questions, reflexively and explicitly projecting any contribution to the problem back onto those who made it.

As we could see for example in chapter 2.1 or 2.8, there is a peculiar way in which individual, personal events (Jennifer Freyd accusing her father of abuse, or the mother who raised the initial accusation in the MacMartin Pre-school case), or indeed individual research contributions (e.g. Ceci’s) gain significance for a broader theoretical and societal controversy. These controversies again feed back into the very concrete instances, relevant for the material lives of those same as well as other people.

But does that mean Jennifer Freyd is to blame for the ‘memory wars’ around false and recovered memories; or is her mother Pamela Freyd to blame? Clearly, neither of these suggestions would make much sense. But if their contribution was not ‘instrumental’, then what exactly is their relationship to these wider instances and efficacies, because undeniably there is a connection.

Similarly, it would be taking the notion of ‘blame’, ‘cause’ and ‘personal agency’ to the extreme when saying that Ceci was to be held responsible for having ‘caused’ the repercussions of his research, such as the ethics debate and its detrimental effects on the generally held assumptions about children’s credibility (as reflected in a subsequent drop in
the reporting numbers). Still, there must be some kind of connection, because Ceci’s presence, the mentioning of his name, or more precisely, a complex set of semiotic dynamics somehow related to his research, his name, his person, reverberates through these debates. It echoes within the scientific, the public as well as the legal arena sparking as well as suffering multiple effects. To put a name to this peculiar kind of efficacy, productivity, I would like to call this a ‘ceci-machine’. A set of signs, or as I said earlier, a set of complex semiotic dynamics that are connected to Ceci in a way that we cannot really grasp yet. This is not to say Ceci (as a person) had ‘invented’ or created this ‘machine’, nor is it a discourse, it merely carries Ceci’s name because they share some of the same ‘meanings’. So to call this a ‘machine’ is merely a way to describe the heterogeneous set of ‘effects’ that produce something and seem to radiate from, or connect to, or transgress activities connected to Ceci (the researcher). They ‘hook’ up to-, or ‘plug’ into other issues (debates etc.). So this ‘ceci-machine’ is neither causing anything, nor is it ‘being used’ or ‘constructed’ by someone, nor is it a discourse. It is a complex (and changing) bunch of effects, it constantly creates links and produces something and this is why it can be called a ‘machine’. It produces effects. This particular one can be called a ‘ceci-machine’ because the effects and efficacies it produces are ‘ceci-ish’ they share a semiotic realm with the researcher Stephen Ceci, and his name recurs in relation to those efficacies. I will return to this, as the peculiar nature of this ‘ceci-machine’ and its recurrence within the field will become even more apparent throughout the following chapters. For the time being it can be understood as an attempt to at least put a name to Ceci’s connection to what happens in the overall field.

This is a first attempt to put a name to what seems to escape our grasp. There is something about the concrete reality of these events that has so far remained elusive and that is closely related to, or indeed made visible by the way suggestibility is present and operates in these instances.

It is in this sense that I would say that suggestibility does something to psychology, it interferes, causes frictions and epistemological short-circuits, but thereby it simultaneously seems to open perspectives. It continuously punctuates the development of psychology as

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75 The notion of a ‘machine’ and the way it is used here refers to Gilles Deleuze’s conception of the ‘machinic’. It will be elaborated and embedded in more detail in chapters 15 and 16.
76 The unfamiliar notions of ‘hooking up’ or ‘plugging into’ are used to denote something being affected, or indeed two things relating, without this affecting having a distinct direction or a determinable effect, apart from the fact that it is present, noticeable.
77 I chose the term ‘punctuate’ because it captures the phenomenon I am trying to describe particularly well. It expresses the significance of suggestibility while avoiding implications of causation, because it is neither
a science at precisely those moments when delicate societal issues happen to intersect with
delicate scientific issues, interlinking very personal with very broad societal dynamics and
ignoring disciplinary or national boundaries. By doing this, suggestibility has continuously
constituted what I would like to call a liminal resource: It transgresses disciplinary boundaries
and pervades pragmatic and theoretical, global and personal, historical and actual
considerations and thereby creates a complex contextualised perspective on the issues of
memory, childhood and expertise.

Putting the question of what suggestibility 'is' to one side for a moment, we can now see
that what suggestibility 'does' is to continuously ask certain questions about the reciprocity
and interdependency of science and law, of scientific practice, legal practice, political
practice and their manifestation as-, and resonances with individual everyday lives.

This reconsideration is crucial because any finding about what 'suggestibility' itself might
be, will not be relevant unless we understand the dynamics and workings of the very
concrete present context within which such a knowledge is gained and to which it will be
applied (this is the 'perspective' suggestibility itself seems to suggest). Or to put it
differently using the operational language of experimental psychology: any generalisable
knowledge about the 'true nature of suggestibility' (if such a thing was to exist) will be
meaningless as long as we do not know anything about the very concrete circumstances
under which, and the concrete dynamic nature of the context into which this knowledge is
being generalised. What needs to be looked at is the concrete dynamic of generalisation
itself, or indeed, reflecting the dangers, polarisations and problems looming in this context,
we need to examine the concrete 'risk of generalisation'.

Following the way the problem of suggestibility has unfolded we need to take seriously this
actual 'risk of generalisation' by examining the concrete conditions under which
generalisation takes place and the actual operations that accomplish it with respect to the
problem of preventing, detecting and prosecuting child sexual abuse.

The following part (B) of this thesis will do this by tracing the issue of suggestibility into
the concrete instances of child witness practice in England and Germany. This implies a
radical shift in focus and mode of presentation. To gather enough detail to provide a
sufficiently complex and concrete understanding of this practice, i.e. to sufficiently
'populate' this complex field of operations, it is necessary to visit and expand on the

possible to say suggestibility had caused the respective problems and ensuing developments, nor does it make
sense to see suggestibility as the effect or product of such problems. The notion of something 'punctuating'
an interaction is meant as a deliberate resonance to systems theory and in particular the "Pragmatics of
Human Communication" as conceptualised by Paul Watzlawick (Watzlawick et al 1967).
specificities of the law, psychological expert practice as well as national specificities and developments in matters of child protection. While this might appear a demanding amount of detail to consider, it is as such absolutely vital for the analytic trajectory of the whole project. Part (B) provides a vivid, detailed and in its specificity absolutely unique journey through child witness practice in England and Germany.
"1 States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child given due weight in accordance with the age and maturity of the child. 2 For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or though a representative or an appropriate body, in a manner consistent with the procedural rules of national law.” (Article 12, General Assembly of the UN 1989).

Article 12 of the UN convention of Children’s Rights (which both, Germany and England have ratified), unequivocally states that children must be given a voice in all legal matters concerning them. Given this it may seem a superfluous question to ask whether children can be witnesses or not. Yet the article contains a two fold conditional clause. Firstly, it refers to children who are “capable of forming” an own opinion, specifying that due weight should be given “in accordance with the age and maturity of the child”. ‘Capability’ and ‘maturity’ are not attributable per se but have to be established with regard to each individual child and within a particular context, meaning that the criteria for judging and determining ‘capability’ or ‘maturity’ will also derive from knowledge established in this specific context. So the question implied here is inevitably also a question of developmental psychology. Secondly, an ‘opportunity’ is to be provided for the child to be heard, but this can be done “in a manner consistent” with the rules of national law. This turns the provision of ‘opportunities’ into a matter of interpretation for each individual state, making it a concrete legal procedural problem.

It could be argued that these two conditionals implicitly revoke the very right article 12 intends to introduce. Lee (2001) points out that this apparent ambivalence towards children, that seems implicitly to invalidate the very promise it is attempting to make, was an unavoidable ingredient of this law at the time of its creation. If article 12 functions, Lee states, it functions to generate and expose, rather than to resolve, the otherwise implicit childhood ambiguity and “then lays the responsibility for managing that ambiguity on the legislatures and policy-makers of the states that have ratified it.” (Lee 2001, p. 96). In this sense, I would argue, that despite the overall binding character of article 12, for the national law the central issue remains a problem situated somewhere between psychology and law,
that is, between psychological truths and legal truths. And it has to be managed locally and
solved continuously, on a concrete level and with regard to each individual case, via
practices implemented to handle, negotiate and contain such ambiguity. Looking back at
chapters 2 and 3, it is clear that what Lee (2001) terms childhood ambiguity is indissociably
linked to societal and scientific issues around the acute and serious problem of child sexual
abuse on the one hand, and on the other hand the perplexing issue of children’s
suggestibility. This is the backdrop against which the local practices of the national law
have to operate and try to address the problem of giving children a voice in the face of
childhood ambiguity.

It is this concrete mediating activity, at the junction of psychology and law that I would like
to examine in the following chapters, because article 12 of the UN convention of children’s
rights encapsulates the ambivalence around issues of memory, childhood and expertise, and
thereby exposes the question of suggestibility at the concrete junction of legal and
psychological practice. In this sense article 12 also demarcates and condenses the
theoretico-concrete point of tension between law and psychology around which the history
of suggestibility research has turned into the history of the prevention, detection and
prosecution of child sexual abuse.

It is my intention in this second part of the thesis to invert my perspective and to trace the
question of suggestibility (from) within the concrete encounter of legal and psychological
practice. Hence in the following I will explore the concrete efforts of the German and the
English legal system to substantiate the abstract demands set out by the convention of
children’s rights in the explicit attempt to give children access to justice and particularly to
enable a more effective prosecution of child sexual abuse. By examining and juxtaposing
the overall structure of the legal systems and the codes, procedures and activities designed
to solve this problem in two different European countries (England and Germany), the
implicit efficacy of suggestibility within two very divergent legal and political systems can
be explored. Who is going to have a voice, and how is this voice going to be heard,
amplified, made audible, and how do we determine the ‘due weight’ it should be given?
Highlighting the differences between the English and the German legal system, I will give a
broadly contextualised introduction to each legal system, outline the basic principles upon
which they operate and describe the legal procedural rules that organise and regulate the
way in which children are enabled to become witnesses. Alongside this legal introduction
there will be a brief recapitulation of the relationship between each legal system and
psychological research into suggestibility and children’s credibility.
Following my specific analytic trajectory I wish to provide a vivid and detailed interdisciplinary insight into the background and workings of both legal systems and their relation to child witnesses and psychological expertise. Rather than rely on secondary literature, I have developed this outline by synthesising information from a multitude of primary sources such as codes of criminal law, codes of criminal procedure, legal commentaries, policy reports, soft law and practice guidance, research reports, expert reports, high court rulings, Acts of Parliament, media reports and relevant findings and debates in the most recent research literature. This introduction also functions as a detailed review of the current interrelations between psychology and the law. This account is unique in its specific focus and detail, and to my knowledge currently no similar synopsis of child witness practice exists in the literature.

Drawing broadly on observations and interview data I will trace the ‘fact finding dynamic’ characteristic for each legal system from the perspective of the different professionals involved. This will provide an insight into their (perceived) role within- and their experience of operating within this specific system of rules. Having developed a general insight into the dilemmas and problems of this task, I will delineate how they actually manage to collect, examine, present, affirm and judge the presence, admissibility and truthfulness of children’s evidence as part of the respective legal system. This will as a consequence allow for analysis of the workings and efficacy of suggestibility within each of these practices.

Obviously within the given framework my outline cannot, and is not intended to, deliver an exhaustive description of the legal systems. Following the trajectory of my thesis I will focus exclusively on how children and their memory/credibility are handled/assured, how suggestibility impinges onto practice and on the way psychological knowledge and expertise feature within the system. The aim here is to create a sense of how the practitioners are positioned towards each other and how they see themselves as operating at the junction between psychology and law.

Finally I will juxtapose and compare child witness practice in England and Germany on a broad structural level, to illuminate the different ways in which they solve the problem of giving children a voice in the face of suggestibility and childhood ambiguity, and what this means for child witnesses (and the efficacy of suggestibility). Here my comparison is aimed to illuminate the internal workings of each structure by juxtaposing them to each other, providing a sort of strange, alien outsider perspective that helps to throw into relief aspects that would otherwise be obscured as taken for granted from within. This comparison is not intended to be an ‘objective’ assessment of the quality or of the ‘absolute’ appropriateness
of any part of each practice. Neither is it intended to determine which of the two might be
the more appropriate, 'better' approach. Apart from the fact that my data could never
warrant such conclusions, the fundamental lack of symmetry between the two systems
would make such an attempt at ranking the legal systems a dubious exercise anyway.
Instead I am aiming for an exploratory analytic comparison that captures the worknings and
rationales of these very different practices by illuminating/juxtaposing how they address
very similar issues, namely that of child sexual abuse, child witnesses and suggestibility.
However, the detailed juxtaposition should enable practitioners of both legal systems to
reflect upon the problems they face and possibly take inspiration from abroad.

Before I venture into my exploration of the German and the English legal system I would
like to offer a more detailed introduction to the methods perspective adopted throughout
the thesis and elaborate on the way the data was gathered (chapter 4). I will then situate the
concrete issue of child sexual abuse in England and Germany by giving a synopsis of the
current situation regarding prevalence, prosecution and conviction rates in both countries
(chapter 5).

4. Methods perspective and data collection: situating interviews and
observations

As outlined in the introduction I am providing 'methods perspectives' at various points
throughout the thesis, because the methods employed and the data collected for the whole
thesis change and evolve as the analysis unfolds. While the first part of the thesis drew
largely on my historical and multidimensional review of the whole field and did not make
much explicit reference to empirical data, the analysis was nonetheless informed by the
empirical data collected. In this second part of the thesis the information gathered via
observation and interviews will gradually become more explicit. So this seems a good point
to give a more detailed account of the considerations that guided the data collection and to
describe salient aspects of the process of data collection.
4. Methods perspective and data collection: situating interviews and observations

4.1 Operators and nodes: capturing legal and psychological professionals as concrete operators and 'nodes of complexity'

Given the evident complexity of the problems surrounding suggestibility, the intention to follow suggestibility even further into practice in order to enquire into its actual efficacy in practice, poses a range of problems. Those who research or practice in the field of child protection must be facing these very same complexities on an every day basis. So in the light of the critical perspectives offered by Burman (1997) and MacMartin (1999) and following the insight that in this field theory, research and practice need to be examined as they relate to each other in practice, I decided to direct my empirical focus at practitioners from all those professions that are creating, teaching or applying knowledge about children’s credibility and suggestibility. As I argued in the previous chapters, they inevitably become part of the very problem they are trying to solve, but this also means that they are at the heart of the dynamic characteristic of this problem; it moves through them, or indeed they move it. In this sense they can be understood as operators within this complex system. They are operators in that they have to perform crucial transformations and decisions around highly complex, if not paradoxical issues, within a system of rules that appears highly inflexible and intolerant of ambiguity (i.e. the law/science), as it provides a stable structure of rules. In order to confirm (and stabilise) and base themselves within this structure while simultaneously enabling the transformations, the operators’ task seems to be simultaneously to reduce and to produce complexity. I will return to this crucial term of ‘operators’, but first I would like to unfold the concrete context a little more.

To examine practice I decided to interview academics and researchers (legal and psychological), psychological and psychiatric expert witnesses, as well as judges, lawyers, police officers and social workers. So in a very real sense I have followed Ceci’s suggestion to investigate researchers and interviewers, but clearly my aim is not to isolate suggestive factors, evaluate suggestive demeanour or to expose instances of what could called ‘bad practice’. I focussed on researchers, interviewers and experts because they are the operators who occupy the pragmatic junctions of complexity that are 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. In this sense one could say that these professionals, these operators, can in their operations be conceptualised as concrete ‘nodes of complexity’. Because in the moment of decision-making they become, or embody, the nodes at which all aspects of this otherwise inscrutable complexity intersect and are expressed, or indeed represented. These operators
have to practically mediate and negotiate all the conflicting aspects of the problem: the vagueness of the concept of suggestibility, varying research results in cognitive and developmental psychology, ambiguous policy requirements, the codes of criminal procedure, other juridical requirements, parents' opinion, public opinion, the current public common sense about the problem of child sexual abuse, related debates about for example 'false memory', 'recovered memory', or the 'parental alienation syndrome', and the historical-personal-and actual aspects of the situation. All of these factors inflict upon every one professional involved in a particular case. At the same time these professionals have to legitimise their own expertise (professionalism) by drawing on complex and ever changing scientific findings (or respectively codes of legal practice), while giving advice to or respectively working within/affirming/researching about a juridical system that by principle does not appreciate contradictions and ambiguity; a system that is intolerant to ambiguity. This means that the practitioners signify, inhabit, or embody, the intersection of psychology and law and this means they also inhabit the space suggestibility has exposed.

It is in this sense that the practitioners and researchers are operators who make complex transformations reducing and producing complexity, basing themselves within and thus confirming stable sets of rules while simultaneously managing and negotiating the acute complexity of the matter that needs to pass through this system, needs to be transformed. The operators could be said to become, or to momentarily inhabit nodes of complexity; as operators they are part of the system that they are continuously representing and transforming, but when inhabiting nodes of complexity they have to be selective, for an instant, and only let one thing pass and not another, i.e. effect a decision. So for now we could understand the difference between operators and nodes as one between stability and movement. Throughout the following chapters, and particularly in part (C), I will return to these concepts and develop them in more detail in relation to legal and psychological practice.

Looking back to the end of chapter 3 we can say that the 'risk of generalisation', that is, for my particular perspective, the dynamic circumstances under which knowledge about suggestibility is gained and applied in a legal and scientific context, and that appears inaccessibly complex when looked at from an abstract perspective, is pragmatically condensed within the concrete considerations and actions of each individual professional. It is at these 'junctions' or as these 'nodes of complexity' that these professionals need to be captured. Practically this translates into broad questions such as: What does it mean to work in a field that is dominated by such a multitude of ambiguities and tensions? How does 'suggestibility' affect their work? How do they position themselves towards it? How
do public debates manifest within a concrete case or decision? Is it possible to see the child at the centre of concern when one is positioned between the conflicting expectations, codes and requirements of the psychological, the juridical, the scientific and the various personal discourses?

This understanding of legal and psychological professionals as operators and transient nodes of complexity not only explains my particular selection of interviewees, but also delivers the rationale for the methods perspective I adopted for chapters 7 to 9. In order to create a sense of the concrete functional structures through which, and in relation to which the operators perform, while simultaneously allowing a detailed experiential view of the crucial junctures that specify the 'nodes of complexity', I have adopted a 'quasi-ethnographic' style (Geertz, C. 1993) for chapters 7 to 9. This 'descriptive/analytic' style will inform the structural comparison in chapter 9 and it will establish the background for a more detailed examination of these practices and juncture lines in part C.

While such an exposition of English and German child witness practice might at points appear demanding in its extensiveness and level of detail, this 'mapping out' of practices and structures forms a vital part of my analytic endeavour. It provides a 'report' of the dynamics involved and thus forms the background for the later analysis. Additionally this exposition is in part guided by, and aimed at answering the questions that my interviewees asked about the respective other system. It provides a unique introduction to-, and juxtaposition of child witness practice in England and Germany that is not available elsewhere and that could inform practices and practitioners in both countries.

Reflexive interviews

The interviews were conducted as broadly structured in-depth interviews. Congruent with the conceptualisation of experts and practitioners as operators and momentary nodes of complexity, it was seen as necessary to give the interviewees an active and reflexive role in the interview process. Obviously there is a limitation to the degree to which 'decision-making' or dealing with complexity as such can be explored in an interview, i.e. 'talked about', or how such accounts can be understood. But adopting a reflexive format at least allows the researcher to explicitly prompt the dynamic complexity. A discussion that invites a concrete positioning towards and dealing with this complexity makes space for its exposure and unravelling. Literally, one could say that to capture some of the dynamic operations around the nodes of complexity, the interview needs to create and confront participants with a specific problem.
Additionally my aim was to make explicit and use my own very position as a researcher and a practitioner in this field. As outlined in the introduction, I have practiced in the field of credibility assessment of children myself, I am psychologist, a researcher and a German national, and I have studied and practiced psychology in Germany. I introduced myself to the interviewees with my specific background and agenda, explicitly setting the interviews up as an opportunity to discuss, comment on or challenge problems in their practice, as well as the aims and assumptions underlying the research project and my position within it. In this way the academics' and legal practitioners' professional ability to reflect about the topics and cases could be systematically employed as part of the analysis, creating an additional level on which the data could be reflected. This turned the interviews into dynamic, bi-directional encounters with instances of life analysis, rather than mere occasions of extracting information from informants. This is why, even though there is no established method by that name, I am using the term ‘reflexive interviews’ to describe my interview approach. This is to capture the underlying rationale of combining the collection of information with the prompting of ‘acute problem solving’, discussion, analysis and spontaneous reflexivity about this very exchange I entered into with the participants. While the exact term ‘reflexive interview’ has not been established as a distinct method, the active and reflexive role of the interviewer for and within qualitative research has certainly been an issue of increasing interest in recent years (Hollway & Jefferson 2000, 2005; Frosh 2003).

More importantly, in its desire to address and negotiate practice problems, to actively engage with participants openly negotiating the rationale and agenda of the whole project, my interview approach follows the spirit of a ‘Science of the Subject’, a research perspective developed in the context of German Kritische Psychologie (Holzkamp 1985; 1995, Osterkamp 1990; Markard 1985; 1993). Furthermore the notion of reflexivity underlying this approach of ‘reflexive interviews’, is strongly influenced by Ashmore’s conception and use of reflexivity (Ashmore 1989). In his “Reflexive Thesis” (1989) Ashmore has delivered and performed an intriguing exposition of the notion, the activity and the concept of reflexivity as it emerges within and haunts the sociology of scientific knowledge, providing insights that are most pertinent for my analysis as well. I will return to the issue of ‘reflexive interviewing’, operators and nodes of complexity at a later point because these concepts are crucial to my overall analysis.

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78 For a related capture of reflexivity in the social sciences see also Finlay & Gough (2003).
In order to provide a shared understanding and a basis upon which such ‘reflexive interviews’ can be conducted it is necessary to offer as much background information and transparency about the research project as possible. To create a shared knowledge base for the interviews the participants were in advance provided with a comprehensive written summary of the analytic background, the aim of the project and my own professional background. This introduction also explicitly encouraged them to regard the interview as an opportunity to ask questions and to discuss matters they were concerned about. They were also informed about my intention to potentially challenge and discuss issues of practice rather than just collecting information. Crucially the written synopsis and the verbal introduction I gave at the beginning of the interviews, also highlighted that the project should not be misunderstood as an assessment of ‘good practice’, and that it was not intended to expose ‘bad practice’. I spelled out very clearly that my study was an attempt to trace the concrete efficacy of suggestibility within the paradoxes and dilemmas of practitioners’ daily work and within their efforts to address these paradoxes (see appendix A for the introductory synopsis). In the process of exploring the field and refining the interview approach I conducted a number of pilot interviews with researchers and psychological practitioners in England and Germany.

The research interviews were planned to last for about one hour, but in the process the majority of interviewees became very engaged and expressed the wish to continue ongoing discussions, which meant that overall the interviews lasted for an average of two hours.

I conducted a total of 32 interviews, 18 in England and 15 in Germany. The aim had been to conduct a small number of interviews with an evenly distributed range of professionals in both countries (see table 1 for the number of interviews conducted and the respective professions involved). Inevitably the present number of interviews was ultimately dictated by the willingness of the respective authorities to co-operate. As expected it proved difficult and time-consuming to secure co-operation with all the different authorities, but finally suitable arrangements could be found for all participants.

Given the limited scope of this study and my intention to follow issues of suggestibility and credibility closely, I chose to focus the interviews on personnel related to the criminal justice systems only, leaving civil matters and particularly the family court system aside. Still, as issues of child sexual abuse and children’s credibility are a central concern for family courts as well (divorce and custody proceedings), family court issues and the relationship between criminal and family courts were frequently mentioned during the interviews. Additionally one of the English judges I interviewed had for a long time been a family court judge as well as a criminal court judge. All of the psychological experts I
interviewed had experience with both sides of the legal system, with the English experts working almost exclusively for family courts. Hence the close and sometimes difficult relationship between criminal and family law in both countries inevitably grew to be a salient and recurring issue during the interviews.

I have not interviewed social service practitioners in Germany, because unlike in England, in Germany social services are not actively involved in criminal investigations. While they might be called as witnesses to give evidence, they cannot investigate cases or interview children to gather evidence for criminal proceedings. There are a number of further differences in my approach to the interviews and questions asked in each country that simply reflect the different structure of the legal systems.

<table>
<thead>
<tr>
<th>Profession</th>
<th>England</th>
<th>Germany</th>
</tr>
</thead>
<tbody>
<tr>
<td>Judges</td>
<td>4</td>
<td>4</td>
</tr>
<tr>
<td>(High Court)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Prosecution Services</td>
<td>2</td>
<td>1 (state prosecutor)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>2 (lawyers – victim advocates, but also defence barristers)</td>
</tr>
<tr>
<td>Police</td>
<td>2 (training officers)</td>
<td>2 (police officers from special sex crime unit)</td>
</tr>
<tr>
<td>Researchers</td>
<td>4 (psych. academic researcher/court experts)</td>
<td>3 (psych. academic researcher /psych. experts)</td>
</tr>
<tr>
<td></td>
<td>2 (law academics)</td>
<td></td>
</tr>
<tr>
<td>Psychologists – (experts/practit)</td>
<td>2</td>
<td>3 (psych. experts)</td>
</tr>
<tr>
<td>Social Services</td>
<td>2</td>
<td>----- does not apply ---</td>
</tr>
</tbody>
</table>

An interesting first observation from the interviews both in Germany and in England was that suggestibility itself seemed to be referred to as absent by almost all of the interviewees. Most interviewees identified it as a problem of the past that they did not regard as very prominent anymore, yet the explanations for its absence differed widely (ranging from ‘the problem is solved’, to ‘it is just not happening anymore’, to ‘it was a phenomenon of the time’ and issue of Zeitgeist and as it vanished from the public discourse, people seem to seek other explanations for similar problems now). So initially one could have thought I was asking the wrong question, chasing something that had already vanished. Peculiarly though, the issues raised by suggestibility and reverberating around it now in the shape and form of current policy and child witness practice, attracted great interest amongst the interviewees and throughout there was a surprising willingness to discuss these issues and to problematise and reflect on the own practice.
Observations

In the general introduction I have already pointed out that my exploration of the field followed what I called an associative and multi dimensional data collection and literature review. This was to indicate that I consider reviewing research literature and journal articles as an exploration of the whole field similar to watching media reports, reading newspaper articles, reading practice guidelines, viewing training videos, laws or codes of legal procedure. Both forms of review are interrelated, they represent and simultaneously inform whole field.

I have conducted my observations in a similar vein, following important links and topics in detail as they emerged, rather than focussing on pre-selected broader areas. In the two central instances of observation I have also engaged with the ongoing activities and got explicitly involved when asked to do so. Similar to the 'reflexive interview' I introduced myself to all those present and explained in detail what the agenda of the research was. Additionally I indicated my willingness to engage with those involved in order to discuss relevant topics or answer their questions. In a broad sense these activities fit into the picture of a 'quasi-ethnographic' approach, or indeed a participatory observation.

In England I explored police training in various police forces. In one instance I joined a six day training course for police officers about video interviewing vulnerable and intimidated witnesses (the category 'vulnerable' includes anyone under the age of 17). The course was held on consecutive days and consisted of eight hours of teaching and demonstrations per day, delivered in the headquarters of the police force.

I also attended the trial of a child abuse case at an English Crown Court (this particular trial lasted five days). Additionally I had the opportunity to discuss the case with the judge and to ask follow up questions about court procedures and practice. I spent a day with witness support, talking to witness supporters and visiting the special facilities and equipment for child witnesses.

During the course of the trial and while observing the police training procedures I was able to view four different video recorded interviews with child witnesses who were the alleged victims of sexual abuse.

In Germany I accompanied a psychological expert assessing the credibility of a child witness for criminal court. This is a practice I am already very familiar with from my own past working experience in this field, so I have detailed knowledge of the procedures and practices involved. Additionally I attended a trial at a criminal court that investigated the alleged sexual abuse of a child, including a credibility assessment of the child by a psychological expert, who testified in court. Similar to the English case I had the
opportunity to talk to the presiding judge about this trial, because he was one of my interviewees. (See table 2 for an overview of the different areas of practice observed in each country.)

<table>
<thead>
<tr>
<th>Observation</th>
<th>England</th>
<th>Germany</th>
</tr>
</thead>
<tbody>
<tr>
<td>Police</td>
<td>Police training courses</td>
<td>Expert practice credibility assessment</td>
</tr>
<tr>
<td>Court case</td>
<td>Court case</td>
<td></td>
</tr>
<tr>
<td>Witness Support</td>
<td>Policy Reports, Practice Guidelines, Training Material, Videos of real case interviews with children etc.</td>
<td>High Court of Appeal Rulings, Legal Codes, Police guidelines, real case assessments etc.</td>
</tr>
</tbody>
</table>

5. Putting child sexual abuse and child witnessing in England and Germany into perspective: prevalence, reporting, attrition

I would like to take a detailed look at the numbers for the prevalence of child sexual abuse, the reporting, prosecution and conviction rates because this is a good place to start and set the scene for the following exploration of child witness practice in England and Germany. Considering the secretive and delicate nature of child sexual abuse, and the related difficulties of the legal system to determine the credibility of disclosures made, it is quite clear that prevalence numbers for child sexual abuse are very difficult to obtain and interpret, and they can be misleading. Caution is advised with regard to numbers of reported, prosecuted or convicted cases of child sexual abuse. When drawing on and juxtaposing such numbers from different countries the need for caution multiplies. Nevertheless, beyond the absolute numbers, there is a stark discrepancy between the trends that can be observed in England and Germany, and during the course of my study (2003-2006) this trend has become even more pronounced. I will thus report some of the available numbers, because they underline the relevance of an anglo-german perspective, and highlight the need for a contextual perspective as well as indicating interesting points of tension within practice.
5.1 Prevalence of child sexual abuse in England and Germany

English and German studies stress that there is very little reliable information about the prevalence of child sexual abuse, because victims are particularly unlikely/unwilling to report it, and because there is no uniform recording practice. Only a fraction of all the existing cases of child sexual abuse will ever be disclosed to the police or other authorities. Hence prevalence studies cannot rely on the criminal statistics (reported, prosecuted and convicted cases), but gather their information by way of large surveys in the general population.

One of the very few large studies into child abuse and neglect, conducted in Britain by the NSPCC (Cawson et al. 2000), has asked a representative sample of 2,869 18-24 year olds whether they had experienced any form of abuse or neglect by an adult, before the age of 16. The study found that a significant proportion of their sample reported to have been sexually abused during childhood. Sexual abuse here was defined as any form of 'hands-on' sexual contact and cases where pornographic photographs had been taken. The results show that 1% of children had been sexually abused by a parent or carer and another 3% by another relative. 11% of children experienced sexual abuse by people known but unrelated to them and 5% experienced abuse by a stranger. Furthermore Cawson et al (2000) report that three quarters of sexually abused children did not tell anyone about the abuse at the time, and around a third had not told anyone about their experience by early adulthood. In most of those cases where a disclosure was made, the confidantes were friends or family. Hardly any of the young people had reported to the police or to other services or professionals (e.g. teachers).

Herrmann (1998) points to very similar dynamics in Germany, where researchers suspect a huge dark figure of undisclosed cases, while even of those incidents that are disclosed to someone only very few will be reported to the police. Following a format very similar to that of the English study quoted above, Wetzels (1998) has conducted one of the largest and more recent studies of prevalence in Germany. They questioned a representative sample of 3,289 persons between the age of 16 and 59. Participants were asked to report any incident of neglect, physical, emotional or sexual abuse they had experienced before

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79 Such studies are always limited because they have to trust the memory and accurate descriptions of the participants. Yet more recent studies have solved some of the problems linked to 'attribution' by asking the participants to give detailed descriptions of certain kinds of events they experienced before the age of 16. By not offering notions such as 'sexual abuse' or 'rape' to the participants, these studies avoid problems of discrete differences in attribution and the reported experiences are more transparent and can be classified more reliably.

80 The NSPCC is the "National Society for the Prevention of Cruelty against Children", see: www.nspcc.org.uk
the age of 16. Applying a narrow definition of child sexual abuse (‘hands-on’ abuse by an adult) their results showed that 8.6% of the female participants and 2.8% of the male participants reported to have suffered sexual abuse in their childhood. With reference to a wider definition of sexual abuse, including for example indecencies, exhibitionism or having pornographic pictures taken, the prevalence rates were 18.1% for women and 7.6% for men.

The authors of the English and the German study concede that compared to neglect, physical and emotional abuse, sexual abuse was the least frequent form of abuse experienced by the participants. Even so they underline that the numbers unequivocally identify child sexual abuse as a serious problem that concerns a significant number of children and that is hugely underreported.

So while a straightforward comparison between these studies is certainly not possible, this is a quite strong indicator that the general dynamics and prevalence of child sexual abuse in England and Germany are quite similar.

5.2 Reporting, prosecution and conviction

A very different situation can be observed with regard to the numbers available from the criminal justice systems in England and Germany.

In England it is difficult to determine the performance of the criminal justice system with respect to the prosecution of child sexual abuse, because there is no separate crime of ‘child rape’ in England and Wales. Hence official figures of rape cases will include children (Kelly et al 2005). A study into the attrition of rape cases in England and Wales by Harris and Grace (1999) found that a quarter of their sample of 500 cases involved victims under 16. Hence in order to observe an overall trend it is informative to look at the attrition in reported rape cases for England and Wales. (See table 1 for attrition in reported rape cases in England and Wales.)

While the absolute numbers of attrition cannot be interpreted reliably with regard to child victims because these figures include adult victims of rape, the overall trend is quite striking. Recorded cases have multiplied by ten since 1977, following a steady increase, while the number of convictions has merely doubled during the same time interval, resulting in the conviction rate dropping from 32% in 1977 to 5.5% in 2002. Furthermore a relatively large proportion of those convictions are due to guilty pleas by the defendant.

81 The Sexual Offences Act which was implemented in May 2004 includes a number of sexual offences that refer specifically to child victims. Yet the Crown Prosecution Services will still be able to use the charge of rape in cases involving children.
indicating that when sexual offences are concerned it is more likely to get an acquittal when the accused denies the charges, than with other criminal charges.

The second table shows the development of conviction rates from 1998 to 2002, and it offers separate numbers for cases involving child and adult victims of rape and attempted rape (Kelly et al 2005, p. 26). (For a comparison of Prosecution outcomes in adult and child rape cases 1998 – 2002 see table 2).

<table>
<thead>
<tr>
<th>Year</th>
<th>Recorded Cases</th>
<th>Convictions</th>
<th>Conviction rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>1977</td>
<td>1015</td>
<td>324</td>
<td>32%</td>
</tr>
<tr>
<td>1987</td>
<td>2471</td>
<td>453</td>
<td>18%</td>
</tr>
<tr>
<td>1993</td>
<td>4584</td>
<td>482</td>
<td>10%</td>
</tr>
<tr>
<td>1996</td>
<td>5754</td>
<td>573</td>
<td>10%</td>
</tr>
<tr>
<td>1997</td>
<td>6281</td>
<td>599</td>
<td>9%</td>
</tr>
<tr>
<td>2001</td>
<td>9449</td>
<td>572 (213 of these due to guilty pleas)</td>
<td>6%</td>
</tr>
<tr>
<td>2002</td>
<td>11 766</td>
<td>655 (258 of these due to guilty pleas)</td>
<td>5.5%</td>
</tr>
</tbody>
</table>

Table 1 - Official Home Office figures (Kelly, L. 2002; 2005)

<table>
<thead>
<tr>
<th>Year</th>
<th>Adult victims</th>
<th>Child victims (under 16)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Prosecuted Cases</td>
<td>Convictions</td>
</tr>
<tr>
<td>1998</td>
<td>1366</td>
<td>382</td>
</tr>
<tr>
<td>1999</td>
<td>1319</td>
<td>317</td>
</tr>
<tr>
<td>2000</td>
<td>1245</td>
<td>329</td>
</tr>
<tr>
<td>2001</td>
<td>1528</td>
<td>326</td>
</tr>
<tr>
<td>2002</td>
<td>1646</td>
<td>352</td>
</tr>
</tbody>
</table>

Table 2 - Home Office Figures (Kelly, L. 2005, p. 26)
Considering that only a fraction of those cases reported will get to court at all, the low conviction rates underline the bleak picture. Still the second table shows that once they have reached court, cases concerning child victims seem to fare slightly better than those with adult victims. Looking at table 2 (see previous page), we can see that one third of those cases concerning child victims result in convictions while only a quarter of those with adult victims lead to a conviction. Yet in 2000/2001 the conviction rate for children’s cases drops to 22%, almost levelling with the low rate for adult rape cases. Kelly points out that the numbers in this table are particularly worrying because they indicate that even those few cases that the police and the crown prosecution services consider to be strong enough to be brought forward, fare poorly at later stages in court.

Projecting forward in my analysis, the significance of these findings becomes even more obvious when considering them in the light of ongoing changes to the legal system that came into effect during the same period of time. Between 1990 and 2002, and thus almost parallel to the steep drop in prosecution and conviction rates, a step by step introduction of new legislation effected radical changes to procedures concerning child witnesses. The special measures introduced are intended to accommodate children’s special needs as witnesses. They are meant to ensure a more efficient prosecution of child sexual abuse and better access to justice for young witnesses and victims of sexual violence in general (a detailed introduction to these changes will follow in chapters 8.2 and 8.3). Even though it is impossible to reliably prove a causal connection, the results of Kelly’s study are a strong indicator that the measures may well have contributed to an adverse effect. This will be one of the crucial questions in my unfolding analysis of child witness practice in England throughout the thesis.

Kelly et al (2005) states that to date there is no satisfactory explanation to account for the steep drop in prosecution and conviction rates. Still, she points out that her data shows that most attrition factors seem to lie in the early stages of the proceedings.

“All the studies demonstrate that the highest proportion of cases is lost at the early stages, with between half and two-thirds dropping out before referral to prosecutors. (...) The most significant factors in early loss of cases are designation as false reports and withdrawals by the victim/complainant.” (Kelly et al 2005, p. 27).

With this Kelly provides a second central point that resonates closely with my later analysis. Examining child witness practice closely I will trace the factors that make it so difficult for cases to get beyond the early stages of the proceedings.

Kelly’s statement is underlined by an earlier cross-sectional study by Gallagher and Pease (2000). Their study focussed specifically on attrition rates in child maltreatment cases. Gallagher and Pease analysed randomly selected police files for investigations into child sexual abuse, physical abuse and neglect conducted during 1997 (the record search was
carried out in 1998 and 1999). They selected 166 case files from each of six randomly chosen police service areas in England and Wales, arriving at a total sample of 1548 cases.\(^{82}\)

The aim of this study was to calculate attrition rates for child maltreatment cases and to examine reasons for attrition. The findings show that, while prosecution and conviction rates for maltreatment cases are generally very low, sexual abuse had higher prosecution and conviction rates than cases of physical abuse and neglect. With regard to reported cases of child sexual abuse the authors found that 63\% of all reported cases were being discontinued by the police, and an additional number of cases was dropped by the crown prosecution services. Thus in this sample only 26\% of all reported sexual abuse cases reached the stage of prosecution.

The authors point to the remarkable variation they found across their sample where the attrition rates ranged from 99\% in one police service area where virtually none of the reported sexual abuse cases was prosecuted, to 55\% in another area where almost half of the reported cases lead to a prosecution. Still, the authors found a conviction rate of 84\% for sexual abuse cases, which means that at least those cases that make it to court do fare much better. Yet again, there was wide variation between the different police service areas with conviction rates ranging from 90\% in one area, where almost every prosecution lead to a conviction, to a 44\% conviction rate in another area where more than half of the court cases ended in an acquittal.\(^{83}\)

Most crucially, alongside their file study, Gallagher and Pease also randomly selected individual cases from their sample and conducted interviews with the respective police officers and crown prosecutors, inquiring into the reasons for the discontinuation of these specific cases. The most frequent reason for discontinuing a sexual abuse case given by police officers was ‘lack of corroboration’ (25\%), ‘lack of disclosure’ (20\%), ‘denial of suspect’ (14\%), ‘concerns over the child’s credibility’ (10\%) and ‘child does not wish to pursue criminal proceedings’ (10\%). Crown prosecutors’ most frequently named reason for

\(^{82}\) Given multiple victims/suspects the resulting 1000 investigations amounted to a total of 1548 child-suspect pairings, which formed the case basis for the study.

\(^{83}\) General findings: They report that 76\% of all reported cases (sexual, physical abuse and neglect) were discontinued at an early stage with the police taking no further action, and administering cautions in a further 5\% of cases. Another 1\% of cases were discontinued by the Crown prosecution services. (The prosecution services account for slightly more of the attrition than these numbers would suggest, because in 7\% of cases discontinued by the police the crown prosecution services had advised the police to drop the case.) Only 17\% of all child maltreatment cases proceeded as far as a prosecution, yet once they had reached court, conviction rates were fairly high with 85\% of those cases that were brought to court resulting in a conviction. Differentiating the type of maltreatment the authors found that attrition is highest for cases of neglect (no further action in 83\% of cases) and physical abuse (no further action in 85\% of cases), with sexual abuse cases having a significantly lower attrition rate; 63\% of all reported sexual abuse cases were discontinued. These differences continued beyond prosecution stage, with conviction rates for sexual abuse cases being significantly higher than for other forms of maltreatment: 84\% of those sexual abuse cases brought to court resulted in convictions, while physical abuse only had 62\% convictions.
dropping a case was 'lack of/insufficient corroborative evidence' (42%), 'doubts over the credibility of the child's evidence' (29%), 'no realistic prospect of conviction' (22%), 'Police and/or CPS believe child would not make a good witness' (16%) and 'suspect denies responsibility' (13%). I will return to these points later, because the interviews I conducted brought up some intriguing resonances with Gallagher and Pease’s findings, allowing a complex and contextualised re-interpretation of their significance.

I have referred to these respective sets of studies by Kelly et al and by Gallagher and Pease in some detail because remarkably, to date they seem to be the only studies available that look into attrition rates of sexual abuse investigations in England at all; and unfortunately the study by Gallagher and Pease has not been published (it is an unpublished research report to the Home Office).

In Germany sexual offences against children (i.e. a person 16 or younger) will under most circumstances be charged as an offence separate from rape, a term only used when adult victims are concerned. The criminal statistics ('polizeiliche Kriminalstatistik') thus holds separate numbers for reported sexual offences against children. However the raw data is difficult to interpret as Wetzels (1998) outlines, pointing to numerous problems arising from the structure of these statistics and the complexity of the German legal system, which has a number of different codes of law referring to different charges of child sexual abuse. Furthermore both, the codes of law and the criteria for registering offences have changed over the years. Most importantly, around 1990, after the German re-unification, there was not just a sudden increase in population (by about 25%) in relation to which reported numbers have to be interpreted, but for about three or four years registration faced considerable difficulties because the numbers from the joining eastern German states had to be merged with those of the western German states, and legal authorities in the east had to adopt a new set of laws.

In his review of the literature about the long-term development of reported child abuse cases in Germany Wetzels (1998) criticises various authors who came to rather simplistic conclusions drawing on the absolute numbers of reported cases. Following these absolute numbers one will find a steady and significant decrease in reported cases between 1955 and 1987, followed by a slight increase until 1995. Weighing various demographic factors, Wetzels calculates a rate of victimisation and argues that while there has been an overall decrease of reported cases since the 60s, the reporting rate has, apart from marginal ups

84 Percentages do not total 100 because more than one reason was given in some cases.
and downs, been amazingly stable between 1985 and 1995. The numbers provided by the police criminal statistics ('Polizeiliche Kriminalstatistik' published by Bundesministerium des Inneren, 2003) are largely coherent with the trend described by Wetzels, and it shows that the same trend continues throughout the following decade. The numbers of reported cases of child sexual abuse have remained on almost the same level between 1995 and 2003.

There are no official conviction rates for Germany. Even though the federal bureau of statistics (statistisches Bundesamt) does provide the number of convictions for every area of crime, they explicitly warn that these must not be aggregated into conviction rates using the reporting numbers gathered by the police, because the police will record cases within different time frames and according to different criteria (Bundesministerium des Inneren, 2003, p. 2-3). Furthermore, the data available from the federal bureau of statistics does not include numbers that would allow comparison of prosecutions and convictions; hence there is no reliable way to calculate prosecution or conviction rates. Still, following the overall trend of the absolute number of convictions, there are good grounds for arguing that while conviction rates must have been very stable from the 60s to the mid 80s, the past ten to fifteen years have seen a significant rise in conviction rates. This can be inferred from the fact that the number of reported cases remains stable while the total number of convictions has increased (for raw data see www.destatis.de).  

Research by Kelly & Regan (2001) and Regan & Kelly (2003) provides a broader picture. They have examined attrition rates for rape cases across Europe. With reference to these earlier studies Kelly et al (2005) reports that Finland, Ireland and Sweden displayed a similarly stark decline in conviction rates as England and Wales. Here Germany is highlighted as the only exception to a Europe-wide trend of declining prosecution and conviction rates. Kelly points out that in Germany, unlike any other European country, the proportion of prosecutions and convictions has increased since 1997, amounting to a 25% conviction rate in 1998-2001. Kelly concludes that overall the numbers indicate that “some core problems link adversarial and investigative legal systems” (Kelly et al 2005, p. 29). Still, she concedes that England and Wales presently have by far the lowest conviction rates.

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85 I have deliberately refrained from introducing any numbers into this paragraph, because this would inevitably give a sense of absolute comparability, while this raw data can at best indicate broad trends. The statistical data provided by the ‘statistisches Bundesamt’ is very detailed, but in its specific detail not directly relevant to my argument. As it is also not directly comparable to the numbers provided for England and Wales I have decided not to give any of the available raw data for Germany. Detailed statistics can be found on the internet http://www.destatis.de/.

86 Some countries are also reported to have much higher prosecution rates than England and Wales (Denmark and Austria with a 50% prosecution rate) and there are a number of countries where the majority of prosecutions resulted in convictions: Finland, Germany, Hungary and Iceland.
rates in the whole of Europe, with only Ireland scoring lower, hence a relationship between low conviction rates and adversarial legal procedure cannot be ruled out.

Following these trends Regan & Kelly (2003) have reported in their study, one can conclude that in the 1970s Germany already had a rather high conviction rate (Regan and Kelly, 2003, report 17% for 1977), which has remained stable and then increased significantly since 1997. England on the other hand has seen a steady decline in conviction rates, with particularly steep drop between the late 90s and 2002. Following Regan and Kelly's report Germany has a present conviction rate of at least 25%, while England and Wales are down to 5.5%. This would indeed point to the significance of differences between adversarial and inquisitorial legal systems, a question that will be at the centre of my analysis.

There are limitations to the applicability of Regan and Kelly's (2003) study to my own perspective. Firstly, Regan and Kelly are able to quote conviction rates for Germany because they have gathered their data by sending questionnaires to the respective European ministries of justice, asking them to provide prosecution and conviction rates. Hence the German conviction rate quoted in their study has been provided directly by the German ministry of justice and there is no indication as to how they arrived at the figures. Secondly, Regan and Kelly's study focuses on cases with adult rape victims rather than child sexual abuse. Still, due to differences in record keeping and depending on the national law, they report that a majority of the data they received includes victims under the age of 16 anyway. Given the close relationship and similarities between rape and child sexual abuse cases (and the fact that in the UK the charge of rape will indeed include child victims) and drawing on the supportive evidence from Gallagher and Pease's (2000) study, it is plausible to assume that the trends reported above are also indicative of the possible attrition rates in child sexual abuse cases. Furthermore, looking at the stark contrast between the situation as reported for Germany and England and Wales, even a very tentative reading of this data points to an intriguing divergence between the prosecution and conviction rates of these two particular countries.

Regan and Kelly (2003) do not indicate whether they have inquired into the respective countries' sources or techniques of data aggregation. Obviously this does not mean the data provided by the German ministry of justice is flawed, but there is no way to verify it drawing on the material that is publicly available. After all, as pointed out, it is the ministry of justice who in another context warns against collapsing reporting and conviction numbers (Polizeiliche Kriminalstatistik). Additionally Regan and Kelly falsely label the German data as 'including minors'. This is incorrect because the total number of convictions (the only data set that can be checked against the publicly available data) show that the data used by the German ministry of justice exclusively refers to convictions for a very narrow definition of adult rape (StGB §177 abs. 2-4 and §178). Hence contrary to Regan and Kelly's labeling, the German numbers do not include data about cases with child victims.
This brief outline provides a crucial backdrop for my analysis, because it underlines that there are very significant differences between the current performance of the English and the German legal system, while there is little reason to believe that the prevalence of sexual abuse as such should differ fundamentally between the two countries. Hence there is some indication that the divergences could relate to the different ways in which the legal systems are structured and thus respond to child sexual abuse (adversarial in England and inquisitorial in Germany).

Looking at the study by Gallagher and Pease (2000) there is some evidence that higher attrition rates in England are related particularly to problems in the early stages of investigations. Referring back to issues discussed in chapter 2, there are also interesting similarities between England and Germany. Evidently both countries have experienced what has been referred to as ‘abuse hysteria’ which was followed by an ‘abuse of abuse hysteria’, i.e. high profile miscarriages of justice around child sexual abuse allegations which turned out to be unfounded. In the light of these tensions and polarisations it is surprising to see that the number of cases reported to the police has not varied wildly, shooting up or dropping relative to the respective societal atmosphere, but that it has indeed increased steadily in both countries. This runs counter to expectations that perceived sudden ‘hysterias’ about sexual abuse or on the other hand pronounced suspicions about allegations of sexual abuse could have influenced the willingness of people to report such cases or even the readiness of the criminal justice system to prosecute and convict. Either this has indeed not been the case, or for a different reason, possibly linked to recording strategies, such a trend is not directly reflected in the available statistics. However, prosecution and conviction rates might well be affected by such changes in the societal atmosphere.

While it is certainly advisable to remain sceptical about the actual meaning and significance of such statistics, particularly where only few data is available, they help to set the scene and thus present an excellent point of departure into the complexity of the concrete space I will be exploring in much more detail in the following chapters.
6. The German and the English legal system: principle differences

Before I go into a more detailed depiction of the German and the English legal system I would like to point out two basic differences between the way laws and investigations are organised in Germany and England.

6.1 Inquisitorial versus accusatorial

There are two main systems of trial in Europe, the accusatorial (also referred to as 'adversarial') legal system, as applied in England, and the inquisitorial legal system, as applied in Germany (Spencer & Flin, 1993). The main difference is that in an accusatorial legal system a dispute is brought by either of two opposing parties and each side presents a case before the court, the function of which is to decide who has won. Here the judges are explicitly not involved in the investigation and take no active steps to discover the truth at the bottom of the dispute. The judge occupies the position of neutral referee who makes sure that the protocol of proceedings is followed properly and in a fair manner, while the case is resolved by either of the opposing sides winning in the clash of accounts. The decision rests with a sworn group of 12 members of the public, the jury.

In contrast to that in the inquisitorial legal system the court is seen as a public agency appointed to actively investigate the truth as soon as it has notice of a dispute or breach of law. It is obliged to actively gather all available information from all those it considers knowledgeable about the matter in dispute. The judges then apply their reasoning powers to this material in order to determine the truth. While accordingly this system works without a jury, members of the public will be part of the panel of judges, acting as lay judges who have an active part in the decision making, Spencer & Flin (1993) point out that the two systems are not mutually exclusive, because all legal systems include ingredients drawn from both ideas. Yet, while in practice the differences between the systems can be less pronounced than in theory, they have very significant implications for the position of child witnesses.

88 I will use the term 'accusatorial' instead of the more popular synonym 'adversarial'. The term 'adversarial' is frequently used to depict the English legal system, but it has been pointed out that the distinct feature of this system is better described by the term 'accusatorial' (Spencer & Flin, 1993). Every legal system will have an 'adversarial' aspect of parties opposing each other, yet the distinct feature of the English legal system is that the accusation has to be made by either one of the parties, meaning an accusation initiates legal proceedings.
6.2 Civil Law versus common law

Another fundamental difference that has important implications for legal procedure and the rules of evidence, concerns the way in which the law itself is structured. The German legal system is based on a comprehensive system of codified, i.e. written, laws that are applied and interpreted by judges. The general expression used for such a system in the English language is 'civil law'. In contrast to that the legal system in England and Wales is based on 'common law'. This system does not rely on comprehensive written codes, but has developed from tradition, custom and precedent. It relies heavily on a huge body of precedent cases, that is, previous legal decisions, in relation to which current cases have to be argued and decisions made (thus also called 'case law'). Yet again, this difference is not as straightforward as it may seem, as judges in civil law countries do at times refer to precedent cases as well, and over the past decades 'common law' countries have seen the introduction of more and more written codes of law.

7. The German legal system: “nulla poena sine lege”

7.1 Structural perspective: criminal law and criminal procedure

The German law is very much driven by the written word and by explicit reasoning. Following the civil law tradition the most basic principle of the German legal system is that there cannot be punishment without a written law that explicitly defines the respective deed as an offence: “Nulla poena sine lege” ('no punishment without law'). Furthermore, other than the English legal system, this is a system of reasoned judgement. Every decision made by its agents, be it the prosecution services (discontinuing or prosecuting a case) or the judges (acquitting an accused or giving a guilty verdict) has to be explicated and argued in writing, weighting all the factors considered and justifying the respective decision.

Broadly speaking the legal system is organised around the three general codes of law. Firstly, the “Basic Law” or Constitution ('Grundgesetz'); secondly, the “book of civil law” ('Bürgerliches Gesetzbuch'); and thirdly, the “book of criminal law” ('Strafgesetzbuch', abbreviated: StGB).
The principle rule for making a charge or respectively giving a guilty verdict is that the deed charged must be proven to match a written code of law.\textsuperscript{89}

There is a corresponding system of procedural rules that regulate the processes of civil legal proceedings, the \textit{"code of civil procedure"} (\textit{"Zivilprozessordnung"}), and a set of rules that regulate criminal proceedings, the \textit{"code of criminal procedure"} (\textit{"Strafprozessordnung"}, abbreviated: StPO). Following my particular trajectory here, I will limit my description to the criminal law and thus to the criminal investigative procedure, in so far as it is relevant for issues of child sexual abuse and child witnessing. Hence in the following I will focus exclusively on the \textquote{code of criminal law} and the \textquote{code of criminal procedure}. I would like to use the common German abbreviations and will thus refer to the \textquote{code of criminal law} as \textit{StGB} and to the \textquote{code of criminal procedure} as \textit{StPO}. Additionally I will focus primarily on those aspects of the law that are central for my analysis and comparison with the English legal system.

\textbf{7.1.1 Code of criminal law and child sexual abuse: codes and definitions}

The current version of the \textit{StGB} (book of criminal law)\textsuperscript{90} contains 358 continuously numbered codes of law,\textsuperscript{91} or paragraphs (\textit{§}), with sub-paragraphs, that define what exactly constitutes a criminal offence and it defines a minimum and a maximum term of sentence that has to be applied if the accused is found guilty.

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{image.png}
\caption{Graphical representation of the legal system.}
\end{figure}

\textsuperscript{89} Three basic principles apply for finding an accused guilty according to criminal law. 1. \textit{\"Tatbestandsmäßigkeit\"}—matching a code of law: The deed accused must match the definition of a paragraph in the code of criminal law (and the accused must have been charged for that particular offence). 2. \textit{\"Rechtswidrigkeit\"}—in breach of the law: The deed must be in breach of the law, which is inevitably the case if the first criterion applies, but allows to exclude e.g. cases of self-defence from punishment. 3. \textit{\"Schuld\"}—guilt: The accused must have acted in a guilty manner (schuldhaft), that is, they must have had insight into the wrongfulness of the act committed. In practice this is a contentious point, which relates to aspects of attempt and premeditation, but it also implies that people can have committed offences and still be considered free of guilt because they are seen as being incapable to understand the full scope (guilt) of what they did. This can apply to mentally ill or disabled defendants and does generally apply to all children of less than 14 years of age, because they are generally defined as lacking the maturity to be held responsible within the framework of criminal law (the threshold for responsibility under civil law is 7).

\textsuperscript{90} This outline is based on the book of criminal law (\textit{\"Strafgesetzbuch\"} \textit{StGB} 37th edition (2002). Other than English acts of law, the book of criminal law presents itself as a comprehensive and final set of laws, i.e. amendments and changes are recorded but they will not necessarily be obvious from the text and the respective act of parliament will not be quoted by date or name. Still, the book of criminal law has undergone quite a few changes in early and more recent times. It is based on the \textquote{Reichstraftagessetzbuch} from 1871, but has been fully revised in 1949, when its language was cleansed from references to the Third Reich and it was amended to accord with the newly instated constitution. Overall changes were made in 1974 and some significant changes concerning sexual offences came into effect in 1993 and 1994. Some definitions and details of sentencing have changed since then. I have attempted to point out those more recent changes relevant to my analysis (for all see Roxin, C. 2001, pp. IX-XXIII).

\textsuperscript{91} It is being amended and refined constantly via appeal decisions in the high court and new laws being passed by parliament.
Chapter 13, which contains paragraphs §174 to §184c, in the code of criminal law defines sexual offences, with the last one (§184c) defining what is to be understood as a sexual act under this law. The paragraphs distinguish the relationship of victim and defendant, the age of the victim and under some circumstances also the age of the defendant. Paragraphs §174, §176, §180 refer to children as victims, and §182 refers to sexual abuse of adolescents (victim under 16 and perpetrator over 18 or over 21).

In order to define child sexual abuse as prosecuted in Germany and to give an idea of the elaborate nature of these codes, I would like to depict the first paragraph in detail and give a summary of the other relevant paragraphs.

The title of paragraph §174 is “Sexual abuse of wards” and it first defines the relation to the victim as: Those who commit sexual act with, or have a sexual act performed on themselves by: 1. a person under the age of 16 who is under their guardianship for educational purposes, apprenticeship or general upbringing - 2. a person under the age of 18 who is dependent on them as their guardian or in an occupational relationship as an employee or an apprentice - 3. their own, or legally adopted, child that is under the age of 18. The paragraph then defines that the range of punishment applicable for this kind of offence is, up to five years imprisonment or a payable fine. The paragraph has a second section that relates to the same victims as defined above and specifies a further set of possible acts as: 1. acts of a sexual nature performed in front of a ward, 2. and encouraging a ward to perform such acts in front of them. The punishment in these cases is defined as up to three years of imprisonment or a fine. The third section of the paragraph states that even the attempt (of any of the above mentioned offences) constitutes the offence. And a final section four specifies that the court may refrain from punishment or apply a mild sentence if, in case of the first aspect of section one or section two, the court finds that the behaviour of the ward mitigates the wrongfulness of the act.

The following gives a broader summary of the central paragraphs relating to child sexual abuse in general.

§176 Sexual abuse of children. (1) A person who performs sexual acts on a person under the age of 14 (child), or has sexual acts performed on themselves by a child, will be imprisoned between six months and 10 years - in minor cases up to five years of imprisonment or a fine. Further sections also define as offence: encouraging a child to perform sexual acts on a third person, performing sexual acts in front of a child, and influencing a child in a respective manner by showing them pornographic material (printed, audio or video), or talking to them in a respective manner.

§176a severe sexual abuse of children. This paragraph builds on §176 and adds that the punishment will be no less than one year of imprisonment if the perpetrator is older than 18 years of age and has penetrated the child’s body in a sexual manner; if the abuse was committed by a group of people; if the child’s health, or physical or mental development was endangered by the deed; if the perpetrator has already been punished for a similar offence within the last 5 years. The punishment cannot be less than two years if the intent of the act was to produce and publish pornographic material. The punishment can be no less than 5 years if the child has suffered severe physical maltreatment during the act or has been close to death as a result of the act.

§176b Sexual abuse of children resulting in the victim’s death, allows a life-sentence to be given, or a punishment of no less than 10 years imprisonment.

Let me summarise the main aspects of these laws and the defined age limits. From the victims’ perspective: Child sexual abuse refers to victims up to the age of 18 where the victim is the perpetrator’s own child or a dependent employee, and it refers to victims up to the age of 16 where the victim is the perpetrator’s ward. All other cases child sexual abuse refers to victims as under the age of 14. Sexual abuse of adolescents refers to victims under 16 (if the perpetrator is over 18). Legal responsibility from the perpetrators’
perspective: a person is responsible before the criminal law from the age of 14, but more flexible rules and sentences apply for perpetrators between 14 and 18 (and relating to another set of laws more flexible rules and sentences also apply to perpetrators between 18 and 21).95

7.1.2 Code of criminal procedure and child witnesses: investigation, prosecution and trial

The StPO ('code of criminal procedure') consists of over 400 consecutively numbered paragraphs ('§'), that regulate the investigative and trial process on the one hand and the sentencing process on the other hand. In practice the StPO is even more crucial than the StGB (book of criminal law), because it defines what the police and the prosecution are allowed to do and depicts the rules of evidence. It regulates what kind of evidence can be used in court and how it must be introduced, how defendant and witnesses must be informed and questioned and how the trial has to be structured.96

The investigative and trial process is split into three distinct phases, each of which has its own rules and agents.

Firstly, the investigative process ('Ermittlungsverfahren'), will be conducted by the police under instructions and guidance of the prosecution services who is the authority over all investigations.

Secondly, the intermediate process ('Zwischenverfahren') is conducted by an 'investigative judge' ('Untersuchungsrichter') on behalf of the courts of law, to double check that the case brought forward by the prosecution is based on sufficient evidence, and to collect more evidence if necessary.97

Thirdly main trial ('Hauptverfahren') is conducted by a panel of professional criminal court judges and lay judges (numbers vary).

The most important principle for criminal investigations that applies for all three stages of the legal process is the "principle obligation to investigate" ('Legalitätsprinzip' or 'Amtsermittlungsgrundsatz'). For the police and the prosecution services this means that they are obliged to start an enquiry as soon as they get knowledge of a suspected criminal offence. They have to fully investigate the case and bring a charge, unless they have actively

95 The Youth Court Law (Jugendgerichtsgesetz) sets special rules for the treatment and sentencing of young adolescent and adolescent suspects and perpetrators in criminal proceedings (age thresholds are 14 to 18 and 18 to 21).

96 This outline is based on the code of criminal procedure ("Strafprozessordnung" - StPo) 33th edition (2001). I have attempted to point out all more recent changes relevant to my topic. Additionally the general depiction of the German criminal law draws on Wesel (2005) and Lüthke & Müller (1998).

97 The prosecution is, at this stage, still in charge of the investigations, but the investigative judge can also order inquiries, on behalf of the court, if the evidence appears to be unclear. So strictly speaking the 'investigative judge' is not 'in charge' of the investigation.
The German legal system: “nulla poena sine lege” and explicitly satisfied themselves that there is not enough evidence of a criminal offence to justify a prosecution, or that no offence has been committed. The police initiate all necessary investigations and along the way submit their files to the prosecution services. Only the prosecution services can decide to discontinue a case. Hence the ‘principle obligation to investigate’ (Legalitätsprinzip) crucially determines how police and prosecution approach their task. It constitutes a central difference to the English legal system, which operates on the discretion to investigate and prosecute. This principle obligation to investigate also makes a crucial difference for child sexual abuse cases because it means that once the police (or the prosecution services) have knowledge of (suspicion of) such an offence, they are obliged to investigate and prosecute regardless of the victims or the families wishes or preferences.

The same ‘principle obligation to investigate’ applies for the courts, only here it is called the ‘maxime of inquisition’ (Inquisitionsmaxime). It defines the task of the ‘investigative judge’ in the second phase and that of the trial judges in the third phase of the legal proceedings. At both stages judges are, following their respective tasks, obliged to actively seek out and hear all evidence necessary in order to decide whether the case should be brought to trial (this is the investigative judges’ task) or to find the ‘material truth’ of the case (this is the trial judges’ task).

Most significantly this obligation of the court to find the material truth of the case means that other than in the English legal system a guilty plea cannot lead to the termination of the investigations or the closure of the trial. While a confession or a guilty plea will be considered as an important piece of evidence, the court still has to make sure it fully investigates the material truth of the case, because it has to come to an independent verdict that reflects what the court concludes has actually happened. This principle most clearly reflects the nature of the inquisitorial legal system: It is not purely about determining guilt or innocence, but this legal system seeks to independently investigate and establish the truth of an incident.

98 The prosecution services can waive this obligation in certain cases ('Oppportunitätsprinzip'), when the offence is very minor or when there are other, much more serious charges against the accused. Yet the police are obliged to investigate every potential criminal offence.

99 There are circumstances under which the wish of the victim might indirectly terminate the investigation. §52 StPO defines circumstances under which a witness can refuse to give evidence. For example a person does not need to give evidence against a close relative (parents or wards can exercise this right to refuse to testify on behalf of their children if these are seen to young to understand this right). So if the alleged victim is related to the defendant and decides not to give evidence against them, this might lead to the case being discontinued by the prosecution for lack of evidence. Still, this might not apply where there is other convincing evidence.

100 §244 StPO defines that the viewing of evidence includes the duty of the court to attempt and find the material truth of the case using all means and information available to them.
Following this principle the investigative judge in the intermediate process will not just reassess the prosecution file, but he or she will have to actively investigate the case if it is considered necessary to collect more evidence. Similarly, if at the third stage, during the main trial, previously unknown relevant information or inconsistencies emerge, the trial judge(s) are obliged to use all means available to them to clarify these new aspects (e.g. find and hear more witnesses, have the police collect more evidence). Failure to do so, that is, failure to exhaust all investigative routes and means available, will make the trial or the verdict vulnerable to an appeal.

This principle duty to investigate using all available means also includes the duty to call an expert witness in cases where the prosecution (at the first stage) or respectively the court (at the second or at the third stage) find that their own knowledge is not sufficient to weigh a particular piece of evidence (e.g. a child’s witness statement) relevant to their investigation or decision-making. Obviously it is at the prosecution’s or the judges’ discretion to decide whether their knowledge is sufficient or not, but in cases of contested child sexual abuse they are very likely to instruct a psychological expert to assess the credibility of the child witness.

§75 StPO defines that giving expert testimony to a court is a public duty, hence any person that is approached by the court (or prosecution) because the court finds that they have expert knowledge that can assist the court, is obliged to comply with the request. However the witness is not obliged to comply, as the assessment by an expert is voluntary. Hence the expert has to ensure the witnesses’ explicit consent and the witness (or in the case of children their carers) may refuse to be assessed by the expert. The expert is responsible to-, and instructed only by the court and has no right to secrecy about details reported during the expert interview. The expert is considered a ‘special witness’, an ‘aid’ to the court rather than a ‘hired gun’ of the defence or the prosecution, as can be the case in England, where experts will be appointed by either of the opposing parties. The court will explicitly demand to hear the experts’ opinion, as they help the court to interpret evidence, but the court is obliged to form their own independent conclusions.

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101 During trial prosecution, defence and witness advocate can also demand for the court to accept or collect further evidence or to call certain new witnesses, which is usually granted. The StPO regulates how the parties have to proceed here and when the court must allow or can reject the introduction of evidence (§226 - §275).
102 This means that any psychologist who the court determines has the expertise they need, has to comply. §75 names very few exceptions that relieve an expert of his duty. §78 to §80 StPO regulate how the expert should be instructed, what their duties to the court are and what their status is during trial.
Depending on the severity of the case it will be tried, at the lowest level, by a district court (Amtsgericht), which consists of one professional judge and two lay judges (Schöffenen).

More severe criminal cases will be tried by a regional court (Landgericht), consisting of three professional judges (one of which is the presiding judge) and two lay judges (Schöffenen). In cases where the defendant or the victim are under 18 years of age the case will most likely be tried by a juvenile court, which is a section of a district or a regional court. These are specialised on dealing with young offenders, but due to their experience with young persons, they will also be expected to handle most cases where young witnesses are concerned.

In German criminal proceedings an alleged victim is generally entitled to their own legal representation, a regular lawyer who is acting as a ‘victim’s advocate’. This is a crucial difference to the English system where no such provision is made. In cases of child sexual abuse, the alleged victim will appoint their own lawyer ‘Nebenklagevertretung’ (victim advocate), and in case they fail to do so the court should appoint such representation on their behalf. This victim advocate acts as an independent co-prosecutor (with almost equal rights to question witnesses and introduce evidence) on the child’s behalf, and in child sexual abuse cases the lawyer’s fee will be paid by the state.

The actual trial is organised around three basic principles.

Firstly ‘Öffentlichkeitsgrundsatz’, or the principle of public trial: The trial has to be open to the public.

Secondly the ‘Unmittelbarkeitsprinzip’, or the principle of immediacy: The entire evidence has to be seen and enquired into (witnesses) personally and directly (‘immediately’) by all the judges concerned with the trial.

Thirdly ‘Mündlichkeitsprinzip’, or the principle of the oral presentation of evidence: Evidence can only be considered before the court when it has been introduced orally during the actual court proceedings. This means that the court must interview and hear every single witness personally. The court must not rely on previously filed statements, and the case has to be established again in its entirety during trial by oral evidence of the
respective witness. The file accumulated by police and prosecution to bring the case only serves to prepare the trial and to guide the judge(s) in their inquiry during the trial. Yet, the file's contents can only bear weight for the court's decision making, once they have been reintroduced orally during the trial.\textsuperscript{106} This is not just a major difference to trial in England, where only evidence relating to contested issues will be presented in court, but it also makes a crucial difference to child witnesses' position and possible protective measures.

For expert testimony these three principles mean that even though a written report will be provided by the expert before the trial, the expert will have to present their testimony orally and in full during trial.

The judge(s) lead the investigation, and following these main principles, the judge(s) will always interview witnesses comprehensively first. They will then give the prosecution, the defence and the witness advocate the opportunity to ask further questions.\textsuperscript{107} §69 StPO defines that witnesses have to be encouraged to initially produce a free narrative, giving a full contextual account of all the information they can provide with regard to the case in question, as they see fit. Follow up questions, closed questions and more probing questions should only be asked following this initial free account. Again this is a crucial difference to the English criminal trial where witnesses will be asked rather closed questions focussing on particular contested details.

The StPO does not state a minimum age for witnesses and there have never been formal requirements for the corroboration of children's evidence.\textsuperscript{108} Volbert (1992) points out that children as young as three have given evidence in court, but in practice the limit will usually be around four or five years of age.

To protect child witnesses §241a StPO defines that witnesses under 16 years of age must only be interviewed by the presiding judge (in cases where there are three professional judges one will be the presiding judge). This means that, while the child will be present in court, the presiding judge is the only person to interact directly with the child. Prosecution, defence, victim advocate and psychological expert (if present) have to direct their questions

\textsuperscript{106} As a consequence of this rule, written material will have to be read out in full during the trial, in order to introduce it as evidence.

\textsuperscript{107} Prosecution and defence will always question witnesses adversarially. In principle a cross-examination of witnesses is possible. §239 StPO defines that defence and prosecution can, if they agree to do this, request the judge to give them leave to cross-examine their witnesses. The judge will in these cases stand back and only ask follow up questions after the cross-examination. Legal professionals report that this provision is hardly ever used.

\textsuperscript{108} The ability to give evidence is determined on a case by case basis and depends on the capacity of the individual witness in relation to the relevant observations and questions at stake in a given case. §61 StPO defines that persons under 16 must not take the oath. §61 StPO puts it at the discretion of the court to decide whether witnesses should generally take an oath. In the cases I observed the judges put this question to defence and prosecution and usually none of the legal professionals involved wants witnesses to take an oath.
The GenTIan legal system: “nulla poena sine lege”

to the judge who will then refer them to the child witness.109 Further special measures that were gradually introduced over the past twenty years, and that can be applied where child witnesses are concerned, are the removal of gowns (no wigs are worn in German courts), removing the defendant from courtroom (§247 StPO), and clearing the public gallery. In the witness protection bill 1998 further provisions were made. Now it is also allowed to interview a witness while not in the courtroom, that is, via CCTV link (§247a StPO), and audio or video recordings of a previously conducted interview with child witnesses can be played as evidence in court (§ 255a StPO). Yet, this video interview must have been conducted by the ‘investigative judge’ and the defence must have been given the opportunity to participate; furthermore this does not rule out that additional questioning of the child in court (for a summary see Köhnken 2002).

Particularly the latter two measures clearly collide with the three principles of the criminal trial (public, immediate, direct oral evidence), and the widespread reluctance of judges to make use of these measures has been an ongoing concern for researchers in this field.110 So while the legal system has made provisions and generally taken into account advice from researchers, in practice these measures are highly unpopular with legal professionals. Infrequently the defendant or the public are excluded, but video recording or CCTV options are used extremely rarely or not at all in most of the Federal States, including the jurisdiction I visited for this study (Volbert 2003).111

When the court is satisfied that all necessary evidence was heard, prosecution, defence, victim advocate, and finally the defendant make their closing statements, and then the judges and the Schöffren retreat to discuss and reach a verdict.112 Any verdict (acquittal or guilty) has to be an elaborately reasoned judgement explicating why and how the respective conclusion was reached. A first version will be delivered orally in court, but for the verdict to become valid a written version needs to be supplied. Again this is a major difference to the English system where judgements are made by the jury, which will only deliver a verdict.

Due to the inquisitorial nature of the German criminal procedure, which requires all witnesses to be heard in court again and that dictates further investigations by the court if

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109 Obviously this implies that child witnesses can never be a cross-examined.
110 See Volbert (2003) for an overview of studies that have looked into the use of special measures in German courts.
111 The state of Schleswig-Holstein forms a positive exception to this rule (Köhnken 2002).
112 If there are three judges and two Schöffren, a majority of 3 to 2 is needed for a verdict, but the more lenient suggestion will need less votes. So if two votes acquit and three find guilty, the acquitting votes will stand, meaning that two Schöffren could outvote three judges in case the Schöffren argue for a more lenient sentence.
necessary, the criminal trial itself can take a considerable amount of time. There is huge variation but for child sexual abuse cases an average criminal trial in a regional court can take between three and ten trial days. The trial does not have to proceed on consecutive days and the StPO allows a break of up to ten days between individual trial days. So whilst an effort is made to avoid long intervals it is not unusual for a more complex trial to stretch across more than two weeks.

The whole investigative process can also take quite a long time. Volbert (2003) reports that in child sexual abuse investigations a considerable amount of time can pass between the initial report and the main trial. She quotes various studies that indicate time spans between the reporting of an abuse and the main trial, as ranging between 5 weeks and 3.4 years (Volbert & Busse 1995 a, b), to ranging between 6 weeks to 3.1 years as reported in another study (Langen 2000). Remarkably however, Volbert (2003) stresses, studies also show that it can take just as long or even longer for a case to be discontinued. The time that passed between the reporting of an abuse and the decision to drop the case (final decision not to open the main trial), ranges between 1 week and 3.3 years in one study (Volbert & Busse 1995a, b), and between 10 weeks and 4.2 years in another study (Grunder 1999).

7.2 Psychological expertise: credibility assessment of child witnesses, sketching the history of SVA in Germany

One of my declared aims in this chapter is to capture the intersection between psychology and law, hence I would now like to introduce the historical background and structure of expert practice in Germany in some more detail. This should help to grasp experts' complex position within the legal system.

Unlike in England and despite longstanding internal animosities between legal and psychological professionals, in Germany the law has always been closely connected to psychological developments. As pointed out in chapter one 'statement psychology' (Aussagepsychology), founded by W. Stern around 1900, has a long tradition in Germany, and researchers have developed distinct methods such as Statement Validity Assessment (SVA) specifically designed to assist courts with questions of credibility (cf. Steller & Köhnken 1989; Köhnken 2002).

Statement Validity Assessment: Rationale and Structure

Statement validity assessment (SVA) based on the hypothesis that, to invent, tell and uphold a narrative that is not based on personal experience, is cognitively so much more demanding than just reporting a true experience, that the narrative of such a lie will show significant qualitative differences to a narrative reporting a true experience (Undeutsch 1967). In an attempt to provide a general synopsis of factors that could help to pinpoint
such qualitative differences between lies and experience based statements, Steller and Köhnken (1989) assembled a list of such criteria from the available research literature. In German these are known as 'Realkennzeichen' ('reality-criteria', or 'reality-indicators'), while in the English speaking world this list of criteria became known as 'Content Criteria' for Criteria Based Content Analysis (CBCA) (Vrij, A., Akehurst, L. 1998). While research has confirmed the criteria's validity in helping to detect intentional lies, its ability to differentiate suggested statements could not be proven. This has been explained by the fact that, where a person is subjectively convinced to have experienced an event, even if it was suggested to them, the re-telling and upholding of the story will not be particularly demanding, because they are convinced of the experience. Hence their narrative will not show the qualitative differences that can be expected in an intentional lie. Still, the full method as it is used by German experts has in practice proven helpful to identify possible circumstances that may have led to suggestion (Steller 2000). Despite the general success of CBCA, Steller and Volbert (1997) stress that these criteria must not be misunderstood as a check list, or as a 'rating scale', because in expert practice neither the absence nor the presence or absolute number of criteria detected in a statement alone can determine whether a statement is credible or not. The criteria based analysis of the child’s statement only makes sense if it is embedded into a detailed examination of the actual circumstances of the disclosure, the interpersonal relationships of those involved and the child witnesses' cognitive/social/language skills. This means experts have a neutral inquisitive task not dissimilar to that of the court, but within the very narrow boundaries of the question the court has asked them to address. The principle question they will try to answer is:

"Could this witness – considering their given individual characteristics, the specific circumstances of the interview, and taking into account any possible influence of a third party – make this specific statement, whilst it is not based on an actual experience." (my translation) (Steller, M., Volbert, R. 1999, p. 23).

SVA is not age specific or specifically linked to statements about sexual abuse, but the circumstances of its emergence meant that it was developed and used particularly for the assessment of children’s credibility in sexual abuse cases. It is acknowledged that the assessment by the expert can be stressful for the child, and it is problematic in that it represents an additional interview. However, the assessment is mostly perceived as very helpful. The expert's assessment and presence in court can help to take pressure off the child by taking them out of the firing line. Persisting questions about inconsistencies or about specific behaviours or family dynamics can be directed to the expert rather than the

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114 There is a long standing disagreement about the ultimate validity of CBCA between researchers from an Anglo-American background and German researchers and experts. On the English side there is persistent scepticism against the method, based on the fact that quite a few of the individual criteria do not perform above chance level in experiments and because it is very difficult to achieve appropriate inter-rater reliability in experimental settings with trained raters (Vrij 2005). The German researchers/experts on the other hand highly value the approach. Yet they also stress that CBCA must not be understood as a rating scale, and point out that only an overall assessment of the criteria in their entirety, and in relation to the particular context in which the respective narrative emerged, can provide enough information to assess a statement. So from this perspective the criticism of English researchers appears to miss the point, because it appears to be based on a far too narrow and slightly mistaken assumption of how the method works.

115 According to Steller and Volbert (1997) the large majority of expert testimony about the credibility of witnesses will be requested with regard to sexual abuse cases and where child witnesses are concerned. They report that adult witnesses were concerned in only one fifth of the expert testimony requested by prosecution or courts from the Institute of Forensic Psychology (Free University Berlin) between 1985 and 1994 (90% of these adults concerned were woman).
child. And it is the expert who will be attacked by the legal professionals if issues remain unaccounted for. The expert can furthermore deliver background information and point to possible sources of misunderstandings or illuminate misperceptions. So whilst the assessment is an additional stressor for the child, credibility assessment is on the whole perceived to work in their favour. It can ideally help to prevent false negative as well as false positive findings (Kohnken 2002). At this point it should also be noted that, due to the fact that giving expert testimony is a public duty, all researchers in this field in Germany are also practicing experts on a regular basis.

Since the German High court in 1955 ruled that contested cases of child sexual abuse require the use of psychological interviews and assessment by an expert (Undeutsch 1989) it has, despite the initial suspicion of the legal profession, meanwhile become a routine procedure to employ expert witnesses.\(^{116}\) Still, this initial High Court ruling did not establish any explicit rules, or control as to which psychologists qualified as experts or how exactly such a credibility assessment should be conducted.\(^ {117}\)

Towards the end of the 90's discontent over psychological expertise grew. As outlined in chapter 2 this was the time of the 'abuse hysteria' and of psychologists developing so called disclosure therapies that were later identified as highly suggestive (Steller 1997). Later this atmosphere shifted to the other extreme, representing what has been termed an 'abuse of abuse hysteria', and featuring heated debates such as the one about a suspected epidemic increase of false allegations of sexual abuse in the context of contested custody cases (Busse et al 2000) (see chapter 2.1).

In the early 90's Germany had also seen two of the most high profile miscarriages of justice around child sexual abuse allegations, quite similar to the American MacMartin Pre-school case. One large case are the so called 'Mainz-Worms trials' (named after the cities related to the accusations or the trials), the other example was the 'Montessori' case, named after the Montessori day care centre where the abuse was alleged to have happened (Steller 2000).

Infamously, psychological experts had particularly in the first case played a significant role in confirming children's (horrendous and at times fantastic) accounts, while failing to even consider the possibility that the statements could have been induced. Additional experts called in at later stages of the trial, demonstrated (as the court found conclusively) that the

\(^{116}\) Amtzen (1982) estimates that by 1982 expert testimony had been offered in more than 40 000 cases (Memon et al 1998). Volbert (2003) summarises results from different studies and reports that the percentage of child witnesses who were assessed by a psychological expert varies between 9% (Busse & Volbert 1995a, 1995b), 11% (Grunder, 1999), 6% (Langen, 2000) and 17% (Wolke, 1995, as quoted in Grunder, 1999).

\(^{117}\) The title 'Diplom Psychologe' is strictly regulated in Germany. Only those who have completed the five to six year university degree, which has a nationally regulated curriculum and exams, are allowed to carry the title psychologist. So obviously this guarantees a certain level of expertise (familiarity with psychometric tests as well as diagnostics and clinical/developmental knowledge). Still, while the title rightly provides a general license to practice, it does not necessarily qualify individuals for specific assessment tasks. Around 2001 a further special qualification has been introduced to distinguish ‘forensic psychologists’.
statements had been the result of an ongoing process of suggestion, fuelled not only by the over-concerned parents, but also by the well intentioned but inappropriate questioning and actions of legal professionals.

It was on the background of this heightened sensitivity to suggestion, that in 1998 an appeal was filed to the Bundesgerichtshof (BGH) (High Court of Appeal). This appeal was brought in relation to a case where expert testimony was seen as flawed, but the High Court took the opportunity to try and settle the issue of psychological expert testimony on a more general level. The High Court (BGH) appointed a group of reputable psychological academicians and researchers in the field to look into the case. These experts were not just asked to examine the expertise delivered in the specific case appealed, but they were instructed to generally examine whether psychological expertise was appropriate in such cases and if so, which was the best method of assessing the credibility of witnesses. In its subsequent ruling (1999) the High Court followed the experts’ recommendations closely and ruled that Statement Validity Assessment (SVA), as described by the experts, shall be regarded as the state of the art procedure all experts have to apply when assessing the credibility of witnesses.

This ruling changed the relationship between psychology and law in this area dramatically and it is remarkable in two respects. Firstly, the High Court (BGH) designated SVA as the proper method and thereby legally sanctioned a specific psychological approach to credibility assessment. Secondly this ruling explicitly interpreted science. It is a 27 page document that explicitly instructs experts, giving an elaborate outline and interpretation of the appropriate methods, how to apply them and how to present the expert testimony to the court.

The High Court ruling: 'BGH Urteil, 30.6.1999 – 1 StR 618/98 – LG Ansbach’

The ruling states that the assessment must be based on ‘basic scientific principles’, that is, it needs to be based on a ‘null hypothesis’ and in the course of the assessment the expert needs to develop and explore relevant alternative hypothesis (alternative to the hypothesis ‘it is a true statement’). The methods used should be appropriate to assess the issues raised in the respective hypothesis and the methods should reflect up to date scientific knowledge in the field (p. 10). The assessment should proceed via Statement Validity Assessment, focussing on the consistency of the account and using the ‘reality-criteria’ (p. 11). The ruling states that these reality-criteria are scientifically proven to be valid, as long as they are used in their entirety and embedded into SVA (p. 12). They must not be used as a check.

118 The court appointed two groups of experts to deliver one expert report each, one with a more general scientific and one with a more specific focus on methods of assessment. Prof. Max Steller and Dr. Renate Volbert (Free University Berlin) were appointed to provide a specific evaluation of methods of credibility assessment. Prof. Klaus Fiedler and Dr. Jeanette Schmid (University of Heidelberg) were asked to deliver a broader scientific evaluation.

119 On page 12 the ruling states that ‘the so called reality criteria can be regarded as empirically approved’. It goes on to state that even though the individual criteria do not have significant validity, the expert testimony
list, because neither their presence nor their absence as such is an absolute indicator for or against a statement (p. 13). The assessment needs to examine the quality of the account given by the witness, but must also consider the overall consistency of the account in relation to earlier statements and other witnesses’ accounts. Additionally, it needs to consider the competency and experience of the witness as well as the development of the specific statement (p. 14). The expert should also explore the motivational factors that could have influenced the statement and take into account the personal competency of the witness to see whether they would be capable of inventing the respective account (p. 17). Where necessary, i.e. in child sexual abuse cases where young or adolescent witnesses are concerned, the sexual development of the witness should be explored (p. 18). The ruling states furthermore that it is not appropriate to assess suggestibility using general standard test procedures, because “suggestibility is not a stable personal trait, but a phenomenon that, according to current scientific findings, is influenced by a range of cognitive and social psychological mechanisms [factors]” (Bundesgerichtshof, 1 StR 618/98, p. 20). The ruling then goes on to define how the expert report should be written and presented. It stresses that the exploration, examination and findings need to be laid out in a transparent and comprehensible (plausible) fashion (p. 21), enabling the court to understand how the expert collected and discussed their information and why they arrived at their conclusions. This implies that all the different hypothesis need to be outlined explicitly, the tests used should be described and a transcript of the tape recorded interview with the witness needs to be included in the report. Finally, the ruling states that it is the judges duty to guide and instruct the expert and most of all to make sure the expert’s assessment and report complies with the minimum scientific standards.

124 It closely defines that any party can appeal against an expert report if they find it does not comply with the scientific standards, and demand an additional expert’s assessment. The court however can decide not to grant such an appeal.

While the ruling is not entirely uncontroversial, it has been welcomed by the research community, as it generally represents the scientific convictions of a majority of researchers in this field in Germany. Most of all the ruling clarifies a crucial point that leading researchers in this field had tried to bring home for years. It spells out that the matter to be will be significantly more reliable if it is based on the overall picture of all these criteria as they form an interdependent whole.

As this is a crucial aspect, the expert is explicitly permitted to draw on information gained from statements of third parties. These can be other witness statements in the police file, or in the case of children, personal conversations with the parents/carers (p. 15). Additionally, the expert can ask the court to have the police interview further witnesses and report back the results.

The ruling explicitly states that the use of anatomically correct dolls and the interpretation of children’s drawings is not allowed, because research has shown that these are not valid methods of assessment (p. 18). The ruling goes on to explain that for the assessment of the credibility of a witness, this judge shall be responsible to ensure, following this ruling, that the expert assessment satisfies the minimum standards of scientificity. If the appeal explicitly outlined specific flaws of the expert’s assessment, the court’s refusal also needs to deliver an elaborate argument why it does not find the appeal justified.
assessed is the credibility of a specific statement in a specific context and not, as many experts in the past assumed, the credibility of a person or their character in general. Yet, the ruling has also been criticised by some academics for its reference to what are perceived as unsuitably strict scientific criteria. And particularly a larger number of practicing expert psychologists have met the ruling with apprehension because it is perceived to complicate their task and seen to dictate a too narrow set of methods and rules they have to use and could be challenged upon.

One of the central points of debate has been what the High Court called the ‘fundamental methodological principle of assessment’, i.e. that any assessment needs to be based on the *null hypothesis*. The ruling states that the principles of scientific procedure command that the issue under examination (credibility of a statement) should be negated until this negation ceases to be congruent with the facts collected while assessing the case.

“The fundamental methodological principle commands that the matter under investigation (here, the credibility of a specific statement) shall be negated until this negation ceases to be tenable in the face of the accumulated evidence. Hence the expert shall base their assessment [initially presume] of the respective statement upon the initial hypothesis that this statement is untrue (so called null hypothesis).” (my translation) (BOH Urteil, 30.6.1999 – I StR 618/98 – LG Ansbach. p. 8).

Heated debates have circulated around the apparent implication that experts should by principle convey to the child they did not believe them, an idea that is sternly rejected by practitioners. The researchers who provided the initial expertise upon which this ruling is based have since tried to clarify that this was not the intended message at all. All this ‘unfortunate formulation’ by the High Court, as one of these experts put it, was supposed to convey, is that the expert should embark on their task by developing a set of plausible alternative hypothesis (alternative to the ‘it is true’ hypothesis) and approach these with an open mind, instead of fixing their mind to one scenario and then trying to validate it without considering alternatives. Hence the mentioning of a ‘null hypothesis’ was intended to address the problem of an ‘affirmative-only’ assessment practice that was suspected to be widespread amongst experts. This kind of ‘affirmative practice’ had been identified as a major problem in some of the previous high profile mistrials, where experts had only sought to confirm the children’s statements, without exploring alternative hypothesis that

126 In German this change in focus is reflected in the changed terminology. The assessment is now explicitly focused on the ‘Glaubhaftigkeit’ (credibility of a statement, in the sense of it being ‘convincing’), as opposed to the traditionally used term ‘Glaubwürdigkeit’ (credibility of a person, in the sense of trustworthiness of character).

127 Original quote: "Das methodische Grundprinzip besteht darin, einen zu überprüfenden Sachverhalt (hier Glaubhaftigkeit der spezifischen Aussage) so lange zu negieren, bis diese Negation mit den gesammelten Fakten nicht mehr vereinbar ist. Der Sachverständige nimmt daher bei der Begutachtung zunächst an, die Aussage sei unwahr (sog. Nullhypothese)."

128 Experts only seeking out factors that could confirm the child’s statement without considering alternative explanations such as suggestion, lie, error, illusion, mistaken or projected identity of perpetrator.
could have explained the children's account (for example suggestion). While the academic debates seem to have ceased, there is reason to suspect that the 'null hypothesis' still leads to confusion amongst legal and psychological practitioners.

Another aspect that is perceived to be problematic in the ruling is the role given to the court. In outlining 'proper scientific procedure' the ruling intends to provide the court with the means to make sure the expert assessment they receive is conducted appropriately and refers to state of the art scientific knowledge. Still, by stipulating that judges should not just instruct the expert, but should also supervise them and ensure the scientific appropriateness of the experts' testimony, the ruling presents the judges with a dilemma. It is doubtful whether a judge can be expected to reliably ascertain that an expert draws on the latest scientific knowledge and applies this knowledge correctly. After all, it is the judges' lack of expertise in this specific area that necessitates the use of experts in the first place.

Obviously much more could be said about the perceived and practical problems arising from this ruling and the ongoing debate is much more complex than I can hope to grasp here. However, for my trajectory these two dilemmas of the High Court ruling are the most pertinent ones because they condense, from two different perspectives (legal, psychological), the complex way in which law and science, psychological expertise and legal practice, intersect around the problem of children's suggestibility. While these latest changes in child witness practice and credibility assessment are not just focussed at suggestion as such, but aim to tackle a range of different problems, it is interesting to see that suggestibility was at the heart of the dynamic that has now, via the High Court ruling, significantly changed and shaped child witness practice in Germany.

Taking a look back at part (A) of the thesis there is a clear parallel to the problems arising around suggestibility, and again we can witness the 'Mesmer effect'. On a slightly different level it seems suggestibility has once again raised the problem of what could be called the dilemma of a peculiar 'epistemology of practice'. How can scientific criteria correctly be applied to practice to warrant decisions (null hypothesis debate)? And how in turn can this practice that requires those decisions make sure this science is actually scientific (judges' dilemma)? These two dilemmas will reappear in various shapes and forms throughout the following chapters.\textsuperscript{129}

\textsuperscript{129} There are social scientists who might explain such dilemmas by arguing for the principle and systemic incommensurability of psychology (the sciences) and the law (King & Piper 1990). Yet, following my
7.3 Experiential perspective: negotiating memory, childhood and expertise in the German legal system

I would now like to create a more detailed picture of what it means to collect and handle children's evidence within this legal framework. In the following I will thus trace children's evidence through the individual accounts of legal practitioners I interviewed and practices I observed, more closely. Following a 'quasi-ethnographic' approach my intention here is not so much an analytic one, but at this point I want to capture some of this practice in detail and demarcate the points of tension within, as they emerge from the individual interviewees' impressions and from the observations I conducted during my study.

The following can be regarded as an experiential map of the practitioners as operators within the system of their practice. This map locates them towards child witnesses, towards each other and with respect to their task specified by the criminal justice system, identifying juncture lines and dilemmas emerging at these intersections, that is, the point where they figure as nodes of complexity. I will later revisit some of these juncture lines in order to examine in more detail the accounts of the practitioners as they deal with these dilemmas.

Collecting and recording evidence: the police

In Germany children's accounts will first be heard by members of a special unit of the police that deals exclusively with investigations around sexual offences against young persons. Any disclosure or report of sexual abuse will be referred to members of this special unit. While urgent cases are dealt with immediately, for others it can take two to three weeks to arrange an interview with the child. An officer of this unit I interviewed reported that her job was exclusively to handle abuse cases and to interview children, which sometimes meant two or three interviews a day. As the officer operates under the 'principle obligation to investigate', she deals indiscriminately with every reported case. Apart from checking whether the child is actually able to communicate in a fashion the officer can understand, she says, there is little to decide or prepare at this stage.

Currently there is no formal special training for interviewing child witnesses, but experience will grow with the job, the officer remarks and adds that she has also acquainted herself with...
with recommendations from psychological literature about interviewing. When asked for her approach to interviewing she describes how she begins with an open rapport, and open questions such as ‘why are you here’ in order to avoid suggesting anything to the child. While throughout the interview she says she might well challenge a child if she has the impression they are not telling the truth, she also maintains that her task is purely to collect information and not to judge children’s credibility. This, she states, is for a psychological expert to determine, hence the police need not and should not make these judgements about credibility.

Still, it becomes clear that paradoxically she will regularly be asked to comment on the perceived credibility of a child witness. This could happen either in court, where the interviewing officer can be questioned as a witness about the initial interview, or during the investigation when the prosecution services, who are in constant exchange with the police, demand comments about the perceived credibility of a witness (see appendix B, excerpt 1). The officer does not explicitly mention any specific ‘rules’ of investigation, but the officer’s dilemma resonates with some of the rules spelled out in the ‘code for police conduct’ nr. 382 (Polizeidienstvorschrift 382). Paragraph 3.6.14 states that officers need to provide what is frequently referred to as “Reifevermerk”, ‘comment on maturity’.

So according to this guideline officers should not judge credibility but make sure they collect whatever might be indicative for or against it. Additionally all this is done in the context of the very broadly defined ‘comment on maturity’, which, as the officer reports, will frequently spark the interest of the court or the prosecution who will ask her to elaborate on such comments. To deliver such elaborations, she finds, puts her in an awkward position, because it is difficult to comment on something she is not actually supposed to be paying attention to in the first place, and which she ultimately lacks qualification to judge anyway. But beyond that, she points out that often she can hardly

130 This does not apply for the whole of Germany, as other police service areas have put in place special training academies for police officers teaching them how to interview children. Still currently only a small number of officers are trained.
131 A chief officer reported that most officers were not aware of the ‘code for police conduct’ nr. 382 (Polizeidienstvorschrift 382), and this was confirmed anecdotally by the lawyers I interviewed.
remember any specific details of the interview situation, because demands for specific comments usually come up a long time after the interview, at much later stages during the prosecution or in the trial.

A central tension arises around the question of how to record children's statement. The 'code for police conduct' nr. 382 (Polizeidienstvorschrift 382) article 3.6.12 states that all statements should, if possible, be recorded verbatim, with relevant passages being noted in a question-answer format. Even more, §58 StPO explicitly demands that police interviews be audio or video recorded where the witness is a minor and a possible victim of sexual abuse. Yet in the police service area I studied, interviews have hardly ever been recorded in the past and the use of audio or video recordings is still extremely rare. Here both of the officers I talked to remark that they do not have the resources to record interviews (no tapes or videos were provided), and that it would take far too long to transcribe the tapes. Ultimately their argument is that a recorded interview by the police cannot be played in court as evidence, so there seems to be little point in doing it. The routine practice described by the officer is that a secretary will assist them in taking notes. During the interview the officer will continuously dictate to the secretary, in her own words, the gist of what the child has just said in answer to a question. Yet, the officer says that with particularly vulnerable children, she prefers to conduct the interview on her own, taking notes throughout or memorising the answers in order to write them down after the interview.133 She adds that it is clearly neither possible nor desirable to note everything down, because only some things will be important and her experience is that it works well the way she does it.

I: (…) and then you would dictate please write this and that down (yes exactly) and you wouldn't take notes yourself while you=

PolG1: not necessarily no but it is difficult you know sometimes quite a lot will be said and sometimes not necessarily ok NOW YOU WOULD SAY everything is important but (well) you just can't do everything you know I'm with regard to this it depends on how it can be used (both laughing)

[GPo1: 291-296]

Both officers state that suggestibility and suggestion are not really a salient issue for them. Obviously they are aware of the dangers of suggestion, and of a need to conduct their interviews in a neutral and open manner. But challenges about suggestion are not something they are particularly worried about, as they both report that their interview technique is not a regular matter of dispute in court (GPo2: 843; GPo: 1945). Both officers concede that there might well be cases where parents or carers have suggested

133 These interviews will take about half an hour, while the technique including a secretary and dictating throughout stretches the interview to between one and two hours.
something to a child previous to the police interview, and they frequently are suspicious about this. Still, the officers are quite clear that they lack the expertise to detect such influences and thus might well overlook suggested statements. Yet, after all, the officers state, detecting suggestion is not really part of their job, because only an expert could make such findings (GPoI2: 1759).

Filing a charge: the Prosecution

On the next step along the way it becomes clear that the recording technique of the police collides with demands of the prosecution services. A prosecutor reports that often police protocols are far too broad in recording children’s statements, which makes it difficult for the prosecution to tell apart the exact words of the child from the officers inferences and summaries. Additionally the prosecutor finds that the police conduct the interviews too superficially, not gathering enough specific and circumstantial detail. And while the prosecutor acknowledges that to avoid suggestion questions need to be asked in an open fashion, she finds that some things just need to be put to the child directly, because there is a legal requirement to gather exact details in order for her to be able to indict an exact deed.

Another problematic aspect the prosecutor mentions are inconsistencies within the child’s statement that the police have left unexplored. To clarify such inconsistencies the file will travel back and forth between police and prosecution with the prosecutor specifying questions that the police need to ask the child in additional interviews. The police officer describes these requests for additional interviews as frustrating. While she will obviously comply, she finds it awkward to have to invite the child again and to ask them about specific times or details that they have already said they did not remember.

Frequently, as both the prosecutor and the police officer report, these additional interviews produce significant inconsistencies to the first interview. Sometimes children report an entirely different story or incident, or they deliver previously unmentioned details, omitting some of those they have reported the first time round. This might necessitate a third interview, but more likely in serious cases the prosecution will take this as an indicator that a psychological expert needs to be appointed to assess the case and to explain the inconsistencies.

Still, the prosecutor remarks, that strictly speaking the psychological expert thereby invades her premises. It is the prosecutor’s task to judge the evidence, to evaluate the credibility of witnesses, and to examine the child’s statements in order and to determine whether the case should be brought or not. Yet, the prosecutor concedes that the legal training they
receive does not include any specific training in witness testimony or credibility assessment, leaving, as she puts it, a disquieting gap open for speculation, gut feeling and attitudes.

Asked about the problem of suggestibility the prosecutor initially remarks that she does not recall any cases where suggestion was a major issue, but she notes that she is aware of the crucial role it can play within the investigative process. According to her experience suggestion will predominantly be a problem in police interviews, where she does occasionally find suggestive questioning (STA: 694). At times she adds, there are also judges who conduct bad interviews in court, asking very directive questions, regardless of their duty to inquire openly (see appendix B, excerpt 2).

The prosecutors' investigative task ends with the decision to discontinue the case or to put it forward to the court. If the prosecutor finds the evidence is strong enough to justify a court trial, they will write an indictment, charging very specifically what they think has happened according to the evidence they have collected. Once the trial is opened the indictment cannot be amended anymore, and it is the exact deeds, as specified in the indictment that have to be proven. Again the prosecutor underlines that it is important to be very specific in the indictment. If the charges are formulated too generally this might lead to losing the case because the evidence cannot be matched tightly to the accused deed.

Let me recapitulate the trajectory of children's evidence up to this point. Since reporting the case the child has spoken directly to a police officer once or twice and possibly also to a psychological expert.134 Yet the child's account has undergone two transformations. The police have transformed it into a written report (or, mediated by the interventions of the prosecution, into various written reports), and the prosecution has used this report to write the indictment, i.e. has transformed the police's findings into a concise document that spells out what exactly the defendant is accused of.

On trial: the court

If a charge is made the whole file, now headed by the indictment, goes to the court. If the investigative judge approves of the evidence and allows the trial to go ahead, the file is sent on to the trial judges, the defence and the victim's advocate. At this stage the file and all the

134 Volbert (2003) reports three studies that have examined files to determine the number of interviews conducted with children during the investigative stage. According to Volbert & Busse (1995a, b) 70% of children will be interviewed once, 11% twice and 2% three times. Grunder (1999) reports that 62% experience one interview, 12% two and 5% three interviews. Langen (2000) reports a slightly different balance. Here 38% were interviewed once, 42% twice and 12% three times. Volbert (2003) points out that these studies might well underestimate the actual number of interviews for each child, because the studies only refer to the officially recorded police interviews. Expert interviews, informal questionings and conversations conducted for example by social services are not captured in these statistics.
child's recorded statements, revert to being background information, as none of it counts as evidence. The file merely bolsters the indictment and the trial judges will study it to acquaint themselves with the case and prepare their investigation. Once in court the case itself will virtually be re-investigated from scratch, as the judge(s) will now take over and hear all the witnesses again, view all the available evidence brought by prosecution and defence, and seek out new evidence if they find this is necessary.

Here the victim advocate has a central role, as they meet and prepare the child witness and mediate between the child and the court. Both of the advocates I interviewed stressed that they will never ask the child about the incident as such, because this could raise the suspicion of suggestion or it might indeed lead to inadvertently suggesting something. The victim's advocate will explain the court procedure to the child, will apply for special measures if necessary, will inform the judge about possible problems the child may have, and arrange for the child to visit the court and meet the judge before the trial. A central problem both advocates mention is the wide spread and often loudly stated assumption of parents and carers that children must under all circumstances be spared from having to go into the courtroom. Yet, the advocates point out that by voicing such concerns in front of the children the carers implicitly suggest to them that going to court must be a terrible experience. Both advocates state that they will try to counteract these suggestions by persuading the child of its own strength, and by asserting their capability to go to court. They try to convey that the court is a positive authority, and assure them that they (the advocate) will be in court with them as a powerful ally, who is able to protect them from attacks and who can make their voice heard by speaking on their behalf in the legal language the court understands.

VAdvocat1: ...well I'd say and that is how I perceive myself in this role that throughout the whole trial process I am sort of the ahm ear eye and also mouth for a particular client (…)

[VAdv1: 439-440]

The judges I interviewed all appreciated the potential contribution of a good victim's advocate, because other than the prosecution, the advocate can give them concrete background information about the children's and the family's situation and alert them to possible problems that may arise around the child's testifying. Before the trial starts the

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135 ‘Victim advocates’ are fully qualified barristers who may on other occasions perform as defence barristers or represent clients in non criminal matters. Both of the barristers I interviewed had performed on both sides in sexual abuse trials on a regular basis: defending alleged perpetrators of abuse or representing alleged victims of abuse.

136 Here a central problem is that many of the barristers who act as victim advocates do not understand this as an active role, and thus often fail to use the possibilities they have to support the child and speak for them in court. Being a relatively new invention, the courts also tend to see victim's advocates as superfluous elements. Additionally only a standard fee is paid for these services, so it is financially not very rewarding to be a victim's advocate and it is thus tempting to minimise time and effort dedicated to such a mandate.
judge(s) reads the file and in sexual abuse cases they may try to negotiate with the defence whether the defendant will-, or can be persuaded to plead guilty, because this would mean that the child need not give evidence in court. Opinions differ as to how important it is to spare the child the court appearance and whether or not it is beneficial (fair) to thereby risk that the defendant will plead guilty to a lesser charge, potentially getting a much milder sentence, while the child’s version of the events will never be heard at all.

The judge(s) decide whether and which special measures should be applied, but they often suspend the final decision until late during the trial. This has been criticised for intensifying children’s stress, because they cannot be prepared accordingly. Still, judges maintain that for them it is crucial to get a personal impression of the case and the defendant before they commit themselves to any special measures (for example excluding the defendant).

Another factor for the reluctance to use special measures noted by advocates as well as judges, is the increased danger of creating reasons for appeal, because the rules of trial become more complicated and prone to mistake once special measures are applied.

The general conduct in a German criminal court follows principles similar to those in an English criminal court, but overall the proceedings are slightly less formal. Black gowns are worn, but no wigs and the barristers do not necessarily rise every time they address the judges. The presiding judge chairs the trial and indicates whose turn it is to speak. Still, the formality of this may vary greatly with the individual judge’s style, and in the cases I observed it was not unusual for lively and rather informal exchanges to ensue amongst the judges or between the judges and the barristers. The spatial arrangements in a German criminal court differ significantly from those in an English criminal court. The tables are arranged in a horseshoe with the judges and Schöffnen occupying the head piece facing into the room (usually on an elevated desk). The defence barrister will sit along the right end of the horseshoe, with the defendant in the dock next to them or behind them. The prosecution sits to the left of the judges, along the left end, opposite the defence, and the place next to them is taken by the victim’s advocate (and the psychological expert, if present). The witness will sit at a table in the middle of the room facing the judges (the defence to their left and the prosecution to their right).

138 The court will rise when the judges enter or leave. While the court sits it is usually open to the public, but it is not common for people to leave and enter the courtroom constantly during the ongoing trial, a practice I have observed in criminal proceedings in England.
139 The public occupies the back of the courtroom, facing the judges. There will also be a court usher, at least one police officer and a secretary who will take minutes of the formal moves of the court (witnesses heard, orders made-, agreed, rejected etc.) and note whatever special aspects the judge wants added to the protocol. Any form of electronic recording of legal proceedings is strictly forbidden.
Questioning children in court:

The central task of the judges (and here mostly the presiding judge) during trial is to view all the evidence, interview all the witnesses, and where child witnesses are concerned it is the presiding judge's exclusive right to address them. Interviews with children can under certain circumstances take up to five hours, as one judge reports. All the judges I talked to agreed that interviewing children is extremely exhausting and requires plenty of skill. Despite being ‘Youth Court’ judges who routinely deal with young suspects and also with young witnesses, the judges report that they receive no special training about young witnesses, sexual abuse, or interviewing. The judges I interviewed report that they will pick up the child in front of the courtroom to show them in and that they will remove their gowns on request. It is their main task, one judge says, to create an atmosphere in the courtroom that enables the child to speak. Most importantly, they will not speak to the child from their elevated desk, but sit with them at the witness table in the middle of the courtroom, ‘creating an island’ as one judge puts it, and trying to ‘block’ all the other people out of the child’s visual field, as another judge describes it (see appendix B, excerpt 3).

Reflecting the basic principles of criminal trial which command that only immediate and oral evidence presented in court can be considered for a conviction, all four judges stress that it is absolutely vital for them to speak to the child personally and inside the courtroom. They say that this is an ‘atmospheric issue’ and that this enables them to get a feel for the witness, to immediately resonate with them, to pick up ‘vibrations’ from them, and to dynamically adopt their questioning in order to quell the child’s fear and give comforting feedback. At the same time it allows them to scaffold the child step by step to report the central details of the incident (see next quote). Most crucially the judges say that this way they can sense nonverbal signals that help them to determine the witnesses’ credibility. Yet, this also constitutes a central dilemma, as one judge explains. As neutral investigator the judge is obliged to remain strictly impartial towards all witnesses, and by getting too close or by being too comforting to a witness the judge may risk a serious challenge by the defence or even by the fellow judges.

Additionally in this context all of the judges point to the danger of suggestion that is often ‘looming’ where child witnesses are concerned, as one judge puts it. In different ways they describe how interviewing children in court needs to be handled very delicately, in order to

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\[140\] In a district court there is only one judge, accompanied by two lay judges, but in a regional court there will be three professional judges and two lay judges. Here the presiding judge takes the lead on interviewing witnesses and admitting evidence. Still, they will always consult the other judges and these have equal right to interview witnesses (except children).
facilitate detailed and accurate accounts to emerge, while avoiding to suggest something to the child or being challenged for appearing to have done so. This is particularly difficult when children refuse to say much more than yes or no, or when they have to be asked about inconsistencies in their statement (see appendix B, excerpt 4). On the other hand, all the judges report that following their experience, apart from singular cases where carers might have suggested something to a child, suggestibility as such is not an issue they frequently encounter within cases. So while the hint at suggestion seems to be routinely used as a line of the defence, it is not an issue that is frequently seen to overthrow or complicate cases. After all, as the judges stress in different ways, it is a central aspect of their task to fully inquire into a case and to detect potential suggestive influences.

**Immediacy in court:**

The judges’ univocally dismiss video recorded evidence or CCTV transmissions as unhelpful. This rejection is closely related to the basic principle of immediacy. They all state very clearly that video or CCTV would distance and alienate them from the witness, hinder their assessment of credibility. Ultimately they find these measures counter-effective, because they do not necessarily spare the child a courtroom appearance. The defence is always entitled to request to hear the child in the courtroom as well, in order to ask additional questions. The judges are aware of the well intended legal provisions made to encourage the use of these measures. Yet, none of them have ever used video recordings or CCTV links, and with reference to the conviction that it will not help children, while complicating procedure, they show little inclination to do so in the future. Herein the judges’ statements reflect the overall atmosphere. The majority of the installed CCTV and interview rooms are used extremely rarely (Volbert 2003). For these judges the immediate encounter is an absolutely vital requirement for assessing the witnesses’ credibility.

**JG1:** [...] that’s something () that will also be (2) ahm let’s say (1) will be picked up immediately (1) ahm by () by the interviewer in the conversation with the with the with the witness ((hmhm)) the reaction whether she is thinking (1) also whether she is surprised by the question where you notice that somebody is surprised by a question in some way then you can be relatively sure that they’ve not invented something in advance and prepared something ((hmhm)) that would be advantageous to say (1) well naturally these are all () vibes ahm that are only for example measurable palpable in this personal exchange with the presiding judge () ahm or the the interviewer ((hmhm)) and these are for example ahm (2) only very difficult to record and even more difficult to recognize ((hmhm)) in any of the video alternatives

**[JG1: 114-125]**

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141 This is captured pointedly by a 2001 newspaper report Volbert (2003) quotes. According to the NRZ (large national newspaper) the video technology that has been installed for 3.3 million Deutsche Mark in courts in the state of Nordrhein-Westphalen, had in the following years only been used nine times.
Inconsistency:

The judges report that a central problem that arises during the trial in court, particularly when child witnesses are involved, is the problem of inconsistencies in witness statements. And here the broad recording style of the police proves to be problematic for the judges as well. Obviously the detection of- and inquiry into inconsistencies is a basic criminological strategy to assess the credibility of witness statements. But for this to work, it is crucial to be able to rule out that the inconsistencies are caused by awkward recording of evidence, misunderstandings during the earlier stages of the investigation or even suggestive influences by the investigating authorities. The judges will hear all witnesses afresh in court, but judges base their questions on the information they get from the prosecution file (and the indictment), and if an expert is involved the judge will also have read the experts report (including a transcript of the interview the expert has conducted with the child). So while hearing the witnesses in court the judge checks the life testimony against all earlier records of the witnesses' statements. They will then inquire into possible inconsistencies that arise between the present statement and the ones given earlier to the police or the expert. At the time of giving evidence in trial, a witnesses' statement to the police may well be over a year ago. So particularly for a child witness it is not surprising that their statement might not precisely match the record of an earlier statement. However, the judges report that frequently children's statement deviates significantly from initial records, new details are added and others omitted or an entirely different event is reported. In an attempt to clarify whether this is down to patchy or awkward recording by the police or whether there is an actual inconsistency in the testimony, the judges will then try and remind the child of what it has reported to the police (by reading it out to them) and ask them to explain or account for the inconsistency. Yet this often proves too complex for children to comprehend, leaving the matter unresolved.

These inconsistencies are also a central matter for the psychological expert to comment on, and judges will seek their opinion throughout the trial. Another way to address this problem is to question the police officer who has conducted the initial interview. So quite frequently (as was the case in the trial I observed) the judge will decide that aspects of the police interview need to be introduced into the trial, or that the circumstances and wording of the police interview need to be revisited in detail. This can only be done by hearing the interviewing officer as a witness and they will thus be invited to be questioned in court. On

142 Other than in England the child witness will not routinely be given their file to read before they give evidence. Yet, depending on the victim's advocate, they might encourage them to read their file or read it to them.
this occasion the officer is also likely to be asked to comment on their impression of the witness at the time of the interview ("comment on maturity"). Judges, lawyers and experts univocally complain that officers are often unable to remember the required details about a specific interview and that they tend to stick very closely to what they have written in the file, unwilling to commit themselves to anything beyond that. This is a serious problem because for their statement to count in evidence, the law requires them to deliver more than just a passive confirmation of what they have written in the file.143

The officer on the other hand reports that she finds it difficult to remember single cases after such a long time, because she conducts interviews of a very similar kind every day. So she will, as required, read her report again before going to court, but if she simply cannot remember any exact details of the interview situation, she finds it quite uncomfortable to be pressed for specific details. She says there is a sense of barristers or judges trying to spot a mistake in her conduct, so she will rather stick to her report, than be led to make a statement she is not entirely certain about (see appendix B, excerpt 5).

As the trial progresses an essential component of the ongoing exchanges between the legal professionals are, at times, quite significant disagreements about the content of earlier witness statements the court has heard. On occasion they might even disagree about the kind of questions that have been asked (e.g. by the judge).144 The StPO (code of criminal procedure) strictly prohibits any verbatim or even taped record of the ongoing trial so actual statements are a matter of notes taken, negotiation and disagreement.145 One of the judges and the prosecutor point out that it is indeed remarkable, and at times annoying, to see how many different versions of the same statement are being heard by a set of professionals who are in the same room listening to the same witnesses.

Let me pause briefly to take stock and recapitulate the path of children’s evidence again. Up to this point the child has met the police officer once or twice and has given a full

143 When challenged or asked for an elaborate description, officers often say something to the effect of ‘if this is what I wrote in the report, then that’s what happened’. As this is not an independent report about an actual memory of the event, it cannot count in evidence.

144 Due to the way the trial is organised there can be several days between the individual sessions (up to ten days are allowed to pass). And while the aim is to avoid long intervals, it is not unusual for a trial that takes for example five trial days, to be spread out across two or even three weeks. (During the trial I attended, the judge was challenged for having asked the child witness leading questions, which he fervently denied.)

145 It is not allowed to video or tape record any part of a trial. §271 - §275 state that written minutes have to be kept of the main trial, containing names of all those present, and broadly following what happens during trial. These are not literal transcripts of what is said but a list of legal applications by the lawyers, references to witnesses statements, decisions made by the court for further investigations and most importantly noting the regular instructions and procedures the court has to follow. This protocol is the only ‘official account’ of the trial and the basis upon which an appeal based on ‘errors in legal procedure’ may be filed.
account to them. Much later they will have met their advocate to talk them about the trial and now, in court they are talking directly to the judge. Their initial account on the other hand has undergone multiple transformations. It has been recorded in writing by the police. These records have formed the basis for the prosecutor's transformation of the statement into the indictment. The police record and the indictment were then read by the judge to form the basis of the judge's own examination of the child in court. So at the very moment of giving evidence in court, the child is simultaneously confronted with the records, that is, the transformed versions of all their previous accounts, via the judge's reading of them. And in a more or less explicit manner suggestibility transgresses all these different layers of questioning and recording. Following the accounts of the legal professionals it seems suggestibility as such is not perceived as a predominant problem. Still we could see how suggestibility lingers within the practice as a twofold problem. Firstly it might lie at the bottom of a case that is reported to the police or brought to court, but secondly and more crucially the police, the victim's advocates and the judges themselves need to be aware of the dangers of suggesting something when speaking to the child and they can potentially be accused of having done so. In this sense the very structure of legal practice, which requires different levels of re-investigation (and re-remembering), also implies (or indeed invites) the potential problem of suggestion.

But there is another mediator I have not yet mentioned in detail. At some point during the investigation the child might also have met the psychological expert, who will have conducted a detailed interview as well.¹⁴⁶ So far I have mentioned psychological experts only marginally. I would now like to briefly interrupt the exploration of dynamics unfolding during trial, in order to capture, in detail, the proceedings as they unfold from the perspective of the experts. Inevitably this will lead us back to the trial.

Assessing credibility: the expert

If the prosecution (via the court) or the court itself appoints an expert, they will provide the expert with the complete file containing all information that has been collected up to that respective point, and formulate a more or less specific question for the expert to address (usually the credibility of the witness, or more specifically a possible suggestive influence). The expert will then begin by systematically reviewing the file to get an understanding of how and under what circumstances the child has first disclosed and to

¹⁴⁶ This can happen at any stage, but most likely before the actual trial begins. Yet in some cases, where no expertise has been sought beforehand and the trial judge finds it is necessary to do so while the trial is ongoing, they can interrupt the proceedings and request an assessment.
whom and what exactly the child has reported to the police. Here the recording practice of
the police causes problems for the experts as well, because they have to prepare their
interview with the child on the basis of what the police have recorded. While the experts
stress that the police reports they see differ widely in style and length, the experts agree that
it is usually not possible to determine what exactly the child has said in the police interview.
Some statements are summarised so concisely that they give little information about the
child’s original account at all.
A frequent experience the experts report is that in the interview they conduct with the
child, children will often fail to mention, significant details that feature in the police report.
Like the judges, it is part of the experts’ task to examine the consistency of the child’s
statement, but again, it is difficult to draw conclusions from-, or interpret inconsistencies
when it is unclear where they originate. The expert will carefully explore with the child if it
has merely forgotten to mention a detail, or whether the police officer has misunderstood
their report or whether the officer has just summarised the statement awkwardly. This can
lead to confusion on the child’s part which might ultimately produce more inconsistencies,
which later might be exploited by the defence.
The expert will invite the child and the parent/carer, and first talk to the parents or carers
to get more background information about the child, the family and the way the disclosure
was made.\footnote{An expert assessment is voluntary and it is important to make sure parents and children understand that they are not obliged to see the expert. Still prosecution and court usually encourage the parents to accept the assessment as the experience shows that it helps to make cases more transparent, which is always to the child’s advantage. Most families follow this recommendation and only rarely do people not turn up or refuse.} The central part of the exploration is the interview with the child, which will
routinely be tape recorded and can take anything between one to five hours.\footnote{Depending on the case, the institutional setting and the resources, experts may also conduct a standard intelligence test with the child or administer personality questionnaires where appropriate.} Most of the
experts I interviewed only conduct one interview, but in cases where the child is too upset
or if there is too much to explore a second meeting might be arranged.\footnote{One expert reports that if it is very early in the investigative stage she plans a number of meetings with the child (five to six) in order to give them time to get to know her and because it relieves her from having to ask very specific questions very early on (GExp5: 1118-1226). Yet depending on the institutional background experts are working in this kind of exploration might not be possible.} The experts will
try to get a detailed account from the child about what exactly happened, whom they told
and they will also try to explore possible inconsistencies with the police statement and
inquire carefully into potential sources of suggestion, be it people around the child or
things picked up via the media (television, internet etc.).
The experts I interviewed agree that for quite a while around the late 90’s there were a lot
of cases with very young children (about 4-7) where the question of suggestion was an
explicit and predominant concern. One expert gives a vivid description of the changing tides of concern and suspicion around child witnesses. She describes the ‘abuse hysteria’ of the 80s which during the 90s turned into an ‘abuse of abuse hysteria’ that dominated German child witness practice for quite a while (see also chapter 2.1). During that later time, one expert reports, the heightened alertness for suggestion seemed to have the greatest effect on experts themselves. Many experts, she reports, became extremely conservative in their judgement and dismissed a lot of cases out of hand even for very vague signs of suggestion. Additionally another expert says that during this period of time virtually any question asked of a child who was the alleged victim of an abuse, could lead people to suspecting suggestion. Overall, the experts say, this atmosphere created unhelpful confusion and a generalised fear to speak to children who were suspected victims at all. Yet, presently they report univocally, the situation seems totally changed. Suggestibility as an explicit topic seems to have vanished from the public agenda completely and there are hardly get any cases where suggestion is flagged up as the initiating problem. Simultaneously, they report, suggestibility appears to have disappeared from the media. The High Court ruling (1999) is a central and recurring concern in the accounts of the experts. Two of the experts mention the dilemma that they find the ‘null hypothesis’ requirement outlined in the High court ruling poses for them. The find it implies that they should approach the child by adopting the stance that they did not believe them This is a practice which they refuse to adopt, because they see it as unfair towards the child and unlikely to win their trust. The interviewer should convey a general feeling of trust and certainty to the child, one expert says. However, both appreciate the general aim of the ruling and the necessity to follow it, not least because not doing so will make them vulnerable to challenges in court. Still, there is some inconclusiveness as to how exactly the expert should align a neutral and scientific investigative posture with the open and understanding approach they feel is needed to interview children.150 The interview with the child will be transcribed in detail because it forms the basis for the in-depth analysis of the child’s account, on the background of the other information collected.151 Guided by the CBCA criteria, the analysis will explore all the potential case specific counter scenarios, i.e. do the circumstances indicate that suggestion has occurred (accidental or deliberate), who would have a motive and are there aspects in the child’s

150 Still others clearly state that for them the ruling means that the guided scepticism does apply to the analysis and not the actual interview. Hence it is perfectly appropriate to be friendly and open towards the witnesses, while approaching the subsequent analysis of the data with appropriate scepticism.

151 One expert reports that decades ago when she began practicing, it was common to collect all the factors they considered supportive of the account, finally concluding that if there were enough supportive factors, that the account was likely to be based on a true experience.
account that support this thesis (e.g. formulaic account, adult words); could it be a false-acquiescence, a conscious lie, are there indicators and motives to be found in the context (family dynamic) or in the statement of the child (lack of reality criteria, inconsistencies, no free narrative) that could support this thesis, and would this child be capable of inventing and upholding the present statement if it was a lie (cognitive abilities etc.). Discussing all of these potential aspects in detail the experts will, depending on the result, finally argue that it is likely (or respectively unlikely) that this is an experience based account (and why). In a complex case the expert's report can be about 100 pages. However, one expert adds, there are always cases where they have to remain totally undecided and thus cannot contribute much.

This can collide with the expectations of the judges. Following the rules the expert should only assist the court to interpret evidence and must not pass a final judgement of their own (about truth or credibility). Still, judges will sometimes complain about what they perceive as indecisive or too vague expert reports. Further, when questioned in court experts will often be hard pressed to maintain an indecisive standpoint in the face of sometimes quite challenging questioning.

**Expert testimony in court**

The written expert report, which usually contains a verbatim transcript of the relevant passages of the interview, will be available to all parties (judge, prosecution, defence, victim's advocate), but in case of a trial this will be considered the 'preliminary report'. Following trial rules, the expert has to deliver his account orally during the trial. The expert will attend most of the court proceedings in order to be able to take into account whatever new evidence emerges and they can also direct questions to witnesses. As already indicated, throughout the proceedings judges or lawyers might ask the expert to comment on issues as they arise in evidence, or inquire about the expert's general impression of the witnesses. This puts the expert in a complex position of a continuous observer, mediator, who also has to maintain their neutral perspective and must be careful to stay well within the boundaries of their expertise.

The expert is only really up for questioning after having presented their full report. Routinely experts will do this by generally introducing the procedure (SVA) and potential tests used, and discussing at length the data, the different hypothesis formed and the

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152 As it can take a while to complete an expert report, the prosecution, or the investigative judge might call the expert before he has submitted the report and ask for an informal outcome in order to steer their own activities and for example decide about holding the accused on remand or taking the case to court.
arguments leading to their conclusion. Depending on the case and the expert, this uninterrupted presentation by the expert can easily take well over an hour. In the subsequent examination by the court and the lawyers, the experts expect to be questioned in an adversarial fashion. Still, my interviewees’ overall experience is that over the past decade lawyers seem to have become much more knowledgeable about the standards of credibility assessment (as detailed in the High Court ruling) and will try to systematically unpick the experts’ report or even the interview the expert has conducted with the child. An experienced expert reports an incident where she was, as she found, unfairly challenged by the defence simply because she had not explicitly mentioned the word ‘null hypothesis’ in her testimony. In this case the court decided that this meant her report did not comply with the minimum scientific criteria and it was thus dismissed. Similarly she says failure to mention other key words from the High Court ruling can sometimes lead to spurious challenges by barristers. This can make the presentation of expertise in court a quite uncomfortable prospect, she finds.

The other experts also describe incidents where a lawyer has drawn on the interview transcript and picked on the expert’s interview with the child, aggressively challenging the expert for what they considered to be suggestive questions, whilst merely pointing to follow up questions on topics the child had already reported earlier. In one case this resulted in an exhausting two hour examination by a defence lawyer. The majority of these uncomfortable encounters exemplified by the experts did not have too grave effects, because the court had ultimately not taken the challenges of the lawyer seriously, or the expert managed to disarm the lawyers’ challenge (this complies with my own observations). Still, they all describe these incidents as harrowing and frustrating, although, their attitudes towards this problem differ widely.

One expert finds that these are only singular extreme cases and temporary effects of the High Court ruling, which, as he puts it, seems to have spurred an unhelpful zeal amongst legal professionals to detect suggestion everywhere. Ultimately, he remarks, if lawyers make such spurious claims the judges will notice that anyway, so it does not really matter after all. The other experts found that this did make their position in court more difficult, meaning they had to stick very closely to the criteria outlined in the ruling. Ultimately they all point

153 Where the court agrees that the expert report did not comply with the standards or was faulty for other reasons (this can be brought up by any of the parties or the judge), a second expert will be called either to just review the whole case including the original expertise, or to conduct an entirely new assessment. The court can then decide to have the challenged expert meet the new expert in court for a direct exchange, or they can only hear the new expert. Even the very experienced among the experts I interviewed report that being challenged is not such a rare event, as cases, court dynamics and court personnel differ hugely. Usually there are no ‘legal consequences’ for the expert at all. Still, judges might decide not to call specific experts anymore if they see them challenged a lot.
out that they have to rely on the judges to resolve such issues. However, there is a sense of tension, and there is a suspicion that the High Court ruling might have had some inadvertent adverse effects on experts’ assessments.

One of the advocates and an expert report that they found that lately expert testimony seems to be driven by the letter of the ruling, resulting in very formalistic and conservative explorations that measure children’s evidence by very high standards. Here experts are observed to have become extremely tentative and careful not to commit themselves to a positive assessment, because remaining indecisive or deciding ‘in doubt’ against the credibility is always safer. This, the advocate and the expert worry could undermine the usefulness of expert’s evidence and ultimately weaken children’s position in court.

While all the judges welcome the High court ruling as a positive step towards clearer rules for expertise, one judge also comments that the ruling seems to have led to an unhelpful schematisation of expertise given. As a result, one judge says, some experts seem to be hiding behind scientific language, which is problematic because it is crucial that the judges and most of all the Schöffnen (lay judges) can understand the expert’s elaborations. Judges and lawyers stress that an expert needs to use simple language free of scientific terminology, and one lawyer specifies that the expert should always aim to put the case in at centre stage, rather than trying to show off their scientific knowledge. Additionally the quality and usefulness of expertise given, as one judge comments, is very much down to the ability of the expert as a performer and presenter in court.

Overall the judges describe the involvement of experts as absolutely necessary, and very helpful. And whilst there are occasional exceptions, they find that the expertise they received is of a good quality. Yet, all of the judges make clear that, if at all possible, they would only appoint experts they already know and trust.

**Dilemma of scientificity:**

The ‘dilemma of scientificity’ links up to a central dilemma recognised by all the judges. Whilst the High Court ruling requires them to supervise and check the expert, they find that there is little they can actually do to ‘assess’ or even keep check on the scientific quality of the criteria and methods used by an expert. And while judges appear to be open for learning more about psychological research around witness credibility, currently, the judges say, they can do little more than take the expert’s assessment on trust. With regard to the specificities of the experts’ testimony all the judges can say really is “either we get it or we don’t”, as one judge sums up the situation.

JG1: ...well that’s how I see it anyway ((hmhm)) the BGH won’t admit this (I chuckling) but they are asking quite a lot of the judge ((hmhm)) how should we have the expertise ((yes yes I)) to say these scientific principles are valid the only thing we can say is we get it or we don’t
After all the judges have to form their own opinion anyway. They are obliged by law not to simply follow an expert's advice, but the judge(s) need to come to an independent conclusion which can, as long as they argue why, also divert from, or even oppose the assessment of the expert (still the latter needs to be well argued and can cause objections).

**Expertise by proxy:**

One judge describes the rationale according to which they should integrate expertise. He says judges have to acquire outside expertise presented to them in cases where their own specific knowledge does not suffice, but they should not slavishly follow what the expert says. Indeed they should incorporate the expertise, make it their own, and then use it within their reasoning as they see fit.

JG1: (…) well the principle is that the expert provides the court with the expertise and ahm (1) hence the court need not slavishly follow the assessment of the expert but it takes the expertise the expert imparted in order to examine for itself what it makes of the whole case (…) anyway in principle well if we wrote that the expert has said this and that and so it is! and that is why we give this verdict (…) that would be wrong ((hmhm)) you see but the court itself has to ahm apply the expertise when it makes these considerations is what the girl said credible but the court does not sort of ahm originally possess this expertise ((hmhm)) but it has to acquire it via the expert testimony that is the legal rationale how it is supposed to work (…)

So the judges need to ‘take in this expertise, make it their own and then apply it to the case. In this sense one could say that it is a form of ‘proxy expertise’ that they do not genuinely possess, but have to ‘lend’ repeatedly, for every individual case. Obviously it is down to each individual judge (or panel of judges) how exactly they perform this complex task of temporarily incorporating concrete expertise and then making it bear on the case. The overall impression in the field is that judges do tend to follow experts advice by and large. Still, among the judges I interviewed there is a clear recognition of the potential paradox and thus dilemma implied in the High Court ruling, and in different ways judges are alert for the possible problems ever new scientific findings could cause when brought into court by lawyers or experts.154

Let me recapitulate again and sum up the trajectory of children’s evidence. We can see now that at the time when the child is giving their evidence in court, speaking to the judge, it will not just be confronted with earlier police interviews, but on top of the police report and the indictment, the judge will also have read the expert’s report, which contains a transcription of the child’s account to the expert, as well as an elaborate interpretation of

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154 The intriguing issue of ‘proxy expertise’ and its application will be revisited in more detail in chapters 9 and 14.
this account. This is the backdrop against which the judge will interview the child, trying to get an account as detailed as possible, if necessary reading from the police report to jog the child’s memory, but also challenging the child about possible inconsistencies to this report. It is crucial for the child to give an elaborate and detailed account at this stage because strictly speaking the court can only consider in evidence, what the child actually says during this interview in court. Obviously the defence lawyer, the prosecutor, the advocate and the expert have the same documents at their disposal and might formulate questions for the child. Yet with children under 16 these questions have to be addressed to the judge who will put them to the child. Taking into account the expert’s presentation, one could say that children’s evidence is heard and interrogated on an additional level, a meta-level, because it undergoes one final transformation.

Children’s evidence is ultimately heard via the presentation and subsequent questioning of the expert, who is usually among the last witnesses to be called and who presents another mediated life version of the child’s evidence. So even though at this stage the child is not present anymore, the child’s evidence can be interrogated again via the expert. Hence unsurprisingly it is at this point, and with the expert at the centre of attention, that potential issues and suspicions of suggestion will be addressed most fervently, pending problems around inconsistencies are highlighted by the parties, disagreements about the content of earlier witness statements in court are brought up, and sometimes even the way a child witness was interviewed by the judge can become open to challenge.

Decision-making:
The panel of professional and lay judges will ultimately decide about the case (in a regional court three judges and two lay judges), and they will, after all the evidence and the counsels’ speeches were heard, retreat for their deliberations. I have made little mention of the Schöffen (lay judges) throughout this outline, because they tend to play a very passive role in court. In principle they have the right to ask questions and they will at times make comments to the judges. During my interviews the judges mentioned the Schöffen mostly in the context of sometimes polarised and awkward comments the Schöffen may sometimes make about a witnesses, but they are also mentioned as partners in decision making. This indicates that they seem to be more vocal during the deliberations held in private. 155 One designated judge (not the presiding judge) 156 will chair the deliberations and

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155 Similar to jury deliberations in England, the deliberations of judges and Schöffen are strictly confidential, so the judges were not able to report any details of cases or decision making during my interviews.
open the debate by summarising the case as it has presented itself, which means, as one judge remarks, this reporting judge also has the opportunity to indicate quite clearly what he thinks is the case. Overall Schöfften are described as helpful and mostly considerate (if at worst disinterested), while sometimes they might have strong or even extreme opinions particularly about child sexual abuse (these can be against the child or against the defendant). Crucially, one judge points out, the Schöfften’s presence and equal vote obliges the judges to listen to the Schöfften’s concerns and interpretations. And it obliges the judges to always elaborate and discuss a case at length, to explain in non legal terms how they weigh specific evidence, why this leads them to a certain assumption and why they would want to pass a certain verdict.\textsuperscript{157}

The judges have to pass a reasoned judgement which will be announced to the court first and then elaborated by the presiding judge in writing. This judgement can be quite elaborate. The court has to argue at length why they are convinced beyond reasonable doubt of ‘one possible scenario’, as one judge puts it. This does not simply mean to announce the court did not have any doubts, but the court has to spell out and discuss the pros, cons and difficulties of the case, and make transparent how they weighted the evidence, and thus why and how they arrived at the verdict. Failure to do so makes the judgement vulnerable to appeal.

\textit{JG1:} (...) the court can always arrive at a (1) possible persuasion [conviction] (1) it doesn’t have to be the only one thinkable but we indeed have to be convinced beyond doubt of one possible version and that must be apparent from the argument outlined in the verdict and when the defence manages to show that in the verdict we have just blanked out for example a certain aspect (hmhm)) problematic aspects that we have just like whatever you don’t mention isn’t problematic so to say then it is certainly possible that the BGH [High Court of Appeal] says well while the court has argued why it came to a certain conclusion a possible conclusion indeed we are actually quite surprised that this and that aspect has not been taken into account and then that’s a kind of combined problem ahm you know at this point the court should have investigated more or indeed should have considered [examined] this much more (1) well and that’s where a verdict might well blow up ((hmhm))

\textsuperscript{156} One of the three judges presides the team of three and leads all investigations. Of the remaining two judges one is designated to be the ‘reporting judge’ (Berichterstatter). This judge has to know the whole case as well as the presiding judge in order to be able to step in for the presiding judge if necessary (e.g. illness). Additionally they will open the deliberations by reporting (summarising) all relevant evidence heard to the panel.

\textsuperscript{157} Even though it seems to be rare, it can indeed happen that two Schöfften uphold their vote against the judges and outvote them (the more lenient verdict needs less votes, hence if the Schöfften want a ‘not guilty’ against three judges voting for guilty, the Schöfften win). One judge reports that in such a case, if she was convinced this is wrong, she could order a mistrial and retry the whole case with different jurors.
when enough evidence has been heard, and come to a verdict that they can base on these considerations.

7.5 Tracing the fact finding dynamic in the German legal system: children’s voice, credibility and expertise

Before moving on to the introduction of the English legal system, I would like to capture and illustrate the overall structure of the fact finding dynamic characteristic for the German legal system with regard to children’s evidence and credibility.

A child’s voice is heard several times, as part of an ongoing collection of information. Initially there is no selection and credibility is not really an issue, as the police have no explicit part in judging credibility. Credibility appears to be established as children’s voice passes through multiple levels (or layers) of mediations, transformations and negotiations by the police, the prosecutor, lawyers, the expert and the judge(s), who can be seen as the operators of those complex nodes of mediation. They engender and become part of what could be described as a continuous process of re-remembering or indeed a sequence of memory-loops, with each loop evoking yet another set of accounts with an ever more complex relationship to preceding and following ones. None of these different accounts is ever entirely superseded or replaced, they remain relevant, are re-invoked throughout, until the final immediate invocation in court, where all the earlier accounts are revisited or resonate implicitly.

The accretion of accounts – Layering different time-zones of recall

Looking back at the overall structure, the most salient characteristic of the German legal system is the massive accretion of accounts that takes place throughout the investigation leading up to the trial. The whole investigation could be described as a systematic process of layering accounts that emerged at different points in time throughout the investigative process, on top of each other. These accounts emerge from different ‘time zones’ within the chronology of the investigation. The same event (the alleged incident) is evoked, remembered and told repeatedly, but at different points in time. Calling them ‘zones’ rather than ‘points in time’, is meant to reflect the fact that for example the event of giving an account to the police in itself takes a certain amount of chronological time and thus is more adequately captured as a ‘zone’ than as a ‘point’.

Additionally these repeated instances of recall are closely interrelated. They stand in a very specific relationship towards each other as they are required to account for-, and legitimise
another. They get juxtaposed, aligned, compared and in court they are ultimately merged around the final life account of the child. In this sense we can say they are accreted. They form an ever more complex system of layers of accounts. Thus different ‘time zones of recall’ are being layered on top of each other, are being accreted.

During accretion the witness accounts and the relationship between the different accounts, or layers, get increasingly complex the closer they are to the trial. On trial all the information is condensed in one present and immediate space via the judges, to be restaged and re-investigated by them. Crucially this has to happen live, in the witnesses’ immediate presence and in the context of their earlier statements, creating what could be termed the final layer of accretion. So following the initial spiral of collection, restaging, revisiting and negotiating of accounts, the pace changes during trial. The trial itself is a condensed form of the process of accretion, but during this final accretion the judges crystallize all the evidence and put an end to, resolve, the loop of accretion.

However, we could see that this continuous proliferation and ‘piling up’ of accounts and the way they are accumulated on growing levels of complexity, inevitably invites frictions between the different accounts, necessitating a corresponding movement of accounting, negotiating, approval or challenge. Clearly, this accretion of accounts, while producing an abundance of information, is accompanied by the dilemma of establishing how these different accounts were evoked (by whom) and thus how they relate to another. So there are cracks and fissures between the accreted time zones of recall, i.e. between the layers of accounts. Accounting for and filling these cracks and fissures is crucial for establishing credibility, but in turn they are the very point where suggestibility is looming within the process.

This dynamic of accretion has another interesting effect. Remarkably we could see how what starts out as the child witnesses’ memory problem, seems to get distributed amongst the professionals involved, as the lines of evoking and accounting for evidence get distributed. At some point it can become the police officers’ memory problem, when the officers are asked to remember the initial interview, to clarify potential inconsistencies and indeed to account for the way the interview was conducted. Ultimately it might even become the legal practitioner’s memory problem, when they are negotiating the details of previous witness statements during trial. Again, it is the judges who operate at this final node of complexity, condensing and resolving all of these loops.

Let me unfold and illustrate this dynamic around the following account of a judge, who elaborates on how he will inquire into children’s account in court. I quote this long excerpt because it covers in detail precisely the dynamics I have described above and thus gives a
good impression of the different layers of accounting and the time zones of recall being unfolded, juxtaposed and revisited. At the same time it provides an illustration of the complex problems emerging from this practice and the delicacy required to disentangle the accreted accounts, particularly where a child witness is involved.

1 JG2: well basically the code of criminal procedure obliges us ahm that's what I have already pointed out at the beginning (((hmhm))) that we ahm well we have to with a child ahm concerning witness status we basically have to treat a child exactly as we treat adult witnesses (((hmhm))) with regard to the follow up questions that are important for evidence (((hmhm))) and that means if there are contradictions regarding time or locations or concerning the kind of acts committed we would always confront the witness with these well that's how I would usually begin ahm to read to the child what has been recorded in an earlier police protocol I would first explain (((hmhm))) well in a way this is how I would first start or I would begin by first asking them if they remember at all (((hmhm))) having been at a police station and then usually this will still get you a yes (I chuckles) but then it gets more difficult (((hmhm))) when I then ask well listen ahm ahm you remember you've been there and now I tell you that here I have a protocol about this () sometimes I will also explain what a protocol is that's where someone has noted down everything the child has said and that's that's already difficult because of this indirect (yes yes)) you know sometimes it is quite difficult to put this into words (((hmhm))) when you refer to something that happened in the past (yes)) and to then to put that in the German language (((hmhm))) so that the child understands the question but this is how I would grope towards this by reading to the child a bit of the protocol and to then ask can you remember that you have said something like this at the police station (((hmhm))) and this is already the point where you sometimes get NO doesn't remember (((hmhm))) so I do encounter this phenomenon quite frequently that questions referring back to the earlier interview (3) cannot be answered anymore (((hmhm))) or that I am not sure whether details from the actual incident are now being intermingled with details from the report that has been given to the police about the original incident well and then here we go again (((hmhm))) and when I realize it's impossible to disentangle that then I will stop right there (((hmhm))) at that point I just have to live with it (((hmhm))) but then well obviously we have to at least try (yes) I first have to at least try (yes yes clearly) to reinstate the memory of the initial interview situation (((hmhm))) point one then point two is it possible that you have said this (((hmhm))) and then point three today you have been saying this and remembering now in the past you have said that why today this and in the past that (((hmhm))) and often that leads to Confusion yes confusion more or less confusion ahm and that's indeed the reason why ahm and somehow here we go full circle a bit 'cos that's because we often experience that children just can't tell this apart anymore (((hmhm))) ahm so we will at a much earlier stage already have requested a psychological expert to do an assessment because they can if necessary offer explanations for this particular phenomenon (((hmhm))) that is explanations that needn't necessarily undermine the overall credibility (((hmhm))) well it then really depends on what exactly was the problem and this means an additional interview (correct)) and for the defence this could potentially mean that the child hasn't been interviewed once or twice but three or four times ahm correct ahm that's always ahm the price to pay that obviously the more interviews you have also over longer periods of time that there simply is a danger with all those details that will be explored and that indeed have to be explored (((hmhm))) that either from the start there aren't any specific details well the kind of things we would hope to get or it just crumbles or the order of certain reported events this is also something we experience frequently that often quite often the sequence of events cannot be upheld then you get some sexual acts that are described but obviously in a totally different order (1) three interviews three sequences (((hmhm))) well and then again we are confronted with the question ahm
Let me unpack this elaborate account from the beginning. The judge describes how he would question a child witness in court and he makes clear that obviously children cannot be treated any different than other witnesses when it comes to clarifying evidence and inquiring into inconsistencies. Yet, from the elaboration that follows we can see that children do pose some special problems in this context. While it might be possible to re-instate the child's memory of having been at the police station, it is much more difficult to ask them what they have actually said there. So it is the re-invocation, or as I put it earlier, the re-remembering itself, and the inevitable complexity of putting such a question, that causes difficulties with child witnesses. Accounting for an inconsistency with the police protocol requires that the child understands what the protocol is and it requires the child to remember the specific event of this protocol being produced. Additionally the child needs to have grasped that the judge's question refers to a discrepancy between this past protocol and the present statement they have just made in court, both of which are accounts about the same original incident (and thus refer to a third time zone involved). While children are likely to confirm to remember having been at the police station, the additional memory loop of remembering and accounting for a discrepancy that originates from this other time of remembering, often proves impossible (lines 10-20). Yet, even if they do give an account, the judge goes on to explain, there remains some doubt about the actual source of this account. Often, the judge says, it is impossible to tell whether children are intermingling aspects from the original incident with aspects they remember have been said during the police interview (lines 22-24). This strikes as a peculiar distinction, because assuming the report to the police was accurate, it should conform with the details of the original event anyway and intermingling should not be a problem. Yet reflected within the judge's account is the problem of suggestibility and thus an awareness for the fact that any evocation of memory can, depending on the circumstances, create discrepant accounts; inadvertently or deliberately. This is the problem implicit to the accreted time zones of recall. The very nature of this system of accreting accounts invites the problem of suggestibility, which then lingers as a potential source of distortion within every layer of this fabric of accreted accounts. Suggestibility is also present as a principle problem at the bottom of each case, because the initial disclosure of the child could already have been a result of suggestions by a third party. However throughout the investigation suggestion also becomes a problem for the

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158 The three time zones here are, the alleged incident itself, the time zone of the police interview and the time zone of that present, actual court case within which the child has just delivered an account.
legal practitioners' own practice. Could the police have suggested something? Could the child's advocate have suggested something, or the expert? Ultimately the judges themselves are wary not to influence the child. The judge expresses this dilemma quite pointedly when describing the delicate and longwinded manner in which he will step by step try to establish the different layers of his question for the child in order to clarify for them what he is trying to get at while avoiding to be suggestive. This is how the judge will "gropes towards this" (line 17) as he puts it, underlining the delicacy of the manoeuvre, highlighting the delicacy of the attempt to disentangle the accounts from different time zones again. Because this means that suggestibility is also present as a 'looming' challenge all of the involved professionals can potentially be confronted with, be it justly, strategically (the experts by the barristers) or implicitly (as in this case the judge). This adds complexity to the judge's operation at this node.

Ultimately the operation at this node can only function because the actual witness statements in trial and the immediate life encounter of all the witnesses with the judges is taken to have primacy over prior accounts. Still, it is clear from the judge's account I quoted above that the court appreciates the potentially limited degree of differentiation and accuracy it can expect particularly from child witnesses, and it is at the judges discretion how to handle this task and how to weigh potential inconsistencies. So, as the judge states in lines 24-26, if it is impossible to disentangle the different accounts he will just stop inquiring, he just has "to live with it" (line 26), as he puts it, appreciating that he might have to live with the fact that a child might not be able to offer distinct clarifications (or that the ones they offer might not be reliable). So it is the directiveness and consideration of the judges during trial that resolves this potentially infinite loop of re-inquiry, because they decide when to stop or resort to other sources. Here the potential benefit of immediate clarification is seen to outweigh the potential confusion the retrospective contextualisation of witness statements might cause. But for this to work it is also crucial for the judges to have the immediate encounter with the witnesses.

So being unable to account for inconsistencies will not necessarily disqualify children's credibility. At this point for example a police officer might be called as a witness. And in this sense we could say that the child's memory problem, their problem to account for a discrepancy, in part also becomes the police officer's memory problem. As demonstrated earlier the officer might also struggle to remember what exactly happened throughout the interview. It is in this sense that one could say that the problem of children's credibility is de-centred from the child; it is distributed amongst the involved professionals as the responsibility to remember and account for the different time zones of recall is distributed.
Suggestibility enters the process through these accounting moves. And it might even become relevant for the judge. The judge clarifies that despite these problems he will have to at least try and ask these clarifying questions, 'groping towards this' (lines 26-34), which can again lead to confusion, which ultimately means that the judge could end up inadvertently suggesting something to the child.

This is where a psychological expert might come in to preclude such confusion, as the judge describes (lines 35-37). He will instruct an expert to comment on such inconsistencies, weighing their possible significance and thereby delivering a very case specific assessment of credibility that might show that the inconsistencies need not necessarily undermine the child's account (lines 38-39). So at various points throughout the proceedings the problem of children's credibility can be deferred to an expert who will then pass children's account back to the court mediated through and enriched with psychological knowledge. Yet inevitably, by producing another account of the child, the expert adds another time zone of recall to the layers of re-remembering. Thereby they potentially create another set of inconsistencies that might become an issue in court. And again it is suggestibility that lingers within the different accounts and that creates problems of accounting (see Appendix B, excerpt 6 for a further example of this).

The judge is perfectly aware of this and he concedes that the added danger of having another interview and spending more time on investigation, is the 'price' they have to pay for the detailed investigation the have to conduct (line 43). And this can ultimately mean that he has to handle the fact that three different interviews for example result in three different chronologies for a story (lines 44-51). These are the routine problems of the inquiry they have to conduct, and that is designed to gather as much rich and detailed information as possible (i.e. lines 1-4 or 27-28), even if this means to accrete inconsistencies.

Children's voice and credibility: mediated accounting - managing childhood ambiguity

Looking back to the introduction of part (B), we can now consider how the German law has substantiated the abstract demands formulated in article 12 of the UN convention of children's rights. How does it ensure children's voice is being heard and given 'due weight' according to their 'age and maturity' and how is this 'opportunity' to be heard created? So crucially, how does it handle what Lee (2001) termed childhood ambiguity? Because it is at this precise point and around this childhood ambiguity that issues of suggestibility, children's reliability and voice, and indeed their protection are expressed concretely.
Following the specification of the German fact finding dynamic as a process of accretion, layering, re-visiting and condensing of accounts, the special measures (treatment) in place for children can be considered as a special form of managing, mediating and accounting for children’s contribution to this process. It is a special form of managing, mediating and accounting that is informed by psychological knowledge and expertise.

So corresponding to this legal structure that requires repeated accounts to be given, accreted and revisited, the system tries to determine children’s credibility firstly by simplifying the interaction they have with the court (speaking to the judge only), and secondly by adding an extra loop of reporting and accounting to children’s evidence production (via the psychological expert).

Firstly, while there are a number of special measures, the most crucial difference for child as opposed to the adult witnesses is the fact that they are only directly interacting with the judge (and not with the barristers). This is meant to keep the interaction for (and with) children as simple as possible, sparing them from having to adapt to different styles of questioning, or to face complicated or openly hostile questions. This provision clearly collides with the principle right of the defence (and all other parties) to challenge witnesses. But the rationale behind this exception is that where children are concerned such confrontation and diverse styles of questioning are generally considered to be detrimental, because they are likely to lead to less detailed and quite possibly less accurate evidence. So the exception is made not just to make children feel more comfortable in general, but also with the aim to ‘filter’ irritations and misunderstandings, and to enable the delivery of more detailed and accurate evidence. Hence the delicate process of accounting and revisiting of accounts has to be managed carefully where children are concerned.

Secondly, the most crucial ‘special measure’ that most children will encounter is the assessment by a psychological expert. Hence it is via the case specific and expert specific questioning, assessment, writing and presentation, that children’s credibility and suggestibility are addressed for the courts. Where the accretion of different time zones of recall becomes particularly problematic for the child witness, an additional loop of recall, mediated by the expert’s assessment and presentation in court, is put in place to assure that potential inconsistencies and ambiguities can be contextualised and explained on the basis of psychological knowledge. In this sense one could say that the system deliberately exacerbates children’s ambiguity, it is enriched, adding to the abundance of already existing accounts. This rich and complex layering of accounts is then meant to be disentangled by the expert, and it is made accessible by the expert’s availability for questioning in court.
So childhood ambiguity is invited into court. It is handled and children’s credibility determined by individually mediating it through psychological expertise and thereby making it accessible to the inquiry of the court (to a certain extend the expert will be questioned on the child's behalf). In a sense we could say that while children remain the 'providers' of their story (which they are asked to repeat), they are separated from the accounting process. It is taken out of children’s hands and passed through the mediating operations of the legal practitioners and crucially the expert.

Accordingly suggestibility's abstract presence is felt and reflected most clearly in the new High Court ruling. Because the ruling aims to organise and systematise expert’s work to assure their assessments follow approved methods and are sensitive to suggestibility. But at the same time it also reorganises the role judges occupy here, because they have to consider the appropriateness of this expertise and make it their own.

Crucially it is not the expert who decides the case, but ultimately the judges have to decide about these mediated states of accounting. However, where children are concerned they are expected to do this by incorporating the expertise given about the specific case. They have to make it their own, make it their 'expertise by proxy' and bring it to bear on the concrete case.

The German substantiation of the demands formulated in article 12 of the UN convention of children’s rights is to be found in this complex interplay of mediations between the child, the expert and the judges.

8. The English legal system: 'there must never be automatic prosecution'

8.1 Structural perspective: criminal law and criminal procedure

In England and Wales, similar to Germany, there is a basic division between criminal proceedings, which are brought in the name of the Queen to punish offenders, and civil proceedings, that are brought to settle dispute between two citizens, or between a citizen and the state. Yet, following the common law tradition in England and Wales there is no single one comprehensive written code of law, but instead definitions for criminal offences, how they are charged and what guidelines apply to sentencing, are derived from a number of different sources. Firstly, some crimes are defined by the ‘common law' rather than
statute. These can leave a number of things unsaid because they are already understood as part of the tradition and embedded within pre-existing case law, in the light of which they are interpreted. So secondly, and most importantly for the English law, there is a huge body of past cases which constitute ‘case law’ (or ‘non-statutory-law’), also referred to as ‘judge made law’ because new decisions refer back to former, precedential, case decisions (lower courts make decisions consistent with previous decisions of higher courts). Furthermore the parliament will continuously pass new ‘acts’ on all areas of criminal and civil law, that will then re-define and establish new rulings for the respective explicit or broader areas of the law. The same applies for the rules that guide criminal procedure. These are also derived from tradition and common law, and can continuously be refined by acts of parliament. This system implies that up to date commentaries and guidelines on certain areas of crime and law are almost more important than the law itself, because they provide legal professionals with the overview and references needed to understand what exactly has been implemented and which acts, statutes or case ruling have thereby been superseded. The most important summary and commentary judges and barristers will refer to is “Archbold’s Criminal Pleading, Evidence and Practice in Criminal Cases”. The ‘Archbold’s’ is a huge volume that is constantly being updated and revised, giving guidelines for charges, possible defences, court procedure and sentencing. It provides references to-, and quotes from the respective precedent cases, statutes or acts of parliament. General guidelines for prosecution are outlined in the ‘Code for Crown Prosecutors’, and the Prosecution Services as well as the Home Office constantly publishes further guidelines for police and prosecutors, helping them to enact, integrate and reference correctly what newly passed acts have introduced. Every ‘Act’ will be accompanied by official “Explanatory Notes”. From this introduction it is obvious that defining child sexual abuse and child witness practice according to English criminal law is not as straightforward as in the case of the German legal system. Additionally there has just been a significant change in legislation for both, sexual offences and the rules of evidence given by children: The “Youth justice and Criminal Evidence Act 1999” and the “Sexual Offences Act 2003”. The former thoroughly re-organises the way children are treated in courts as witnesses and as offenders. The latter

159 Generally there is no overview over these decisions and if a lower court does not follow this rule, the decision will stand anyway unless the specific case is appealed and taken further to the appeal court.
160 The first edition of this book dates 1822. Since then a new edition has been published every year.
aims to create a contemporary and comprehensive definition of sexual offences in general, addressing many shortfalls of previous, sometimes quite dated legislation. For my undertaking this produces a rather difficult situation. Given the datedness of former acts referring to evidence and sexual offences, and the only very recently passed new acts (1999, 2003), the current situation is still hugely dominated by the old rulings. The legal professionals I interviewed, were inevitably still familiar with proceedings referring to the old laws and have only just begun to appreciate (and be trained in) the new laws. Hence it is important to bear in mind that my investigation examines a phase of change and transition.

8.1.1 Criminal law and child sexual abuse: statutes, acts, definitions

The Acts relevant to issues of child sexual abuse before May 2004 are described in government guidance produced in the early 90’s. To indicate the diversity of sources and acts related to such offences, here are the central references: “Sexual Offences Act 1956”, the “Indecency with Children Act 1960”, the “Criminal Law Act 1977”, the “Protection of Children Act 1978”, the “Children and Young Persons Act 1933”, which is mentioned because it contains a statute about ‘cruelty to children, and finally the “Offences against the person Act 1861” is mentioned because it provides statutes about ‘grievous bodily harm’. Additionally common law is relevant where definitions of assault, manslaughter or murder are concerned.

The “Sexual Offences Act 2003” came in force on the 1st of May 2004 and repeals, as the crown prosecution service guidance puts it, almost all of the existing statute law in relation to sexual offences. Other than earlier Acts, this Act gives more comprehensive explanations of what constitutes an offence and there is a much larger number of different explicit charges (yet often these are not mutually exclusive). The Act also goes on to define what the crucial terms used in the statutes are to mean. This provides, so it is hoped, much clearer guidelines for the prosecution to charge and prove an offence and a much narrower

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162 My further elaborations will show that this is a true and, with respect to the Youth Justice and Criminal Evidence Act 1999, quite astonishing discovery. In 2004, when I conducted my interviews, there still was little clarity about central aspects of the act.

163 Under the initiative “Every Child Matters - Change for Children” and the 2004 Children Act, children’s services and child protection as part of it are currently undergoing vast changes that are intended to transform children’s services completely. At the centre of these changes is the organisation of all relevant services around the individual child and providing more interagency practice. See: www.everychildmatters.gov.uk

164 The age of consent had already been raised from 12 to 16 as early as 1885 in the Criminal Law Amendment Act.

framework within which the jury has to come to a decision.\textsuperscript{166} The guidelines of the Crown prosecution Services on the Sexual Offences Act 2003 summarises the main provisions of the new act as follows:\textsuperscript{167}

- Rape is widened to include oral penetration
- Significant changes to the issue of consent and the abolition of the Morgan defence\textsuperscript{168}
- Specific offences relating to children under 13, 16 and 18
- Offences to protect vulnerable persons with a mental disorder
- Other miscellaneous offences
- Strengthening the notification requirements and providing new civil preventative orders

Most crucially for child victims of abuse, the act removes consent from many offences referring to children and adolescent victims, meaning that in these cases only the act itself and the age or other constraints have to be proven, because these children are now by principle considered too young to consent. This applies for victims who are:

- Children under 16 (including under 13)
- Children under 18 having sexual relations with persons in a position of trust
- Children under 18 involved with family members over 18
- Persons with a mental disorder impeding choice
- Persons with a mental disorder who are induced threatened or deceived
- Persons with a mental disorder who have sexual relations with care workers

All main sections close with an indication as to whether the offence has to be tried in a Crown Court (by indictment), by a magistrates court (by summary trial) or whether it is a so called either-way-offence that can be tried in either court (these distinctions will become clearer in the following paragraph). Finally the section defines the maximum term of sentence the offender has to expect when convicted.

8.1.2 Criminal procedure and child witnesses: formal rules for investigation, prosecution and trial

One of the fundamental principles for criminal prosecutions in England is reflected in Lord Shawcross' (Attorney-General in 1951) "classic statement on public interest, which has been supported by Attorneys-General ever since: 'It has never been the rule in this

\textsuperscript{166} In order to clarify offences against children, there now is a much larger number of different explicit charges than previously, yet often these are not mutually exclusive and thus allow the prosecution some freedom as to how to charge.

\textsuperscript{167} One of the most important changes with regard to adult victims of rape, is the introduction of a statutory definition of consent. Section 74 of the Act defines consent as "if he agrees by choice, and has the freedom and capacity to make that choice". Furthermore the Act prescribes a 'test of reasonable belief in consent' (section 75 "Evidential presumptions about consent"), and outlines the evidential and conclusive presumptions about consent and the defendant's belief (section 76 "Conclusive presumptions about consent"). The generally non-consensual offences are named in sections 1-4 of the Act: 1) rape, 2) assault by penetration, 3) sexual assault and 4) causing a person to engage in sexual activity.

\textsuperscript{168} The "Morgan defence" is a defence of a genuine though unreasonably mistaken belief as to the consent of the complainant. This defence is now abolished by the new Act, which means that the defendant now has the responsibility to prove that he has actively satisfied himself that the other person concerned (alleged victim) did in fact consent to the sexual activity at the time in question.
country – I hope it never will be – that suspected criminal offences must automatically be
the subject of prosecution’. (House of Commons Debates, volume 483, column 681, 29
January 1951).” (Crown Prosecution Services, 2000, p. 8). Hence other than in Germany,
where police and prosecution have an obligation to investigate and prosecute, in England
the investigating bodies (police and prosecution services) have the discretion to investigate
and prosecute. They can decide not to embark on, or to discontinue an investigation or
prosecution at any stage during the proceedings. Generally the crown prosecution services
in England have a much more circumscribed task than their German equivalent, because in
England the police are an independent investigative authority. All initial decisions about
whether to pursue a case and how to proceed will be made by the police and they will lead
all investigations. Still, evidence collected by officials from involved authorities, such as
social services, is also admissible. Hence where children are concerned the investigative
interview can for example be conducted by a social worker. The prosecution services
will not investigate but might, if approached by the police, give advice on individual cases.
Usually the prosecutors only assess the final case files sent to them by the police, to decide
whether to bring the case to court or drop it. Hence the crown prosecution services
will only get to see those cases the police have found worth investigating and charging in the
first place.169

In criminal proceedings broadly three different stages can be distinguished, pre-trial, trial
and sentencing. One of the Acts central for guiding large parts of the pre-trial phase, that
is, how investigations should be conducted and what is admissible evidence is the “Police
and Criminal Evidence Act 1984”.170 But with respect to child sexual abuse and child
witnesses this Act has been superseded by various new acts over the past decades. Most
crucially the “Criminal Justice Act 1988” abolished the corroboration rule that had so far
only allowed children’s evidence if it was corroborated by an adult eyewitness.171 A few
years later the “Criminal Evidence Act 1991” implemented some special measures for child
witnesses. The most recent Act that repeals and dramatically reorganises the rules of

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169 The prosecution service as such is a relatively new because fairly recently there have been dramatic
structural changes in the English legal system. Traditionally it has been the police’s task not just to investigate
a case but also to conduct the prosecution in court. This changed in 1986, when a separate prosecution
service was put in place. The Crown Prosecution Service now is an independent body headed by the
Attorney-General. Anecdotally it has been remarked by some of my interviewees that within the police force
this loss of independence and power is not appreciated, and there are suspicions that the resulting ambiguous
and weak position of the Crown prosecution services leads to difficulties with prosecutions.

170 All acts of law can be found on the internet: www.opsi.gov.uk

171 It is important to note that this is a simplified description of what the ‘corroboration rule’ entailed. One of
the judges I interviewed noted that the corroboration rule had never been very clear cut and that it had always
been a very difficult area of the law.
evidence particularly concerning child witnesses and young offenders, is the “Youth Justice and Criminal Evidence Act 1999”. 172

Most crucially article 53 of this act states that: “At every stage in the criminal proceedings all persons are (whatever their age) competent to give evidence”. The Act furthermore widens and refines the range of special measures that now apply to all witnesses under the age of 17, to witnesses who suffer from a relevant incapacity or are eligible for assistance on grounds of fear or distress (articles 16.-17.). These measures are meant to protect child witnesses. The broader rationale underlying these provisions is the expressed aim to improve the quality of the evidence given by the witnesses. The Youth Justice and Criminal Evidence Act 1999 (in the following YJCEA 1999) names the following special measures.

- Art. 23. - Screening the witness from the accused by means of a screen or other arrangement (in court during trial)
- Art. 24.- Evidence by live link: Cross-Examination and live evidence can be given via live TV link (CCTV) from a different room
- Art. 25.- Evidence in private: excluding from the court the defendant or the public
- Art. 26.- Removal of wigs and gowns
- Art. 27.- Video recorded evidence in chief: a video recording of an interview of the witness is to be admitted as evidence in chief of the witness (and thus will be played in court)
- Art. 28.- Video recorded cross-examination or re-examination (not yet implemented)
- Art. 29.- Examination of witness through an intermediary (not yet implemented)
- Art. 30.- Aids to communication (in case of disability, disorder or impairment) 173

For the investigative and prosecution process clearly the most crucial special measure is provided in article 27, the video recorded evidence in chief. For the police this means that when dealing with witnesses under 17, the police is, if they decide to investigate a case, obliged to video record their investigative interview with the child. Alongside the YJCEA 1999, the Home Office has also published a set of guidelines for the police, specifying how to conduct these video interviews with children and vulnerable witnesses, called “Achieving best Evidence” (2001).

Once the police has passed the file to the prosecution services the prosecutor has to evaluate the case applying two central ‘tests’, outlined in the official guidelines “The Code for Crown Prosecutors” (2000). 174 “The Code” is a slim booklet that outlines the broad principles according to which the prosecution services make their decisions. Most importantly it states the two ‘tests’ that have to be applied.

173 Additionally there are Sections 34 and 35: Mandatory protection of the witness from cross-examination by the accused in person. Section 36: Discretionary protection of witness from cross-examination by the accused in person. Section 41: Restrictions on evidence and questions about complainant’s sexual behaviour.
174 “The Code” is a public document that is available on the internet (www.cps.gov.org), and in various languages, on tape or in Braille.
4.1 There are two stages in the decision to prosecute. The first stage is the **evidential test**. If the case does not pass the evidential test, it must not go ahead, no matter how important or serious it may be. If the case does meet the evidential test, Crown Prosecutors must decide if a prosecution is needed in the public interest.

4.2 This second stage is the **public interest test**. The Crown Prosecution Service will only start or continue with a prosecution when the case has passed both tests, The evidential test is explained in section 5 and the public interest test is explained in section 6.” (Crown Prosecution Service, 2000, p.4) (highlighted in the original).

The first test defines that the Crown prosecutor must be satisfied that there is sufficient evidence to provide a realistic prospect of conviction against the defendant on each charge. Furthermore they must consider whether the evidence is admissible and whether it is reliable (i.e. whether the witnesses are accurate, reliable, credible, has retracted allegations). The second test relates to the programmatic statement by Lord Shawcross I quoted above and requires the prosecutors to consider factors of public interest for and against a prosecution. As these are case specific there cannot not be a prescriptive list of factors, but the code gives some examples. The more serious an offence the more likely a prosecution will be in the public interest. Factors against a prosecution can be, that the offence was minor or was committed as a result of a genuine mistake, the defendant has already been made subject of a sentence, the prosecution is likely to have a bad effect on the victim’s physical or mental health (see The Code for Crown Prosecutors p. 8-15). Crucially for cases of child sexual abuse the code also states that, while the CPS prosecutes on behalf of the public at large, it still “should always take into account the consequences for the victim of the decision whether or not to prosecute, and any views expressed by the victim or the victim’s family.” (Crown Prosecution Services, 2000, p. 13). So unlike the German case, an English prosecutor will be very unlikely to prosecute against the wishes of a victim or their family (where the victim is under age).

There are two different courts with jurisdiction in criminal cases, the Magistrates’ Court and the Crown Courts. If the prosecution decides to go ahead with the case, they will draft the charges (where the case goes to a Crown Court, an indictment is written) and depending on the specific charges, one of these two courts will try the case. Less serious cases will be heard in the locally organised magistrates’ courts in a **summary trial**. A summary trial is conducted before a bench of magistrates, or ‘justices of the peace’, who usually are carefully selected lay justices, that is, respectable citizens who have no legal expertise but receive basic training and are assisted by a legal professional. There is no jury, as the

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175 This test is called an objective test that means to anticipate whether a jury or magistrates are more likely convict than not to convict the defendant.

176 Almost all offences committed by children and young people (which by the Criminal Justice Act 1991 means under 18) must be tried summarily and by a youth court. This is part of the magistrates’ court, but uses specially selected magistrates. In very serious cases young offenders will be tried by indictment.

177 The sexual offences act specifies in which court a specific charge has to be tried. Yet, some charges are identified as 'either-or-offence', which means the defendant can chose in which court they want to be tried.
magistrates decide all matters in question.\textsuperscript{178} The rules of procedure and evidence are broadly the same as in a Crown Court, but the atmosphere is less formal.

More serious cases require ‘trial on indictment’, which will take place in a Crown Court, before a professional judge and a jury.\textsuperscript{179} There is no formal specialisation among judges in criminal work, but some are known to be experts in certain areas, e.g. sex crimes, and will thus be likely to receive respective cases. However, judges who try rape and sex abuse cases need to receive training in the sexual offences law (a qualification referred to as ‘rape ticketed’). Trial on indictment must be preceded by committal proceedings in the magistrates’ court, where the prosecution evidence will be examined to make sure it is admissible and amounts to the charges indicted by the prosecution.\textsuperscript{180} Still, in child sexual abuse cases this proceeding can, and will regularly, be skipped.\textsuperscript{181}

Once a charge is made the pre-trial stage begins. During this preparatory period that can last over several weeks, the Crown Court judge who will try the case, will hold one or more preliminary hearings, or ‘plea and directions hearings\textsuperscript{182} in court (no jury is present). These hearings are crucial to prepare the whole trial, because once the trial resumes it needs to proceed swiftly and on consecutive days.

In the first hearing the defendant will be presented to the court, the indictment is read out and the defendant is asked to make their plea. A major difference to the German legal system is that, where a defendant pleads guilty there will be no full trial and usually no
evidence is heard. The case will be handled exclusively by the judge, who will decide about sentencing matters. Where the defendant pleas innocent, the trial will go ahead and the parties go away to prepare the presentation of their evidence. Hence other than in the German legal system, in England the court does not undertake any investigations, as it is the parties' responsibility to put forward evidence and call witnesses. During further preliminary hearings the judge will neutrally oversee the preparations and ensure the evidence brought by the parties is likely to be relevant and admissible. They will also make sure the prosecution discloses all their evidence and any material which might assist the defence, to the defence barrister. During these hearings the judge may also receive and decide about applications for special measures to be provided for child witnesses, and either of the parties, or both, might apply for expert evidence to be gathered and heard on a particular aspect of the case. While the expert is instructed by the respective party that calls them, it is the judge who has to decide whether such expert testimony should be admitted to the trial in the first place. Finally a date for the main trial will be set as soon as possible, but at a time by which the parties are expected to be ready.

The trial resumes with the jury being sworn in. Generally, the procedural rules of the courtroom are based on the principle right of the accused to confront their accuser in person, that is, face to face. This encounter should take place in open court and the accused must be given the opportunity to challenge the accusations. Hence they will cross-examine their accuser and the witnesses adversarially there and then, or much more frequently their counsel will do this on their behalf. Furthermore the defendant has the right for this to happen in the presence of a group of the defendant's peers who will judge the case, i.e. the jury consisting of twelve randomly selected members of the public. During

183 Where defence and prosecution disagree strongly as to what occurred, there might be a so called 'Newton hearing' in order to hear evidence and establish a factual basis for sentencing.
184 Not guilty pleas represent about 2% of all criminal trials (Gudjonsson, G. H. & Haward, L.R.C. 1998, p. 158).
185 In order for special measures to be provided for children and vulnerable witnesses an application has to be made during the preliminary hearings, by either of the parties, or failing this, by the court itself. It is then for the court to decide about their application and it will do this by determining whether, and if so which measures "would, in its opinion, be likely to improve the quality of evidence given by the witness." (art. 19(2a)).
186 "Basic criteria for admissibility of expert testimony as stated by Lord Justice Turner (1975): "An expert's opinion is admissible to furnish the court with scientific information which is likely to be outside the experience and knowledge of a judge or jury." (quote as in Gudjohnson & Haward 1998, p. 169). The YJCEA 1999 also specifies that expertise can be heard on the question of whether special measures should be applied (art. 20(6c)), whether a witness is competent to give evidence (Art. 54(5)), and whether a child witness should give their evidence sworn or unsworn.
187 While for example medical expertise will frequently be given, it is very rare for psychological experts to be employed in criminal court cases (Gudjohnson & Haward 1998 p.170). To judge witness accuracy and credibility in an ordinary person (witness), is one of the primary task of the jury, so psychological experts' potential contribution in this area is generally seen as problematic.
trial all those material facts that are disputed must be proven by evidence, and here immediate ‘live’ oral evidence has precedence over other forms of evidence (Spencer & Flin 1993). This evidence must be relevant to the case and admissible.

The law of evidence is complex, but these are the most common kinds of inadmissible evidence: hearsay evidence, evidence of previous misconduct, evidence of previous convictions of the defendant and evidence that was improperly obtained.\(^{188}\) The fact that only disputed facts must be proven in evidence means that information relating to undisputed circumstantial aspects of the case, that have been agreed between the parties, do not have to be proved by evidence in court. Such circumstantial aspects that establish the context of the case can for example be introduced in writing or by report. Hence unlike in German courts, a lot of the material such as witness statements that establish the circumstances of the case, can be read out from police interview protocols, or will be submitted and handed to the jury entirely in writing. Ultimately it is the immediate clash of opposing accounts that refer to the disputed aspect of the case, in front of the jury, that is seen to enable the jury to determine the fact of the case.

The burden of proof in criminal proceedings rests with the prosecution, and they have to prove beyond reasonable doubt that the defendant is guilty.\(^{189}\) The trial begins with the prosecution ‘making their case’ by presenting all their evidence and calling all their witnesses. Other than in Germany it is not the court, but the parties who call and examine witnesses adversarially. This happens in two stages. First the witness gives their ‘evidence in chief’, that is, they are ‘examined in chief’ by the party calling them. Here the party will question their witness guiding them to systematically and concisely deliver evidence favourable and relevant to their case.\(^{190}\) Subsequently the witness is ‘cross-examined’ by the other side, who will test (that is, challenge) their statements, aiming to elicit evidence damaging to the case, or even try to damage the credibility of the witness. Finally the party calling the witness may ask follow up questions. Once the prosecution rests the defence will ‘make their case’ and call their witnesses. Where unforeseen evidence has emerged the prosecution might get another chance to provide more evidence and to follow up on evidence presented by the defence.

\(^{188}\) For a more detailed introduction see Spencer & Flin (1993). Currently these rules are undergoing drastic changes (particularly where rape and child sexual abuse are concerned).

\(^{189}\) The defence on the other hand is responsible to lead evidence about general defences like duress, self-defence or insanity.

\(^{190}\) The barrister must not ask their witness leading questions, but they will aim to guide their witness strongly and to draw out the evidence by well placed questions.
The judge does not have an investigative task but throughout the trial they chair and orchestrate the trial by observing the rules of evidence, deciding about objections the parties might bring against each other, overseeing the appropriateness of the cross-examinations, guiding the jury with comments, directions and warnings about the evidence and the legal points at stake. This is particularly relevant, because throughout the trial the indictment can be amended. Where prosecution and defence agree that charges, or aspects of charges, have become irrelevant in view of the evidence presented, this charge can be removed from the indictment, to leave only those that are still disputed to decide for the jury.

Where child witnesses are concerned a number of special measures may be applied and following article 27 of the YJCEA 1999, their evidence in chief will usually be replaced by the showing of a video that has been recorded of the children’s interview with the police.

Where special measures are used in trial (e.g. video, CCTV, screen etc.), article 32 of the YJCEA 1999 states that the judge, if he considers it necessary, should give the jury a warning to ensure they do not hold the use of special measures against the defendant (guidance on when and how such warnings should be given can be found in Archbold's Criminal Pleading).

After all the evidence has been heard, the parties make their closing statement. The judge will then give final instructions to the jury and sum up the case for them. In this ‘summing up’ the judge will revisit central points presented in evidence and remind the jury which exact aspects of the case have remained controversial and are thus for them to discuss and decide.

The jury is then dismissed to the jury room to come to their verdict. It is the jury members’ explicit task to view all the evidence and to make judgements about the credibility, reliability and accuracy of witness statements and what weight should be given to their accounts and other evidence heard. For a conviction a 10 to 2 majority of the jurors have to come to a conclusion ‘beyond reasonable doubt’. The ‘reasonable doubt’ standard of proof is often explained to jurors by judges telling them that they have to be ‘satisfied as to

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191 If there are legal arguments about the admissibility of evidence, or new evidence is submitted during trial, the judge will hear these arguments in the absence of the jury. This is to ensure the jury is not confused by legal arguments and does not get to see/hear anything that might turn out to be inadmissible (Gudjohnson & Haward 1998).

192 Where this happens the judge will direct the jury to give a verdict of ‘not guilty’ with regard to the respective charge.

193 Art. 31 Statements made under special measures “shall be treated as if made by the witness in direct oral testimony in court. Art. 31(4) “In estimating the weight (if any) to be attached to the statement, the court must have regard to all the circumstances from which an inference can reasonably be drawn (as to the accuracy of the statement or otherwise)."
be sure'.194 Jury deliberations are strictly confidential and the jury is under no obligation to deliver a written or verbal rationale for their verdict. They will declare that they have found the defendant guilty, not guilty, or in case of a deadlock, remain undecided. If the jury finds the defendant guilty the case moves to the sentencing stage, which will be conducted by the judge alone.

There is no systematic Home Office data on the average amount of time the prosecution and trial of child abuse cases takes. Periodic research reports quoted in Plotnikoff & Woolfson (2004) indicate that despite increased efforts to fast track cases involving allegations of child sexual abuse, these cases actually take longer than the national average for criminal prosecutions. Additionally, over the past years the average time between reporting and trial has increased from an average of 10 months in 1991-1992, to an average of 14 months in a study referring to 1998. A recent case study, that refers to 44 child witnesses in abuse cases reports an average waiting time of 11.6 months for Criminal Court cases (ranging from 6 months or less to 12 months and more for a considerable number of witnesses) (Plotnikoff & Woolfson 2004).

8.2 Psychology and law: the role of psychological research and expertise in English child witness practice

Parallel to the structure adapted in the previous chapter about the German law, I would now like to explore in more detail the role psychological research and expertise have played for developments in English child witness practice.

"In any event... there is no body of specialist knowledge which can be brought to bear on questions of credibility. In this situation, the view of the law is the only one which is possible. It is that decisions about credibility can only be based on common sense, ordinary human intuition, and practical judgement based on experience of life." (Scottish Judge Sheriff Marcus Stone, quote as in Spencer & Flin, 1993, p. 238).

The English legal system has always had an uneasy relationship with scientific expertise, and with psychologists in particular because the courts are by principle reluctant to admit expert evidence on the behaviour of a 'normal' (as opposed to e.g. mentally ill) person. Hence the English law is particularly restrictive with psychological or psychiatric expertise on issues of normal eyewitnesses' testimony or credibility (Spencer & Flin 1993; Gudjohnson & Haward 1998). The testimony and credibility of a normal person is seen to

194 In Civil cases (such as in family courts) the standard of proof is 'on balance of probabilities', meaning that a 'more likely than not' conviction does suffice to decide the case.
be perfectly accessible for lay people without the help of experts, and it is for the jury alone to judge the credibility and accuracy of witnesses.

With regard to child witnesses, it is only over the last two decades that the English legal system has begun to appreciate the contribution of psychological research to policy and practice. A crucial turning point in this relationship, as Bull (1998) points out, was a 1987 Home Office report on the issue of the obligatory corroboration of children’s evidence. The report had been commissioned as a result of the growing concern about child sexual abuse. Based on a thorough review of the available research into children’s memory and testimony the report came to the conclusion that counter to the widely held belief children were by and large capable of giving accurate and reliable evidence and that there was no principle need for children’s evidence to be corroborated by an adult eyewitness. This report ultimately convinced the government to abolish the corroboration rule for child witnesses (Criminal Justice Act 1988). In 1988 the government also set up the Pigot Committee. This committee of high ranking legal professionals was to thoroughly review child witness practice in England in response to the scandal that erupted in 1987 around the so called Cleveland crisis. In the case of the Cleveland Crisis it was paediatricians’ uncritical reliance on what they assumed to be physical indicators of sexual abuse that had caused a vast number of children being falsely diagnosed as abuse victims.195 Around the same time, and slightly pre-dating similar developments in Germany, England saw other high profile cases where children reported bizarre instances of sexual and ritual abuse, for example the so called ‘Broxtowe Case’ (Nottingham), or the Orkney Islands case.196 In both cases an initial suspicion of child abuse had led to numerous children being interviewed repeatedly, and in a quite coercive fashion by social services and the police. It was found later that (presumably) inadvertent suggestions by these overly zealous professionals had played a central role in producing the horrendous accounts some children ended up producing.197 While ultimately none of the allegations could be substantiated, children had been removed from their families, and in some cases were not allowed to return for several

195 The so called Cleveland Crisis is one of those high profile cases where a small number of over-concerned professionals (in this case pediatricians) had, within a very short period of time, caused a total of 197 children to be removed from their families for suspicion of having been sexually abused. While great distress was caused to the families and children, some of which were only returned to their families after months or even years, the allegations could not be substantiated in any of the alleged cases (cf. Bell 1988). For a circumspect analysis see Lee (1999).


197 Following some sources it appears that in the Orkney Island case the children never made any explicit allegations.
years after the cases had been closed, causing wide spread criticism and sometimes hostile attacks against the social services.

The Pigot Committee reviewed the cases and the practice and drew on psychological research to make some drastic suggestions as to how child witness practice could be improved. The “Criminal Evidence Act 1991” implemented some of the Pigot report’s recommendations, such as CCTV facilities for child witnesses and video recorded police interviews that could be shown as the child’s evidence in chief in court (Spencer, 1997; Spencer & Flin, 1993). By allowing children to give evidence from outside the courtroom, it was hoped that CCTV facilities would make children more comfortable, and thus enable them to provide more detailed and accurate evidence. The video recording of children’s interviews with the police also meant that children could be spared a courtroom appearance. But most importantly the video preserves children’s evidence at an early stage in the investigation and thus ensures that their evidence is not either forgotten, changed in a later re-telling or altered by suggestive influences the child might be exposed to in the meantime. Rolling out the new practice of video recording witness interviews and showing them in court also highlighted the need for new specialised interviewer training.

Acknowledging the problem of children’s suggestibility and the complexity of conducting such interviews and thus the need for special interviewing skills, the Home Office, in collaboration with psychological researchers, produced guidelines that instructed the police how to conduct these video interviews with child witnesses (“Memorandum of Good Practice”, Home Office 1992). For the first time the police were given explicit guidelines (‘soft law’) on how to interview children and the police forces were obliged to provide special training for all police officers before they could conduct these interviews. The ‘Memorandum of Good Practice’ also encouraged the joint training and practice of police officers and social workers.

It should be noted that this was also the time when psychological researchers in the Anglo-American context, began to voice serious concerns about the complexity and apparent reciprocity of research into children’s suggestibility. As demonstrated in chapter 2.9 the results of such research as well as the debates around them tended to feed back into the public opinion and legal decision making with uncontrollable effects. Bull (1998) states that on an important international conference in the early 90’s the point was made that “what the general public, juries, police, lawyers, judges, etc. believe about the suggestibility of child witnesses was more important than any disagreements among psychologists.” (Bull, R. 1998, p. 194). And it was in 1993 that Ceci and Bruck in their programmatic synopsis of research into children’s testimony, noted on the issue of suggestibility: “The field of
children's testimony is in turmoil..." (Ceci & Bruck, 1993, p. 403). As outlined in chapter 2.1, throughout the 90's anglo-american research and practice was also haunted by the increasingly heated debates around the issue of recovered and false memories (Herman 1992; Loftus, E. et al 1994), and the emergence of other discoveries relevant to child witnessing like the 'parental alienation syndrome' (Gardener, 1992), or later on the 'Post-Traumatic-Stress-Disorder' (PTSD).

In the years following the implementation of the 'Memorandum of Good Practice', a group of researchers and academics from psychological and legal backgrounds was commissioned to review and examine the changes implemented in 1991, and as a result of this review the white paper 'Speaking up for Justice' (1998) was published. The Youth Justice and Criminal Evidence Act 1999198 is based on this white paper, and followed its recommendations very closely by implementing new-, and refining some of the existing special measures. Hence again psychological research had been instrumental in shaping the new law around child witnesses. Most crucially, following further review of the 'Memorandum of Good Practice' interviewing practice (Davies & Westcott 1999), psychological and legal academics were also commissioned to develop new guidelines to replace the 'Memorandum of Good Practice'. Concluding their review Davies and Westcott (1999) warn that the unhelpfully polarised societal atmosphere around children's credibility and suggestibility still persists.

"Sentiment on the competency of child witnesses has been subject to pendulum swings in recent years. Headlines proclaim that children are either very good witnesses or very dangerous witnesses; children never lie about abuse or they lie easily about it; the law is overwhelmingly in favour of the defendant or it accedes unnecessarily to the whims of the child." (Davies & Westcott, 1999, p. 38).

Further, Davies and Westcott state that "In many areas, however, the necessary research does not exist and there is a need for more systematic studies to address the tangle of social, developmental and motivational factors which determine the accuracy and suggestibility of a given child under questioning." (Davies & Westcott, 1999, p. 38).

The revised interviewing guidelines that instruct training and interviewing practice since 2001, again drafted on behalf of the Home Office by a team of consultants comprised of legal and psychological academics and researchers, are titled "Achieving best Evidence in Criminal Proceedings: Guidance for Vulnerable or Intimidated Witnesses, including Children. Implementing the Speaking up for Justice Report" (2001).

While psychological expertise seems to systematically inform the law and training of interviewers, the judiciary is more detached from these efforts. The Pigot Committee had in 1989 recommended special training for judges who try child abuse cases, but it was only during the mid and late 90's, that the Judicial Studies Board (responsible for the training of

judges in England and Wales) began to implement changes with regard to judges’ training. This initiative seemed to have been sparked by the national debates that followed the broadcasting of a television program about Ceci's implanted memory research in 1994 (see chapter 2.4). During 1996-1998 it held the first seminars for judges who were authorised to try child abuse cases. As part of this seminar judges were not just shown an NSPCC video on child witnessing ("A Case For Balance", 1997, NSPCC), but judges also saw an excerpt of the American television program "Out of the Mouth of Babes" that features a report about Ceci’s work and his implanted memory research with children. The use of this film has received harsh criticism from numerous academics in the field who describe it “to be a convincing demonstration of the unreliability of children’s evidence” (Plotnikoff & Woolfson, 2002, p. 302), and state “that Ceci and Bruck’s work gives ‘the impression that (...) children’s accounts of abuse are often false.” (Myers, 1995, p. 392; Wescott, 1998; as quoted in Plotnikoff & Woolfson, 2002, p. 302). While defending his research, Ceci is reported to have conceded that the film might give a slightly unbalanced impression of children’s credibility (Plotnikoff & Woolfson, 2002). Regardless of such critique, slightly amended later versions of the same film continue to be used by the Judicial Studies Board to train judges.

Looking back at this brief outline, it becomes clear that within a relatively short period of time, ten to fifteen years, psychological research has begun to have a significant influence on legal-, and child witness practice in particular. And similar to developments in Germany, it was the concern about children’s suggestibility and the complex issues surrounding suggestibility in general, that played a central role in initiating the change in climate that facilitated the procedural changes. Still, other than in Germany it is not the introduction or regulation of psychological experts who advise the court. In stark contrast to the German law, that considers psychological expertise particularly helpful to assist in assessing witness credibility and has even made obligatory particular scientific methods, the English legal system explicitly rules out such methods. However, in England psychological expertise becomes efficient within legal practice in more generalised ways. It is introduced via the special measures implemented, via the guidelines ("Achieving best Evidence"), and via the respective training provisions now obligatory for police officers. Hence in England the attempts to tackle the problem of suggestibility while improving the way in which children’s voices can be heard in court, are focussed predominantly on the way the police interview children. It is the police who are facing the most significant changes in the way they encounter children as witnesses, and this inevitably heightens awareness for their work and it underlines the significance of their decisions.
I would like to introduce the latest guidelines “Achieving best Evidence in Criminal Proceedings: Guidance for Vulnerable and intimidated Witnesses, including children” (2001) (in the following ABE) in some more detail, because they encapsulate the way in which the English legal system now addresses the problem of child witnessing and suggestibility and thus form the basis of child witness practice in England.

**Achieving Best Evidence in Criminal Proceedings: Guidance for Vulnerable or Intimidated Witnesses**

The ABE applies to witnesses of the prosecution and of the defence and provides guidelines for “all persons involved in relevant investigations including the police, social workers and members of the legal profession” (Home Office 2001, p. 1). It is not a binding code of law, but the document states that significant departure from the guidance will have to be justified in the courts. The guidelines declare that training and maintenance of interviewing skills in accordance with the guidance are obligatory, but it leaves it to the respective agencies to define and enact the curricula and practical details of such training. Following the focus of my inquiry I would like to concentrate exclusively on those aspects of the ABE that refer to child witnesses (under 17), and give a brief sketch of those recommendations referring to interviewing and to the production of detailed, reliable and admissible evidence.

The main body of the ABE is about 200 pages long. It gives detailed instructions on how to prepare and conduct investigative interviews with children and it provides the legal knowledge necessary to carry out the interview in a manner satisfactory to the court. It describes the recommended joint action between various agencies involved and details how witnesses may be prepared and supported prior to-, and in the interval between the interview and their court appearance. It also depicts the special measures available to witnesses in court, and advises on good practice when examining and cross-examining child witnesses in court “so as to enable them to give their best evidence” (ABE p. 4). This phrase captures the ruling principle of this guidance. While child protection and welfare is a central aim, all the measures are simultaneously designed to, and are applicable where they are likely to improve the quality of the child’s evidence. Hence the guidance consists of a mix of legal advice and psychological recommendations, with the main focus being on the preparation and conducting of video interviews with witnesses. Crucially the ABE states that, because the video of children’s evidence will replace the child’s evidence in chief in court, the video interview has to be conducted in accordance with the rules of investigation and evidence as they apply in the courtroom and during trial. Hence the police officers have to observe a number of conventions and restrictions that would usually be observed by the legal counsel and the court.

“It is therefore good practice to conduct an interview as far as possible in accordance with the rules which would apply in court. Interviewers who ignore these rules are likely to produce video recordings which are unacceptable to a criminal court.” (italics in the original) (ABE 2001, p. 139).

This means that the police officers not only have to decide whether to investigate, and check the eligibility of the witness for special measures, but they also have to determine the witnesses’ competency, compellability and availability for cross-examination. Competence is defined as being ‘able to understand questions put to them and being able to provide answers that can be understood by the court’, additionally it must be assured that the

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199 The YJCEA 1999 defines the quality of evidence in Art 16(5) as follows. “In this chapter references to the quality of a witness’s evidence are to its quality in terms of completeness, coherence and accuracy; and for this purpose “coherence” refers to a witness’s ability in giving evidence to give answers which address the questions put to the witness and can be understood both individually and collectively.”

200 The ABE quotes the YJCEA 1999 with regard to competency, given that the court considers all the special measures available to persons with special needs. “...persons are incompetent as witnesses where the
child knows the difference between truth and lies. Compellability means that the witness can be “legally required to attend trial” (ABE, p. 13).

The ABE particularly underlines the importance of planning the interview thoroughly, and stresses that officers need to establish a good rapport with the child during the interview in order to obtain detailed and accurate evidence. The ABE gives very detailed instructions how to conduct the interview and to avoid suggestion. The interview should follow four distinct phases: 1. Establishing rapport; 2. Free Narrative; 3. Questioning; 4. Closure. There are numerous examples of questioning techniques, the advice relates to the broader legal and policy context and includes references to psychological research literature. Crucially the ABE closes with a summary of the legal constraints interviewers need to comply with when conducting the video interview. Most importantly the full circumstances and conditions of the interview need to be transparent and accounted for to satisfy court standards. Interviewers are admonished to avoid leading and suggestive questions and to prevent witnesses from giving evidence of what he/she has previously said to another person. This kind of evidence is seen to have little evidential value and it might amount to ‘hearsay’, which is altogether inadmissible in evidence. The advice furthermore reminds interviewers that so called ‘bad character’ evidence about the accused is inadmissible. Hence the witness should be prevented from mentioning anything about the accused that amounts to a general denunciation of character, might point to previous convictions or to offences not related to the one accused because this will be seen to prejudice the jury against the defendant. While the court will always use its discretion to judge individual cases, violating the rules of evidence could ultimately mean that the court decides to partly or fully exclude the video from evidence. As a consequence of this, the officers are reminded, the child will not just have to give its evidence in chief in person, but where the video is void other special measures will also be unavailable to the witness. Hence, ultimately the advice states that where the rules of evidence are concerned “the interviewer should err on the side of caution”. (ABE, p. 139).

Overall the changes to the legal system were received very positively and have been described as a bold move by the policy makers. A study investigating police officers’ and social workers’ views on the YJACEA 1999 (Nield et al. 2003), in the years following its implementation, found that both professions expected the changes to have positive effects on the accuracy of evidence and thus assumed vulnerable witnesses would benefit from the changes. The implementation of the original ‘Memorandum of Good practice’ (Home Office, 1992) and its follower the ‘Achieving best Evidence’ (Home Office, 2001), were also welcomed by legal professionals and psychological researchers alike, because they followed research recommendations and provide a framework that was hoped to resolve

court finds that they are unable to understand questions put to them, or unable to give answers to them which can be understood.” (ABE, 2001, p. 12-13).

201 This refers to the way the witness is treated before and during the interview, meaning that for example when going to the toilet during the course of an interview the officers needs to accompany the witness to the toilet to make sure they do not speak to anybody.

202 “Any statements made by the witness about the alleged offence prior to the interview are likely to be hearsay. (...) such statements should not be deliberately elicited from the witness during a video recorded interview. For example a witness should not be asked to relate any conversations he or she may have had concerning the offence.” (ABE 2001, p. 142).

203 “The interviewer must be very careful to avoid mention of such matters and should try to steer the witness away from any mention of such discreditable facts.” (ABE 2001, p. 143).
some of the inevitable tensions between child protection, child welfare and the need to secure detailed but legally admissible evidence.

However, research conducted in the years following the implementation of the Memorandum of Good Practice (1992) and then the ABE (2001), raised questions about the efficiency of the interviewer training. Studies suggest that there are problems with the quality of the interviews conducted. A large proportion of interviewers omit the ‘free narrative phase’ and ask mostly specific and closed questions, many interviews were shown to lack at least one of the four recommended phases and the quality of the different phases varied widely; particularly the rapport and the closure phase were conducted poorly in some instances. There are suggestions that training is not showing the desired long term effects with interviewers neglecting preparation and planning of interviews (see for example Davies et al, 1995; Davis et al 1999; Westcott & Kynan, in press; Westcott et al 2006). Hence there is an ongoing debate as to why interviewers do not seem to follow the recommendations and whether improved training following national curricula could solve this problem.

Apart from this more internal critique of the kind of training the judicial studies board devises for judges, there is also wider concern about the courts’ unhelpful attitude towards the changes. Reportedly “many psychologists and practitioners (…) see the undoing of many of the positive achievements wrought earlier in the investigative process by court systems which owe more to legal tradition than proven effectiveness.” (Wescott et al 2002, p. xxx). So there are ongoing debates about what are seen to be uncooperative attitudes of courtroom personnel, and the pressures created by their expectations.

Additionally both of these critical issues need to be considered in the context of the attrition rates in child abuse cases for England and Wales (see chapter 5). According to Kelly et al (2005) prosecution and conviction rates have seen a steep drop since 1977 and particularly between 1992 and 2002. This is indeed surprising considering the steady and in part dramatic improvements to child witness practice since 1988, particularly because the changes are well founded in research and appear to have been welcomed. While the police’s and the courts’ potential non-compliance might have contributed to the problem, it seems unlikely that this could be the sole explanation for this trend.

As outlined in chapter 5, it is difficult to interpret such statistics and thus I do not want to overstate the relevance of these numbers. Clearly, the overall debate is much more complex than I can capture here. So at this point, and crucially for my trajectory, I would like to point to two central issues that become transparent. Once again (similar to Germany) we can see that issues arising around suggestibility were at the centre of the concern that finally
triggered the initial changes to legal practice. And while the problems and discussions that circulate around these changes inevitably differ from the ones encountered in Germany, they are of a similar nature. Again suggestibility has raised what I earlier described as the dilemma of an 'epistemology of practice'. As it seems simplistic just to assume the problem rested solely with the police or the courts (refusing, ignoring or being unable to follow the recommendations), we are again faced with the question of how exactly science (here psychology) does relate to the law. How exactly are children being given a voice via these recommendations and what does that mean for legal practice?

Rather than assigning the blame on either side, or to dismiss in principal the potential of a productive collaboration between psychology and law (King & Piper 1990), I would like to suspend the problem for now and investigate the practice dilemma exposed by suggestibility in detail. Hence I will trace further the question that suggestibility seems to be asking at the intersection of science, law and child witnessing.

8.3 Experiential perspective: negotiating memory, childhood and expertise in the English legal system

In the following I will create a more detailed picture of how the English legal system operates to collect and handle children's evidence. I will thus trace children's evidence through the individual accounts of legal practitioners I interviewed and practices I observed, more closely. As I have pointed out English child witness practice is currently undergoing drastic changes, and here the interview training police officers receive plays a crucial role. This is why I have chosen to depict police practice mainly from the perspective of training courses I attended.

The intention of this chapter is not so much an analytic one, but at this point I want to capture the structure of this practice in detail and demarcate the points of tension, as they emerge from the accounts and observations of the practitioners. In part C I will revisit some of these junctions in order to analyse in more detail the accounts of the practitioners as they deal with these dilemmas.

Recording evidence: the police and social services

Where child abuse is reported to the police the investigating officer will, based on this report, conduct initial inquiries to decide whether the report is serious and should be investigated further. Following the guidelines set out in the ABE the officer has to decide whether the witness is eligible for a video interview and whether a video should be conducted. While children generally are eligible, a video should only be conducted where
there is a hardened suspicion of an offence and where the witness is willing to be formally interviewed. Additionally the police need to establish the child’s general capability to be a witness, that is, their competency, compellability and availability for cross-examination.\textsuperscript{204}

This early stage of the investigation is, if the case is not dropped anyway, part of what the ABE calls ‘pre-interview assessment’. The officer will try to get a first impression of the clarity of the allegation (does it constitute an offence), the severity and acuteness of the allegation (in case instant action is required to avert harm), and the apparent credibility of the allegation, which also depends on the nature of the disclosure and possible circumstantial evidence that could bolster the allegation.

On the video interviewing training course I attended, a number of experienced officers discussed and highlighted the complexity of this task. They pointed out that sometimes the alleged victim has not made a full disclosure and it remains unclear if and what is supposed to have happened (relatives or friends might have reported), while there is little circumstantial evidence. Furthermore following their experience many of the alleged victims do not wish to be formally interviewed, adamantly refuse to go to court, recant the allegations at some stage, or are uncertain about filing charges and testifying, because they do not wish for the perpetrator to be punished. In the past this usually meant that no video interview was conducted and the case had to be dropped. While the training officer points out that more recently it is recommended to video interview these witnesses anyway (in case they change their mind later on), the officers are worried that this might end up trapping witnesses into having to go to court against their will, because the prosecution wants to go ahead.

Where the case warrants a video, the capabilities of the child have to be assessed. Hence the officers have to consider the child’s age and language abilities, whether they will be able to give a clear and convincing account in the video interview, how they will come across as witnesses in court and whether they will be capable and willing to stand cross-examination (which is a necessary condition). If the officer decides to go ahead with the case and to conduct a video interview they need to prepare the interview by identifying the child’s individual needs, preferences and anticipate potential problems that might arise.

\textsuperscript{204} Competence is defined as being ‘able to understand questions put to them and being able to provide answers that can be understood by the court’. In relation to this police officers are also advised to inquire into the child’s understanding of truth and lies (particularly with younger children) and to remind them that they must tell the truth. Compellability means that the witness can be “legally required to attend trial” (ABE, p. 13) and most importantly a video interview must only be conducted where the interviewer is sure that the witness will also be available for cross-examination (this is a principle requirement for all witnesses who give evidence in criminal trials).
During the ABE training course, officers are reminded that this part of the 'pre-interview assessment' is crucial to establish a rapport with the child and to gather helpful background information. This ideally involves informally meeting the child, speaking to the carers/family, where appropriate to liaise with social services (who can give background information or offer support for the child), and to hold a 'special measures meeting' with the prosecution services (and social services) in order to negotiate further proceedings and special measures applications that need to be sent to the court.

It is generally possible for the video interviews to be conducted by a social worker, and the ABE recommends close co-operation or even joint interviewing by a police officer and a social worker. The social workers I interviewed report that just after the Memorandum of Good Practice was introduced in 1992 there had been a lot of initiative to offer joint training. Social workers would often initiate cases that emerged from their practice, chair special measures meetings and take the lead in video interviewing children. Yet, while both of the social workers report they have conducted numerous interviews in the past, they do not do this anymore. They say that lately the police have taken over the case management more and more and interviews by social workers have become much rarer. Social services now will often only see those cases they are involved in anyway, or those the police refer to them for court preparation, support or pre-interview assistance. Overall, the 'barriers between the agencies have gone up again', as one of the social workers puts it resignedly (SW1: 1239).

Speaking from their own experience the social workers report that their work of providing counselling and support for prospective child witnesses, is significantly complicated by the fact that the accusation of suggestion is always looming. They will offer general support, talk to children about the court appearance, help them to develop coping strategies for waiting and for when they are challenged in court or accused of lying. Yet they must be very careful about the phrasing of their advise and strictly avoid talking about the actual case, because they might inadvertently suggest something or they might invalidate the child's evidence because they could be seen to be coaching the children. Still, both social workers also report that suggestion as such, as an issue that arises from a case itself, had not been-, and does not seem to be a prominent problem within the cases they see.

Another problem the social workers point to, that is closely related to the potential accusation of suggestion, is the frequent request by defence barristers to disclose social service files to them, to be used in evidence. This is problematic because depending on the

205 These issues are meant to be addressed in the new “Every Child Matters” initiative.
case, and on possible previous involvement of social services, the file might contain intimate details about the child and their often complex relationship to the defendant. Children will regard the disclosure of such information to the court, and thus the defendant, as a breach of trust, which can ultimately destabilise them even further. Obviously, one social worker says, the defence wants to find evidence of coaching that could weaken the child’s case, but she suspects that they are also systematically looking for such intimate background information that could be used to discredit the child in court or undermine their allegations.

With regard to interviewing the social workers suspect that the general prejudice that social workers are more likely to suggest (or to be accused of suggestion), combined with the police’s fear of suggestion and their guardedness to collect their own evidence, has led to a more police focused interviewing practice. Overall it seems there might have been a mutual withdrawal from joint practice by both sides, as the police officers I talked to also complained about social services secretiveness and lack of responsiveness. This, the police officers say, often thwarts the police’s attempts to get advice and to invite co-operation.

Overall the police bear the main responsibility for the case and the investigating officer is responsible for organising and keeping track of the preparatory and evidence gathering process throughout and they should record the results of their initial assessments in detail to be able account for further planning decisions and proceedings. Failure to do this, the training officer reminds the officers during the training course, might lead to the video being given less weight or it even being excluded, which often means the case will be lost for lack of evidence.

Alongside the pre-interview assessment officers need to plan how to conduct the interview itself, familiarise themselves with the case in order to establish what kind of information is needed and how to get elaborate and detailed accounts from a particular child witness without using leading or suggestive questions. During the training course officers remark that in practice they hardly find time or resources to do much of an assessment or elaborate planning, let alone to record results and strategies in writing. Various officers report that

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206 Interviewer training does not follow a national curriculum, and some police forces still conduct joint training and make an effort to actively involve social services in the investigation of child abuse cases. Still, the police service areas I visited did not offer joint training and they operated mainly without explicit co-operation with social services. So while there will certainly be areas where social workers conduct interviews, my focus follows practice as it presented itself in the areas I visited.

207 According to art. 27(4b) of the YJCEA 1999 the video will not be admitted in evidence when "any rules of court requiring disclosure of the circumstances in which the recording was made have not been complied with to the satisfaction of the court. Art. 27(4a) video will not be allowed as evidence in chief when the witness is not available for cross-examination."
they are frequently asked to do video interviews within a few hours notice, even at night, which makes preparation and planning virtually impossible. Still, the officers agree that it is crucial to conduct the interview as quickly as possible, and ‘fast-tracking’ and ‘immediate response strategies’ are part of their good practice recommendations for child witness practice.

The ABE also states that for the whole interviewing process it is crucial for the officer to establish a good rapport with the child because “witnesses, especially the young and the vulnerable, will only divulge information to persons to whom they feel at ease with and whom they trust.” (ABE, p. 33). Hence during the training course the training officer repeatedly stresses that establishing a good rapport is part and parcel of getting detailed and accurate accounts, and thus the rapport must be central in the pre-interview assessment, as well as on the day when the child arrives for the interview, and then again as the first stage of the actual interview. So before giving evidence the child will ideally have talked to the officer on one or two occasions and the officer should make them feel comfortable during the interview. Still, officers are also reminded that they must be careful not to create a too informal atmosphere or to use positive stroking or respond in any way that might suggest to the child specific answers are expected. Throughout the training course the issue of rapport is a recurring topic that sparks much debate as it seems difficult to find the correct degree of rapport and the officers feel the rapport collides with the strict procedural rules that they have to observe when speaking and dealing with the child, to make sure the video is admissible in court.

Video interviews will be conducted by two officers in a specially equipped room at a police station or at specially established designated sites that can be booked by the interviewing officer. Rooms are informal and comfortable, and equipped with two cameras, one recording the interviewee and one recording an overhead perspective of the whole room. While one officer conducts the interview the second officer, who is connected to them via an earpiece, monitors the interview from a monitoring room, which is equipped with televisions and recording equipment.208

For the interview the ABE prescribes four distinct phases: 1. establishing rapport; 2. encouraging free narrative recall; 3. asking questions; 4. closure. As indicated, the rapport stage is described as crucial, because it sets the tone and scene for the interview. Apart from warming up by talking about neutral topics, in this phase officers should also establish

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208 The monitoring officer keeps time, operates the recording equipment and the position and focus of the cameras, keeps cursory written notes about the interview and might assist the interviewing officer by reminding them of additional questions to ask or issues to revisit.
the so called ‘ground rules’ for the interview (tell children they must tell the truth, but also encourage them to ask if they do not understand a question etc.), and establish that the child knows the difference between truth and lies and to establish the purpose of the interview.\textsuperscript{209} When appropriate, the second phase should be initiated by encouraging the child to deliver a free narrative of the matter at stake (this should happen seamlessly as not to suggest anything to the child). Here the ABE describes at length how the interviewer should prompt the child without leading them or suggesting anything to them. Police officers are advised to give minimal acknowledgement replies or for example echo what the child said, as this also helps to establish the officer has understood correctly. For phase three the ABE advises that if necessary the interviewer should resort to content-, open ended-, specific-, closed- and ultimately certain kinds of leading questions. While such questions are described as potentially unavoidable to elicit the kind of detail needed in court, the ABE again cautions the officers to avoid suggestion, coercion or for example positive stroking and to make sure they return to open questions whenever possible. Additionally officers need to bear in mind the constraints of evidence. Hence they have to avoid encouraging the child to for example give hearsay evidence or to report things that could be seen as ‘bad character evidence’ against the defendant. Finally the closure phase should be used to summarise findings and to check with the colleague assisting with the interview whether there are any remaining questions that need to be asked (at this stage they should also answer questions the child might have and thank the child).

During the training course, officers spent a long time practicing and considering the introductory phase. Some of the more experienced officers reported that children are frequently bewildered by chat about neutral, unrelated issues and that many children are puzzled about being asked whether they knew the difference between truth and lies. Other officers were uncertain about the open narrative phase. They pointed out that the narratives children deliver are often chaotic and difficult to follow. With regard to the rules and constraints they have to consider during the interview, various experienced officers commented that they always find it uncomfortable to know that the video will be watched by the prosecution and in court. They are concerned about potentially embarrassing things they might inadvertently say in the rapport stage, about problems that might arise as a result of their incomplete or inappropriate questioning, or about inadmissible things the child might say.

\textsuperscript{209} ‘Ground rules’ are a reminder to the child to tell the truth, to say they don’t know if they cannot answer a question, to ask if they have not understood a question and to challenge the interviewer if they misunderstand.
Throughout my conversations with police officers one of their recurring concerns in relation to the interview was that they might be challenged later on in court because they might be perceived to be asking suggestive and leading questions, or that they might indeed inadvertently end up suggesting something to children via questions, or the encouragement they give and thereby unwittingly taint the evidence. On the other hand the officers were worried about failing to establish a rapport and thus failing to facilitate disclosures with children drying up or not delivering any details. Additionally the officers spent a lot of time discussing the potentially unfavourable effect of their own interviewing style on the impression the witness will make in court. There was also disagreement as to whether they should challenge the child. While officers felt that they should challenge children if they had the impression they are not telling the truth or withholding information, the training officer reminded them that this might reflect unfavourably on the child witness, because the jury might think the officers did not believe the child.

Overall officers' accounts reflect a strong involvement in the cases they pursue. They voice frustration with the crown prosecution services who, according to the officers' accounts, will far too often drop cases that should have gone to court. Additionally officers complain about the lack of systematic support the new special measures procedures get from judges, who like to make late decisions, do not grant measures, or adjourn cases when speedy procedure would have helped witnesses.

Once the police has closed the investigation and prepared the file, the file, including the video and all the other evidence, will to be passed on to the prosecution services for assessment (if possible the police will have included a specific charge against the accused).  

Filing a charge: the prosecution:

The crown prosecution service only receives the file (including tape recorded suspect interviews and video recorded witness interviews) once it is fully investigated by the police. Applying the two tests the 'Code for Crown Prosecutors' dictates (test of evidence and of public interest), it is the prosecutors’ task to view the file and to decide whether formal prosecution should go ahead or not. Rape and abuse cases will be referred to a special unit of the Crown Prosecution Service, where the whole file will be reviewed by

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210 In the past the prosecution will have looked at the file on the basis of the charge suggested by the police. Currently this is changing with the prosecution taking a more active role. The police is encouraged to consult the CPS during investigations and the CPS can recommend further investigations where needed or amend the charge.

211 The crown prosecution service has special units and child abuse cases will be handled by a rape unit that consists of prosecutors with special training in the law of sexual offences.
prosecutors who are specially trained in sexual offences law. One of the prosecutors I interviewed reports that currently a new scheme is being tested that encourages the police to seek prosecutors’ advice during the investigations. She welcomes this change because her experience is that the police bring far too many cases that should not have been brought at all or where the evidence presented does not sufficiently bolster the charge, making the prospect of a conviction unlikely.

Child abuse cases, one of the prosecutor reports, are usually quite straightforward to assess, because the offences are clearly defined and then the evidence is either there on the video or it is not. When assessing a video the prosecutor says one important thing is to see how the witness will come across to a jury because this helps to anticipate the potential success of the case. She will view the video and look for evidence that supports or indeed might undermine the case and that could possibly be followed up and substantiated by the police. Most crucially, she states, the child needs to have stated in their own words, explicitly and in detail what exactly the accused has done to them, and the details need to be consistent. The prosecutor will systematically go through the video and create a list of distinct incidents that constitute offences and that can be charged. Where the prosecution considers the evidence sufficient for particular charges, and there is nothing to indicate the evidence might not hold (e.g. previous withdrawal of accusations by the witness, or witness refuses to go to court, expected adverse affect for witness’s well being when going to court), they will write the indictment that provides a concise list of the exact offences the defendant is charged with. The prosecution will also write a review of the whole case, a case analysis that shows they have applied the two evidential tests, that provides the rationale for how the indictment was assembled, and which additional inquiries have been made. Depending on the special qualification of each prosecutor, for more complicated criminal court cases the prosecutor might only prepare the file and sit in preliminary hearings. For the actual trial a barrister will be instructed to lead the prosecutions and they will receive the case review for their reference.

The prosecutors I interviewed found that overall the video interviews were of a reasonably good quality and over the past years officers seemed to be getting better at taking a more understanding approach to interviewing. One prosecutor states that the police seem to be quite good at avoiding suggestion. And anyway, she states, if they asked suggestive questions, this would be visible on the video and obviously make the video inadmissible, so it would not be a problem in court. Still, both find that suggestibility is not a prominent feature within cases, not even as a ploy used by the defence. The prosecutors’ main complaint is that the videos produce a lot of extra work because they take much longer to
assess than a written statement (some are well in excess of two hours). Additionally, one prosecutor remarks that it can be tedious to watch the video because they are often repetitive, drawn out and contain lengthy introductory conversations that seem awkward and irrelevant.

CPS1: [...] I think they're very good they're very useful ((hmhm)) I much prefer them I mean they're (I) a pain in a way 'cause they take hours to ((chuckling)) to put a file together ((laughing)) (I) you know you get a written statement you can do within half an hour you ((videos)) ((three hours)) later you're still there ((with your cup of coffee)) ((LAUGHS))

Still, overall she finds the videos helpful because without them it had been difficult to assess how credible the witness would come across in court. Some of the cases she had now put forward on the basis of a video, because the child appeared so convincing, she might have discontinued in the past simply because of the child's young age. Similarly children who are difficult to understand and would struggle to impress a jury can be identified more easily. Additionally she welcomes CCTV technology, as again, some of the cases she now prosecutes, she says, she would have discontinued in the past, anticipating particular children would not be capable to give useful evidence live in court, or even be cross-examined, and thus should be spared the ordeal of a court appearance in the first place.

Let me summarise the trajectory of children’s evidence in England and Wales as I have described it so far. In the ideal case the child will have met a police officer who had to initially assess the child's credibility and their wishes and capability to give evidence on video and later in court. A lot of assessment and planning activity is directed at the child's evidence before it is even collected. If the police decide to go ahead, the child will be video interviewed by the police officer, and will be asked to give a full narrative account of what happened. As part of the whole file the prosecution receives and assesses this video as it is, now considering the child's apparent credibility as it appears on the video. The issues of whether the child will be capable of standing cross-examination is therefore considered once again. The prosecution also assess the evidence provided on the video in relation to the overall evidence collected. Where the prosecution decides to go ahead with the case, the video, stands as the child's evidence-in-chief. But it is important to recognise here that just as in Germany, children’s words do not go unmediated by further semantic processing. The prosecutor will have transformed aspects of the video into the indictment, and into the case review that details the prosecution's rationale so as to instruct the barrister who will represent the case in court.
Preparing the trial: preliminary hearings

The file the prosecution has put together to support the indictment which contains what they consider to be the admissible and relevant evidence, will be sent to the defence and to court. This file does not contain all the information that has been gathered by the police, it contains only what the prosecution regards to be relevant to prove the charge. Information gathered by the defence will not be disclosed to the judge or the prosecution. The file now contains a transcript of the video interview with the child (a copy of the video will be available on request) and the special measures applications the police (or prosecution) decided to make, and the judge will use this file to prepare for the trial and to hold the ‘plea and directions hearings’ (now ‘plea and case management hearings’). These are a sequence of brief preliminary hearings the judge holds in open court to read out the indictment to the defendant so they can make their initial plea, and to hear the prosecution and defence barristers concerns about potential problems around the preparation of the evidence. Here they might discuss disagreements about the admissibility of evidence suggested, one party might argue for the need to employ and/or hear an expert, or apply for leave to introduce an existing expert assessment as evidence; where the prosecution wants to include additional evidence at this stage the judge will ensure that the defence is provided with this information in good time before the trial to be able prepare a response. Either of the parties might also apply for social service files to be disclosed and included in evidence, on the grounds that these might reveal past problems and/or disclosures of the child. If this application is made the judge has to review the files first to make sure they do contain relevant and admissible information. The judge will also hear arguments for/against use of special measures and decide about their application.

These hearings are an absolutely crucial part of the whole criminal process, and one judge I accompanied during a trial, remarks that these hearings are a vital part of the whole proceedings, because “you make sure everything is set and ready before you start.”

During these hearings the judge will already aim to eliminate all possible aspects of the case that the parties might agree on anyway and to narrow down the case. This is to make sure the parties are very precise about the details of the case that are actually contested and thus prepare and bring evidence only with respect to these contentious aspects, that is relevant.

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212 The file does not contain all the information that has been gathered by the police, but the defence may request for so called ‘unused material’ to be disclosed to them, and the prosecution has a duty to disclose unused material that might potentially strengthen the defences’ case (unused material is information the police have gathered but which the prosecution have not explicitly drawn on). The judge will only get knowledge of these aspects of the case if they are introduced in evidence by either party.

evidence (because the law of evidence defines that only those disputed aspects need to be proved by ‘live’ evidence). Additionally these hearings are to ensure that once the actual trial begins and the jury is sworn in, there are no surprises and everything is prepared so the case can proceed without delays.214

The trial
The actual trial begins with the jury being sworn in. The judge will remind the jury of their principle duty and then the prosecution is called to present the indictment, outline their case, call all their witnesses and present all their evidence.

The conduct in criminal court is slightly more formal than in a German court. The judge and the barristers wear wigs and gowns (black for the barristers and e.g. purple and red for the judge), the barristers rise whenever they are addressed by the judge or wish to address the judge. All exchange is conducted via the judge, who indicates whose turn it is to speak. The judge sits at an elevated desk at the front of the room, the witness box to their side also slightly elevated. In front of the judge, and lower down but also facing the room, there are an usher, one or two clerks and a clerk who operates the tape recorder that continuously records the proceedings. Defence barrister and prosecution barrister sit facing the judge, on one level at the left and right end of a long desk. Each barrister is assisted by their clerk/solicitor, who sits behind them passing on notes or files as they become relevant. The defendant sits in the dock at the back of the room facing the judge, accompanied by one or two court officers. The jury sits to the judge’s left or right, along the side of the room, in good view of the witness box. The public gallery can be at the side or the back of the room.

Throughout the trial it is the judge’s task to chair the proceedings and to guarantee the fairness of the procedure. They make sure all rules of evidence are observed (only admissible evidence introduced), utter objections or judge objections being brought by either party, make sure the jury can understand the evidence produced and where necessary demand or provide explanations for the jury. Where unforeseen dispute arises between the parties about evidence or ongoing witness statements, the judge might send the jury outside in order to prevent them from picking up anything they should not be aware of. Then the

214 Obviously there are unforeseeable circumstances that can arise despite the best planning and then the court will have to react spontaneously.
judge will discuss and settle the matter, and once the jury has returned, the evidence will be presented to them in the agreed form.215

During the questioning of witnesses the judge has no investigative task, but particularly where child witnesses are concerned the judge may ask clarifying and follow up questions and will interfere with either party if they treat a witness too harshly or ask inadmissible, convoluted or too complicated questions. Again, this is mainly to ensure the jury can understand what is being said, but it is also meant to protect witnesses, which is particularly important when a child witness is cross-examined. Still, it is at each judges’ discretion when to interfere or challenge a barrister and it is a basic assumption in the English law tradition that in cross-examination evidence should be tested robustly.

The judge will also give standard instructions to the jury about the special measures used (video, CCTV), to make sure the jury understands that these measures are routine provisions for child witnesses and do not imply the guilt or dangerousness of the defendant.216 The judge accompanies the trial with a constant flow of explications and frequently provides elaborate synopses of legal points and problems arising, arguments brought, steps taken to clarify or resolve a problem, decisions made and the rationale implicit in those decisions. Hence despite not having an investigative task, judges are quite active, moderating, organising and orchestrating the presentation of dispute and evidence for the jury as they come up. This explicit verbalising and moderating is to ensure, in the present moment for the jury, as well as for the records and in the future (all trials are tape recorded), that every move of the court is transparent and correct (or at least challengeable), and that the judge has done all he could do ensure a fair trial.217

The child witnesses’ video interview will be shown as part of the prosecution’s case, because it is the child’s evidence-in-chief. The video will usually be presented in open court and via televisions placed around the courtroom or a big screen visible to everybody. The jury might also be provided with a transcript of the video interview. In most cases the video will simultaneously be shown to the child witness, in order to remind them of the

215 During the trial I attended this happened frequently, because the defendant had insisted on doing his own defence and the judge needed to assist him and make sure he was not going to introduce evidence that was inadmissible or inadvertently say things that would prejudice the jury. Still, even with experienced barristers this will routinely become necessary.

216 Article 32 of the YJCEA 1999 demands this warning to be given. The Explanatory notes state about this article “This section provides for the jury to be warned, if the judge thinks it necessary, that the fact that special measures have been made available to a witness should not prejudice the conclusions they might draw about the defendant. This will be particularly relevant where, for example, intimidated witnesses are screened from the defendant: this should not be taken as justifying a conclusion that the defendant is dangerous.” (article 131.)

217 During the trial I attended the judge would frequently mention the tape counter numbers of the ongoing recording, in order to highlight crucial passages that might later become relevant and need referring to.
evidence they have given and to prepare them for their cross-examination that will follow after the video has been shown.

The child will have spent most of their time in court waiting and once they are called, sitting in a small CCTV room in front of a TV screen to watch their video evidence they recorded with the police about 8 to 12 months earlier (this can take around one to two hours and will be interrupted by breaks). The CCTV room is a small separate room in another part of the court building (or even in another building) that is equipped with a TV and a video camera, and from which the child’s picture and sound can be transmitted to the screens in court. Before the video is started the judge will have a brief exchange with the child via the CCTV link to make sure they are present and visible on camera, and are aware of what is going to happen next.\textsuperscript{218}

The judges I interviewed all generally welcomed the idea of the video and the CCTV link as being an improvement to child witness practice, because it had enabled more children to be heard in court. Still, they report that there are a lot of technical difficulties with videos being of a poor quality and equipment breaking down and one judge speculates that the different size of the screens installed in different courtrooms, might well have an effect on the jury’s impression of the witness. Furthermore all of the judges complain about the length of the videos, which adds significantly to the duration of trials and puts considerable strain on the jury and the child when having to watch it in court. Where a witness gives their evidence-in-chief live in court and systematically guided by questions their counsel asks, this might take around 20 minutes while a video will easily run for an hour or two.

One judge remarks that there are videos where children are visibly “wilting at the end of them” because they are so exhausted (J2: 91). The judges also criticise the interviewing style of the police as being very longwinded, allowing for lengthy introductions, endlessly circulating around the central issue without getting to the decisive details (J1: 1024), pacing the interviews badly (J1: 1008), being obsessed with sometimes irrelevant details, and at times being repetitive, disorganised and not focussed enough on the kind of information needed in court. The judges also find it irritating that police interviewers seem to constantly echo whatever the child is saying (J1: 957), and, one judge reports, he has had cases where the officer repeated something back to the child it had not actually said (J1: 993). Particularly the introductory rapport phase is perceived as awkward and one judge says he is “not quite sure what jurors make of this” (J2: 49). However, judges unanimously stress

\textsuperscript{218} The CCTV link is operated by the judge and in the courtroom it consists of small screens with video cameras hooked onto them, installed on the judge’s, the defence barrister’s and the prosecutor’s desk. The child will see the face of the person that is talking to them. The judge has a screen showing both, the respective barrister and the child.
that the videos are very good to tackle the problem of suggestion. Throughout, they report, police officers appeared to be very good at avoiding suggestive questions (J1: 80; J2: 293). Overall, one judge says, it was very rare for interviewing officers to be called as witnesses, because even if there was any doubt as to the kind of questions asked in the interview, it would all be on the video anyway, making it unnecessary to call the officer. Once the video has been played the judge will hand over to the defence barrister to cross-examine the child via the live link, and then give the prosecution the opportunity to ask some follow up questions (which they often waive, to spare the child more questions). The defence will usually ask closed and very specific questions about central aspects of the story the child has reported on the video. Ultimately this will lead to challenging the child about these aspects, or about inconsistencies in their story. This can at times be a relatively short interaction, and crucially the child is not asked for a narrative but the questions are likely to only allow very specific and short answers, and they are likely to be increasingly probing towards the end of the cross-examination. Finally the prosecutor might ask the child some follow up questions, most likely addressing the same issues just raised by the defence, and again allowing only short specific answers. Still, the prosecution often refrain from asking any questions, leaving the exchange between child and defence barrister to be the only actual life interaction the child has in court with respect to the evidence.

The judges report that children generally seem to cope well with cross-examination, even though there are barristers who have an unfortunate tendency to ask complicated or repeat questions or to become slightly aggressive. However, two judges comment on what they perceive to be potentially detrimental and confusing effects cross-examination can have on children (J2: 600). Here the problem are not so much aggressive barristers, but the overly friendly approach used by some, who get the child to agree to things they had not said before, and which they might deny again when later on asked by the prosecution. But this in turn can make the whole evidence appear inconsistent to the jury.

The prosecutor finds that on the whole children cope well with cross-examination, even though there are cases where the child witness cannot continue. When in doubt the prosecutor states, she would always discontinue a case in favour of the welfare of the child. Following the child's cross-examination, the prosecution might present more file material or physical/medical evidence. Most of the legal professionals report that in child abuse cases normally there is not much further evidence of this kind, which means that basically the word of the child stands against that of the defendant. After the prosecution has made

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219 In the case I observed the cross-examination by the defence barrister lasted only fifteen minutes and the prosecution took around five minutes to ask follow up questions.
their case it is the defence barrister’s turn to call witnesses, and present evidence, and often they will call the defendant to give evidence.

Let me pause again and briefly and summarise the path of children’s evidence up to this point. Children have actively taken part in the preparatory activity of the police and have then given their full account in the video interview. Until the actual cross-examination in court they have no part in the further proceedings as the video takes their place. Once recorded the child’s evidence on the video is not interrogated, transformed or altered anymore (e.g. by further questioning), it stands at the different stages of the procedure as it is, while its role changes as it goes from being the child’s initial account, to being evidence for the prosecution to being the child’s actual evidence-in-chief in court. In court the child is directly confronted with the video again, watching it in the CCTV room and then being cross-examined by the defence barrister and possibly the prosecutor. This is the only time the child interacts live with the court (through CCTV link) and is directly questioned (and challenged) about aspects of the video recorded statement on the video they have just watched. Yet again, crucially this is an exchange strictly controlled by the barristers’ questions and it is likely to be quite brief. It is focussed on probing aspects of children’s video evidence rather than having them give a full account or elaborately negotiate their credibility.

In very rare cases, the jury is presented with an additional perspective onto the child’s evidence. A psychological expert might be instructed to look the case and give evidence in court. Either of the parties might call a psychological expert to give evidence, and they will, if they appear in court, be treated like any other witness. As pointed out earlier, the instruction and role of an expert will have had to be announced, negotiated and approved of in the preliminary hearings.

**Psychological expertise in court**

In England it is generally very rare for psychological experts to be called in criminal trial, so the following account of experts’ involvement should be read as special case accounts of experts’ occasional contribution. Questioned about the lack of expert involvement, judges point out that there is very little a psychological expert could contribute with respect to child witnesses’ evidence, because they are not allowed to comment on anything that is for the jury to decide.
One judge explains that the “first thing that you do decide is whether its an area properly within […] which falls within the category of expert evidence” (J1: 488) and here following the “Archbold’s Criminal Pleading, Evidence & Practice” he states that only a “topic about which members of the public sitting on the jury genuinely would need expert evidence to illuminate something of which they would otherwise be unaware” can be assessed by an expert. The judge elaborates that “generally the courts take the view that members of the public are capable of deciding whether people have made things up or not” and thus are reluctant to hear a psychological expert (J1: 496).

The psychological experts I interviewed (all of which were also active researchers in the field), reported that if they are asked to give testimony about children’s evidence, this is usually in the context of family court cases, that is for civil proceedings.220 Still, they will occasionally be instructed to assess cases for criminal courts. Usually, as the experts report, they will be asked to assess the appropriateness of the interview conducted with the child. Hence they will exclusively focus on the style of interviewing, whether it follows the ABE, whether there are any inappropriate or leading questions, and potentially there may be a question about the certainty about a specific response that was given to a leading question. Very rarely, one expert says, there might be a case where he was asked to comment on whether there was anything in the answers the child gave during the interview that might suggest that the child had been influenced, or coached before the actual interview had taken place (Exp2: 384).

In contrast to German practice the experts will not meet and question the child witness. The experts I talked to found that this would be unnecessary anyway. Corresponding with their circumscribed task the experts will be supplied only with the video interview and the

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220 Here their expertise will often concern child custody decisions, but frequently they will be asked to help the court determine the credibility of abuse allegations that might have arisen in the context of family court proceedings. As civil courts have a different standard of proof and operate without jury, the experts will be asked to comment on the actual credibility of children’s statements and on the possible veracity. Still, they will nonetheless be cross-examined and their evidence might be harshly challenged by the barrister who represents the opposed party. As in civil courts proceedings are not concerned with guilt or innocence, in a family courts the judge will not give a verdict, but will make a so called ‘finding of fact’, in which he might find that indeed the alleged person has abused the child and thus must not be allowed to have custody of the child, or must even be prevented from seeing them at all. Whether or not criminal proceedings will be started, and whether or not the perpetrator will be charged in a criminal court as well is entirely independent of the decision made in the family court and the family court will not take any action in relation to these criminal matters. This depends on whether someone reports the incident to the police and whether the police and the prosecution services decide to actually proceed with the case. If a criminal case follows a family court case where a finding of fact has determined that the child has been abused by a particular person, the police or prosecution might decide to draw on some of the evidence used in family court (and usually the family court will disclose this information), but the ‘finding of fact’ as such does not bear any weight in the criminal court, as here the rules of evidence are much stricter and the standard of proof in much higher (‘beyond reasonable doubt’; in a family court the standard of proof is ‘on balance of probabilities’, which means that one needs to be at least 51% sure).
transcript. Still, the experts report that in cases where it seemed relevant they might ask for more context information from the file, and where the assessment explicitly extends to the case history, they will receive the full case material (where for example the disclosure history is in question). But it can also happen, one expert says that on the day of the trial additional background information is given to them and they are required to take this into account there and then.

Depending on how the barrister wants to proceed the expert might just submit a written report or will be heard as a witness in court (which is very rare). It is the barristers who will choose the expert they wish to employ (and the expert on their part are free to refuse), and there is no official regulation as to who can be called as an expert. Hence, if giving evidence in court, the judge will first seek to establish the expert’s qualification either by just asking for their current occupation and CV or by explicitly inquiring into their research record in the field. Experts will be asked whether they have published on the topic in peer reviewed journals or whether there are other activities that can prove they are established and knowledgeable in the required area (e.g. having composed government guidance).

Like any other witness, the expert will give their evidence-in-chief guided by the questions of the barrister who called them, and then they will be cross-examined by the opposing barrister. Experts describe expressing their findings in court as the most difficult task, because they have to be careful to remain within the boundaries of their expertise as well as expressing themselves in a way that cannot be misunderstood to interfere with aspects of the case only the jury can decide. Hence they will never speak about the potential truthfulness or veracity of the child’s statement. In most cases one expert reports, he will stick closely to the question he was asked and say that he had not been able to find any evidence for coaching and that the interview was conducted appropriately. In the interviews he assesses, he adds, there will often be some poor interviewing, and he will criticise that in his report, but this is usually not sufficient to support the claim that a statement has been suggested. One expert reports that defence barristers often have a quite exaggerated understanding of the effect a leading question can have on the answer of a child. Overall the experts report that even though accusations of coaching are the most frequent reason for the few appearances they make in criminal courts, suggestion as such is not really a problem. The police interviews are fine in terms of suggestion and due to increased awareness for the problem, as one expert suspects, even carers, parents or teachers these days are careful not to suggest anything and avoid asking any questions.

During cross-examination, the experts report, the barrister will often try and lead them to comment on additional aspects of the case that might lie outside their expertise. One
expert for example was encouraged to comment on the effects of sexual abuse. The barrister wanted to know whether the manner in which the respective child reported the experience was typical or not, which the expert refused to answer pointing to his lack of expertise in this area.

The experts agree that there can be a very ‘fine line’ between the things they are asked to comment on and the things they feel confident to express. One expert says that for example he would never comment on the veracity of a child’s account, but he might say that he “could find nothing in [...] what the child said that would cause [him] (2) concern (1) that the child was not recounting a genuinely experienced event” (Exp2: 488). In extremely rare cases he might also alert the court to a remarkable feature in the child’s evidence (e.g. a very detailed description of something) that could underlie their statement, but not without adding that the court might already have decided to give this full consideration. This is “sort of vague and clear at the same time”, the expert concludes (Exp2: 538).

While only one of the experts has personally experienced hostile cross-examinations where his expertise as such was attacked by a barrister, all of the experts I interviewed have at least witnessed another expert being treated quite harshly during cross-examination. In exchanges one expert describes as ‘verbal gymnastics’ that can at times border on the ‘unethical’, barristers might attack their personal status as experts, their expertise as such or suggest they have strayed way outside the margins of their expertise. Hence the experts agree that the most important thing is to stick within the boundaries of their expertise and not to be lead by the barristers to stray any further.

Exp2: [...] I make it very clear (2) what it is I’m hear to talk about ((hmhm)) and won’t budge beyond what my expertise is even if the person who’s called me sometimes tries to get you to do that ((Yeah)) I won’t do it so I think in cross-examination ahm that lessens the room they have for manoeuvre ((hmhm)) because I’m quite tight on what it is I’ll talk about

[Exp2: 649-653]

The judges I interviewed found the contribution of experts generally problematic, as the adversarial nature of the English trial means that both, the defence and the prosecution are entitled to call an expert, which, as the judges point out, all too often means that the jury is presented with two opposing expert opinions. Even though since recently experts have had to sign a paper which obliges them to be neutral and to be loyal to the court and not to the party that called them, one judge doubts that experts really stick to this agreement. And after all, the judges state, it is impossible for them to assess the expert’s approach, because even if their explanations appear to be sound, the scientific methods as such always remain impermeable to the judge and the jury. This makes it difficult for the judge to keep check
of the admissibility and fairness of the information presented, and this makes it difficult for the jury to decide how much weight to give to an expert’s account.

Judge2: you can see it a lot with psychologists here you get all these tables that are truly mumbo jumbo to us (laughing) [...] ahhm but you how you didn’t understand the nuts and bolts so they appear to be perfectly good nuts and bolts he was using

Thus, one judge says, amongst judges there is a general distrust in experts, particularly against psychologists. To exemplify this distrust he points to the film about child witness research by Stephen Ceci that judges are being shown in training, indicating that after watching this film he and a number of colleagues had been left in doubt about children’s ability to testify (another judge confirms this impression). And while he acknowledges that later versions of the film had tried to give a more balanced account, helpfully alerting them to the possible dangers of suggestion, he finds that overall this kind of research gives a rather confusing message for legal practice.

With respect to psychological expertise in court, judges agree that even if an expert was appointed neutrally by the court, this would still be dangerous because the expert might still err. For the majority of cases one judge comments, it is perfectly straightforward for juries to decide, as it is all about, as he puts it, “the application of human experience” (J1: 530).

**Final stages of the trial: summing up and decision-making**

The trial in child abuse cases does usually not last very long, an average of one to three days, as one judge reports. In many child abuse cases only very few witnesses are called (the child, the person to whom the child first complained, the defendant and maybe the arresting officer), because only contested aspects of the case have to be proven by ‘live’ evidence. All those witness statements that establish circumstantial aspects of the case and/or are not in dispute between the parties, will just be read out from the prepared files. Or the relevant facts are extracted in written schedules (called ‘admissions’) which are handed to the jury. So apart from the witnesses that are heard, a lot of uncontroversial facts that thus do not have to be proven in evidence will be established by reading from files or simply by submitting them. One judge reports that as the trial progresses often the margins of dispute narrow considerably, leaving only one or two very specific points of dispute between prosecution and defence. (The indictment may be amended throughout if it is in the interest of justice, where for example the evidence differs from what was expected.) It

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221 This estimate assumes a case with one complainant.
is these very specific points the jury has to decide upon and with regard to which the jury has to consider and weigh the evidence they have seen. After all the evidence has been heard and after the barristers have given their final speeches, the judge will sum the case up for the jury. In this summing up the judge will direct the jury about the law and will aim to give the jury a balanced summary of the evidence seen and outline the points that they need to consider. The judge will tell the jury exactly what they are expected to deliberate about and decide on (they might even be given this in writing), and issue ‘directions of law’ tailored to the facts of the respective case. The judge will also remind them of problems or inconsistencies within the case and he might issue standard warnings about certain kinds of evidence. Where a child witness was heard the judge might for example remind the jury that crucial evidence was given by a child and that they need to consider carefully if they believe what the child has said. It is at the judge’s discretion which kind of warnings they feel are necessary and how exactly they structure this summing up of the evidence. Still, the summing up might become subject to scrutiny where an appeal is filed, so the judge will have to make sure to produce a fair and balanced explication.

This account captures concisely the active and yet neutral role of the judge during trial. The judge is quite clear that he will summarise the evidence, and thus make a selection, but that this selection must be neutral and balanced because its sole purpose is to ‘remind’ the jury, as he stresses repeatedly (lines 4, 5, 7, 11), of the important evidence. Hence this summing up needs to be planned and presented delicately in order not to become the subject of a possible appeal (line 15). The way the judge prepares the summing up once again illustrates
the procedural specificity of the English trial. The judge can begin thinking about the
summing up right from the start of the proceedings, because all the evidence that is going
to be presented has already been agreed upon in advance; the trial merely stages it for the
jury.

The jury deliberations are strictly confidential, and the jury does not give reasons for their
final decision, they return to court only to give a verdict of guilty, not guilty or undecided
(so called 'hung-jury', in which case a retrial needs to be ordered). In the case of a guilty
verdict the last stage of trial begins, the sentencing. Matters of sentencing are entirely for
the judge to decide and at this point they are allowed to make public and take into account
possible previous convictions of the defendant. The judge will announce the sentence in
court either on the day or at a later time.

While they do point to problems, overall the judges say they welcome special measures.
While there might be unexpected decisions, they say, at least one can always see the reason
why juries might have come to a certain decision. A broader problem two judges mention,
is the impression that the strictly video mediated appearance of child witnesses apparently
fails to convince jurors, because watching the witness on a screen, the judges assume, has
much less of an impact than actually encountering the child in court. Both judges report
about a number of acquittals in cases where they had expected a conviction and their
impression is that the video presence of the child is one of the central factors for these
acquittals. One judge interprets this as a result of the public being virtually 'anodized'
against the representation of shocking things we are shown every day on television.

J2: Well there is quite a group of us I think who think that the videos are unconvincing to jurors
I mean I watch them and I'm sure the jury is gonna convict ((hmhm)) and all too often they
acquit [...] I think they see the videos rather like (1) ahh you and I watch the television you
can see the most horrendous things on television [...] and I think that we protect ourselves in a way by [...] ahh the word is it anodises it I think you know just makes it (2) 't
just doesn't get to you like [...] they see it you know just as another bit of television in a way
and [...] I mean I don't know what the acquittal rates are but ah you know surprising
numbers are acquitted ((hmhm)) I think compared with my expectations

[J2: 588 – 616]

Additionally two judges find that juries sometimes, seem to acquit too readily on the basis
of some inconsistency in the child's story that has emerged in cross-examination (J2: 600).
The judges also mention that juries often seem to acquit in cases where the child has failed
to complain about the abuse instantly (J2: 770). A law academic I interviewed underlines
this impression, stating that judges often report juries were reluctant to convict on the
statement of a child that is unsupported by other independent evidence, against that of an
adult. Still, the judges also point out that often there is very little evidence presented in

222 The verdict must be reached by a majority of at least 10 to 2 votes.
court besides the witness statements, and this could well contribute to the jurors reservation. One judge points to the unfortunate trend that child abuse cases are often brought with little or no circumstantial evidence which leaves the child’s statement standing against that of the defendant. He wonders why the police do not try to bring more circumstantial evidence, because, he says, they need to anticipate what the case will ‘look like in court’.

Let me finally sum up the trajectory of children’s evidence. From the very beginning children’s credibility has been at the centre of concern, but the only person they have actually met is the police officer. It is the video that carries their evidence through the whole process. The prosecution, the barristers, the judge and finally for the jury have all seen the child on video on one or two occasions. Still, while the impression of children’s credibility is decisive at every stage of the procedure, children’s credibility is not being negotiated or discussed at any point. The child’s first account is elaborately prepared and produced by the police to stand as what is hoped to be a detailed and untainted representation of the child’s account (and credibility), which is stabilised, preserved on video and then passes through the different stages of the process as it is, until the final viewing by the jury. As this is the earliest, and the only elaborate interaction with the child, that has to stand all the way through the process, it is at this point that suggestion seems to linger most pertinently as a problem expressed by the police and the social services.

Once the interview is recorded, suggestibility seems to become an abstract issue around the admissibility of evidence or legal argumentation, which is a matter to be assessed by the barristers. Still, at no point throughout the process is there an actual negotiation of children’s credibility, because the evidence is collected to ‘speak’ for itself and to be negotiated only by the jury. Not even the psychological expert will be able negotiate or discuss the child’s credibility, but they can only comment on the appropriateness of the conditions under which the evidence was collected (suggestibility being one of the central issues to consider). So the expert will only add to the neutral staging and presenting of children’s evidence for the jury, leaving negotiation and discussion to them.

Most importantly we can now see that the emergence of the child’s evidence (just as all the other evidence) is also continuously filtered through the judge’s ongoing comments that accompany and orchestrate the preparation and then the presenting of evidence as well its viewing. Yet, the judge will not negotiate or discuss the child’s evidence either. These comments, and the judge’s final summing up, are again designed to guide and balance the jury’s attention to the evidence (to put them in a legal frame of mind) and to warn them of
potential structural or legal weaknesses of particular kinds of evidence. All arguments, negotiations and actual debate about this evidence, its weight and credibility will take place in the jury room. So overall the process is geared towards isolating, preparing, filtering and neutrally presenting the evidence for the jury to see and consider.

8. The English legal system: 'there must never be automatic prosecution'

8.4 Tracing the fact finding dynamic in the English legal system: children's voice, credibility and expertise

I would like to capture and illustrate the overall fact finding dynamic characteristic for the English legal system with regard to children's evidence and credibility. Following children's evidence through the English legal system one could say that the fact finding dynamic in the English criminal process is characterised by movements to filter, reduce, control and purify evidence. This is an attempt to present to the court, and thus to the jury, only the objective and relevant essence of what the specific evidence should prove with regard to the exact incident that is disputed in a specific case.

From the very start of the proceedings children's credibility is a central issue and it remains crucial for every further stage during the process. Yet, the child's voice is strictly speaking only heard elaborately at one point during the whole process, when at the very beginning they give their full account to the police officer. This is the only time when they are asked to report freely and to remember as much as possible for their account to be preserved on video in full. This video then functions as the child's voice in all other stages of the process. It passes through the process and through its changing roles untransformed, to then confront the child again during trial.

Referring back to the metaphor of different time zones of recall I introduced in chapter 7.4, this could be characterised as a process of capturing the account (the recall) at the earliest possible time, and then to isolate, and stabilise this account to be used at later stages throughout the process. So particularly with respect to child witnesses and the video recorded evidence we could say the English legal system isolates and stabilises the initial time zone of recall, preserving it for later use. The following stages will merely refine and filter the evidence further. Let me explain what I mean by this in some more detail. This movement of purification, specification and reduction can be observed at three distinct levels of the process.

Purification and honing of accounts: isolating and stabilising different time zones of recall

Firstly, the police are, particularly with regard to child witnesses, instructed to filter cases, pursuing only the relevant ones, and to investigate and put forward evidence in a very
specific way. So with regard to children's voice this first stage is exemplified nicely in the
central rationale of the ABE, because this filtering and purifying of evidence is inscribed
into the guidelines and the legal constraints officers have to observe. The police are
instructed about the kinds of evidence they should aim to collect and about how they
should go about collecting it so that it is admissible in court.

The police role then is not one of broad investigation. Instead they must assess and
anticipate the prospective evidential strength of the case, the child's credibility and
capability as a witness, and limit their investigations accordingly. This preparation begins
before the actual investigation has even started, to make sure that the evidence to be
gathered will be sufficient and will emerge in a manner consistent with legal procedure.

If the video interview is conducted well it is expected to represent an objective and pure
capture of the child's evidence, gathered as early as possible to avoid forgetting or
alteration by suggestion, and offering accurate, but also admissible information. This is why
suggestion and suggestibility are most explicitly present and expressed as a problem at this
first stage, by the police and by social services. The officers' and social workers' planning
and communication with the child is marked by the fact that prospectively purifying the
evidence for the whole process, first of all means to keep it clean of suggestion and to
avoid even raising the suspicion of suggestion.

Secondly, once the video has been approved by the prosecution services (filtered again),
there will be the pre-trial hearings whose sole purpose is to clarify and prepare the actual
trial and the relevant evidence as fully as possible to avoid surprises. Barristers and the
judge will be anticipating potential problems around evidence, raise and settle
disagreements about admitting new evidence/witnesses and also try to narrow down the
actual issue at stake as much as possible. Once again this could be described as specifying,
cutting and honing the case at stake as well as the evidence that needs to be-, or is allowed
to be brought. Let me exemplify this with the words of a judge who describes how for
example a social service file might be added to evidence, if either of the parties apply for
this to happen.

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1 Judge1: [...] this case over here (reaches for a file) is is a good example for that (1) what happens (1) is
2 that in this case it's ahm (1) it's ahm (2) (turning page(s)) yes ahm ahm multiple allegations of
3 indecent assault and rape (1) ((hmhm)) and ah (1) the defence (1) ah (2) want to know
4 whether the complainant in that case has made any complaints before (1) if they were false
5 complaints (1) ahm whether there's anything in her background to suggest that she is not
telling the truth about (1) ((hmhm)) this complaint and someth' like (1) and so and you can
6 see that with that complaint there's been a great deal of social service intervention (1)
7 ((hmhm)) so at some point I've got to plough through all that (1 chuckling (1) to see whether
8 there's anything the defence should be told about her (1) background (1) and (1) quite often
9 significant parts of the of the background are put in evidence in that way ((hmhm)) (1)
b'cause to give the jury the full picture about the (.) the nature of the gulf
would the social service workers could be called as witnesses ((A: they could be (.) could be)) but depending on whoever side decides they would be=
Ja () it well it usually (1) if if the record is admissible it would be agreed in other words if () if () you might have a row in c' () not a row (I chuckling) but you might have a dispute in court about whether this evidence should be introduced () but if the decision is taken yes it should be generally (2) ah both sides will agree that what's in the record can go into evidence you don't actually need to call the live witness to say it ((hmhm)) (2) it's very often it's happened so long ago it'd be quite pointless (.) because the person will say well I made this note but ahm ten years ago ((hmhm)) I can't remember
so would the evidence be introduced by reading from a file then or by being submitted as=
no generally () it could be but generally what they what what they do as a case goes on ()
they build up a series of what's called admissions which is just agreed facts ((hmhm)) so you have a () a sheet of A4 (1) ahm and good barristers will start on their computers at the beginning of the case with a thing headed ah admission and then as the as the case goes on they go on adding to that document () as the case goes on as'm () as the issues become clearer as what is really in dispute becomes clearer and it's very interesting how at the beginning of a case () however well case managed it is beforehand () you find the parties are this far apart (indicates with his hands) and then as the case goes on you've you find the () the areas of real dispute narrow ((hmhm)) (1) and as the areas of real dispute narrow then more and more (1) can be put on your list of admissions ((hmhm)) (1) so and then at the end of the evidence you just print that off and give it to the jury those are agreed facts (1) so () you may have you know it is agreed that on the () 29th of May 1994 (1) Charlene Blankinshop told her social worker that ((hmhm)) (1) something or other
I: but the (1) the question on how to weigh this kind of a' (1) admissible. evidence ((ja)) is
what the jury has to decide upon=
It's what the jury's for absolutely=
I: It's an agreed fact but whether this telling to the social worker is a prove of her fantasising
or a proof of her ((exactly)) having this concern in fact had years ago ((absolutely)) already is=
Judge: all matters of weight ((hmhm)) (1) what weight you attach to evidence () what inference you draw from evidence () what conclusions you draw are entirely a matter for the jury [...]
this past record can stand as evidence or not. Hence it remains a past record (from a past time zone) that is (or is not) transformed into being evidence.

So there is a movement of reduction and specification of things that will actually be said/heard in court, leaving only disputed aspects to be underlined with actual oral evidence. So the process is one of shaping and honing the evidence that gets into court. Additionally the judge explains how during the preliminary hearings and even in court, the ‘areas of real dispute’ narrow considerably as more admissions are made, ultimately leaving only a very specific issue of dispute for the jury to decide (lines 28-31). So during trial the actual dispute will be specified and reduced even further.

*Thirdly*, this process of reducing and honing continues during the trial, where the barristers should make sure they know in advance and orchestrate carefully what their witnesses are going to say, guiding them through the evidence systematically and limiting them to the necessary points. Similarly when cross-examining, as a judge puts it, they should give the witness the opportunity to deal with disputed issues, while leaving limited margins for unwanted answers. Again this is to peel out and present only the crucial points at stake in an orderly and easy to grasp manner.

Most crucially during the trial it is the judge’s ongoing guidance, commentary and the directions (to the jury as well as for the record), that ultimately shape and control the evidence that is put in front of the jury as it emerges. Ultimately the summing up can be seen as the final balancing and ‘shaping’ of evidence. It could be described as a sort of generalised attempt at undoing potential premature judgements or potential bias, and as such it is a deliberate suspension of judgement actively performed by the judge for the jury. It is to make sure they only start judging and negotiating evidence once all evidence has been presented and they have gone away to deliberate. The summing up could be seen as the last attempt at shaping and honing all the evidence after it has come in front of the jury. It is a last safeguard, a post-hoc purification, almost reversing chronological time, or indeed excising it from the process.

Negotiations of evidence will only begin at the end of this refined process of presentation, which aims to produce a number of clear binaries for the jury to consider. What weight is attached to the evidence, what it means or which inferences should be drawn from it are entirely matters for the jury to decide (lines 41-42). So what remains obscure at this point, and cannot be talked about, are the thought processes of the jury and their negotiations.

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223 As mentioned earlier, in case of doubt about the nature of evidence being presented during trial, the judge will send the jury outside and review the respective evidence in order to determine whether or which part the evidence should be put in front of the jury.
Here we only have the judges’ reports and experience about how cases end, and their speculations as to why this is.

Capturing the overall dynamic of remembering and presentation of evidence in court we can say that it is a staging of isolated and stabilised past time zones of recall. To a certain degree time appears even to be removed from the process.

We can now see that, where psychological expertise is called, their contribution is also directed at (and limited to) the refinement and assessment of the process of purifying and honing. Their voice can only be introduced directly into this process where the expert is asked to approve or disapprove of the appropriateness of the way evidence has been gathered from children, and to rule out suggestive influences in the interview.

Still, psychological knowledge and expertise is present in the form of the special measures and the guidelines for the police. It is via the guidelines that psychological expertise has become part of the process of purifying and reducing evidence for court in a way that is seen as most suitable to children and enables their ‘best evidence’ to emerge and be heard.

Children’s voice and credibility: mediating absences and presences across time and space

So how has the English law substantiated the abstract demands formulated in article 12 of the UN convention of children’s rights. How does it ensure children’s voice is being heard and given ‘due weight’ according to their ‘age and maturity’ and how is this ‘opportunity’ to be heard created? How does it handle what Lee (2001) termed childhood ambiguity?

Because it is at this precise point and around this childhood ambiguity that issues of suggestibility, children’s reliability, voice and protection are expressed concretely.

Following this specification of the English fact finding dynamic as a process of purification and reduction of evidence, the special measures for children become visible as a special form of purification and stabilisation instructed by psychological expertise. Where children’s evidence is seen as volatile and potentially unreliable, these special ways of purification have been devised with the help of psychological knowledge. Hence children’s evidence is filtered through special measures that mediate the child’s absence and presence in the process across time and space to enable their voice to be as immediate as possible but still accurate and admissible. So in a sense even minimising fear or irritation during the trial, or indeed minimising the possibility of fear being suggested to the child, serves as a form of informational hygiene for the production of children’s evidence.

Special measures achieve this by mediating the child’s physical, spatial or even temporal relationship to the investigation and the courtroom. The screen (curtain) for example intercepts the visual space between the child and accused, thereby mediating their physical
presence in the courtroom. While both, the child and the accused are physically (immediately) present, the screen makes the child invisible to the accused (and vice versa), but keeps it visible to the court and the jury, and audible to everyone in the courtroom. Hence the screen can be seen to filter information as to allow only those aspects assumed to promote good evidence and fact finding. Removing the public or the defendant from the courtroom mediates-, and thus enables the child’s presence in the courtroom via the absence of those who the child might perceive as intimidating. It alters the immediate physical structure or scene of the courtroom. In a similar sense the removal of wigs and gowns will change the immediate setting of the court for the child by making it less imposing and thus, arguably, less intimidating.

Closed circuit television goes a step further by mediating across the spatial relations. It allows the child to be absent from the courtroom, by transmitting the child’s televised image from a different room onto a television screen in the courtroom. So in a sense the television screen takes the child’s physical place in the witness box, as a witness that is hoped to resonate much less irritably with the courtroom than the child itself might do, and in reverse might be less ambiguous to the court. In a similar sense the removal of wigs and gowns will change the immediate setting of the court for the child by making it less imposing and thus, arguably, less intimidating.

Video recorded evidence of children goes a step further even. Recorded by the police it goes through all different stages of the process and in trial this video fully substitutes the children’s ‘evidence in chief’. Hence similar to the CCTV this video poses as a proxy witness on children’s behalf. While they are absent the video mediates their presence, it mediates across space representing them in court as a reliable witness, not irritable or fearful. But this video additionally mediates children’s voice across time. It preserves their voice from the initial interview and transports it to the time of the trial. In a sense one can say that this video transmits the immediacy of the initial interview by the police into the immediate presence of the courtroom, allowing these two time zones to overlap in order to enable the earliest possible account of the child to be presented and heard in court in what

224 Obviously, for the child this means that the court personnel (defence barrister, prosecutor and judge) is replaced by the television screen the child is looking at, where their faces will appear or vanish depending on who is talking to the child.
is hoped to be the most unambiguous and objective fashion, that is, delivered by a video tape. These special measures are the concrete and well intended attempt to tackle suggestibility and thus to contain childhood ambiguity. Ultimately they are intended to preserve, transport and amplify children's voice in order to give them better access to justice. With regard to suggestibility we can say that childhood ambiguity, and the problem of children's credibility, is addressed by divorcing children from their account as early and as thoroughly as possible. Thereby it is hoped the memory problem is also largely suspended, because the child only remembers at one early stage and then this information is fixed on the tape so they need not remember again in detail while the video can be played any time independent of the child's presence. This means that the problem of children's suggestibility seems confined to the first stages of the process, concerning police officers and social workers, but less acute during the later stages. Suggestion is either fixed on the video, that is isolated and detectable, or it is not present at all. Hence reversing the gaze one can also say that suggestibility's presence is most clearly reflected and felt in the new ABE guidelines and in the overall changes in law that now structure the way children's evidence has to be collected and presented in court. So for the English legal system suggestion is ultimately implicit in the question of how and what is going to be gathered as evidence (and what is 'chipped' away) and how it is honed. Because it becomes a formal question about the existence of suggestion within evidence, the concept of 'chipping away for pure evidence' always raises the question of what is being chipped away and what is left over, and who is chipping and what the criteria are for performing this purification.
9. Comparative perspective: child witness practice in England and Germany

I would like to close this part of the thesis by summing up, gathering and directly comparing the main characteristics of child witness practice in England and Germany as I have unfolded them in the foregoing chapters. Hence I would like to return to the broader question I had outlined at the beginning of this part and capture the structural differences between the English and the German legal system. This is to compare the way each of them is led to answer the abstract demands set out in article 12 of the UN convention on the rights of the child (UNCRC). This will also involve considering how suggestibility features within these systems in general and the different systems responses to the problem of suggestibility in particular.

On the basis of this broader comparison it will be possible to move on and attend more closely to the nature of the juncture lines and dilemmatic positions inhabited by and created for practitioners, asking what they mean for the way practitioners operate and become nodes of complexity, sifting and filtering ambiguity.

It is important to bear in mind that my comparison is aimed at illuminating the internal workings of each structure by juxtaposing them to the other structure, providing a sort of strange, alien outsider perspective that helps to throw into relief aspects that would otherwise be obscured as taken for granted. This comparison is not intended to 'assess' the quality or appropriateness of any part of each practice, or to even determine which of the two is the more appropriate, 'better' approach. Apart from the fact that my data would not allow such conclusions anyway, we can already see that this kind of ranking would not make much sense because the two practices are far too asymmetrical.

9.1 Differing fact finding dynamics

The most crucial difference between the German and the English legal system is to be found in the overall organisation and structure of the fact finding dynamic.

The German fact finding dynamic is characterised by an accretion, accumulation and proliferation of evidence, a systematic layering of different time zones of recall, causing what I termed 'memory-loops', or a layering of time zones of recall. This layering culminates in a final simultaneous restaging of all evidence and all layers of evidence production in trial and by the judges.
The English fact finding dynamic on the other hand is characterized by systematic purification, filtering (reduction, cutting) and honing of evidence, which is geared towards a systematized and controlled presentation and testing of the essence of the relevant information in front of the jury. Here for child witnesses the aim is to avoid memory-loops altogether and to preserve the immediacy of the initial interview, that is to stabilize and isolate the initial time zone of recall, the initial instance of remembering, in order to carry it into the trial as it is, collapsing the two time zones of production and presentation of the video.

So in the German legal system the credibility of children's statement is produced and affirmed by a spiralling process of accreting, enriching, re-inquiring and expertly assessing the child's multiple accounts and their development over time at various points throughout the process. In contrast the English legal system produces and affirms children's credibility by collecting their initial statement following expertly confirmed rules and fixing it on tape for the whole process, to avoid any re-inquiry and preclude the possibility of inconsistencies as far as possible.

From this brief account we can already see that what constitutes credibility varies hugely between the systems.

**Germany: dynamic time, immediacy and systematic forgetting**

The conception of 'credibility' and 'memory' reflected in the German legal system, is based on a dynamic conception of time as passing and transforming linked to the principle assumption that the immediate encounter and questioning of a witness, i.e. present recall, is the most reliable way to determine and assure the accuracy of the statement and to test the credibility of a witness. Credibility is furthermore established via the immediate negotiations in court and the exchanges with the witness. Children's voice is immediately mediated and negotiated following these principles. This means that inconsistencies do not form a problem in principle but will be subject to multiple negotiations and assessment.

So while there are various layers of accretion in the run-up to the trial, the crucial moment to determine credibility and accuracy is that of immediate accretion and condensation in court.

Following the child's evidence and the various layers of accretion through the process, it is clear that during trial there are even more stages of re-remembering and mediation of the initial accounts. There are three points at which the different accounts of the child gain different levels of complexity.
**Firstly** when the child gives their live evidence in court (this will be about the third or fourth time they give a full life account), this account will be met with the judge's amalgamation of all the child's previous accounts as they are represented in the file. The child will not just be asked for another full account (as if telling it the first time) but they will also be asked to position themselves towards these earlier accounts there and then. So this could be understood as the point of *maximal immediate complexity* and reflexivity of all the different accounts, because they are now present simultaneously in their different representations and juxtaposed to the child who gave them. This can only work because the court always gives precedence to the immediate life account, but the judges seek to determine credibility by examining the live account in relation to previous layers of accounts and the witnesses verbal self-positioning towards those.

A similar dynamic applies when the police officer is called as a witness and asked to remember the interview and what exactly they asked. Here the child’s memory problem also becomes the officer's memory problem, it is proliferated, and the child’s problem of accounting for their statement also becomes the officers problem, so accountability also gets distributed as the court initiates these live memory-loops.

**Secondly,** this loop of accounting gets distributed even further. The deliberate absence of any electronic recording devices during trial means that disputes may arise amongst the court personnel about previous witness statements given during the trial, which means that now the life evidence as it is remembered by the legal professionals, is also subject to reflection and negotiation. So after the evidence has been given there is a point of *maximal complexity of mediated accounts* as the memory of all the evidence heard is negotiated/discussed by all those present.

**Thirdly,** and particularly with child witnesses, an expert will present their own mediated version of the child’s evidence, amalgamating through their expertise, all previous reports of evidence, all live accounts given by the child (the one they have given to the expert and the one they gave in court), and other evidence they have heard in court, into another version of the child’s evidence. This obviously is the expert’s version of the evidence, but interestingly this version will again be open to challenge and questioning by the judges and barristers.

So the special treatment children receive consists of this extra loop of detailed examination and questioning by an expert. This means children still ‘own’ their account, and they are positioned as the primary source to account for and elaborate on their memory, but for it to be valid it has to be revisited and mediated more intensively than for other witnesses, in a process that also distributes and proliferates the problem of childhood ambiguity and
accountability across the involved professionals. As children’s evidence is heard live in court, we could say that childhood ambiguity is invited into court. Indeed it is teased out, exaggerated and illuminated by the explicit questioning and revisiting, creating an abundance of information but also of potential ambiguity that can in principle affect all those involved (even the judge). Here the expertise is to become part of the judges’ knowledge, as a kind of momentous and case specific of ‘proxy expertise’, as they integrate it into their own considerations weigh and incorporate it.

As the principle of immediate negotiation of, and accounting for evidence is crucial in the German court, the child is additionally provided with a ‘legal voice’ of their own. The victims advocate will act and speak entirely on their behalf (but must also be wary not to be suspected of suggestion).

So while childhood ambiguity is invited into court, it is mediated via numerous live operators. The way these measures, or indeed operators, work reflects the principle of dynamic, passing time that underpins the functioning of the German legal system. These live operators are party to the dynamic progressions and changes the process undergoes and are supposed to guarantee continuity and mediation across time (during the investigation), as well as being able to immediately react to and resonate with issues and dynamics arising during trial. At the same time it is quite apparent that suggestibility inhabits these cracks between these layers of accounts and that it resides within the dynamics of renegotiation. In a dilemmatic way it inhabits the very dynamic of accomplishing the consistency of their relationship and the legitimacy of their production because this involves a new questioning, which again raises the problem of suggestion.

Judges as point of immediate crystallisation:

While the overall process is based on continuity, total reciprocity, communication and interaction between all levels of the investigation (police, prosecution, judges), the investigation and decision-making process is centralised, it converges towards the (in principle) omniscient judges. So all of these different memory loops and lines of mediation and accounting run towards the judges who have to handle and to finally resolve them. So in the German legal system it is the judges who, in a centralised position, inhabit the dilemmas and paradoxes. They have the power of investigation and organisation but also that of judging which leaves them with the dilemma of neutrality versus forming conclusions.
Time, immediacy and systematic forgetting:

As such the trial functions (and resolves complexity of abundant evidence) on the basis that it is set up as a unique, irreversible singular event. Everything counts as it is said there and then and as it is evaluated there and then, with the awareness that it cannot be repeated in exactly the same way. In fact for the layered complexity to be resolved it is not enough to 'let it converge' on the judges, but the trial needs to be set up as a unique event. This is why it is crucial that the trial must not be recorded on tape or video. Recording it would mean to degrade the trial to be yet another layer of accounts that can be revisited and picked apart. The trial needs to be the ultimate point of live encounter, negotiation, spontaneity and complexity, because this also ensures the filtering and systematic 'forgetting' of irrelevant aspects. This only works if the trial is allowed to be the last, and the most complex, but also the most immediate layer. The same trial cannot be repeated again (witnesses change), so in case of challenge there needs to be a complete retrial.\(^{225}\)

It is a dynamic, irreversible process of accreting, mediating, negotiating, filtering and forgetting. And the child becomes part of this dynamic.

Still, here suggestibility exposes the issue of scientificity, on a concrete level where it is the judges' task to oversee the appropriateness of the experts assessment (methods), and on a broader level where it is the expert's task to follow the version of scientificity the BGH-ruling has set out for them.

England: frozen time, purification and controlled recall

The conception of 'credibility' and 'memory' reflected in the English legal system, is based on a principle of stability and consistency of memory, with dynamic time being virtually removed from the process as far as possible, in an attempt to stabilise evidence for its exact and neutral presentation in court.

The English criminal process is organised around systematic moves of filtering, purifying, reducing and controlling evidence because the evidence is designed to be presented to a panel of juridical laypersons who cannot be expected to organise evidence or to distinguish inadmissible aspects. This reduction and purification is particularly pronounced where child witnesses are concerned and here it is the declared aim to carry the immediacy of the child's first account into the trial.

\(^{225}\) Obviously formal procedural records are kept, and they can be challenged. Also the judgement is reasoned and elaborated in writing, and thus can be challenged as well.
Where the police decide to hear children’s account, it is produced in a strictly regulated fashion and recorded on video. Hence the child is virtually divorced from their account, because this video will now testify for them throughout the procedure. Where the German legal system multiplies and mediates accounts producing layers of accounts to be revisited, the English legal system aims to capture and freeze the pure essence of the immediate account at the earliest stage for it to be carried through the whole process. In this sense we could say they aim to excise time, or the dynamic operations of passing time from the evidence.

But the English system is also chipping away to reduce and hone evidence in order to only retain the immediate accounts of the most relevant (relating to controversial points) and admissible aspects (as is the judge’s main focus). These are also seen, by the judge, to be the ‘sharpest’ most pertinent aspects. It is this sharpness and potency that the prosecution will assess in the evidence and that needs to be presented and brought out in court, and here consistency is a major factor indicating stability and thus credibility. In court the child watches their own video evidence almost like a spectator and will then, not so much re-tell the story, but in cross-examination the barristers will, in a controlled fashion, aim to direct them towards aspects of the story and ask them to account for those.

To address childhood ambiguity the English legal system, built on stabilising, purification, control and reduction, has constructed a particularly rigorous process of purifying and stabilising children’s evidence across time, via the different special measures put in place. All of these measures separate children from their account to keep it complete and untainted and to avoid the dynamic efficacy of passing time. Additionally they minimise the child’s direct contact with legal personnel or the court. So here childhood ambiguity is addressed by isolating and containing the child’s account and thereby separating it from the ambiguity. It is not so much expert’s involvement, but the implementation of the different special measures that are aimed to minimise irritation to enable children to give best evidence and have their voice heard while still addressing childhood ambiguity and therein suggestibility, by mediating children’s absence and presence in court, mediating their evidence across time and space.

In court the judges’ comments and directions will further balance and purify the evidence. Unlike in Germany, where the judge needs to draw out and elaborately inquire into any aspect of the case that is potentially relevant, the English judge knows about the case only in so far as the parties have informed him, and they will seek to reduce and narrow down the presentation of evidence in court to the absolute essence of required evidence. This
means for English judges that their power is neutral and abstract, directed towards the structural aspects of a case and aimed at suspending judgement rather than making it. Consequently the dilemmas and paradoxes arising with in a case are external to the judge, do not belong to him and he can reflect upon them in a more detached manner, because they are to be inhabited by the jury.

However, the dilemma the English legal system creates and faces as a result of this process of controlling, purifying and reducing of evidence, is that of judging and defining the quality of what is being ‘chipped away’ and what is left. This is where suggestibility inhabits the formal organisation of this process, because it is the constant ambiguous qualifier whose absence or presence defines what should happen to the evidence, while the exact criteria for judging its presence or absence remain vague. This dilemma seems to have been shifted to the early stages of the process, explicitly resting on the police officers or social workers who interview children, but it implicitly lingers all the way through the process, because it is the juror’s gaze on the evidence that needs to be anticipated and that finally counts. The detailed description of child witness practice in England already hinted at the practitioners’ experience of this dilemma, but to understand how children’s credibility will actually be accomplished, I will revisit some of these fracture lines suggestibility has exposed in detail in the following part of the thesis.

Frozen time, control, fragmentation and total memory:

Where the German system is characterised by continuity and centralisation, the overall process of the English system, is characterised by the fragmentation, detachment and isolation of evidence as well as assigned tasks (this is to assure neutrality, objectivity, and that the evidence speaks for itself). And here, as a measure to improve the quality of evidence children are divorced, isolated from their account. The investigation and accumulation, the shaping and presentation, and the discussing, weighing and judgement, are tasks assigned to different personnel in the process and there is no real reciprocal exchange, no interaction between them. The police investigate, but the prosecution sorts the evidence and presents it to the court. In court there is no interaction between the jury and the barristers, but the evidence is purely put in front of the jury, while they passively receive it, take it in. Barristers and judge, even though they have different objectives during the trial, are all part of what could be called the ‘presentation team’. They interact and communicate purely to assure, according to their designated roles, the presentation of evidence. The jury is directly addressed by the barristers and the judge but they will not
answer back, so there is little or no feedback for the barristers or the judge as to whether and how they have received the evidence or the advice. Finally the jury negotiates and discusses amongst themselves, but again they will only present the pure result of the negotiations to the court, there is no rationale or justification offered to the court of the public. Very similar to an experimental setting, all this is to ensure the evidence speaks for itself, and can be viewed by the jury in controlled and balanced conditions.

The trial functions as a controlled space of pure presentation, and not, as in Germany a space of investigation and negotiation. It is therefore necessary for it to be recorded on tape to create a total account. All the elements said and heard in court should be standardised, repeatable, hence as a measure of control this process should be reversible and replayable on record. It is the judges declared task to achieve this. So other than in Germany where an instance of maximal and irreversible immediacy is needed to debate and resolve complexity, the English trial is a neutral instance of presentation and confrontation of evidence; ambiguous forms of complexity should have been filtered out beforehand; and evidence is set out to 'speak for itself' under specific controlled conditions. The process must be reversible, recordable. Yet, just as in the German system the final negotiations and decision-making itself cannot be recorded or even observed. The jury operates in a closed space of discussion that admits of no repetition or return.

9.2 Summarising the dilemmas of child witness practice in England and Germany

Looking back at this 'map' of English and German child witness practice the first and most obvious thing to notice is the fundamental asymmetry between the two systems and the way they operate. We can now see why a direct comparison between the reporting and prosecution statistics would not make much sense. With regard to the inherent complexity of each system and the different practical issues arising in the context of the different practices it is also clear why a ‘comparison’, in terms of ranking the 'better' approach, would not just be impossible on the basis of the available information, but it would also be futile. This is why I have set up my inquiry in the spirit of a mutually informative juxtaposition rather than a comparison in the strict sense. Let me revisit and collect some of the points that have emerged in the light of this juxtaposition.

Firstly, it is interesting to note that even though in both countries suggestibility was at the heart of the problems that inspired changes in child witness practice, the measures taken by each of the legal systems differ dramatically. In both cases the law has to some extent
‘written science’, has made ‘science law’, by implementing certain measures and procedures around child witnesses that were informed by research in the field. However, it seems that the two legal systems have come to opposite conclusions as to the validity and applicability of certain scientific findings. While this is obviously related to their differing legal practice and the way evidence is heard and assessed in court, this ultimately leads to a situation where apparently the legal systems are following two different epistemologies. The English law declares as scientifically ‘unknowable’ what the German law explicitly inscribes into their codes of procedure (see chapter 7.2 and 8.2). While in England there are no scientific procedures or findings that can help illuminating issues of witness credibility, in Germany those findings do exist and, it is in fact unlawful not to draw on them. To suggest that these epistemologies are entirely unrelated would be an over-simplification, as there are more complex issues at the bottom of this. But what exactly are these concrete more complex issues, and how can they be grasped?

Interestingly this different appreciation of science by the legal systems, is reflected in debates between English and German researchers who disagree adamantly about the benefits and validity of Statement Validity Assessment. While the German researchers point to findings that underline its overall reliability and usefulness, English researchers are adamant that there is no sufficient evidence for such claims (Steller & Volbert 1997; Volbert 2000; Vrij 2005).

Again this is a simplified way to describe this debate, but in the light of my detailed ‘map’ of both child witness practices we can see that experts in both countries occupy extremely different positions and roles and thus do not just refer to very different procedures when they talk about ‘expert practice’ or ‘credibility assessment’, but they are also relying on utterly different sets of experiences of such practice. While most German researchers are also experts (the law obliges them to be), and they routinely meet actual child witnesses, assess credibility and give testimony to the court, for most English researchers it is extremely rare to be involved in giving expert assessments. Crucially, even when giving expert testimony, English experts would never meet actual child witnesses. Even if they were to give expert testimony, they would typically not meet actual child witnesses. It can be assumed that German and English experts and researchers are not entirely ignorant of this difference, but it has so far been remarkably absent from the debate.

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226 Legal restrictions and ethics guidelines applying in England would, until very recently, also have made it almost impossible for them to encounter child witnesses as part of their research. All of the English researchers I interviewed criticised the extreme restrictions around child witnesses (and witnesses in general) that had led to a situation where almost no research exists that looks at actual child witnesses’ experience of giving evidence. This problem has forced many English researchers to conduct their studies in the USA, where restrictions are not as absolute. Two singular and more recent exceptions are Plotnikoff & Woolfson (2004) and Wade (2002).
Looking more closely at expert practice we could see another peculiar dynamic related to the way in which the law seems to collapse into science in a very concrete fashion. For example in Germany judges are now obliged to 'check', or assess the appropriateness of the principles of the expertise delivered to them. While the judges seem to pragmatically gloss over this dilemma, strictly speaking this makes them the 'epistemologists' of this science in practice. This is even more evident in the example of the German expert who describes how she was challenged about not having appropriately integrated the 'null-hypothesis' into her account and her assessment could thus not pass for scientific. While this could be dismissed as part of the strategic rhetoric that lawyers use, in this very moment it is the lawyer who acts as the 'epistemologist of practice'. It is their version of a 'null-hypothesis that is brought to bear upon whatever the expert says. The English experts reported quite similar examples.

In the light of these peculiarly concrete 'epistemological shifts' and dynamics, we get a completely different view of the problems of suggestibility research described in chapter 2. There are not just the parameters of experimental science and the issues of its underlying epistemological claims. But epistemology itself is created in practice, and in court, it seems. So while in chapter 1 and 2 the debate was based on a sense that if only there was an adequate scientific grounding for questions of suggestibility the matter might be solved, we can now see that the dilemma lies in the precise fact that it is not epistemologists providing the definitions for what is science, but practitioners, as in this case for example lawyers.

Secondly, there is an interesting difference in the way responsibility and decision making is distributed in the two systems. In England the most complex and sometimes most far reaching decision has to be made at the very beginning of the process, by police officers. In Germany this decision is shifted to the far end of the investigative procedure and will be made by prosecutors or judges (investigative judge). Obviously this relates to the different default positions of the legal systems. In Germany the default is set by the principle obligation to investigate all suspected criminal offences (criteria for discontinuation must be actively investigated and argued). In England there is the explicit discretion to investigate, which is meant to avoid spurious investigations. So here the default is not to

227 There are critical voices from within the English legal system that indeed criticize this way or organizing the criminal legal system, assigning the most complex tasks and the most difficult decisions to the lowest level of the investigative hierarchy and to the least experienced members of the legal process. LawAcademic3 (601): “It's quite perverse the more serious the charge the more inexperienced the court find it necessary to deal with it (2) of course we have a professional judge but the tribunal of fact are lay jurors (.) who can can claim exemption if they've had to do jury service within a certain time previously (.) all the theoretical justification for having them is that they don't have any experience with the legal system (...).”
investigate unless the case shows a certain seriousness (so here undertaking further investigation would need to be argued).

Looking back at the statistics in chapter 5, it would be easy to relate these two factors prevalent in the English system (the early decision made at the lowest level of the investigative system combined with an implicit ‘default’ not to investigate) to the high attrition rates of reported abuse cases and the low prosecution and conviction rates. However, it could be argued Germany has better numbers because it allows too many cases into the system and risks ‘false positive’ decisions. Firstly, such arguments must remain speculative because there is no way to validate such claims (it is impossible to reliably find out about ‘false’ decisions in each system). Secondly and more importantly, the lack of symmetry between the systems renders such a comparison problematic anyway. If the difference lay in the German legal system simply being geared towards collecting more and ‘better’ evidence, then the numbers would indeed reflect more rightful convictions. While, this is again speculative, it could broadly be supported by the overall prevalence numbers of child sexual abuse, which indicate that it is indeed a frequent occurrence that is systematically underreported. Yet again, the prevalence numbers are not particularly reliable either.

Looking at the English legal system on its own however, there still is the peculiar issue of the astonishing drop in prosecution and conviction rates occurring during the same time period when child witness practice saw its most significant improvements. So there must be some factor related to the way the early stages of child witness practice are set up. Looking at the study by Gallagher & Pease (2002) and the problems reported by for example Westcott (2002, 2006), there is good reason to suspect that the police do indeed struggle with their task (see chapter 5 and 8.2).

Thirdly, we could see interesting differences between the way in which children are positioned within the two legal systems. Their role differs hugely with regard to the degree of their active involvement, their encounters with professionals, the number of times they are asked to tell their story and the way their voice is heard in court. Still, it is difficult to tell what exactly this means for the impact of their voice, for their accuracy and for the quality of their experience when giving evidence.

In different ways both systems have, compliant with their principle structure, provided children with the opportunity to speak in court and shown willing to give due weight to what they say. While we could see the effort made to achieve this complex task and the
problems arising from it for the legal systems, it is still difficult to say whether they have actually managed to provide ‘access to justice’.

This part of the thesis was not intended to provide ‘answers’. It was intended to ‘populate the field’, i.e. to follow the issue of suggestibility into concrete practice and to provide a detailed picture of the circumstances and the context within which the issue of suggestibility arises and into which knowledge about suggestibility will be applied. It provides a backdrop against which the question suggestibility itself seemed to be asking (i.e. that of the ‘risk of generalisation’) can be examined in more detail.

However there is one important finding that can be stated with some confidence at this point. It has become clear that we cannot yet answer the questions raised in Part (A) and throughout Part (B), because we have not actually grasped the nature of the problem at all. When assuming that the problem of child sexual abuse and child witness practice for example in England, is the one that is tackled by containing suggestibility, we are left puzzled about the fact that the proactive and positive attempts of policy makers in England to solve this problem should have backfired so distinctly. Or is that not what happened? Is there another problem?

So if one thing has emerged from this part then it is the insight that we are not looking for answers about suggestibility, or solutions for child witness practice, but that first we need to try and understand what the problem is.

Part (C) will trace this issue by revisiting some of the central juncture lines encountered throughout this Part (B) and by providing a detailed analysis of the intertwined dynamics of theory and practice. While drawing on the wider framework established by the juxtaposition of German and English child witness practice, the following analysis will focus predominantly on the dynamics of English child witness practice. A similar analysis will need to be performed for the German side, but this cannot be accomplished within the framework of this thesis.
Part C - Creating Reliable Witnesses

Judge: And if you do always tell the truth where will you go when you die?
Girl: Up to heaven sir.
Judge: And what will become of you if you tell lies?
Girl: I shall go down to the naughty place, sir.
Judge: Are you quite sure of that?
Girl: Yes, sir.
Judge: Let her be sworn, it is quite clear that she knows more than I do!

(Exchange reported to have taken place when Mr Justice Maule (1788-1858) had to examine a little girl on the nature of the oath – quote as Spencer & Flin 1993, p.51).

Judge: [...] what's (laughing) the difference between truth and lies one child (1) ahh well a lie is when you say you haven't done it (laughing) ahh that's a good one isn't it (.) also AND WHAT would you say if I said I was wearing a green shirt (1) ahhmm (.) this is one of the questions they'll always ask (.) ah well I'd say you are colour blind (laughing) that's a very good child that (.) ahhm but lying is when you say you haven't done it I think is wonderful (laughing)

(English High Court Judge reporting answers children gave when the police tested their competency as witnesses during video recorded interviews – interview by JM, 2004).

The question of reliable witnesses has been at the heart of this cross-examination of suggestibility all along. It subsists as the ‘ghostly twin’ of suggestibility and reverberates within any question directed at suggestibility or asked about it. It is the question of reliability that drives the exchanges of the two judges quoted above. However, looking at these two quotes more closely an additional problem springs to mind: Who is witnessing what? The children are bearing witness of their own reliability, which in turn is witnessed and approved by the judges. Yet, the children are also witnesses of the legal system’s ambiguous constitution and operations. In their answers they witness and thus expose the peculiar and indeed necessary operations of the judges, who are, at this moment operating as nodes of complexity. They are bearing, filtering, passing through the ambiguity they have to inhabit, while presiding over the clear cut binary structure of the law which is continuously invaded by a diverse set of incommensurably ambiguous dynamics that resonate with any of these concrete moments.

This last part of the thesis will revisit some of the salient juncture lines of child witness practice as outlined in the previous part and examine in detail what it means to accomplish the task of operating at the complex nodes inherent to this practice. What it means as an operator to make the complex transformations of reducing and producing complexity, of
basing oneself within and thus confirming stable sets of rules while simultaneously managing and negotiating the acute complexity of the matter that needs to pass through this system, and that needs to be transformed in this instance. What it means to concretely deal with child witnesses and suggestibility at the intersection of legal and psychological discourses and to make their voices heard. Again we will see how suggestibility, that has directed us towards asking these questions, reverberates within this practice. It does this explicitly by being the declared centre around which child witness practice appears to be organised and implicitly by breaking open, slicing apart concrete practices from within, providing a glimpse at their driving forces. In this sense suggestibility, as a liminal resource will finally become visible in its function as a method as well as the subject of inquiry.

The aim of the following analysis is to offer a distinct series of very circumscribed but also very concrete analytic moves into practice; i.e. to analyse distinct cross-sections, slices, of complex singular operations. This is to examine how exactly practitioners operate at some of the most crucial junctions, how they negotiate their own position amongst interrelating rules, concepts and agencies and at what cost they do this. The emphasis here is on carving out patterns and structures within these exemplary concrete instances of practice that might help to capture and reformulate the problem at stake and possibly add transparency to the whole field.

We will see how in the course of this part the question of reliable witnesses expands and as the focus grows more and more concrete, it spills out into the wider framework of issues surrounding memory, childhood and expertise.

Exploring matters of memory, time and accountability we will see how police officers while attempting to determine children’s reliability, are themselves required to be the reliable witnesses of their practice, lending instant integrity to the future assessment of the witnesses they have produced. I will show how in the course of this operation the ‘short-circuiting’ of different ‘time zones of veridicality’ undermines practice while suggestibility resonates within the emergent structural uncertainty.

Examining the micro-constitution of credibility raises issues about the conceptions of childhood and agency implicit to the working models of children as reliable witnesses and subjects of protection. Why is it that child protection ends up eclipsing children’s rights? Here the concept of protectability serves to illuminate the gendered dynamics, visceral
panics and irreconcilable double-binds engendered by issues of protection versus rights; welfare versus justice.

Finally I will examine the positions of experts and expertise at the intersection of legal and psychological practice. What does it mean for experts to be reliable witnesses for science and how does science create its own witnesses? At the same time however the law must make sure it ‘tests’ this science for its reliability, instantaneously and following its own criteria. Again we can see the oscillation between very abstract epistemological issues that impinge on and feed off the actual and very concrete performance of a specific expert in court. At this point, in the context of the paradox of application, it becomes clear how the creation of reliable witnesses is conflated into very abstract issues of reliable witnesses for science, for suggestibility, for legal procedure, and the very concrete issue of performing scientificity and of making children’s voice heard as a credible voice.

Throughout this part I am moving through and exploring different sets of analytic tools and frameworks, persistently following suggestibility into the ever more concrete particulars of practice. As a result of this suggestibility’s own subversive efficacy within theory and practice will become visible. It is making incisions into, creating ‘voids’ within the ordering fabric of theory and practice. These voids can be traced back across this thesis. In this sense the whose thesis can be understood as a ‘map’ of voids. By explicitly unfolding some of the theoretical framework that informs the whole thesis (e.g. the work of Gilles Deleuze), I will show that when taking seriously the dynamic visible within these voids, those voids, as instances or pockets of subversion, could provide pragmatic passages for change.

I have taken the conscious decision to limit the following analysis to English child witness practice. Hence in this part I will only make occasional reference to the German side, at points where the juxtaposition can directly inform the analysis. The fact that in this part the German child witness practice receives a proportionally less thorough treatment than the English side is not meant to imply that it is in any way less problematic or superior to English child witness practice. Part (B) has shown that German child witness practice is extremely complex and bears inherent problems that warrant an analysis in its own right. However this goes beyond the intended aims and the capacity of this thesis and will have to be the topic of a future project.
10. Methods perspective: discursive realities and the reality of discourse

The methods perspective adopted in this last part of the thesis aims to realize a double agenda. Firstly, I will exploit the diagnostic and analytic possibilities of a wide range of methods that are based on different theoretical frameworks. Secondly this will enable me to critically reflect upon the specific ways in which those different methodological and theoretical frameworks relate to the concrete data, to the problem I am examining via their perspective, or to put it bluntly, to the 'real'.

Taking different angles on the juncture lines that run across child witness practice, the following analysis will draw on a variety of tools and perspectives rooted in different approaches to discourse analysis, critical discursive research and work related to the philosophy of science. I will draw on some of the social constructionist approaches (discursive psychology) introduced in chapter 3 as summarised in the article by Clare MacMartin (1999), and on the critical discursive research perspective as represented by the work of Erica Burman (1997). As the analytic methods of these two perspectives relate very differently to discourse and practice, they will enable me to undertake a multifaceted analysis and help to highlight and express different issues that arise around the dilemma of childhood, suggestibility and legal practice.

However, these two perspectives are also based on very different views about the role of language and discourse and their relation to what is seen as the 'real'. Hence it is quite clear that the explicitly syncretic methods perspective I am suggesting might be perceived as a problematic move, because it combines what are seen as incommensurable approaches. MacMartin (1999) for example warns that there is an inherent danger in methodological eclecticism where discourse analysis is concerned, because some of the traditions that operate with the term discourse “may be incommensurable in their theoretical and methodological stances, including the conflicting roles assigned to the analyst.” (MacMartin, C. 1999 p. 511).

"Indeed, the reason Edley and Wetherell (1997) call for a détente is that the terms 'discourse' and discourse analysis are fiercely contested." (MacMartin, C. 1999, p. 511).

This apparent danger, as MacMartin puts it, or indeed incommensurability, derives from very different conceptualisations of how the analysis should relate to the 'real'; or in turn

228 Chapter 3 outlined the different epistemological, philosophical and political frameworks that underpin these different agendas of critical approaches to psychology.
how it conceptualises this ‘reality’. MacMartin describes this difference rather unhelpfully as a matter of scale and perspective, qualifying discursive psychology as a ‘bottom-up’ and critical discursive research as a ‘top-down’ approach (ibid. p. 510). This kind of description obscures the crucial problem at stake in this ‘incommensurability’. From the bottom of ‘what’ is discursive psychology operating? And at the ‘top’ of what does critical discursive research reside? MacMartin’s capture obscures the fact that the two approaches do not at all agree as to what exactly it is they are looking at, let alone what its top and bottom may be. As I have outlined in chapter 3, the tension arising between the two approaches oscillates around the question of the ‘real’ and the question of what it means to relate to it in a specific way.

This divergence has been poignantly expressed in the at times heated debate about the fiercely contested, if not insoluble, issue of ‘epistemic constructionism’ (Edwards, Ashmore, Potter 1995; Edwards 1997) versus ‘critical realism’ (Parker et al 1997; Parker 2002). This debate, also termed the ‘death and furniture debate’ with reference to the ‘classic’ tropes that furnish the routine arguments that are used to counter relativists’ position, is complex in itself and I do not wish to rehearse or explicitly comment on this specific episode. However, reference to methods derived from both of the perspectives involved in this debate deliberately reactivates some of the tension underlying this debate.

In the way I can talk about my specific data via these perspectives, I hope to show how this tension could be utilised and productively by-passed.

In chapter 3 I have pointed to the fact that both perspectives remain (in different ways) vague with regard to very concrete ‘truth’ issues at stake in the context of suggestibility, child witnessing and sexual abuse. They remain detached from what escapes their grasp, they remain detached from the question of how their stances could be made relevant for, brought to bear upon the concrete problems faced by those witnesses and practitioners faced with the question of ‘truth’ and the ‘reality’ this truth means for their life experience.

By implicitly reactivating and pragmatically unfolding the conceptual tension between the perspectives, I hope to not just benefit from the different analytic moves a combination of these perspectives allows me to employ, but simultaneously I hope to peel out and explore what seems to have escaped their grasp. This could provide a new way of asking the question of how to ‘relate to the real’.

In this sense and realising this double agenda, my specific analytic endeavour follows a wider exploratory spirit. I will approach the interview data by selectively drawing on some of the analytical tools that are associated with discourse analysis and more specifically conversation analysis and ethnomethodology (Garfinkel 1967; Sacks 1992; Lynch 1993;
Edwards 1997; Edwards & Potter 1992; Potter 1996; 2004). My analysis will also be embedded in a critical account of the historical, political and cultural discourses that underpin and shape the acute reality of child witness practice and childhood as such, positioning my inquiry more closely to what Parker termed ‘critical discursive research’ (Parker 2002, 1992; Burman 1994, 2001). Finally, it is the theoretical and reflexive spirit of the work of Isabelle Stengers (1997, 2000) and Bruno Latour (1987, 1999) that informs my analytic concepts, and that will guide my underlying inquiry into the question of how to ‘relate to the real’.

Interestingly the sociology of scientific knowledge, which forms the background of Latour’s work, has seen a debate that bears similarities to the one between the critical psychological perspectives. Although operating within a very different framework and thus raising very different sets of problems that relate to different conceptual issues, it seems that the debate around the productive or indeed detrimental implications of the talk of ‘constructivism’, as Latour refers to it, raises tensions and dynamics that are very similar to the ones at the heart of the debate within critical psychology (Latour 1999a; Bloor 1999, 1999a). To put it bluntly, it is the question of how the abstract relates to the concrete, the question of how we can and should reflect about this relationship and what it means for the way in which we are in consequence able to speak about, and to speak to those who occupy and operate within this concrete realm. Latour (1999a) implies a similar move when he painstakingly tries to detach and thereby rescue what he considers the positive value of ‘constructivism’ from the destructive relativist nihilism he sees implicit in deconstruction.229

Following the spirit of this suggestion I would like to define my underlying exploratory agenda with reference to Latour. I would like to examine the concrete possibilities emerging from what Latour expresses so pointedly in his comment on these debates around discourse, constructionism, relativism and realism.

“So we do not have to choose between realism and social construction because we should try to imagine a sort of mix up between the two ill-fated positions. Rather we have to decide between two philosophies: one in which construction and reality are opposite, and another in which constructing and realising are synonymous.” (Latour 1997, p. xiv).

On a theoretical level this echoes the problems that arise where questions of suggestibility and thus issues of child sexual abuse are concerned, and Hacking (1995) makes this point even clearer with regard to sexual abuse.

229 To separate deconstruction and constructivism, Latour suggests the slightly unwieldy term ‘compositionism’ as an escape from the detrimental implications ‘constructivism’ has come to imply. “Deconstruction goes downhill to avoid the peril of presence, compositionism goes uphill to try to catch as much presence as possible. One behaves as if the main danger was for words to carry too much meaning, the other fights to wring out as much reality as possible from the fragile mediators it has painstakingly assembled.” (Latour, B. in press p. 18).
"It is a real evil, and it was so before the concept was constructed. Neither reality nor construction should be in question." (Hacking, I. 1995 p. 68)

To say these two things together, to imply them at once, means to be perceptive of the fact that at a certain level of practice both of these two things necessarily have to be in play at the same time; they have to be indissociably efficient if practice is to function at all. Here we could begin to examine and understand how they are variously occasioned as part of the very way practice inevitably operates. Ultimately this opens a path for a very concrete perspective onto the activity of those legal and psychological practitioners who occasion these operations and the way they (both, the operations and the operators) are embedded within their framework. At this point it will become clear why and how it is that in our attempts to grapple with these issues, we need to be much more concrete and at the same time much more abstract than, for example, the critical and discursive perspectives in psychology have so far attempted to be. Here the implicit resonances with the work of Gilles Deleuze will be made explicit.

MacMartin’s and Burman’s elaborate clarification that their sincere concern is for the determination of, and just prosecution for child sexual abuse expresses a shared awareness for the underlying conceptual problem. Yet the debate around ‘epistemic constructionism’ versus ‘critical realism’ has so far mainly served to manifest existing antagonisms, diverting attention (and critical analytic energy) from that which appears to escape both of these perspectives. Hence it seems worthwhile to pragmatically reactivate the tensions between these approaches in order to explore and align their analytic scope and thereby to move beyond (systematically ignore) those antagonisms. This should open a path to explore the possibilities of a critical analytic perspective where neither reality nor construction are in question.
11. Matters of time, integrity and accountability: children’s evidence between psychological research and legal practice

One of the most salient juncture lines that emerged in part (B) centred around the video recording of children’s evidence by the police; a special measure introduced for the English legal system to facilitate children’s voices being heard in court while accommodating what are perceived to be children’s needs as witnesses as well as ensuring the legal admissibility of their evidence. Chapter 8.2 has pointed the difficulties of translating research recommendations into practice particularly relating to police officers’ non-compliance with the interview guidelines.230 In the following I would like to examine in detail the discursive and structural dynamics surrounding the planning, production and evidential use of the video recorded evidence.

In order to capture the police officers’ position within the system, as well as reflecting on the overarching structure this practice is embedded in, I will conduct the analysis by alternating between two different analytic perspectives. On the one hand I will capture the police officers’ positioning within this practice, focusing on issues of accountability and integrity. On the other hand I will develop the concept of ‘time zones of veridicality’ by tracing the process from the perspective of the video itself, as it takes the child’s place in the process, as what could be called a witness by proxy on their behalf.

11.1 Time zones of veridicality: integrity and the production of reliable evidence

The following discussion took place on the third day of one of the training courses I attended.231 Over the course of the previous days the officers have talked about the law of evidence to ensure the interview complies with courtroom procedures of admissible evidence; they have talked about interviewing techniques appropriate to children and about the possible problems they might encounter with regard to suggestion. At this point they have spent all morning learning that it is crucial to build a good rapport with the child in

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230 Research indicated that police officers did not seem to follow the prescribed interview guidelines very closely, with many interviews failing to include an effective rapport stage or relying too heavily on closed questions instead of open questions that allow a free narrative (see end of chapter 8.2 for details).
231 The course is called “Video Interviewing Vulnerable and Intimidated Witnesses”. Courses vary hugely across English police forces. The courses I attended in 2004 to collect this data, usually ran full time over six consecutive days with around 12 to 15 participants (very experienced as well as career younger police officers). Officers can volunteer, but are usually assigned to participate. It is the expressed aim of the police forces to train every single police officer in video interviewing children, in order avoid delays and enable an immediate response if sexual abuse is reported.
order to draw out detailed information while avoiding misunderstandings and suggestion. The following discussion circulates around a section in guidelines that states that comfort breaks should be allowed any time, but if children need to leave the room to go to the toilet, police officers have to accompany them to the toilet and make sure they do not speak to anybody (ABE article 2.99, p. 35).

I am providing this rather long excerpt in full length at this point to establish an overall sense of the discussion and issues arising.

(‘TO’: Training officer; PO1/PO2/PO3/PO4: participating police officers.)

**[Excerpt]**

1 TO: [...] but why do we do it? It’s this issue about whether they’ve been what? (.) conduced
2 (1) cajoled (1) threatened that’s the issue (.) (PO1: hmm) if they’d been conducted (.) cajoled
3 (.) or threatened it’s likely to be b:::y (.) the person that we’ve brought with them as their
4 witness supporter (.) (PO1: hmm) another family member who happens to be at the
5 police station (.) oxr a police officer (.) (PO1: °ya°) (1) °ok° (.) which can happen at
6 anytime (.) it can happen before they arrive at the police station (.) as they arrive at the
7 police station after they leave the police station (.) y’know I find that the fact
8 that they say that you gonna do this and that (.) but I find that (3) a little bit a bit a bit
9 you know (1) it it it’s a:::most like saying like you are taking this person
10 into custody° (PO1: hmm) I would if I wanted to go to the toilet during the course of
11 an interview at a police station the last thing I would expect is for the police officer to
12 follow me out of the interview room to the toilet (1) ahm=
13 PO2: if the tape’s running whilst they go to the toilet (2) you’re gonna be seen on the tape
14 anyway (1)
15 TO: you’re gonna be seen?
16 (1)
17 PO2: if the tape’s still running (.) while they nip out to the toilet (.) (TO: °ya°) you stay in the
18 interviewroom (.) (TO: °ya°) you’re gonna be shown (.) on there °anyway°=
19 TO: the officer is yea (.) °there’s sn there’s sn° (.) but the issue (.) the issue I am talkin’bout is
20 that its talks about an’ and (.) (Helen)°234 mentioned it they’re about security at the police
21 station (.) yea fine (.) that’s one thing I can say yes I would agree with (.) that you don’t
22 know whether that person gonna go off and plant a bomb or (.) or do anything else (.)
23 yes I I’ll go with that one (.) I’m I’m with that one (.) but I’m really do:::n’t (.) agree:::e
24 [uhhmm]
25 PO3: [you’re gonna] ruin the rapport
26 (1)
27 TO: you’re gonna ruin the rapport? by going to the toilet with them?=
28 PO3: Yeah I think so it’s quite intimidatin’
29 TO: I think it’s potential to offend them
30 PO3: °ya°
31 [...]  
32 TO: I think (.) it’s it’s it’s I just think that tha’ we are fixated with this fear of of

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232 In favour of more clarity I have edited some of the excerpts, by omitting a few lines. Omissions are indicated by square brackets ‘[...]’. Still, great care was taken to make sure omissions do not alter the overall character of the discussions and utterances. Complete recordings and transcripts are in the author’s possession. The transcript notations used are a simplified and modified version of the system developed by Jefferson (1984). For further discussion on issues of transcription see also Wetherell & Potter (1992) and Ashmore et al (2004). See appendix A for full account of transcript notations used.

233 Po12: 720-866.

234 Name changed. The training officer refers to a previous remark by PO1.
evidence being (↓)

P01: "[tainted]"

TO: [be]ing tainted or it or the evidence being or as bein’ accused of cajoling and
tainting the evidence by not being able to account for every single moment that we are
with them ummm and I think I think it’s easily suggested by any defence barrister that I
you know a defence barrister worth their weight in gold could easily suggest at any point
during the course of any proceedings that any witness comes in and deals with you that
at any point you’ve suggested something to them or induced them and said something
"to them" and we wouldn’t have evidence to say anything otherwise other than no I
didn’t ummm and I you know it in there and that’s what it says it says that you
should accompany them to the toilet and ensure they don’t speak to anybody else
"et cetera et cetera" I just think that’s a little bit (1) asking a bit too much (0) (1) [...]

PO1: but effectively your integrity is supposed to be intact isn’t it because if anybody else=

TO: why? ’cause you’re a police officer?=

PO1: "yes" absolutely.

PO1: "yea ok I’m you know (1) it’s horses its its what the guy says=

I think you can stand up in court and answer all the questions that they’re asking you and
you’ll say no they weren’t interfered with no this didn’t happen that didn’t happen ((TO:
yes)) [umm]

TO: [all the time] they were with me

PO1: yes

TO: I can say that nothing untoward occurred=

PO1: "your honour"

TO: "yea"

TO: "(chuckling)

PO4: "we’ll have cameras in the toilets then next time"

TO: Sorry?

PO4: next thing an’ we’ll have cameras in the toilets

TO: (chuckling)

Let me begin by capturing the overall scope and tone of the discussion. Throughout this
discussion there is a constant oscillation, or in fact a circular shift between colliding issues
and topics. And the impression of shifting positions is exacerbated by the peculiar way in
which the training officer, whose task is to introduce and teach the material, appears to
simultaneously intersperse caveats and critique against the guidelines. Additionally, it seems,
the officers need not only be concerned with what is on the video, but they should be even
more worried about what is not on the video.

The training officer states clearly why it is they should accompany witnesses to the toilet,
and he delivers a neat three part list: officers have to go with the witness in order to ensure
no one can “conduce, cajole or threaten” (lines 1-2) them. But then this again might “ruin
the rapport” (line 25), intimidate or “offend” (line 29) the witness, which the officers must
avoid at all cost because as a result of this they might fail to elicit detailed information from
the witness, risk misunderstandings or suggestion or even foreclose a potential disclosure
of abuse entirely. Furthermore they shouldn’t be too obsessed with “tainting” the evidence
(line 34-35), as the training officer observes, while he simultaneously goes on to imply that
there indeed is a need to plan in advance how the video will present the witness in court, and how the video itself is presented. And that indeed means being able to "account for every single moment" (36) and to perform their task in a legitimate way. Here one of the officers reminds him that this ultimately means to maintain their own integrity, to make sure their “integrity” is “intact” (45), as well as the integrity of the interview. Yet this seems in danger of conflicting with the duty to facilitate the disclosure since it means going to the toilet with the witness and thus might ruin the rapport. Following this exchange it would seem that the production of such a video is a paradoxical task. We have seen throughout the detailed exploration of English legal practice in part B, that the video is put in place as a sort of 'proxy-witness' on the child's behalf. Its designated purpose is to fix and to preserve children's evidence and to present it neutrally and in a reliable, stable fashion when needed. But given the terms of this discussion it would seem not to be a plain record, a neutral objective witness by proxy, but rather an ambiguous protagonist that in itself needs accounting for. Let me begin by taking a closer look at the part the video plays and unfold the issues at work from its perspective.

Visibility
The video adds a peculiar sense of visibility to interviewing practice. By introducing a sense of complete, unadulterated footage, a sense of total visibility within the interview room, the video in turn also highlights the relative lack of visibility and transparency in areas outside the interview room. It thereby draws attention to, and intensifies the contrast between the two areas 'inside' and 'outside'. By minutely accounting for one space, it also produces a totally unaccounted, invisible space around it, and this space now is the target of heightened sensitivity. While at first it seems as if the video will also be a neutral witness on behalf of the police officers, confirming their good conduct as they are “seen on the tape anyway” (13 and 18) doing nothing untoward, the role of the video turns out to be rather more complex (or indeed more sinister) than that. Moving to the end of excerpt 1 we can see that the video finally turns out to be a rather ambiguous witness on behalf of the officers; a witness that implies more uncertainty than it resolves. This is reflected ironically in the statement concluding this debate. Ultimately it seems, the issue can only be resolved by extending footage and visibility endlessly, by making it unlimited, which means to install “cameras in the toilets” (lines 60 and 62) as one officer remarks. Interestingly this also evokes a sense of the video being a form of surveillance, rather than just a neutral record. It is eyeing the officers’ activity suspiciously. I will get back to this issue, but for now I would
like to move on to a second, closely related issue that emerges from this idea of visibility, that of integrity.

**Integrity**

Traditionally a police officer would have interviewed a child witness, recorded their statement in writing and summarised it for the file. Obviously they would have had to follow strict rules of conduct and there may have been concerns about the officers' practice, but by and large this practice was designed to function based on the fact that the officers were positioned as reliable recorders of evidence, that is by virtue of being police officers; by virtue of their induction into, and establishment as part of the investigative legal machinery. We could say they are established as circumscribed 'evidence gathering apparatuses'.

Considering the officers as such circumscribed functions of the legal machinery they can be likened to what Latour (1987) refers to as a 'black box'. Latour uses the expression 'black box' to describe the way in which scientific and technological work, if it operates successfully, manages to close black boxes. That is, to establish an area where a matter of fact is settled in such a way that one need only focus on inputs and outputs, while its internal complexity is rendered opaque (see Latour 1987; 1999). Stengers sums this up neatly stating that a “...black box establishes a relation between what enters it and what leaves it in such a way that no one has, practically, the means to contest it.” (Stengers 1997, p. 86). Where police officers' practice is successfully 'black-boxed' that practice is secured against investigation. The legal system is not a science, nor are police officers 'scientific concepts/technology', but the way in which the legal system sets up its distinct functions is based on a principle very similar to the one described by Latour for the sciences as closing black boxes. Adopting the terminology for legal practice we could say that the legal system has created a grey box. This grey box is a circumscribed area of practice, here the police officers' activity, that operates on the basis of fixed rules and comes equipped with an overall integrity and legitimacy, which by default covers all those operating within it. If it functions successfully in the way it is set up to function, police officers are in principle constituted as grey boxes of evidence gathering, and routinely only the input (raw

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235 Latour and Stengers do not mean to imply that the complexity thereby vanishes altogether, nor do they mean to qualify such an operation as being problematic or unproblematic, or it rendering something 'unproblematic'. Their concept merely describes one of the crucial mechanisms that makes science work: certain aspects need to be (and often are very successfully) 'stored away'.

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information) and the output (evidence) will be of interest (e.g. courts of law examining the evidence).

Yet with the video recording this has now changed with respect to child witnesses. Where interviewing children the grey box of the police officer as a reliable and neutral 'evidence-gathering-apparatus' has now been opened and we routinely get an intimate view of what is going on inside. Above and beyond the question whether this opening of the grey box is a good thing or not, it is clear that as soon as we can see what the officers are doing, their concrete performance becomes a matter of constant reflection and debate. Hence the officers now have to actively make the rules of conduct work in practice and they have to actively produce their integrity. They have to produce it at the very moment of the interview, but also for the prospective immediacy of the courtroom presentation of this video. And this leads straight into the issue of the different time zones at work here. I will return to the problem of integrity.

Time Zones of Veridicality

A closer look at this excerpt shows that the impression of paradoxicality we get when following the exchange, is also a result of the simultaneous efficacy of two different time zones. The paradoxicality arises from the officers' attempts to simultaneously operate within, and with regard to, two different time zones. Similar to its use in chapters 7.4 and 8.4 the term 'time zones' is meant in a descriptive sense, simply denoting the circumscribed interval of chronological time within which something happens, e.g. the hours or days in the course of which an interview is planned and then recorded.

In the immediate time zone of planning and conducting the interview it is paramount to maintain a good rapport, because it is within this time zone that the child will talk to the officer. Here only a good rapport will enable a detailed and accurate account to emerge and to be recorded. In this time zone, going to the toilet with the child appears like taking them "into custody" (9) like a suspect. The impact of this rather extreme statement is increased by the training officer's repeated delay to the statement (lines 8-9) and its apparently hesitant delivery. Clearly, the child must not be treated like a suspect because it is likely to

236 Obviously there are cases where the 'evidence gathering' of the police itself becomes a matter of challenge or inquiry (and tellingly this is notoriously difficult), but in principle the legal system can only function smoothly because it is based upon the premiss that it does not have to routinely examine the police's practice, and can safely assume that the police operates correctly; that it 'outputs' the kind of information the court needs.

237 It is quite clear from my exploration of changes to legal practice in England in part B that one of the explicit aims for introducing video recorded evidence was to make police interviewing practice visible. So this is not a surprising finding. So above and beyond the expected benefits of such a move, I am examining the way in which it actually inflicts upon practice.
offend them and to ruin the ‘rapport’. In the time zone of conducting the video interview such behaviour can be seen as a sign of being “fixated with this” fear (32) of the “evidence being tainted” (33-34) and thus it is indeed “asking a bit too much” as the training officer concludes in line 44.

Yet, these utterances by the training officer are simultaneously interspersed by considerations and comments that operate within, and project forward into a completely different time zone, the time zone of the trial in which the video interview will be displayed. In this second time zone courtroom procedure applies and ‘truth’ is generated by completely different means and credibility is judged in relation to a different framework. The intersection of time zones within the training officer’s elaborations is particularly obvious within his turn from line 35 to 44. In this turn utterances relating to the time zone of the interview literally enclose, or ‘form brackets around’ the intermediate illustration of what is representative of trial time (lines 37-43). Let me elaborate on this some more.

Following the extreme case scenario that the training officer unfolds step by step in lines 37 to 43, the time zone of the trial presents itself as one in which truth is guaranteed by the application of intense and systematic uncertainty. The whole paragraph, including the ‘preparatory lines’ (35-36), consist of extreme case formulations, arranged to add to an escalating sense of arbitrariness, culminating in the reference to the guidelines (42). Initiating the account by the adverb ‘easily’ and following this up with a fivefold progression of ‘any’—thing that could apply or happen, this passage almost creates a sense of loss of control; this seems to be a space devoid of direction, reason or constraint. One has to account for “every single moment” (36); and it can be “easily suggested by any defence barrister (…) at any point (…) during any proceedings that any witness comes in and deals with you that at any point you have suggested something to them… and you couldn’t say anything…” (37-41).

One could say that the training officer is using a rhetoric of ironic hyperbole to imply that it is ultimately pointless to even bother following procedure because a defence barrister could always destabilise their account. Yet more is going on here. Beyond the training officer’s hyperbole, this account reflects the implicit paradox of colliding time zones. It expresses the exasperation of facing a task that seems virtually insoluble, because it means to operate at one moment but within two time zones: the time zone in which the interview is conducted and the time zone of the trial.

It is interesting to note that at this point, and as if to resolve the problem, the officer refers to the ‘guidelines’ (42). However, the training officer’s triple repeat of the reference to the guidelines, adds a rather distanced, ambiguous, incredulous tone: “it says in there and that’s
what it says it says..." (42). It is clear that the guidelines are supposed to address the problem and they propose that every step along the way has to be rule based so that it can be accounted for. Therefore it is fundamental that the police officers’ integrity is intact. Once again we can see that this ‘integrity’ is not given by virtue of their position as police officers. But the grey box has been opened, and it is precisely because they are police officers (46-47), that their integrity has to be actively produced and affirmed. The video has to be produced at the time of the interview, but needs to follow trial rules, because it is produced in anticipation of courtroom appearance, where it can be displayed in the way the two officers demonstrate in an almost stage like exchange (50-56). I will examine this closely interwove dialogue in more detail later, but for now I would like to further trace the broader dynamic related to the different time zones.

Accounting for every step along the way means that the very important initial stage of the interview, the rapport stage, needs to be recorded on video as well. This rapport stage, where the officers engage in an informal conversation with the child in order to establish an open and friendly atmosphere, will end up being shown in court as well. In the following extract the training officer reports what a judge has said about the effect this has on the jury.

[Excerpt 2]238

1 TO: The only thing that judge Smith239 bless him says is that the jury switch off during
2 the rapport stage so whilst this book240 concentrates on how it is so important to get
3 that rapport in the interview he quite clearly said that they switch off=
4 POI: He’s right he’s absolutely right
5 TO: you know s:::o you have to weigh up well that’s what’s our question perhaps if we
6 can do our rapport pre-interview assessment then you only need a shorter rapport on
7 your actual video to make them comfortable and then later on at court the jury won’t
8 switch off well not switch off quite as quickly as °perhaps°

So after all, the rapport, which the guidelines suggest is so important for achieving best evidence, seems to have different effects at different stages of the procedure. It might become the very issue that undermines the value of this evidence in court. If the jury ‘switches off’ they might end up missing important aspects of the evidence. So here, in the officer’s preparatory considerations, the video is a rather awkward and unpredictable witness on the child’s behalf. Here we can detect the collision of time zones, the tension between what “the book concentrates on” (line 2) and suggests for the actual interview,
and what the judge reports from the courtroom (1-3). This is supported by the spontaneous comment of one of the experienced officers (4). We can advance the argument further. Not only are these different time zones, but they are different time zones of veridicality, since truth is established through different means within each of them. The very aspects that facilitate, and thus bolster and underline children's evidence in the time zone of the interview, that is, the rapport and trust that enable them to deliver a full narrative, will produce an awkward impression in the time zone of the trial. Here the rapport might appear tedious and lengthy, and it might ultimately distract from the relevant evidence. Instead of clarifying the matter, the training officer's comment about how to negotiate this problem (lines 5-8) turns into an illustration of the precariousness arising from the attempt to handle this collision. The training officer recommends the officers should "weigh up" (5), but interrupts himself, hesitantly pausing with "well that's what's our question perhaps" (5), indicating that the criteria according to which this 'weighing up' should be executed are not quite clear. The officers should refine their immediate actions in the interview so as to "make" children "comfortable" (7) in the interview, but always bearing in mind the impression they imagine their conduct will make on prospective jurors and their specific attention span during the trial. Tellingly, here the training officer's statement remains suspended in an unfinished sentence, fading tentatively on a silently uttered "perhaps" (8), thus underlining the potential dubiousness of such an endeavour. Clearly the video is not just ambiguous in its production, but it must be expected to turn into a shifty witness as it performs in court. Even those things that are on the video seem to change value when transferred from one time zone to the other. This phenomenon is even more pronounced in the next excerpt.

In the following excerpt immediate issues of statement credibility are at stake. One participating officer insists that to arrive at a clear and unambiguous account they might have to challenge the child. Yet the training officer points to the potentially detrimental effect this could have for the rapport (as it might "pooh pooh the rest of" the interview 1-2). But he also crucially reminds the officers that it is the time of the trial they are simultaneously positioned within, and that this is the time they have to operate towards.
11. Matters of time, integrity and accountability: children’s evidence between psychological research and legal practice

[Excerpt 3]241

TO: [...] so I don’t actually know (2) what benefit it would be (1) other than pooh-pooh the rest of your interview really (chuckling) you know (PO1 chuckling) [...] what I’m trying to get at is (1) is that (1) it is so urgent to challenge a witness’s evidence at (snaps finger) that point in time= well it could be that’s the thing couldn’t it [...] at the end of the day that person might not be telling the truth= they might not be but (1) is it appropriate to do it at [that point [??]]

PO1: [but you don’t want to] lead that poor kid down the garden path (TO: No you don’t) putting pressure on it (TO: No)

thinking oh (1) I’m in that hole now I’m gonna dig it some (1) I’m gonna dig it deeper (tomorrow)

[POt: hmm]

TO: [I can I can actually] I come up with two things here which I’ll miss if I do it during the course of that first242 interview (1) and that first interview is played in the court ((PO1: hmmm)) then quite clearly (1) I’m demonstrating if it turns out that what they said actually was the truth (1) quite clearly at the end of that interview (PO1: hmmm) if that’s played before the court I am demonstrating that I actually don’t believe them which is ammunition for the defence [...] if it’s one interview that’s played before the court we’ve already particularly if the jury ahm get to see that aspect of it they’ve been already ahm (1) we’re implanting a seed in their mind that we actually don’t believe it

So indeed the video is not a neutral and unambiguous witness, it does not deliver what it is entrusted with objectively to the court. Within the time zone of the interview a challenge might uncover a lie, but crucially it could strengthen the evidence by helping to clarify things and prevent misunderstandings (15). Challenging the child could mean to avoid leading “that poor kid down the garden path” (8-9), digging the hole of a potential lie, misunderstanding or inconsistency even deeper (10). Yet when transposing the immediacy of such a challenge into the courtroom via the video, this very challenge is likely to end up undermining the child’s evidence (which might in fact have turned out to be true, line 15). So, it seems, it is not advisable to challenge the child during the interview, because in the other time zone of veridicality, in the courtroom and thus in its new immediacy, the challenge acquires a different meaning. In the courtroom a challenge is aimed at explicit or implicit inconsistencies, it belongs to the language of cross-examination and is designed to test evidence or indeed ‘attack’ it. It is meant to unearth, highlight or indeed create inconsistencies. These are the weak spots the defence aims to gather and put to the jury. Thus a challenge will deliver “ammunition” (16) for the defence, or it might just on its own account implant “a seed” (19) in the jury members’ minds, cultivating the idea that not even the police initially believed this witness. Here the expression “implanting a seed in their mind” (19) is interesting because it gives a vivid sense of the (imaginary) prospective

241 Poll: 481-527.
242 The training officers refers to the initial video interview as the ‘first’ interview because they have just discussed the possibility to potentially conduct a second interview if there were additional questions. Yet following my insight into the practice second interviews are quite rare, meaning that usually there is only one interview (the ‘first’ one).
jury’s passive and imponderable perceptiveness towards the video, that nonetheless needs to be anticipated and acted upon by the officers with the utmost delicacy.

Time zones of veridicality, duration and sequentiality
The dynamic resulting from the intersection, or merging, of the two time zones of veridicality is clearest when examined from the time zone of the trial, the final destination of the video. Above and beyond the concerns of the police officers, in the courtroom the collision of the two time zones of veridicality culminates around issues of duration and sequentiality. In chapter (8.4) I have described the fact finding dynamic of the English legal system as a process of cutting and honing, geared towards a focussed and orderly presentation of relevant evidence to the jury. Evidence undergoes various reviews, shapings and transformations until it gets to court. During my courtroom observations I have had the opportunity to get a sense of the impression the video makes in the courtroom. My own observations are confirmed by this comment of a psychological/legal researcher (former social worker) who captures the phenomenon pointedly in the following remark.

[Excerpt 4]243

LawAc2: [..] I found where (1) ahh there was evidence in chief given live in court (1) the time it took you know was much shorter because the prosecuting lawyer will focus on what is going to prove you know the charge (1) and they draw it out and when they felt they got enough they stop (1) ([hmhm]) so that might take twenty minutes whereas your pre recorded evidence might be an hour an a half [...] you know so it didn’t make the same demands on the jury’s concentration ([hmhm]) you know it was short () sharp () focussed

So firstly the issue of duration is crucial.244 Referring to the trial the researcher points out that when the prosecutor “draws it out” (3) the evidence emerges in a concise and short period of time, and they stop exactly when they feel they have enough to prove the charge, making it a “short sharp focussed” (6) presentation. And this ‘short-sharp-focussedness’ is obviously directed at the jury who will have no difficulty in grasping such an account. In contrast to that the video will run for about one and a half hours making quite some “demands on the jury’s concentration” (5-6). Secondly, and closely related to this issue of duration, there is the issue of sequentiality, that is, the order in which this evidence emerges in a video recorded investigative interview.

244 While elsewhere in this thesis ‘duration’ occupies a central position as a theoretical concept, at this point it should be understood in its simple, vernacular sense. Here duration simply denotes the amount of chronological time passing while the video is shown.
11. Matters of time, integrity and accountability: children's evidence between psychological research and legal practice

[Excerpt 5]245

So above and beyond the concerns of the police officers, in court the video is a fanciful witness. It does not deliver children's voice in a predictable and reliable fashion. By transmitting the very nature of the investigative interview, that is, the disorderliness (non-sequentiality, i.e. narrative non-linearity) and duration that characterise the immediate nature of the investigative interview, into the courtroom, the video ends up undermining children's evidence. The very features that are commonly perceived to represent veridicality within the time zone of the actual interview (e.g. immediacy, the spontaneity of a response, a story emerging in a non-linear fashion), can end up having the contrary effect within the time zone of veridicality constituted by the trial.246 Here evidence needs to be immediate but it is also expected to be highly structured. It is expected to emerge in a highly controlled and sequential fashion via the ordering activity of the barristers and the way that they 'draw out' the evidence. This is usually most obvious for the defence barrister, but equally applies to the prosecution examining their witness. They will also aim to extract an orderly sequence of events from their witness, that can prove the case and impress the jury. In this context the video, which is assumed to be the most objective, stable and predictable of witnesses, turns unpredictable, because it short circuits time zones of veridicality. It short circuits the investigative time zone of the police with the fact finding time zone of the court. In other words, it collapses the sequentiality of the overall investigative process into one time zone of 'live' courtroom activity.

Let me pause here, because it seems two different issues are getting entangled at this point. On the one hand there is the problem of the jury's fading concentration. During a lengthy

246 In the broader field of ethnomethodology and discursive psychology a lot of work has been done around the structures of every day reasoning and studies of vernacular and legal discourse suggest that markers such as 'spontaneity' of responses as well as for example a non-sequential manner of presentation are considered markers for the credibility of statements. Thoughtful pauses or hesitation and 'formulaic sequentiality' will be interpreted as suspicious (cf Garfinkel 1967; Sacks 1992; Edwards & Potter 1992, 1995). Interestingly, and following a similar rational, 'spontaneous and disordered presentation' also feature as a characteristic of experience based statements in the list of 'content criteria for criteria based content analysis'. (Steller & Volbert 1997).
and disordered presentation of evidence they might not be able to ‘hold on to important information’. But additionally the duration and non-sequentiality will set this evidence apart from all the other evidence they have seen; it runs counter to the expectation of a ‘short sharp and focussed’ presentation of evidence.

On the other hand we have the sequentiality of the overall investigative process. How do these two issues interrelate? Let me explain this with reference to Scheffer’s (2007) analysis of the role of sequentiality for what he terms the ‘micro-formation’ of the defence case. Sequentiality is not just important for the way in which a specific account emerges in court, but it is also central for the overall organisation and transition evidence undergoes from the investigative to the trial process. Scheffer argues that in court the defence barristers unfold a “field of presence” (Foucault 1972/1989, p. 64), within which they contrast, confront, juxtapose and thus integrate all the information and statements that have previously been collected and that have undergone a crucial set of transformations in the run up to the trial. Hence during trial the barristers populate this ‘field of presence’ with those statements, skilfully carving out their particular shape and intended efficacy within the trial. The same is true for the prosecuting barrister, but the video has skipped the transformation stage, it delivers unrefined evidence directly into the courtroom. So where the video is being played, the barrister cannot unfold their field of presence, they have to stand back while the video clutters the field of presence with untransformed information from another time zone.

It is in this sense that I argue that the video is a fanciful witness on children’s behalf, because it short circuits the time zones of veridicality, it short circuits the investigative time zone of the police with the fact finding time zone of the court.

Purified evidence and tape-fetishism

Situating the police officer’s activity and the way it is embedded in the overall structure of English legal practice as described in chapter 8, their declared task can be described as an attempt to purify children’s evidence, to free it from ambiguity. This is a move similar to what Stengers (1997) outlines as the crucial change in the natural sciences during the 18th century. A move that she also finds reflected in Freud’s shaping of psychoanalysis as a science.

“Just as the eighteenth-century chemist no longer deals with the materials that he will use in the natural world, no longer studies the unpurified primary materials that the artisan transformed, but “creates his object”, the analyst institutes a state that has all the aspects of an “artificial illness”...” (Stengers, I. 1997. p. 97).

In a similar vein the police officers attempt to create a purified and stabilised forensic exhibit. They create the ‘pure object’ that can be examined under the controlled conditions
of the courtroom. Drawing on my above analysis, one could say that in this case purification means the extraction of time, the removal of temporality. The video recording is an attempt to extract, to remove actual time from the interviews, in order to create an artificially timeless, stable capture of an immediate instance of evidence emerging. As I have argued it is this very attempt of stabilising and freezing an objective capture of the evidence that betrays the effort, because facts do not travel well on video, as the video resonates awkwardly with the time zone it is inevitably implanted into later on. During presentation time seeps back into the process because any viewing produces its own resonances.

This points to an intriguing link to what Ashmore, McMillan, Brown (2004) call ‘tape fetishism’, that is, “the treatment of a tape as direct evidential record of a past event, and thus a quasi-magical time machine.” (Ashmore et al 2004, p. 349). Following my analysis we could see that children’s video recorded evidence has been designed to be exactly such a time machine, a fetish of stability and objectivity. Yet the video itself is a witness with a character and a reputation as Ashmore et al outline. There is a general mysticism of objectivity surrounding recorded material. And the indestructible credo of ‘What you see is what you get’, or, what you see is what ‘really happened’, has always been the devil in the detail for discourse analysts, legal professionals, jury members and media spectators alike. Examining recordings in qualitative research and in legal contexts, Ashmore et al explore the question of how we actually hear/see what is on tape and which rhetorical processes are concomitant with our decisions. Their arguments focus on the transcripts of tape recordings, hence they are inspecting the same phenomenon I have been concerned with, only they consider it from the ‘opposite end’. Still, they come to a very similar conclusion.

"...the tape is not and cannot function as a time machine. It cannot function in this way because there is never an unmediated hearing. (…) As an artefact this tape may well appear as a fetish, but if it does so this is because it has already been subjected to a series of transformations, or translations. Its career as a fetish object begins not at the moment when it slips into the analyst’s audio deck, but further back, when it is revised and catalogued, as a piece of research material (…) and potentially even further back when the conditions of its recording are negotiated (…). Attending this chain of transformations allows us to see around the inevitability of tape fetishism." (Ashmore et al 2004, p. 370-371).

I have explored some of the transformations and translations the video recorded evidence undergoes before and while it is being produced and put forward to the court as what appears to be, or is indeed hoped to be a fetish of objectivity. It is precisely because of its assumed role as a fetish that it backfires, because this status obscures the fact that it creates a short circuit between different time zones of veridicality.

Video recorded evidence was set up with the well-intentioned aim of allowing for children’s voice to be heard in court in detail and in an unambiguous fashion, in order for it
to be given due weight (as demanded by the UN Convention of Children’s Rights), while addressing the problem of children’s immature memory and their potential suggestibility. Yet, by short-circuiting the two time zones of veridicality, the video ends up creating more ambiguity than it resolves, and we can already see how this will ultimately be at children’s expense. Firstly the police officer’s attention is directed away from the individual child, as they try to correctly handle the paradox of performing simultaneously within/towards two time zones of veridicality; planning how to elicit potential evidence in anticipation of the possible impression it will make in court, while also maintaining their own integrity. Secondly the video’s showing in court short circuits the two time zones of veridicality. And as the video betrays the courtroom’s traditional expectations for emerging evidence, it becomes even more difficult for children’s voice to be heard in court. The video is and can not be a time machine. It carries a serious structural problem that undermines this practice above and beyond the officers’ efforts, potential mistakes or misperceptions; above and beyond the question of how it is actually applied and whether anybody in particular should be blamed for ‘bad practice’. This will become even more evident in the next chapter.

Ashmore et al’s considerations about tape-fetishism also provide an intriguing resonance with the methodological issues raised in chapter 10. Once again it raises the question of how to relate to the ‘real’, what should research consider to be the ‘real’ and what is the consequence of this decision? The tape, as an instrument of research, data collection and data analysis becomes visible as more than just a container of information, it is not the frozen instant of the ‘raw’, ‘bottom-line’ reality that is to be examined. The tape is a mediator, a set actor within a dynamic process of transformations that seem to run both ways, continuously questioning the location and nature of its own source and at the same time establishing itself in ever new relationships to future listeners/viewers. The tape reinvents itself as the material reality of every one instant thereby realising its own construction. To grasp the material and momentous complexity of this, it seems, we have to venture into a region somewhere ‘beneath’ (below or within) discourse and beyond ‘conversational patterns’.

11.2 Structural uncertainty: shifting poles of accountability, responsibility and authority

As outlined earlier, as a result of the visibility created by the video, the issue of police officers’ integrity has become a matter of principle scrutiny. Now the officers have to
actively and continuously produce their integrity and thereby that of the interview afresh at the very moment of conducting the interview. Yet, it seems unclear what exactly constitutes this integrity. With regard to excerpt 1, I have already pointed to the continuous shift between paradoxical poles of accountability. Officers must not “conduce cajole or threaten” (1-2) the witness, and account for not having done so by accounting for “every single moment that they are with them” (36). Yet, this again might ruin the rapport and intimidate the witness, foreclosing a disclosure. Still, they need to already plan how to present the witness to the court and not having performed the interview in a legitimate way might ultimately undermine the evidence, ruining the child’s case. We are left with the question what exactly qualifies ‘integrity’ and what does it mean to conduct an interview in an appropriate fashion? Looking back at excerpt 2 and 3 we can see that the officers are oscillating between an orientation towards the guidelines, and the judge, the child, the barristers, the jury and ultimately the guidelines again. Hence they are positioned and operating amongst shifting poles of accountability and responsibility. We can see the police officers as operators at nodes of complexity.

The paradox of integrity
Let me return to excerpt 1 and consider the exchange with regard to its actual conversational context, that is, as an exchange in a teaching and training context.

[Excerpt 1]-fragment-

1    TO: [...] but why do we do it? It's this issue about whether they've been what? (.) conduced cajoled (1) threatened that's the issue (.) ((PO1: hmm)) if they'd been conduced (.) cajoled (.) or threatened it's likely to be b::::y (.) the person that we've brought with them as their witness supporter (.) ((PO1: hmm)) another family member who happens to be at the police station (.) or a police officer (.) (36) which can happen at anytime (.) it can happen before they arrive at the police station (.) as they arrive at the police station after they leave the police station (.) y'know I find that the fact that they say that you gonna do this and that (.) but I find that (3) a little bit a bit a bit you know (1) it it's a::::most like saying like you a::::t::::ing (1) hhhhhffff taking this person into custody (.) ((PO1: hmm)) I would if I wanted to go to the toilet during the course of an interview at a police station the last thing I would expect is for the police officer to follow me out of the interview room to the toilet (1) ahm =

2    PO2: if the tape's running whilst they go to the toilet (2) you're gonna be seen on the tape anyway (1) you're gonna be seen?

3    TO: you're gonna be seen?

4    PO2: if the tape's still running (.) while they nip out to the toilet (.) (TO: "yea") you stay in the interviewroom (.) (TO: "yea") you're gonna be shown (.) on there "anyway" =

5    TO: the officer is yea (.) "there'sn there'sn (.) but the issue (.) the issue I am talkin'bout is that its talks about an' and (.) Helen's (247) mentioned it they're about security at the police

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247 Name changed. The training officer refers to a previous remark by PO1.
11. Matters of time, integrity and accountability: children’s evidence between psychological research and legal practice

Following the training officers’ turns we get a sense of his ambiguous position towards the guidelines, as he delicately shifts between the position of a teacher/instructor who is explaining the material, to that of a critic who is actually distancing himself from the material and indeed openly disagreeing with it. Interestingly, on the other hand it is one of the participating officers who challenges his critique, putting him right with regard to proper procedure (45). In excerpt 1 line 1 the training officer is clearly positioned as a teacher. He poses two rhetorical questions (“...but why do we do it? It’s this issue about whether they’ve been what?” line 1) and then goes on to answer his questions instantly in a neat three part list (“conduced cajoled and threatened that’s the issue” line 1-2). He then repeats this same kind of turn twice. In line 2-3 he poses another rhetorical question that he goes on to answer in a three part list (“if they’d been conduced... it is likely to be by?” line 2-3). This is followed by an interspersed “ok” (5), confirming what he has just established and to allow a pause for the information to sink in. Then he moves on, building another layer in his unfolding argument, again delivering a three part list (6-7). However, counter to what one would expect of a teacher, what he is ultimately leading up to and carefully establishing via this intricate ‘three by three’ rhetorical move, is not a clear explanation for the rule he is referring to. This turns out to be an elaborate and delicate build up to criticising this very rule. In line 8 he hesitantly tries to pin down how he “finds that”, and thereby signals that
11. Matters of time, integrity and accountability: children’s evidence between psychological research and legal practice

this is ‘just’ a personal opinion (‘I find that’). Then he moves on to a very mitigating “a little bit”, which he repairs into a less mitigated “a bit a bit”, and then adds “it it it’s a:::most like saying like you a:::re” (line 9), again pre-emptively mitigating his conclusion and hesitantly searching for the right expression. This is followed by an audible exhalation that could be understood as marking another ‘searching for the right expression’ pause, to then pointedly converge on his point: “taking this person into custody” (9-10). So he has very delicately and elaborately, and by means of a ‘teacherly’ rhetoric, built an argument that backs his disagreement with the guidelines and is thereby adopting a stance that is opposed to the actual material he is supposed to teach. And he confirms this disagreement more strongly in line 23 with an extreme case formulation (“I really don’t agree”), indicating his detachment from this material by referring to it as “it talks about” (20) or “it says” (42). This ambiguity of the training officer’s ‘teaching-position’ arguably reflects the ambiguous position created for the officers’ interviewing practice.

Crucially the point the training officer develops so carefully in his rhetorical ‘three by three’ figure (lines 1-7) is about the efficacy of suggestibility within their practice. It is about the way suggestibility relates to ‘good practice’ interviewing, and thus to their integrity and to the way they are expected to perform and express this integrity. He carefully points to the fact that suggestion is a dispersed phenomenon. He outlines that effectively, suggestion or witness tampering can be committed by anybody, the “witness supporter”, “a family member” or a “police officer”; and it can happen at anytime, “before they arrive at the police station”, “as they arrive”, or “after they leave the police station” (lines 4-7). Still, it is for them, the officers, i.e. in the police station, and more precisely during the interview, that the guidelines make suggestibility such a central issue by providing these rules and creating visibility. Obviously in this excerpt the training officer is specifically referring to the ‘toileting rule’. But his elaboration exemplifies a much broader point at stake. From the police officers’ perspective, or at least following the picture the training officers conveys here, the guidelines funnel the critical gaze and public scrutiny, they funnel the ambiguity surrounding suggestibility, and concentrate it, project it on the police officers, by magnifying the importance of the situation in which they might encounter suggestibility. So the precariousness and ambiguity of suggestibility is gathered into and concentrated on what happens at this very point in the interview, apparently blanking out all the other scenarios in which it might occur. This sense of being the focus of critical attention, being under surveillance, is clearly reflected in the officers’ comments about the video. The video goes from being a witness on their behalf (proving their integrity by ‘showing them on tape’ line 13 and 17-18), to being an instrument of surveillance. It is seen as a controlling
observer and unpredictable witness, that is inherently geared towards extending its gaze infinitely. It is imagined that its gaze will only be satisfied when it can capture the ultimate fringes of the officers' or the child witnesses' space, the toilets, as the closing lines indicate ironically (lines 60-63). For the officers this produces what the training officer calls this fixation with the "fear of evidence being tainted" (32). So regardless of whether this fear is 'objectively' justified or not, it is a vital part of the police officers' position. Reflected within this principle fear is the dynamic of suggestibility, looming within the process, making rapport and integrity practically irreconcilable for the officers.

However, despite the training officer's efforts to raise this paradox, from the way the discussion continues, it is quite clear that the officers already have a definite preference for how this dilemma should be resolved. One of the officers argues against the training officer's doubt, and corrects him, clearly indicating that the crucial issue at stake is their formal integrity to the court ("stand up in court" line 50). PO1 reminds the training officer that it is crucial to maintain their integrity, and that it is their formal integrity as a police officer, the formal integrity to the court that is "effectively your integrity is supposed to be to be intact" (45) and to be performed to the judge ("your honour" line 56). And here the importance, the nature of and the shared knowledge of this 'formal' integrity is expressed literally by the officers' display of how this integrity is performed in court (50-56).

[Excerpt 1] -fragment 2-

45 PO1: but effectively your integrity is supposed to be intact isn't it because if anybody else=
46 TO: why? 'cause you'r a policeofficer?=
47 PO1: °yes° absolutely
48 (3)
49 TO: °yea ok° I I'm you know (1) it's horses its its what the guy says=
50 PO1: I think you can stand up in court and answer all the questions that they're asking you and
51 you'll say no they weren't interfered with no this didn't happen (TO: yes) [umm]
52 53 TO: [all the time] they were with me
54 PO1: yes
55 TO: I can say that nothing untoward occurred=
56 PO1: °your honour°

This turn in the discussion shows that the nature and indisputable importance of this formal integrity is a shared knowledge between trainer and officer. Although this exchange began as a discussion, the training officer, when challenged, does not argue this point. There is a long pause in line 48 followed by the training officer's yielding "yea ok" in line 49. And to confirm this even further he then falls in with what PO1 is presenting in direct speech, completing her sentences, and they conclude this performance of 'formal integrity'
as if reciting a passage of a well known play or poem. Hence this standard performance of 'formal integrity' is something they both know by heart.

I would argue that the paradox of integrity, i.e. the dilemma reflected within the positioning between shifting poles of accountability and responsibility that briefly came to light in fragment 1 of excerpt 1, is a form of 'structural uncertainty'. This structural uncertainty derives from the irreconcilability of rapport and formal integrity. For the officers it is intensified by the gathering of the critical (public) gaze onto the interview situation. I call this 'structural uncertainty' because it is not meant to reflect the officers' state of mind. This uncertainty is characteristic to the structure of this practice, it is characteristic for the position police officers occupy within it. And here, answering to this structural uncertainty, officers decide in favour of formal integrity to be on the safe side. A time-honoured and familiar, almost ritual, incantation forecloses on the potential argument between trainer and officer (see fragment 2 of excerpt 1). In this sense we can say that they solve their dilemma by resorting to 'defensive practice'.

Looking back to chapter 8.3 we can see that it is extremely unlikely that the interviewing officer would actually be called to court as a witness. Following the accounts of barristers and judges it was clear that neither of them consider the court appearance of the interviewing officer as particularly helpful. If there were formal complaints about the way the interview was conducted, the incriminating evidence would most likely be available on the video anyway. Given this it is rather peculiar that the officers should be so concerned about their integrity.

The rapport paradox and the 'ethical search for the truth'

However, there is another reason why officers would tend to stick to the 'safe' side of maintaining their formal integrity. Let me focus on the rapport itself, the elusive state of relations between interviewer and child that they are frequently reminded is crucial for eliciting a disclosure, obtaining detailed evidence, and that will help to avoid misunderstandings and hence, inadvertent suggestion. This rapport is rendered ambiguous by the implicit dynamic of suggestion. Too little rapport might intimidate the witness or a challenge might ruin the rapport and "pooh pooh" the interview (excerpt 3, line 1-2). But too much of it will be equally detrimental as it may give the impression that the officer is so close to the child that they are steering them. Yet additionally, and for the officers this is equally problematic, it could taint the evidence, weaken the impact of the child's evidence in court. Their interviewing could be seen to be encouraging specific responses and could thus be challenged as leading and suggestive, which would undermine the child's evidence.
as such. This ‘rapport-paradox’, which has been evident throughout the previous excerpts, encapsulates most concisely the dilemmatic intersection of psychology and law. It has been exposed by-, or is indeed implicit within the problem of suggestibility as it is present within, as it transgresses this practice.

This dilemma is nicely expressed in the following excerpt, from a police training course. Here the training officer has just clarified the overall agenda for their interview. It should be neutral and entirely open minded inquiry into what happened. It should be an ‘ethical search for the truth’.

[Excerpt 6]248

TO: [...] but at the end of the day we want to know what’s happened regardless of whether it’s what we want to hear or what we don’t want to hear really (1) it’s ahm (2) what’s the [???] terminology? (2) ahm ethical search ahm ((PO2: search for the truth)) search for the truth (1) that’s how we describe it

PO1: that is right and it has to be ethical (1) you you (1) I think we’ve all it again everybody must have fallen foul of being encouraging and they’re just like you say tell you what you want to hear (1) and you go back with that and then you sort’f look at it in the cold light of day and you think (.) ou::chh °it’s completely wrong° (1) and you’ve also been in court when you are sitting watching your video thinking ohh °god did I say that?° and you are being encouraging and it’s supposed to be relatively cold (2) but sort of you’ve got to be friendly enough to get the information

So suggestibility is a constant threat, taking the shape of tainted information that was obtained in the context of too much encouragement which will “in the cold light of day” or ‘sitting in court’, look ‘completely wrong’ (7-8). Here the dilemma is neatly expressed within the officer’s depiction of being “supposed to be relatively cold” but, as the officer adds hesitantly and vaguely after a pause, “sort of you’ve got to be friendly enough to get the information” (10-11). But what exactly does it mean to be ‘sort of friendly enough’ in a concrete context? There are no clear metrics with which to address this question.

So structural uncertainty is related to the potential challenge police officers might face in court, but it is also intensified and doubled by the way the guidelines structure police practice and the visibility of police practice. At the same time this structural uncertainty resonates with the ambiguity that suggestibility carries into the way practice is perceived as well as the way it is performed and perceived to being performed, feeding back into police attempts to regulate their own interviewing practice.

248 Poll: 625-235.
Children's evidence suspended between psychological research and legal practice

The following case example illustrates the concrete effect of this structural uncertainty and the way the police officers are positioned towards it. And it also exemplifies concisely how the officers tackle this structural uncertainty, i.e. how they operate at this concrete node of complexity.

One police officer described an awkward experience 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 (A) the girl had reported being victim of sexual misconduct by another member of the care staff (B). The accused denied all the allegations. The police officer found that even in the course of repeated interviewing the girl appeared unwilling to disclose any details about the alleged abuse. As the initial report by staff member A appeared convincing, the officer says he grew increasingly concerned that he might not have conducted the interview with the girl in the correct manner, and thus might have precluded a disclosure. Additionally he thought he might not only have failed to facilitate a disclosure but perhaps even have devalued any potential subsequent evidence from the girl by having subjected her to repeated questioning. Any subsequent disclosure could be attributed to the suggestive effects of his repeated inquiries. The case was finally resolved by a lucky coincidence. It was clarified by an unrelated chance remark by another child who had witnessed how the member of staff B who was accused of sexual misconduct had accidentally hurt the girl with a food trolley. In the light of this information, it had been possible to clarify with the girl, beyond any doubt, that this in fact was the incident she had initially complained about.

The police officer reports that retrospectively, it became clear that, even though the reporting member of the care staff had not been entirely certain about the accusation, she had, after consulting with her colleagues, decided to report the incidence to the police anyway, rather than clarifying with the girl first. She had done this because she feared her clarifying questions could have suggestive effects on the girl, or that the police might later, during a possible investigation suspect her of having suggested something to the girl. 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.

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249 Some details of the case are altered to guarantee anonymity. Still, the exemplary nature and principle character of the example is not affected by the alterations.
This is only a brief sketch of a complex incident, but it reflects a dynamic that is by no means unusual. It clearly underlines the structural dynamics around suggestibility, uncertainty and integrity I wanted to highlight. Let me isolate three central points here.

Firstly, there is a clear sense of the way structural uncertainty pervades the whole incident, affecting not just the police officer, but also the care staff. The staff members’ collective uncertainty about the accusation produces (and thereby also exposes) uncertainty about their own professional position, and thus about the adequacy and legitimacy of the actions that need to be taken. They partly resolved this uncertainty by passing it on to the police officer. Hence instead of clarifying the issue with the girl, they opt for maintaining their own ‘formal integrity’. They resort to what I termed ‘defensive’ practice’, making sure proper procedure is followed. For the police officer uncertainty multiplies even further when he is left to wonder about his own professional conduct and integrity. Again it is the concern about a potential disintegration of his (and the interviews) formal integrity, that guides his practice and that features as a central part of his account. So his account also reflects a form of defensive practice.

Secondly, 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, that is, the assumption that an incident of sexual abuse must have happened. Let me make this point very clear. 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) and the positioning of the professionals within this practice, destabilises their positions. So interestingly in this example suggestion proves to be a pervasive dynamic. There is no distinguishable ‘source of this suggestion’, it is resonating, efficient within the structure of this practice in general, as well as affecting the concrete operations in this case. Yet it is also diffuse in its direction. None of the involved practitioners can be accused of having ‘caused’ the suggestive influences to which staff members and the police officer succumb when following the hardening suspicion that sexual abuse must have happened. Peculiarly in this case the girl is the only one who does not succumb to the available suggestion. Despite the fact that she has, strictly speaking, been subjected to a direct form of potentially suggestive practices when being interviewed repeatedly about the event in question. Yet, she persistently clung to her sparse but accurate account.

Thirdly, this shows how the professionals are struggling to reconcile their own professional roles and the demands of formal integrity, their awareness of sexual abuse and suggestion,
with the demands of the concrete case. As stated above, I am not implying that any of the involved were acting unprofessionally or hastily, this is not a question of 'bad practice'. But looking at the structural dynamic and the positionings, we can see clearly that, amidst the paradoxical obligation to reassure and legitimise their own actions, attention is diverted from the girl. Those dealing with the case are less and less able to focus on the 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. Hence one could say that the girl’s testimony ends up being suspended between theories about abuse, suggestion and disclosure, and the ambiguous nature of the practical obligations and considerations of those who were trying to help her. It is suspended between the officer’s aim for rapport and disclosure on the one hand, and the awareness of issues of false-allegations, suggestion and their need to maintain their own integrity and that of future interview(er)s on the other hand. In this sense I would argue that the child’s account is suspended between theory, research and legal practice.

Luckily, and thanks to everybody’s alertness, this particular case could be resolved. Yet, against the background of the high profile miscarriages of justice discussed in chapters 2.1 and 8.2, it is quite obvious that whatever the exact outcome of the ensuing polarisations and diversions might be in other, less fortunate cases, they are always at the expense of the children.

Structural uncertainty and defensive practice
This example illustrates how the issues arising around the paradox of integrity, i.e. the efficacy of suggestibility being condensed and projected onto police practice, combine with the dilemma expressed by the rapport paradox. The heightened awareness of, and visibility of this practice contributes to the structural uncertainty that characterises police officers’ positions in this practice. The officers are aware of the dangers of false accusations and of undetected abuse but also of suggestion and the issue of tainting evidence, but they do not have the authority or confidence to resolve this uncertainty, so it is deferred, passed on to the next level of legal practice if possible. They defer the uncertainty, by operating towards the maintenance of their own ‘formal integrity’ and this means resorting to ‘defensive practice’, closely following procedure to avert ambiguity and protect their own integrity. With regard to excerpt 1 we could see how the officers did not just consider defensive practice a self-evident choice, but additionally it was thought to be the most beneficial solution for the child as well. Maintaining their own integrity would guarantee the integrity of the interview which in turn would sustain the evidence’s efficacy in court. Yet, the case
example illustrated that defensive practice can lead to an inflexible and formulaic approach to interviewing that reflects the uncertainty of the officer's own position. In effect defensive practice means that the children and the concrete case are removed from the centre of attention and their account ends up suspended between the ambiguous expectations and obligations the officers see themselves confronted with. Additionally this structural uncertainty means that the officers are vulnerable to the overall atmosphere that resonate around issues of child sexual abuse and suggestibility in general. This adds to the difficulty of maintaining a balanced position towards a concrete case and again contributes to the structural uncertainty that spreads into interviewing practice. Here the formulaic approach of defensive practice will lead to interviews that are paced badly, being inflexible and drawn out and at times creating awkward silences or interactions where the guidelines are applied too literally. Overall defensive practice means that officers are unable to resonate with the demands and specificities of the concrete case. In effect defensive practice is always at the cost of child witnesses.

This finding resonates with the comments of judges reported in chapter 8.3, who complained about the quality and length of some of the police interviews, pointing out that the officers often do not get to the point and ‘beat around the bush’, pacing interviews badly and that they should have their “antennae going” (J1: 1037) when interviewing children in order to get good evidence from them. Recent comments from the judges I interviewed indicate that this is still a relevant issue. In an email exchange one of the judges comments: “I am increasingly concerned about the interminable length and poor quality of interviews with complainants.” (Judge1, summer 2006).

Additionally this analysis provides a complex perspective for the research that has shown the apparent non-compliance of police interviewers with the guidelines (see chapter 8.2).

Similar to the previous analysis, that explored the short-circuiting time zones of veridicality, we can see that child witness practice and the way it is organised through the guidelines and instructions, carries a serious structural problem that undermines this practice above and beyond the officers' efforts, potential mistakes or misperceptions; above and beyond the question of how it is actually applied and whether anybody in particular should be blamed for 'bad practice'. It is clear that translating findings into practice is neither a simple matter of better guidelines or 'good instructions', nor is there such a thing as straightforwardly 'correct application'. While there might be officers who do not understand or wish to follow the instructions, the overall problem that has so far been overlooked is that of structural uncertainty and defensive practice. Considering these issues also provides a new
12. Speaking up against justice: memory, credibility, protectability

A central problem illustrated in chapter 8 emerged around dynamics of children’s positioning within the legal system and the way special measures are employed to make children’s voices heard. Crucially the question of credibility emerged. The question of how to define, grasp and establish children’s credibility in relation to-, or on the background of special measures. These measures were introduced to preserve, transport and amplify children’s voice in order to make it’s delivery more accurate, more transparent and thus to ensure the gathering and display of children’s ‘best evidence’. But what exactly constitutes this ‘best evidence’ within practice? How is it defined, produced and recognised? And what are the costs involved in its production? These are the questions that drive the analysis in this chapter.

12.1 Credibility: the discursive reality of children’s credibility in legal practice

I would like to begin my analysis by examining a crown prosecutor’s account of how she uses video recorded evidence in making her decisions over whether to prosecute or drop cases. The following transcript is part of an interview I conducted with the crown prosecutor.

(I’ : Interviewer -- ‘CP1’ : Crown Prosecutor).
I: what’s the most problematic thing then in child abuse cases?

CP1: uh::h (1) child abuse cases tha’ they’re not really one of the most prob’ a’ I was thinking more of things like drugs cases ((hmhm)) when you’re missing () the continuity and stuff like that ((hmhm)) ahm (1) “child abuse cases”

I: I mean ((hmmmmm)) when reviewing these videos what would you be looking for then () for example?

CP1: It’s hard to tell isn’t it you just (1) how they’ll come across in front of a jury that’s ((hmhm)) that’s really (2) ah::m (2) if (1) if you think that (1) there’s something () it’s hard to define it’s just instinct really isn’t it a lot of it you’d you’d (1) I haven’t had many but I’ve had a couple () where I think I’m not entirely convinced I believe them ((hmhm)) you know ahm (2) but if it’s just instinct then to be honest and if there’s nothing on the file to indicate (1) any information at all to actually undermine the credibility of the witness () ((hmhm)) then I would go ahead with it because ((hmhm)) (1) you know th’ the evidence is there the the the child witness has come out with () sufficient () information to to found the charge ahhm and really () my own personal (1) feelings don’t come into it it’s got to do it purely on the evidence […] but it’s it’s really just (1) listening to what they say (1) and seeing (1) if there’s anything they say that’s contradictory ((hmhm)) (1) anything that the police can make further inquiries into […] just basically things that the police can () can check up on it’s not really about (1) do I believe them or not (1) ahmm (1) b’ but it is (1) if they say things that () are contradictory then that is going to () undermine their credibility so it’s (1) it’s it’s just generally getting a feeling for the witness really an’ and seeing (1) evidentially if there is anything () arising from what they’ve said that can be () followed up to strengthen the case ((hmhm)) “that’s basically what I look for”

In this account (9-25) it is quite obvious that her use of the video is not guided by criteria that can be explained in a straightforward fashion. She seems to oscillate between issues of “instinct” (11 and 13) on the one hand, but on the other hand she states that she is purely looking at the “the evidence”. But then the question is also “how they’ll come across in front of a jury” (9) and “getting a feeling for the witness” (23).

Before going into detail let me draw attention to the way her answer is set up. In order to understand in conversational terms what the prosecutor is doing in this account, it is crucial to note the framework provided by the interviewer’s question. In line 1 the question refers to “the most problematic thing” in child abuse cases and when this fails to produce an answer, the question is rephrased in a more general way asking “what would you be looking for then” (6-7). The question, even though mitigated, still implies that a ‘problem’ is at stake and thereby sets a frame of accountability; it asks the prosecutor to report her practice, but also to account for it, to justify how and why certain (problematic) decisions are made (Potter 1996; 2003). This sets the agenda for the answer provided in lines 9-25, which can thus be described as a hesitant and delicate way of accounting for one’s practice.

250 CPS1: 130.
This conversational management exposes the dilemmatic, conflicting issues that impinge on the ‘assessment’ of credibility for the court.

Clearly the prosecutor’s response is set up hesitantly, it is a very hedged response, indicating the delicacy of the issue, but also indicating that she does not have a ready explanation of this issue to hand. It may be that this ‘unpreparedness’ is inherent to her position within the legal system. It is certainly not part of a crown prosecutor’s everyday practice to explicitly account for these kind of decisions. This may explain why she is unfolding the criteria step by step as she moves through her account. Nevertheless, as we shall see, there are indications that credibility is a dilemmatic issue in this area of practice as in others and that its dilemmas require the prosecutor to give a circumspect account of her use of the video.

Crucially the first and most important thing mentioned is the perspective her assessment takes, and that is “how they will come across to the jury” (9). So similar to the police officers her orientation is towards anticipating the juror’s future viewing of the video. As she does not have to interview the child or produce the video, her criteria for truth and credibility are entirely oriented towards the juror’s potential perception of the video. The jury are not legal professionals, they are put in place precisely because they operate on the basis of common sense. Hence it is crucial to see ‘how’ the video ‘will come across’ to them, and it is on this level that the prosecutor says that it is “just instinct really isn’t it a lot of it” (11). So here the prosecutor is speaking from the position of a ‘member of the public’ looking at the video and getting an impression of the credibility of the witness.

Still, in the following elaboration (12-23) she changes direction and recalibrates her account carefully with regard to her own position as a legal professional. Because while for members of the public ‘instinct’ might play a role, as a legal professional establishing the evidential value of a case she needs to distance herself from something as vague as “just instinct” (13). So in line 13 ‘just’ takes on a different meaning, it now indicates the insufficiency of instinct, it is ‘merely instinct’. It is something to be avoided and thus in the following she provides a whole list of proper legal terminology to underline the stable criteria for her decisions that will override ‘instinct’. She will see if there is anything “on the file to indicate any information” (14) to “undermine the credibility of the witness” and to see if “the evidence” (16) is there to “found the charge” (16). So it is clearly not about ‘instinct’ but it is a straightforward matter of evidence being there or not, being present or absent. If the child “has come out with sufficient information” she will go ahead with the case even if she has had an ‘instinct’ that she was “not entirely convinced” she believed them (12) (as was the case in a ‘couple’ of cases). And this underlines that “her own personal feelings
don’t come into it” (17-18) because “the evidence” was “there” (16). And here she establishes even further how straightforward this is, because “it’s really just listening … and seeing if there’s anything they say that’s contradictory” (19-20)”; and it is “just basically things that the police can check up on” (21). And by introducing the issue of ‘contradictions’ and thus inconsistency, she refers to another objective legal criterion that is absolutely crucial in determining a witness’s credibility, because, as she outlines this can be ‘checked up by the police’, and if there are contradictions it is “going to undermine their credibility” (23). And again she affirms that it is “not really about do I believe them or not” (21).

These shifts also perform what has been termed a ‘stake inoculation’ (Potter 1996, Edwards and Potter 1992). The prosecutor distances and thus inoculates herself from the child, the evidence, the decision and thus the criteria by clarifying that “it’s not really about do I believe them or not” (21-22) and that her “own personal feelings don’t come into it” (17-18). She has neither stake nor interest here and is merely the operator, the neutral filter through which the evidence must pass according to certain rules. Because “it’s got to do it purely on the evidence” (18) as she puts it, skilfully suspending both, the actor and the activity; she suspends the question of who (or what) exactly this ‘it’ is, and what ‘it’ is that ‘it’ has got to do ‘purely on the evidence’. Thereby she successfully distances herself from ‘it’ (the thing) and also removes herself as an agent of such ‘doings’ (‘it’ the activity). Additionally the activity of ‘undermining’ of credibility is explicitly positioned with the child, because it is the things they say that will undermine their credibility (“if they say things that are contradictory then that is going to undermine their credibility.” (22-23)). So here she has positioned herself as a follower of straightforward rules that will be applied to the evidence, i.e. to what the child says. In this sense and because of the positioning work she has done it does indeed look like a very straightforward issue.

However peculiarly in line 23-24 she closes, as if to sum up the whole account, by stating that “it’s it’s just generally getting a feeling for the witness really”. With this she leaves the realm of legal terminology behind and makes a sudden return to what I have earlier identified as the ‘common sense’ perspective of the jury. Getting ‘a feeling’ relates closely to ‘how they’ll come across’ (9) and ‘just instinct’ (11). At the end of her account she shifts back from the legal discourse into the common sense discourse where ‘feeling’ and the ability to anticipate the juries’ ‘feeling’ is expected to have a general purchase for assessing matters of credibility. Crucially it is not her feeling but a ‘general’ one. However, she goes on to add with a little pause, “an’ and seeing (.) evidentially if there is anything” (23-24). So it is not just ‘seeing’ but it is ‘seeing evidentially’, and here the insertion of ‘evidentially’ is
crucial because it explicitly repositions her within the legal discourse that she had just departed from.

First the prosecutor positioned her initial impression of the video as an important resource for her further decisions. Then she moved into the clearly determined, objective and binary discourse of the law, where evidence is either there or it is not there, and where things can emerge as contradictory and can be checked up. Finally she relapses into the 'general feeling' that already qualified this first impression. The last phrase in line 24-25, “just getting a general feeling for the witness really an’ and seeing (.) evidentially if there is anything...”’, neatly comprises the dilemma of credibility, the paradox she is negotiating. She needs to align common sense criteria and the (assumed) impression of the jury with what need to be objective and straightforward criteria according to which evidence can be assessed. At the same time she must not be seen actively ‘doing’ this, because the evidence needs to ‘speak for itself’. So this is the dilemma she is delicately negotiating and solving here, but, as I will argue on the basis of the next excerpt this happens at a price.

The prosecutor operates at the node of the dilemma of credibility characteristic of the English legal system. This legal system treats common sense as the decisive ‘fact finding measure’, but it is obviously not for the prosecutor to apply her own common sense. She does not make that decision. She must position herself as a legal professional in command of the rules of evidence and investigation so that she can determine if the evidence is there or not and see if there is a chance of conviction. Crucially however her task also requires her to anticipate how the jury will perceive what evidence there is. This anticipation can only be done through her own personal ‘common sense’, which again she cannot be seen to apply. In a sense, then, what she delicately performs is turning common sense descriptions of children’s credibility into the law so as to extract the principles of the law from common sense (from what the jury will see). The simultaneous presence of these two defining issues that she negotiates while detaching herself from them, creates a sense of veiled neutrality, or indeed paradoxical neutrality, in the prosecutor’s account.

I would like to move on to a second excerpt from the same interview. The following is the latter half of a long uninterrupted answer the prosecutor gives when asked how helpful she finds the videos for her own work. She instantly and enthusiastically replied that: “I THINK THEY’re I think they’re very helpful I think they’re very helpful...”. So this is a question that she finds it much easier to relate to than the earlier one.
[Excerpt 8][251]

1. CP1: [...] I think they're good I think they're I think they're (2) as a way of looking at the child
and seeing how the child will come across to the jury (hmhm) (1) I mean I had one (2) I
was really chuffed about this [...] I had ahm a video tape that I watched for a five year
old (hmhm) now (1) that's young for here we don't normally prosecute on the evidence
of a five year old (hmhm) that's it's unusual (hmhm) (1) ahm and she was an absolute
star (ahm) ahm it was an indecent assault [...] and she described it (3) perfectly (1) this and
(1) this was a child who could not have made it up (1) you know her (1) innocence (1)
shone through on the video (1) absolute (1) ohh she was (1) a doll absolute doll ahm (1)
and you watched it and there was no corroboration (1) at all (1) nothing (1) absolutely
nothing except her word and normally (1) you'd think long and hard about that with just
such a small child but (2) and if I hadn't watched the video (1) you'd think "uhm you
know uncorroborated evidence of a five year old" (1) but she was so good (1) I said well
let's let's prosecute because I think a jury will believe every word she says no matter what
he says in his defence (hmhm) and he got three years he was convicted (hmhm) and
(1) that's a really good example (1) of I think how helpful having a video can be (1) because
it helps to assess you to you know (hmhm) just assess what they are like (2) you know
you get you get some that're (3) sort of look shift::y but then (1) it's it you know it must
be such an unpleasant (1) if I had to describe to you you know a sexual experience it'd be
bad enough but (hmhm) doing it to a stranger a man when you're a child must be (3)
hideous (1) so you (1) I think you've got to take into account (2) that they might look
shifty and uncomfortable because they are uncomfortable you know so ahm (3) but it's I
think they're very good they're very useful I much prefer them [...]"
it up” because “her innocence shone through on the video” (6), which again is underlined by the fact that she was “absolute (1) ohh she was a doll an absolute doll” (8). So after all it is not actually the girl’s ‘describing it perfectly’ but it is the fact that the girls gives the impression of an innocent doll, that makes the prosecutor so confident that the jury will believe her. This is underlined further by the next line, because here she explicitly refers to those evidential criteria mentioned beforehand, such as corroboration. In this case there was no corroboration at all. As with the praise of the girl’s innocence, the lack of corroborating evidence is presented as making for an exceptional case expression. She repeats that there was “no corroboration at all (1) nothing (.) absolutely nothing except her word” (9). Here the last phrase is crucial, because it establishes the distinction between what the girl said, that is, ‘her word’, and what she ‘was’ (innocent, a doll). Given the elaboration that follows this in lines 10-12 it is clear that ‘the uncorroborated word’ of “such a small child” would not be deemed credible. So in contrast to what the previous excerpt suggested, in this case credibility is not so much determined by what the child actually said.

The prosecutor offers this to be understood as a taken for granted (legal) common place, by presenting it as something one would ‘obviously’ be ‘thinking to oneself’. She says “you’d think uh::m you know uncorroborated evidence of a five year old” (11-12) as if to imply ‘we all know’ what that means, i.e. that this will obviously not do in court, it is a ‘no-brainer’. Again she frames this in terms of the girl’s performance. The evidential weakness of her word (uncorroborated evidence of a five year old) in this case did not matter because “she was an absolute star” (5), “she was so good” (12) and had she not watched the video she would not have prosecuted the case (10-11).

Looking back at the previous account of how the dilemma of credibility is solved, this example runs counter to the evidential criteria established in the first extract. It seems that for children different measures apply and that impression, feeling and ‘instinct’ will lead the evaluation after all. It is for that very reason that seeing the child on the video is so helpful. Yet, here it is interesting to see how the prosecutor adds another twist to her account after she had already closed it in line 14-15 by saying “and that’s a really good example...”. This addition is set up as if it was just meant to add to, and qualify her praise of the video even further, but it leads her straight into another precarious issue related to ‘seeing children on the video’; the issue of shiftiness. This necessitates further repair and explication, yet ultimately it means that she ends up contradicting the very criteria for assessing credibility that she has just set up within this account with her best case scenario. Some children
"might look shiftily and uncomfortable because they are uncomfortable" (20). Let me examine this in detail.

In line 15-16 she says the video helps "to ass' you to you know ((hmhm)) just assess what they're like". This hesitant repair of the first "assess" into "you know just assess" may indicate a sudden ambivalence towards the actual straightforwardness of this process. To 'assess' alludes to a scientific (or indeed objective legal) process of evaluation, and the prosecutor distances herself from this by adding a 'just', reducing it to 'just assess'. So this 'just assessing' will establish 'what they are like', which, as she has just explained is crucial because while there are those who are 'absolute stars' and will convince the jury; there is also 'shiftiness', i.e. the insincerity of those with unclear motives and intentions, whose truthfulness must be doubted. But again she hesitates and repairs her sentence because the differentiation has become precarious. As soon as she qualifies this further by saying "you get some that're", she interrupts herself, pausing and then correcting what might have come out as 'some that are shiftily', into, "sort of look shiftily" (16-17). This is crucial because it opens up the dilemma she has now allowed to emerge within her explanation and it thereby expresses the condensed paradox of children's suggestibility and credibility that resonates within her account.

By avoiding to say 'they are' shiftily and reducing it to 'they sort of look' shiftily she allows the implication that this shiftiness need not be a fixed state ('being shiftily and insincere'/intentionally devious). It could just be a momentary appearance, or even an impression someone else might get of the child. And making matters even more complex she rushes to add "but then" (17) "I think you've got to take into account that they might look shiftily and uncomfortable because they are uncomfortable" (19-20). So 'looking shiftily' can be resolved into 'being uncomfortable' and there are perfectly sincere reasons for 'being uncomfortable' that are to be expected for a true victim of sexual abuse that has to undergo the "hideous" (19) experience of being interviewed. This is hardly contestable, and a very insightful addition to her statement. Indeed we might speculate that she is at this point addressing the ideological dilemma posed by her otherwise unbalanced presentation of matters (Billig 1991). Still carrying this kind of logic to the extreme, one would ultimately have to conclude that only those who display the demeanour (or 'appear' to be) of the conventionally incredible should be considered as credible witnesses (and this would disqualify the display of 'innocence shining through', because those who appear too innocent, following this logic, must be considered untruthful). Still, in practice, this clearly does not rule out the possibility of a witness simply feeling uncomfortable, for whatever
reason. This twist thoroughly exposes the implicit ambiguity carried into the process by aspects of suggestibility and childhood ambiguity that resonate around this practice.

At this point we can see how the video itself grows an ambiguous entity again. In the prosecutors’ account the video initially stood out as a crucial resource, because it would provide her with an exclusive preview of the child as a witness exactly as they would be seen by the jury (the child is fixed, stabilised on the video), and this would help to alert her to aspects of the child’s performance of credibility that their ‘word’ alone could not deliver.

Yet now it becomes clear that this ‘seeing’ of “what they are like” (16) re-introduces the very ambiguity that the existence of the video was aimed to eliminate.252 (This echoes the ‘enigma’ of tape-fetishism as described earlier with regard to the work of Ashmore et al (2004). How can we know that what we see on the video is really what we see?) By showing the child the video exacerbates and thereby exposes the deep ambiguity of the inner workings and constructions of what children’s credibility is expected to look like. It re-introduces us into the paradoxical ‘mirror world’ that we have seen at work with regard to suggestibility research with children (see chapter 2).

Before engaging with these issues in more detail I would like to recapitulate the positioning of the prosecutor. How does she operate at this node? Considering the implicit paradoxes, it is rather perplexing to see that, while this is not an entirely smooth delivery, and the prosecutor has manoeuvred her way through this last account with a few hesitations and repairs, she emerges from it fluently and apparently unperturbed by the antinomies of the principles that govern her practice. From an analytic distance it appears a rather self-defeating portrayal of her practice. However, she is able to close her account confidently affirming that “I think they’re very good they’re very useful I much prefer them” (21).

This is a good illustration of the prosecutor as an operator at a node of complexity. It is a specific characteristic of this practice that in any concrete moment it has to ‘hold together’ such contradictions. This will be done by negotiating them across a set of rules anchored within the legal system, which allows the prosecutor to delve into and negotiate those paradoxes, move them around and filter them while still being situated within, and being able to retreat towards the stable set of structures. Rather than this being a ‘special case’, a ‘problem for this practice’, I would suggest that these are inherent characteristics of the prosecutor’s practice.

252 This also relates back to the initial dilemma of ‘instinct’ as represented in the prosecutor’s first excerpt. Instinct could show that someone who is actually truthful might look incredible, but it can also indicate that someone who looks truthful is actually truthful, while someone who is not truthful, might look as if they were, whilst they might also look incredible despite being untruthful.
Having looked at this practice more closely it should be clear this specific way of ‘working’ again leaves children suspended in a specific way. This is a reminder of the fact that the ambiguities surrounding children are saturated with, or indeed part of those paradox dynamics surrounding suggestibility. Here, the concrete operations of the prosecutor resemble the dynamics we have observed in chapter 1 and 2 with regard to experimental psychology. There is an attempt to confine the unmanageability of suggestibility to a formal level, to draw it out and tackle it on the safe territory of neutral technical questions (i.e. questions of experimental procedure or indeed legal procedure as in this case).

A further issue emerges with regard to the tools of my own analysis and the way they relate ‘to the real’. In order to get a more detailed understanding of the exact way in which children are suspended at this point I need to step outside of the transcript, and this specific conversational context. While this focus has captured a distinct set of concrete dynamics, the specific concreteness of children’s suspension has so far escaped the grasp. As outlined in chapter 10 I will now interweave an additional frame of analysis to explore the concrete composition of children’s suspension and interrelation with suggestibility.

In order to understand what is at stake here, to get a grasp of what drives the paradoxes within what constitutes children’s credibility or, as in this case, what discursive resources enable the statement that “she cannot have made it up” because her “innocence shone through” I need to readjust the analytic focus and examine more closely the discourses that animate, pervade and resonate with this account and the way the child is positioned within it.

12.2 Childhood ambiguity, memory, agency: children’s rights versus child protection

“Repertoires about children embody conflicting assumptions concerned with ‘innocence, vulnerability, dependency, nostalgia for the past, hopes for the future, original sin or intimations of the unquashed, unalienated spirit here to come (Burman, E. 1997, p. 294).”

I would like to show how the conflicting repertoires and assumptions Burman refers to resonate within child witness practice so as to create ambiguous, paradoxical and ultimately silencing positions for children. As I will now argue, it is these discourse dynamics that constitute the complex and intrinsically paradoxical dilemma of children’s protectability.

In chapter 3.3 I introduced the work of critical psychologists who deconstructed the traditional concept of development and exposed its powerful role within scientific,
institutional, pedagogic, political and medical discourses around childhood. This critical psychology of development has problematised dominant discourses of a naturally maturing, progressively developing child, by showing that they obscure the powerful political, cultural and emotional dynamics that underlie their apparent neutrality.

On Morss’ (1990, 1996) view it is the myth of natural origin that gives children such a special status in science as well as society. Positioning childhood as the natural origin and development as a process of biological growth and maturation, can legitimise claims made about what constitutes the ‘normal’ stages of development, and thus what ‘normal children’ are expected to be like. It also helps to obscure the historically and politically specific institutional and moral agendas and interests that are involved in producing these expectations and constructions against which ‘normal childhoods’ are assessed. Unravelling these hidden political and moral agendas, Morss outlines how this ‘natural’ state of origin implicitly positions children as deficient, provisional members of society. They are not yet ‘beings’ but only ‘becomings’ as he puts it, they are not autonomous but dependent, in need of guidance and thus not fully to be trusted in their accounts. This implicitly warrants their separation from adults in terms of rights and in terms of their position in society. In this sense the ‘special-ness’ of children is at the cost of their isolation from the (adult) community that tries to protect/promote their rights. It is their apparently ‘natural’ dependence and need for guidance (the precise features that constitute them ‘as’ children), that in turn make the attempt to give them an autonomous voice in the law an ambiguous endeavour (Burman 2003). As Burman points out, behind these apparently unproblematic (natural) categories of dependence and guidance, there are broader cultural-political rationales of governing and controlling children as future citizens.

"...it seems there are broad cultural-political investments in maintaining children and young people as docile and dependent through educational, legal and welfare practices that portray them as deficient and therefore in need of training and/or protection." (Burman, E. 2003, p. 39).

Another all-encompassing repertoire closely linked to naturalness and dependency, is the way ‘normal’ childhood and particularly infancy has been idealised as an untainted state of bliss and naïve innocence. This idealisation of childhood implies that it is a delicate and vulnerable state that requires utmost dedication and protection (and here it is often mothers who face the blame for being unable to bring out what is expected to be there ‘naturally’) (Bradley 1989; 1991; 1993).

Crucially ‘innocence’ also implies a moral dimension. In the narratives of the modern western world the child has come to be constituted as an asexual being of an almost angelic purity. Stainton Rogers and Stainton Rogers (1992; 1998) have minutely traced this phenomenon they termed the ‘desexualisation’ of childhood in the western liberal world.
The ‘desexualisation of childhood’ has, they argue, resulted in an atmosphere where any association of children with sexuality has become so unspeakable and indeed unthinkable that issues like sexual abuse can only feature as the unspeakable paramount evil. Stainton Rogers and Stainton Rogers argue that it is this ‘special-ness’ of sex in relation to children and our imaginary identification with their innocence, that causes the moral panic. It is this visceral terror and instinctive repulsion about sexual abuse that results in people either totally ignoring it, or mindlessly rushing to children’s rescue. Here any reflection or productive debate becomes impossible. Ultimately children end up in a polarised scenario that is governed by the opposition between a repressive protectionism (that makes children complete wardens of the state, controlled and stripped of basic freedoms in the name of protection); and an extreme liberationism (that sees children’s rights arguments hijacked by the pro-paedophilia lobby who present the freedom to enter into a sexual relationship with an adult as a basic right children should be granted). This kind of hysteria and polarisation makes it impossible to realise that at the bottom of child sexual abuse, and any other form of maltreatment, is the abuse of power imbalances. Stainton Rogers and Stainton Rogers (1992) argue that reflecting on issues of power in the way adults relate to children, would be a first step to develop a productive ‘concern’ for children that allows to protect children from harm without eclipsing their freedom (see also Stainton Rogers 2004).

In this context Burman points to the gendered dimension within the developmental narrative where the ‘child of development’ is typically the active, white, rational, autonomous, problem solving little boy, while the ‘state’ from which development usually takes place is “typically a feminised and infantilised arena (Burman, E. 2003, p. 39)." It is little girls who represent development as a state of neediness and vulnerability, which again comprises and engenders desirability in its full ambiguous force, appealing as much to fantasies of protection as to fantasies of seduction and possession (Stainton Rogers & Stainton Rogers 1992; Curt 1994).

"Thus the new development category, ‘the girl child’, produces girls and young women as both not quite child and not only women, for as a new hybrid the ‘girlchild’ somehow represents a doubled position of vulnerability to abuse and oppression – whether in terms of labour or sexual services." (Burman, E. 2003, p. 39).

Let me pause and consider how these issues are reflected within the prosecutor’s account. Readjusting the analytic gaze on this basis, now aiming to capture the child’s position as it speaks, we can see that in excerpt 8 the video is by no means promoting the child’s voice. Following the account of the prosecutor we can see that the video is in fact rendering the child passive again. Instead of amplifying the girl’s voice the video perpetuates her

passivity. As outlined earlier, it was not so much the girl’s actual statement that impressed the prosecutor, and presumably the jury, but it was her ‘star performance of innocence’ that outweighed the fact that her young age would have disqualified her as a reliable witness. In the light of the new analytic framework we now get a clearer picture of the implications resonating within this ‘innocence’. We can see how exactly it produces a star performance of credibility in the eyes of these spectators. What makes the girl’s performance so compelling is the degree to which she fits the criteria of a pretty little girl, sufficiently ‘little’ to be of natural innocence, still naive and thus untainted by life’s vicissitudes; she is a-sexual like a doll and hence not just unambiguously pretty and attractively delicate (vulnerable), but also perfectly dependent and passive, in need of protection and with no mind of her own to fantasise or the capacity to contemplate or even construct a lie. Hence what “shone through on the video” (excerpt 8, lines 7-8), what emanated from her performance, was precisely this sense of angelic purity. However, these constitutive discourses are disguised by the way the prosecutor presents it. She states that it was ‘shining through’ all by itself, hence it is presented as an objective quality of this event, it is nothing added by the spectator or ‘produced’/enacted by the girl, it was just there to be seen by everybody.

And while in this case these implicit discourses clearly worked in favour of the girl, we need to trace the wider implications of such categories deeper into the concrete practice. Clearly, when unable to fit the ‘doll-category’, “looking shifty”, or indeed having reached an age where girls as adolescents are by definition seen as prone to deceit and promiscuity, they hardly stand a chance of even getting to court. It is hard to imagine a fourteen year old girl being described as the source of radiating innocence. I will return to this issue.

So the prosecutor’s very brief account is not just saturated with resonances to discourses around credibility and childhood, but it also exposes problematic issues of sex, gender, agency, vulnerability, what it means to be a victim or more specifically what it means to be a victim of sexual abuse, and to speak about such victimisation.

Instead of amplifying and transporting children’s voice the video perpetuates childhood ambiguity and passivity, it perpetuates and thereby exposes the problems already implicit in discourses surrounding childhood and sexual abuse. That is, a gendered agenda saturated with the problematic implications of traditional developmental psychology.

Following this example it seems that successfully to carry children’s voice into court means to systematically render it passive again. In an abstract way it appears as if the right to speak

254 Here I can paraphrase a judge I interviewed who resignedly recommended: ‘As a witness you shouldn’t be female and between 13 and 17!’ (JG3).
itself is dangerous (but for whom?), as if children are being protected from their right to speak.

Credibility and children’s rights in court

Let me move on to see how these issues feature in the courtroom. In the following excerpt a high court judge reports about the directions he is advised to give to the jury in cases where child witnesses give evidence.

[Excerpt 9]255

1 Judge2: [...] this is the advice we get ((hmhm)) it may be appropriate to warn the jury to take
2 particular care with the evidence of a very young child (2) ahm (1) now (.) children now
3 are vulnerable witnesses who get a special ((hmhm)) measures direction (1) and you say
4 well don’t hold it against the defendant that you know he did it through a television set
5 ((hmhm)) that’s nothing against the defendant we like to have children comfortable to say
6 what they have to say nowadays but I think that’s quite a difficult one when you have to
7 when you say (.) and I will sometimes say it depends how it feels
8 depends on the evidence of a nine year old boy now you know you all know children
9 (.) ahhh (.) nine year olds can lie nine year olds can tell the truth but this this was a nine
10 year old you are dealing with here ((hmhm)) (1) ahhhm but wh’ wha’ what that actually
11 says I’m never quite sure ((chuckling through the word ‘sure’))

This account is organised around an interesting contrast. In a peculiar way issues of human rights are pitched against issues of children’s rights. The first, and according to the judge’s presentation, unproblematic direction he mentions is the one that reminds the jurors that the fact that the child has given evidence via a video link must not be interpreted as indication of the defendant’s dangerousness towards the child and thus as an indicator of guilt. It is just to keep children comfortable “to say what they have to say” (6-7), as he puts it enigmatically. This direction expresses the defendant’s human rights, it underlines their right to a fair and unprejudiced trial.

While this first direction is presented as unproblematic and as something the judge would simply ‘say’ to the jury (“and you say well” 3), the second direction is presented as a warning (1). It is “a difficult one” (5) as the judge comments hinting at the precariousness of this second direction. And he delivers it in the form of a self-confessed, if somewhat amusing, tautology; an apparently meaningless statement, as the judge indicates by saying “but what that actually says I’m never quite sure” (10-11); a concession that is accompanied by chuckling. It is slightly disconcerting to think a judge did not quite know what he was “actually” saying in court, and even be amused by this insight, but then, there are multiple layers to this statement.

255 Interview J2, from line: 945.
Firstly, we can once more identify the self-detachment that is so characteristic for the legal professionals' speaking in the English court. The judge is not unsure about something he is saying, but he is not sure about "what that" (10) says, attributing the potential efficacy of 'that', i.e. such an utterance, such a direction, to the utterance itself. A direction is not something he ‘says’ but he is merely delivering the words.

Secondly, what makes this direction, as he presents it, a tautology, and apparently meaningless is the fact that, presented purely as a statement and out of context, it would qualify as a riddle. To say “nine year olds can lie nine year olds can tell the truth but this this was a nine year old you are dealing with here” is not much help at all, because as such it does not say anything. But why then is this a “difficult one” (6-7), a problematic direction?

Formally and in the court context this statement clearly alludes to matters expressed in article 12 of the UN convention of children’s rights: “…the views of the child being given due weight in accordance with the age and maturity of the child.” (General Assembly of the UN 1989). So this statement gains meaning where it is uttered and considered precisely at the intersection of legal and (developmental) psychological discourse. By uttering it in this way the ambiguity inscribed into article 12 is in effect deferred to the jury. It becomes an appeal to the jury to solve the ambiguity, to decide what weight to attach to a child’s statement at that moment, here and now, giving weight to it according to age and maturity. But while being reminded of the issue of ‘age and maturity’ (“a nine year old boy”), the jury is simultaneously reminded of the fact that it is utterly unclear what exactly this is supposed to mean (they “can lie and they can tell the truth”). While the judge finds this amusingly perplexing, when referring back to the issues raised by Burman (2003) and Morss (1996), it becomes clear why this direction is likely to make perfect sense to a jury.

Firstly, it is uttered by a judge during trial, so it will hardly occur to a jury to consider it to be ‘meaningless’ or even ambiguous; it is a direction of the law. But secondly and crucially, it directly appeals to a traditional and commonsensical discourse of development, it explicitly asks jurors to make sense of it and to fill the gaps of ambiguity with those things ‘we all know about children’. And the judge even makes this explicit in line 8 when illustrating how he would deliver the direction by saying: “now you you know you all know children”. Again, in isolation this statement would be just as meaningless as the direction that follows. What does it mean to ‘know’ children and is it actually true that ‘we all know them'? How could ‘we', or a specific member of the jury possibly be expected to know ‘children’ as such? The concrete implications that lend meaning to such a statement are the ones relating to the traditional discourse of development. Here ‘the child’ or ‘children’ are
represented as a generalized other, as a specific prototype of 'the normal child' that 'we all know'. So this appeals to the general imagery about children and development, and even to 'the child in us'. It thus makes sense to say 'we all know children'.

Hence where the jury is reminded to “take great care” (2) with the evidence of a young child, ‘taking care’ could still be understood in the neutral manner of ‘attending carefully’, but this could equally function as a “warning” (1) to the jury to be suspicious of the evidence. If the judge calls on the general discourse of childhood and development, the way the jury members are most likely to make sense of it is to give less weight to this evidence, because it was given only by a nine year old boy, only by a child. Hence in effect, pitching Human Rights against Children’s Rights in this manner, reintroduces the problems and imbalances implicit to the discourse of development and childhood. While it might balance perceptions for the defendant, this logically ambiguous statement is likely to undermine children’s evidence.

So children are allowed to speak in court but their speaking again necessitates a standard warning that ultimately ends up undermining what the child says. Crucially, this is not the result of a direction that explicitly and maliciously instructs the jury to distrust children. Neither is it the result of malicious intentions of the judge or the policy makers. This direction undermines children’s evidence because it is uncritically based on-, and thus invites and calls upon the problematic implications of the developmental discourse that circulate within this discourse anyway.256 These implications constitute the very concrete nature of what it means to speak, or to be spoken of as a child in this context.

As in chapters 11.1 and 11.2, my critique is of a structural nature. It is not about ‘biased attitudes’ towards children, ‘bad practice’ or ‘personal prejudices’; rather it captures the way legal practice implicitly perpetuates and aggravates the discursive dilemmas of children’s ambiguous societal position.

Children’s credibility, legal and parental instincts

In the light of the high attrition and low conviction rates reported for England, children’s credibility is clearly a very concrete and serious issue. The complexity of the problem is also evident in comments by judges and lawyers who confirm that it is difficult to get a conviction in child abuse cases. To exemplify the various discourses intersecting and

256 And if this is one version of how the ambiguity introduced by the UN convention of Children’s Rights is solved, then Children’s Rights must be criticized for merely reconfirming the very problems they are set out to solve.
colliding here, I would like to quote a statement by a legal professional/law academic I interviewed.

[Excerpt 10]257

1  LawAc1: [...] those of us who are parents particularly sort of instinctively thought well that’s right
2  isn’t it we shouldn’t (1) mistrust children just because they’re children ahm (1) but but the
3  question of where you go from there in terms of proof I think has been a rather more
4  difficult one ((hmhm)) (1) ahm judges tell me that juries are reluctant to convict (1) on the
5  uncorroborated evidence of a child (1) even if instinctively they’d believe the child (1)
6  when the judge says you must be sure you know beyond a reasonable doubt (1) ahh of the
7  word of a child against an adult they (.) tend to back off sometimes ((hmhm)) so (1) I
8  suspect there are problems around the standard of proof in in child accusations but (1)
9  ‘cause many of these investigations and the police officers are only too well aware they
10  need to generate other evidence above and beyond what the child says (1) ah and and in
11  many cases there is supporting evidence () ahmm and I think it’s also (1) widely
12  acknowledged that children can be horrible little liars as well and everybody’s got a story
13  to tell of some case ((hmhm)) where (1) they think that children maliciously accused an
14  adult ((hmhm))

So even if, as in this case the ‘instinct’ is that of a parent, all protective and in tune with the imagery of the vulnerable naïve child, this parental insightfulness has no purchase in a court of law. As a lawyer and parent this interviewee explains coherently how on balance in court the evidence will be considered to be given only by a child, and jurors will “back off” (7), reluctant to convict on the “word of a child against that of an adult” (6-7). This whole account is reminiscent of the prosecutor’s statements I have examined earlier. Again it is about the police having to provide more evidence, ‘checking up on things’. In contrast to what the prosecutor indicated, however, this legal professional is quite clear that ‘what the child says’, their voice, will not be sufficient.

At the same time this account gives an intriguing presentation of the nature of childhood ambiguity and the conflicting repertoires and assumptions at work where children are concerned. The initial appeal to a parental discourse and the parental instinct to believe children is contrasted against the reverse impression delivered only moments later, where it is suddenly “also widely acknowledged that children can be horrible little liars as well” (11-12).258 Intriguingly as a statement of fact this contradicts the consensus expressed in the literature as well as all the other statements I collected about this issue from legal and

257 LawAc1: 363-378.

258 As an aside it should be noted that this contradicts utterly and totally what the research literature says about children being extremely unlikely to deliberately falsely accuse (or lie). And it contradicts all of the other opinions presented throughout my interviews. (cf. Busse 2000) German and English legal professionals and psychological experts were unanimous in their assessment that while there are a lot of unclear and unsolved cases, they never had a case where they suspected or even proved that a child had, on their own account fabricated an allegation. Obviously nobody excluded this as a possibility, but based on experience it must be extremely rare. 291
psychological practitioners. Above and beyond the factual nature of this claim, while it is presented as a legal issue ("maliciously accused" 13), the way this is formulated ("horrible little liars") does not strike as a particularly legal phrase. It is not something that would be said in a legal setting but it is a vernacular, familial sort of expression a parent might use. It links up neatly to another ‘parental’ and commonplace discourse that emerges frequently around the question of children’s credibility. This is the ‘childhood fantasy’ discourse. Children are referred to as having a lot of fantasy, as being full of ideas and stories and that at times they can even be seen to be surprisingly manipulative. This is another thing that ‘we’ apparently all ‘know about children’, at least if we are parents. There were a number of instances in my interviews that illustrate this discourse. One example is a comment by a German prosecutor who indicates that having her own daughter has been an eye opener to her with regard to the fantastic and untrue stories children are likely to tell. She states that: “...for me it was extremely helpful that I now have a four year old daughter that helped me to get an understanding of the kind of things children will say ((hmhm)) and I can tell you THEY DO SAY ALL SORTS OF THINGS I don’t know really do you have children? [...] that opens a whole new perspective you know I wasn’t aware of that sort of thing anymore” (STA1: 1188).

With regard to excerpt 10 we could add that this peculiar turn in the legal professional's account is clearly a move around the ideological dilemma she has ended up with by earlier implying that jurors do not believe children. So this twist can also be seen as a rhetorical move to cover the opposite side of her argument in order to appear knowledgeable and balanced in her opinion (Billig 1991). Yet, crucially we can also see the paradoxical implications of the developmental discourse at work again. Both, the parental and the legal ‘instinct’ are shot through with the paradox of children’s position in the developmental discourse, a paradox that is ultimately condensed in the issue of suggestibility. It is the paradox of children being needy and deserving of protection, of being naïve and thus credible, but also being immature in their memory and unpredictable if not fantastic in their accounts and, thus, incredible. Yet, as we could see this dilemma will ultimately be resolved against them, because “the question where you go from there in terms of proof” (3) will undermine their evidence, or to be more precise, will undermine their word because they are only children.

259 While this interviewee promises to provide a case example for a case where children had lied about an abuse, she is ultimately unable to locate the case example after all.
So here we are back with children's word, their speaking in court that is rendered passive again, undermined, in a way that it now indeed looks as if the right to speak in itself was a dangerous thing.

12.3 Memory, agency, sexuality: the paradox of children's protectability

Let me follow children's voice in some more detail. The issue of convictions, acquittals and jury decisions in cases of child abuse is illuminated further in this second account given by the same judge we have heard before in excerpt (9). For the following analysis I am mainly interested in the second half of this excerpt (from line 16 onwards), but I have decided to include the full excerpt that shows how this account is positioned within the flow of the interview.

[Excerpt 11]260

Judge2: that's that's an interesting one but then you start handpicking your jury and say (NO I) (I chuckling) only people that have been sexually abused can serve on this jury or (I) where where (chuckling) where do you stop I mean where do you stop if you do that I'm I'm not sure it's just it's a thought because that's what the jury is about they deci' they have=

Judge2: you JUST HAVE to TAKE twelve random people I can't think you can improve on it "in the end" (hm) and one of them is gonna have some racial prejudice and one of them is ((hmh)) a (I) have been abused as a child and one of them is gonna be (I) stupid and you know you (I) we' that's you know it's the system (I chuckles) ah 't is you know I don't think 'm (I) y'na' a lot of us have given a lot of thought to that (((hm))) and I think in the end that's (I) that's the way you know and actually (I) most of us feel that jurors come up with the right verdicts (I) (hmhm) ahhh (I) and you can always find an answer well I know wha' y' know "y' ca' why did they find not guilty there" then you always know OHHH it was because you know he didn't tell the teacher or you know ((hmhm)) (I) mean that's usually the fatal thing is is when they don't tell their parents the 's what juries don't understand (I) and a little girl said it once (2) I'm only a child I didn't know what I you know she was sort of four years at doing it (I) "why didn't you anyone you could tell your mother when that started?" (I) I was only a child I didn't know what to do I was frightened (I) he was my father (I) NOW you hope juries would understand that but (I) cases where there're acquittals acquit usually where kids have failed to complain in circumstances where you would think they would ((hmhm)) (I) ahhh (I) but they not because as this one said (I) I I was only a child (I) she was nine or ten "I think" ((hmhm)) (I) never want to do it (I) which I didn't say like I'm saying well this 's what she was saying which was very good (I)

260 J2: 753-783.
It is clear that this account is sparked by a challenge. The question throws into doubt juror’s knowledge about issues of abuse and thus their ability to judge such cases. So unsurprisingly the judge mounts a principled defence of the juror system. It is interesting to observe here that throughout his quite eloquent account, there are certain points where the explanation breaks down (line 12 and 16). Clearly these are not random stammers, but they occur at points where the elaboration itself hits on a dilemma. The judge’s self-interruptions help to blur this dilemma, instigate a change in direction while avoiding self contradiction.

Obviously, as he points out, ‘handpicking’ juror’s for their specific experience and knowledge would defeat the very system that is built upon the presupposition that a random set of members of the public has to judge any case. And he closes hesitantly saying “you (.) we’ that’s you know it’s the system” (12), thereby circulating through virtually any possible perspective one could employ at this point (‘you’, ‘we’, ‘that’, ‘it’), ultimately opening it up to a maximum of vagueness by deciding to end on ‘it is the system’. And, he adds, it should not be dismissed out of hand because a lot “us” have given it “a lot of thought” (13) and “feel that jurors come up with the right verdicts” (14-15). At this point he seems to set up an opposition by saying “and you can always find an answer” (15), “you always know” (16), apparently implying or aiming to say ‘when they do not come up with the right verdicts’, but he doesn’t say that. Instead he interrupts himself and delivers some sort of inarticulate ‘stuff’ (“well I know wha’ y’ know y’ ca” line 16). Then he states more neutrally “why did they not find guilty there” (16). So he has introduced the case example to follow without implying the jury was in any way mistaken or wrong, but there are things they do not “understand” (19). Peculiarly in the following account there is a marked absence of what exactly it is they do not understand, it remains half suspended within the example he gives.

This case example delivers crucial links to the issues of children’s voice and credibility discussed earlier. The judge says “you always know” (16) when juries acquit that it is because the child has not told anyone, has failed to complain “where you would think they would” (24), and this is the “fatal thing” (18) he says, when they do not tell their parents. Here he delivers the example of a nine year old girl who had been four at the time when the abuse happened and who did actually explain in court why she had not complained at the time of the abuse, which the judge finds “was very good” (25-26). Still the jury would acquit in this case. This account unravels the central issue at the heart of children’s credibility and child protection. It illustrates the complex collision between the discourse around child protection and discourses around credibility.
Credibility colliding with protection: agency, accountability and the failure to complain

The example given by judge 2 again refers to a little girl in court, but the outcome of her case is not as favourable as that of the earlier example by the prosecutor. This girl is not deemed credible, or at least, not credible enough.

This is an interesting example because it involves a child that is said to speak openly and unambiguously in court. Following the judges account, she delivers a clear and plausible explanation for why she has failed to instantly complain. Notably the girl herself explicitly recruits the traditional developmental discourse for her account. More precisely, she recruits the protection discourse and appeals to her own helplessness. She appeals to her qualities as a victim, by presenting herself as being “only a child” (21) hence innocent and dependent, which meant she “didn’t know what to do” (21) was passive, naïve and helpless. She was “frightened” (21), vulnerable and delicate, unable to act for herself. But considering her elaborate recruitment of the protection discourse, why is her voice problematic, why is it that jury’s “usually acquit in such cases”, why does it run counter to their common sense? The tension, or dilemma that is expressed within this example is caused by the collision of the ‘protection discourse’ with what constitutes the ‘credibility discourse’.

As outlined earlier, the credibility discourse is for example expressed in article 12 of the UN convention of children’s rights. It refers to “those children who are capable of forming his or her own views” and it states that due weight should be given in “accordance with age and maturity”. Yet, the case described by the judge illustrates that maturity and the ‘capability to form an own opinion’ are intricately linked to accountability and thereby also to responsibility. Someone who can speak the truth in an accountable and responsible manner is also in charge of their life, they are an agent of their own narrative and can thus deliver an independent, robust and stable voice to account for their actions and experiences.261 Hence there is an intricate connection between discourses of maturity, accountability, credibility and agency.

261 Ingrid Palmary (2005) delivers an intriguing analysis of a dynamic closely related to my example here. Analyzing the accounts of refugee women in Johannesburg, South Africa, who have been displaced from the African Great Lakes region, she explores how the romanticised positioning of women as politically inactive, not guilty of-, or accountable for conflict, and hence pure victims of violence and persecution, will in return silence them in their own resistance and claims to agency. Innocence here resonates with deserving of help as well as with passivity and not having a politically credible or active voice. Herein “the structuring of services on a construction of ‘innocent women’ provides both the space for women to contribute to the depoliticisation of the family but also renders some women more ‘deserving’ than others.” (Palmary, I. 2005, p. 54).
However, as could be seen earlier, child protection is arranged around the developmental meta-narrative of children as naïve, dependent, passive, innocent victims. Most crucially here ‘innocent’ also means untainted by matters of a sexual nature. This is where the complex collision of discourses takes place. The little girl in this example, who is only a child, dependent and passive, cannot account for her actions, she has not complained, and hence has shown that she was not mature enough to understand what exactly happened to her. Hence in this sense she cannot be a reliable witness. Yet, she is speaking up and delivering an explanation. In a perfidious twist it seems to be the very fact that she is speaking up in court, trying to account for her story, that makes her even more ambiguous. This speaking up and accounting in her case undermines her (performance) as a victim, because she is not passive enough. So in a peculiar sense she is too passive and not passive enough. How does this make sense?

Creating protectability: the dilemma of childhood, gender and sexuality

Let me disentangle the issues at stake here, because it is again the implicit complexity of the developmental discourse that feeds such paradoxes. On the one hand there is the issue of accountability and credibility and on the other hand there are issues to do with gender and the double-bind linked particularly with sexual victimisation that insidiously confounds and intertwines issues of knowledge, agency, guilt and accountability. So both aspects converge onto the issue of agency.

The interrelation of agency, accountability and credibility emerges clearly from the implications of children’s dilemmatic positioning within the developmental discourse. As outlined at the beginning of this chapter, the position as ‘preliminary’ citizens, as ‘deficient’ but growing minds, which renders children controllable, and positions them as in need of training and protection, corresponds as much with the denial of children’s agency, as it corresponds with the denial of credibility and power in a political sphere. 262 In this context it becomes clear that it is this same entwined dynamic of dependency and immaturity that on the (arguably) ‘positive’ side produces the ‘need’ to train and guide children, but that on the flip side implies heightened vulnerability for suggestion. Or to put it bluntly, the immature mind is seen as ‘instructable’ to the same degree as it is seen to be ‘manipulable’. 263 Looking back at chapter 2, we can see that this once again relates to the

263 In a peculiar way this echoes William McDougall (1911) and his undaunted definition of children’s suggestibility as both, a vulnerability to manipulation and their most valuable means of learning (see chapter 1.2).
specific discursive dynamic that made ‘the child’ emerge at the very intersection of a rising interest in suggestibility and the growing concern for child sexual abuse.

To fully understand the complex implications of this intersection it is necessary to refer back to my outline of critical developmental psychology. There is an additional complication with regard to issues of sex, gender and agency, as I have outlined through the work of Stainton Rogers and Stainton Rogers (1998), Stainton Rogers (2004) and Burman (2002; 2003). ‘The child’ as such is usually represented as close to nature, untainted, innocent and devoid of gender. However, in the context of sexual abuse this conception is fractured because the different gendered positions of boys and girls in relation to the (predominantly male) abuser inevitably become relevant. Here it is the ‘girl child’ that is in a doubled position of vulnerability, both on the basis of youth and of gender. Laden with the ambiguity of vulnerability and need for protection on the one hand, and seductive desirability on the other hand, girls become the complex site of extra moral investments and control.264 So while different and similarly complex dynamics apply to boys (also in their position ‘as’ children and thus innocent), it is girls in particular who need to be denied any kind of agency in relation to sexuality, in order to uphold the clear unambiguous picture of vulnerability and victimhood that warrants protection, hence to make them protectable.

In turn, when children demonstrate themselves as being not so innocent, or present themselves as too knowledgeable in an area considered exclusively reserved for adults, this creates perplexity and dilemmas. These children fall outside the category of ‘the child’. They might indeed be seen as not unambiguously detached from the abuser or as displaying a form of active agency and resistance (speaking out) that does not conform with the position of the passive victim. This makes them awkward, paradoxical victims.

“Children who have been sexually abused perhaps ‘hold’ or represent the most stigmatised childhood knowledge and that needs to be repudiated in order to safeguard prevailing power relations. (Burman, E. 2003, p. 43).

Children who are victims of sexual abuse cause a great deal of unease, because they hold this ‘non-childhood-appropriate’ knowledge. This unease can lead to both extreme ignorance and reluctance to engage or notice abuse, or unbridled panic and hysteria fostering the haste to rescue children.

264 “Most worryingly, innocence itself can be a sexual notion as applied to children. It connotes a purity, virginity, freshness and immaculateness which excites the possibilities of possession and defilement.” (Archard, quote as in Burman, E. 2002, p. 12). Burman (2002) points out how this ambiguity and thus need for control is reflected in discourses about girls being dominated by a discourse of original sin, rather than innocence (this is evident for example in debates around teenage pregnancies and more recent debates about the prosecution of rape, issues of consent and the increasingly popular ‘girls-asking for it’ discourse). See also Warner (2003).
Crucially, in connection with the question of credibility in a legal setting that is concerned with the very question whether a child is the victim of abuse or not, and must not rush to conclusions, these underlying ambiguities make children's speaking utterly problematic for the court.

In the context of these critical reflections it becomes clear just how the girl in the judge's example, who told the court that she had not complained because she 'was only a child', was too passive, but not passive enough. She was too passive in the past in that she had not complained, had failed to do what seems natural, i.e to be shocked by what was happening to her and to seek help, to complain. So in the judge's example, the only actual 'failure' that can be spotted is on part of the child witness. This is what the judge alludes to when he points out that it is where "kids failed to complain in circumstances where you would think they would" (excerpt 11, lines 23-24). So here the absence of an explanation for what it is the jury does not understand, is again filled with common sense. The 'you' in this sentence is the 'common sense' of the jury, and a sort of all-inclusive appeal to 'what reasonable people think'. This undoubtedly well intentioned 'common sense' is saturated with the ambiguous implications of the discourses surrounding childhood, gender and sexuality. So implicitly this means that the girl was too passive in the past, she did not complain when the abuse happened and thus cannot be trusted in her account. But on the other hand, by speaking in court, she is not passive enough during the trial, because a victim speaking up, accounting and being knowledgeable in this manner contradicts the expectations a jury has of a victim, and might even make them suspicious of her having an agenda.

In the light of this analysis it is worth re-considering the example of the first little girl, the one the prosecutor described as a doll whose 'innocence shone through on the video' and who was found to be credible in court. I do not mean to compare the cases as such, but

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265 Even though it is impossible to know whether this was a problem in this particular example, the issue of not complaining also resonates awkwardly and perfidiously with the underlying suspicion that the child might have played some part in making the abuse happen. And while the political and societal atmosphere has changed dramatically in this respect over the past fifty years, the deep ambiguity, if not fear towards young girls' sexuality still resonates awkwardly in discourses about rape, consent and indeed children's evidence in court.

266 The same judge reports another example of a 12 year old girl who had explicitly wished to give evidence live in court to face the defendant and make sure he hears what she has to say. However, the jury had not believed her, despite her presence in court. The judge suspects that the reason for this lies in her having appeared so determined and angry that the jury might have suspected she had fabricated the accusations (J2: 652-670). There are a number of other examples for this dynamic in my data.

267 Obviously it does not make sense to compare the cases as such. There is little information about the actual cases at stake and we can only speculate that the first case ('indecent assault' excerpt 8, line 6) might
my analysis has illustrated the conflicting discourses that constitute the ambiguous conditions under which children's credibility is produced in each of these cases. We can now see the discursive resources mobilised within the prosecutor's claim that "this was a child who could not have made it up" (excerpt 8, line 7). This girl could be believed because apparently she struck the delicate balance between being unambiguously pretty, that is a-sexual like a doll, but thereby also passive, and thus protectable. So she could be imagined as a victim of abuse while not really being tainted by this event, and she could thus be positioned as a protectable child. Accordingly it was not so much her word that had to convince the prosecutor and the jury, but it was the way in which her 'shining innocence' could be recognised.

This complex set of circumstances and conditions seen at work in these examples, can be condensed and expressed in the concept of 'protectability'. It is this delicate state of being passively harmed, damaged but unaccountable, while displaying all the signs of vulnerability, innocence and naivety that appeal to the protection discourse. Still, the nature of this 'display' should not be too 'agentic', i.e. motivated or deliberately expressive, in the form of a voice, as anger, resistance or reasoning, but it needs to a passive state, or presence, a 'shining through'.

The girl in the first example is 'protectable' and therein credible. But as we have seen this also implies that those children who do 'look shifty' and/or uncomfortable enter an ambiguous zone outside of protectability where it becomes difficult to hear and understand their story. As the judge points out, juries do "not understand" when the child has not complained, this is usually "fatal" as he puts it. Clearly in this second example, where children's word has to be considered, they become ambiguous because this is not really the space for them to speak.

**Protectability: creating reliable witnesses – Suspending children's voice**

This is where I can return to my earlier question about children's voice, because we can see now that their voice is indeed 'dangerous' in a variety of ways. As a result of this there is a have been less severe or less complex than the second one, where apparently the girl's own father was the accused.

268 My concept of 'protectability' here resonates closely with what Lindsay O'Dell (2003) has termed the 'harm story' of sexual abuse. Her analysis explores the way in which the framing of child sexual abuse in terms of psychological harmfulness ('harm-story') singularises victims of abuse into one homogenised category and in effect denies them individual agency as it positions them as a product of their own past abusive experience.
peculiar twist in the way child witness practice is constructed by the law in an implicit attempt to work around this ‘dangerousness’.

Firstly, the analysis has shown that the existing attempts of the legal system to create opportunities for children’s voices to be heard (as demanded by the UN convention of children’s rights), in fact render children passive again, and in effect make them inaudible. A whole machinery of instructions and mediating technologies is installed between the court and the child. Direct interaction with the court is reduced to a minimum, and at various points it appeared as if the right to speak in court was in itself inherently dangerous. It seems as if the special measures are indeed most effective in protecting the child from their right to speak.

Secondly considering this from the perspective of the legal system one could argue that the legal system is protecting itself. It is protecting itself from the ambiguity that children carry in order to secure the stable operation of its own procedures, and to create good, reliable witnesses that resonate with its structure. So to a certain extent the legal system could be seen to operate in this specific way in an attempt to produce the kinds of witnesses it is able to deal with. These are passive witnesses, victims, whose innocence shines through on videos, but who do not actually say anything; i.e. protectable witnesses. In this sense, one could say that the law aims to disambiguate witnesses in order to make them approachable to the court, and in turn to protect the legal order from the ambiguity attached to the child. Following this line of argument one could conclude that thereby children are protected, i.e. detached from the ambiguity produced by their own voices within this system. So in this sense children are indeed protected from their right to speak because their own voices are a threat to their credibility.

Thirdly, we can now reconsider the positioning of the legal practitioners towards the ambiguity arising around child witnesses. It is the specific construction of the law, the structural safe guards that allow the prosecutor to say ‘abuse cases are not really problematic’ (excerpt 7, line2), because the evidence is either there or it is not. From her position she can disperse the ambiguity, defer it to the jury, as it is not her decision really and she will not get in direct contact with the witness anyway. But to make this decision, operation, she needs to gloss over the perplexing contradiction she presents because otherwise the system would not function.

The judge is similarly detached from the ambiguity, as he is an observer and ‘balancer’ of cases, not a decision maker. Still it is interesting to see that while he defends the system, he appears to be reserved about his direction to the juries, laughingly presenting it as something where he is “never quite sure what it says” (excerpt 9, line 10-11). I will return to
the way his chuckling marks what could be called a point of maximal paradoxicality, or a void.

With respect to the earlier analysis of structural uncertainty we can see that this analysis also relates to police practice. The issue of protectability is at the centre of police officers' considerations as it resonates closely with structural uncertainty. This is an important link that I will explore in more detail in the next subchapter.

In the light of the complex issues surrounding protectability and credibility we can now see why children's evidence is elaborately produced via the special measures, only to be rendered passive again. Or, as we can say with regard to the interrelated analysis of structural uncertainty and the parallel problems arising for police practice, children's evidence is elaborately produced and then suspended.

Children's voice ends up being suspended between the discourses of protectability, sexuality and credibility. It is suspended between the increased anxiety about sexual abuse and the fear of false allegations and miscarriages of justice. It gets suspended between the prosecutor's assumptions of what constitutes this 'display' of credibility for a jury and the allusion to the fact that this might be an inherently ambiguous criterion to judge credibility after all. It gets suspended between the judge's delivery of his direction and this peculiar ambiguity towards the meaning of such a statement. It also gets suspended between police officers 'ethical search for the truth', the rapport paradox and issues of integrity and accountability.

So legal process, from initial interview to courtroom, implicitly constructs and perpetuates the problematic implications of the developmental and gender discourses around children. The law does this in a manner that enables it to disambiguate children so they can safely be allowed into the legal system as witnesses, without posing a threat to this system, or to the circumscribed way they can be allowed to be credible. However, it thereby ends up excluding, rendering silent and problematic a vast number of witnesses that cannot manage to fit the criteria of protectability, because they carry this ambiguity, that the legal system is not structured or equipped to handle. This is particularly evident in the investigative dilemmas faced by the police.

I would like to close this analysis by returning to those investigative dilemmas the police are expected to handle. In the light of the concept of protectability it is now possible to capture another dimension of the problem of investigative time and structural uncertainty.
The quality of passing time and the ‘rush to protect’

In chapter 11.1 I outlined how the video short-circuits different time zones of veridicality, thereby disrupting the investigative sequentiality underlying criminal procedure, and causing problems for the police officers’ prospective and retrospective planning and conducting of the video interview with the child. With regard to issues of protectability we can see that officers are faced with an additional temporal dilemma, but one more to do with the ‘quality’ of passing time. The intense (moral, societal) concern for children combined with the assumptions about the unreliability of their memory causes a ‘rush to protect’.

Looking back at debates and changes in child witness practice it is clear that one of the central and most unassailable paradigms that guide child witness practice is the conviction that child protection must be a matter of ‘rapid response’, and speedy procedure. Suspicions of abuse warrant extreme urgency and children, so it is inscribed into the guidelines, cannot wait, must not be left to wait.

This is illustrated in this account by a judge, who states that it is absolutely crucial to provide a rapid response to reported cases of sexual abuse.

[Excerpt 11]269

1 Judge1: [...] these things (snaps finger) happen very quickly (2) ahhm (1) tha’ the child’s made a complaint mother’s gone to see the police you want to get the child ((hmhm)) (2) interviewed (1) straightaway (3) and () you know you can’t leave it (4) shouldn’t leave it

A reported abuse creates a sense of alarm, and this is reflected in police practice. For the police ‘speedy procedure’ is a central element of good practice, and this is reflected in policy, yet as the following excerpt from a police training course demonstrates, ‘speedy procedure’ produces yet another paradox.

[Excerpt 12]270

1 TO: [...] a lot of the pre-interview assessment is about enabling you to assess that individuals needs and assess (1) HOW your interview might need to be planned what are you gonna do what what points are you looking for and what factors here are going affect the interview how it’s gonna turn out again this could happen here because this might be the first time you see them [...] because you’ve come on at 4 o’clock and been told that you got an interview at 5 (1) and you’ve got you’ve had NO pre-interview assessment so you’re at the police station and you have to do ALL of this (1) HERE [...]
Here the training officer is once more reminding the officers that it is of central importance to conduct a thorough pre-interview assessment with the child and to plan the interview. Yet, while elaborating on the importance of planning the training officer states that it is quite possible that all of this preparation will have to take place at the police station and be condensed into the course of a single hour “because you’ve come on at 4 o’clock and been told that you got an interview at 5” (5-6). This clearly runs counter to the central aim of the ABE and thus the police training course, i.e. to convey to the officers the necessity and value of specific interview techniques and systematic preparations and planning. Yet the training officer does not seem to find this problematic as such, perhaps because this kind of urgency is inherent to child abuse investigations. At other points throughout the training course the officers confirm this. In accordance with the general aims for ‘fast tracking’, the officers find that the aim must be to conduct interviews within a day or two if possible or if necessary, even within the hour. So all the training officer in this excerpt is concerned about, is to prepare the officers for the inevitable dilemma of their practice, i.e. the fact that they have had “NO pre-interview assessment so you’re at the police station and you have to do ALL of this (1) HERE” (6-7).

One of the social workers I interviewed exposes the resulting dilemma pointedly by comparing a potential child abuse investigation with the procedure the police might follow when investigating organised crime.

[Excerpt 13]²⁷¹

1 SocW1: If we were involved in for example (2) organised crime investigations we might spend
2 weeks and weeks and weeks planning (1) and observing (1) and watching (1) ((hmhm))
3 and we would do that in a controlled and ahm and ahm organised [...] but what happens
4 when there is a concern particularly around sexual abuse of a child is you almost not sort
5 of (1) you’re not ahm you’re not sort of let your breath out and people have organised
6 and booked the video the video interview in the same way they have booked (1) the
7 medical examination of the child [...] there’s this implicit need to rescue children (3)
8 and (1) again people like me have said actually if we go to rescue and we actually are not
9 able to collect sufficient information to do that [...] if we actually push in [...] then what
10 does that mean for the child’s safety? because what we’ve done is if the child is being
11 abused is we have taken the lid off the can of worms ((hmhm)) we have actually looked
12 at all the worms wriggling around and then we have had to put the lid back on because
13 we have no where else to put the worms right yea

It is precisely this urgency, this ‘need to rescue’ (7) as the social worker puts it, that will create the pressure and panic that leads to an interview being booked before one has even “let” one’s “breath out” (5). That is before one has had the time to actually ‘exhale’, take a

²⁷¹ SocW1: 661-675.
step back and begin to think about how the case could best be approached. As indicated in chapter 8.3, social workers are in general not very appreciative of the way the police handle child abuse cases. However, interestingly this social worker, when pinpointing what she considers a central problem in child abuse investigations, is not talking about the police's potential failure to empathise with the child or to take their complaints seriously. She makes a rather investigative, legal point by arguing that the actual investigation needs to be planned and executed much more skilfully and more thoughtfully. When outlining the 'practice' of rapid response she compares the hasty booking of the video suite with the instant way in which the medical examination of a rape victim would have to be conducted (6-7). This illustrates nicely how physical evidence (traces on the body that indeed need to be collected without delay before they are lost or compromised) are confounded with 'evidence to be collected' from the child's memory. We have seen earlier how the child's memory is treated as an unreliable container that needs to be emptied. It is treated as if the 'contents' of their memory could be elicited, stored and presented to the court in the same way as the evidence and traces possibly found on their body. Obviously the child's account is not a straightforward piece of evidence and it has become clear that it is extremely difficult to obtain and even more difficult to actually put forward and evaluate. Hence it is peculiar that such an important part of the investigation should be conducted in a rush and under pressure.

With regard to the overall analysis this rush can be identified as the 'rush to protect', an urgency that adds another layer of uncertainty and paradoxicality to the police officer's practice. How can they take care in preparing an interview, when there is an incontestable, indeed almost natural, sense of urgency to respond to issues of sexual abuse.

"Why do we rush to save children? Why should we pause to think about this, when the imperative to do so seems so strong, and indeed it has been called 'natural', or 'instinctive'? (Burman, E. 2003, p. 44).

It is a 'taken for granted' that a fast response is the only appropriate measure in cases of sexual abuse, and it is this urgency that informs the officer's practice. Yet, paradoxically, while this sense of urgency seems to have intensified over the past years and as a result of growing awareness for sexual abuse and new guidelines and measures, the actual chronological time a child abuse investigation takes has, despite the procedural changes, continually increased (Plotnikoff & Woolfson 2004). So there is a peculiar discrepancy between the 'quality' of time experienced by the police officers as a mounting sense of urgency and pressure to conduct the interview, and the 'quantity' of measurable chronological time that is passing throughout the overall investigations and that seems to

272 See also chapter 8.1.2.
be stretching out and increasing (paradoxically it seems the resolution to speed up
procedure is actually slowing it down).

In the context of the previous analysis and the concept of protectability and childhood
ambiguity we can see that this overall urgency, and this tendency to ‘physicalise’ and
containerise children’s evidence is another facet of the various ways in which the
ambiguities emerging around children’s suggestibility, credibility and sexual abuse are
implicitly contained. So here time does not so much feature as a matter of sequence and
chronological time zones of past and future events that interrelate, project or short-circuit,
but at this point time becomes relevant as ‘passing time’, and in this sense as a more
abstract durational force. Firstly, this passing time is seen to continuously degrade, corrode
and thus devalue the evidence that should be collected from the child’s memory as quickly
as possible in order to stabilise and fix it on video (or indeed to ‘purify’ it). Secondly,
passing time here comprises the potential threat posed to the child and thus expresses the
pressure of the police’s own accumulating ‘inactivity’ in the face of the ‘natural’ urgency
and ambiguity attached to sexual abuse. ‘Passing time’ expresses the mounting pressure that
can only be released by doing something, processing the case, quickly passing it through
the system to shift the structurally imposed institutional burden of ‘fast tracking’, as well as
the personal burden of the urgent wish to protect, to rescue ‘the child’.

“...the abstraction of the child affords a slippage from individual to society, from the child to the nation, from
the lost to the true authentic self; and — most significant in relation to child sexual abuse — from the feminised
subject in need of protection to the patriarchal superego urging action (or restraint from action). In short
ambivalent political agencies are constructed by, and in relation to these texts of childhood.” (Burman, E.
2003, p. 42).

As the social worker points out, this ‘rush to protect’ will ultimately be at the cost of those
children it aims to rescue (see excerpt 13). Where the police rush in to investigate, but
could then, as a result of too little preparation not collect sufficiently detailed evidence (i.e.
interviews of a sufficient quality) to carry the case through, to convince the prosecution or
the jury, they will have to drop the case (or lose it), leaving the child exposed and
unprotected as a result. Or as the social worker puts it, “what we've done is if the child is
being abused is we have taken the lid off the can of worms ((hmhm)) we have actually
looked at all the worms wriggling around and then we have had to put the lid back on
because we have no where else to put the worms right” (9-13). Obviously the opposite case
will be no less damaging to the child. Where the ‘rush to protect’ leads to false positive
conclusions and results in the unjust prosecution for sexual abuse, children will often suffer
the effects.
Suggestibility, memory, sex: children as unreliable containers, irritable dispenser and volatile interactants

Condensing the analysis and combining the critical issues raised around time, structural uncertainty, childhood, agency, protectability and suggestibility, we can now identify three distinct tropes that reflect and sum up the way children are positioned at the intersection of these diverse discourses between psychology and the law.

Firstly, children are positioned as unreliable containers of information. They cannot contain evidence and it degenerates rapidly in their immature minds. Hence it needs to be preserved on video as soon as possible, so the video can become the carrier of the evidence on the child's behalf. However, it is the video that in turn renders the child's voice passive again. It suspends children's voice in a peculiar twist that appears to protect children from their own ambiguous voice as well as insulating the court from the dangerous ambiguity they carry. Additionally this trope resonates with the police officers' dilemma of having to follow speedy procedure in order forestall the rapid decay of evidence.

Secondly, children are positioned as irritable dispensers of evidence. They are considered prone to get scared, distracted and confused by the courtroom setting and legal procedure, and hence their voice needs to be mediated in various ways or they need measures that allow them to stay out of the courtroom. This is also reflected in the police officers' struggle between their own integrity, the ethical search for the truth and the rapport paradox. Both of these tropes can now be seen to reflect a way to confine and control the ambiguity carried by child witnesses. And they are closely interlinked with a third one.

Thirdly, children are positioned as volatile interactants. The measures reflect the reciprocity of the problem, because any direct encounter with children is implicitly seen to bristle with potentially reciprocal misunderstandings and the hazards of suggestion. The number of direct encounters is thus kept to a minimum, by using videos and television screens that are hoped to represent children in court unambiguously. But there are more dimensions to this trope. Children's volatility is intricately linked to the complex discourses around development, sexuality and gender. In the light of the exploration of the ambivalent imagery that surrounds children and sex and that renders particularly girls' position ambiguous, we can now see that the issue of children's volatility and suggestibility is of a reciprocal nature. Hence faced with a child witness in this context we might get infected by this ambiguity and volatility and become unsure of (conscious of/aware of) the source and nature of what we know, assess, and see in the evidence and thus in the witness.\textsuperscript{273} Looking

\textsuperscript{273} This implicit danger is exemplified neatly in the example provided by Burman. "The furore around the photographs by Sally Mann, for example, highlight the unease which apparently 'knowing', sexually aware
at the history of child protection over the past two or three decades it becomes clear that this is not an unfounded fear at all (see chapter 2). In this context this fear becomes doubled in a more personal or indeed visceral sense, because it relates to issues to do with sex.

Looking back at the whole analysis it is clear that this is, in a condensed form, what suggestibility has been connoting, or indeed ‘carrying’, all along. Suggestibility carries within it and exposes the intertwined issues of credibility, protectability, passivity; the issue of what it means to be an agent, what it means to be able to speak for oneself, what constitutes the possibilities to speak for oneself and the dilemmas that this speaking creates within the different contexts. By transgressing and at the same time connoting this ‘thicker’ of interlinked and paradoxical concrete issues, suggestibility has also been instrumental in exposing them. At every one of the nodes of complexity it was the issue of suggestibility that needed addressing and that spoke for and exposed the inherent paradoxicality. In this sense we can say that again suggestibility provides a liminal resource. Even though at this point it is operating on a very different level, the dynamic is very similar to the one observed in chapter 2.3 – 2.9 and as summarised in chapter 3.5. At every moment suggestibility exposes the concrete link between the structure organising a concrete event and the paradoxical nature of this relation to the concrete.

As in the last example I gave with regard to the ‘volatility’ of child witnesses, suggestibility implies a dynamic that always stretches both ways, that always implies both directions of making sense or expressing a connection. This is what, in the above example makes it so disquieting to realise that we cannot be entirely sure if the ‘suggestion’ originates in us or in the child or possibly neither. This is the dynamic at the bottom of structural uncertainty and protectability.

In their expressed ambiguity, these dynamics engendered by suggestibility, also provide a poignant reminder of the question of how the analytic tools, the methodological frameworks employed in this practice relate to the material reality of the expressed ambiguity. Let me add a more pragmatic outlook for this line of analysis.

[children elicit – even, or perhaps especially, when we cannot resolve the ambiguities surrounding whether the sexualisation is generated by them or us.” (Burman, E, 2003, p. 49).]
12. Speaking up against justice: memory, credibility, protectability

Protection versus rights - welfare versus justice

What does this analysis mean for the way protection (i.e. welfare) and credibility (i.e. justice) relate to another? And how can this analysis relate to the issues discussed in chapter 9?

It is now clear that at the point where children’s voice becomes doubly precarious (i.e. endangered and dangerous) the (justified) call for children’s protection denies their agency and eclipses their actual right to speak. After all it seems the ‘best interest of the child’, ‘children’s welfare’, inevitably collide with ‘justice’ because the court is ‘dangerous’ (frightening) for the child as well as endangered by it. Following this rationale ‘children’s best evidence’ is the one produced in compliance with the silencing and purifying ingredients of children’s protectability.

This is the implicit rationale on the basis of which the debate around ‘children’s access to justice’ gets stuck in what we can now see is an artificial antagonism between ‘welfare and justice’ or ‘protection versus rights’ with the ‘fairness and justice for the accused’.

In chapter 9, juxtaposing German and English child witness practice, I have raised the issue of ‘false negative’ versus ‘false positive’ tendencies that might be seen to be expressed within the way the two legal systems are organised. However we can see now that this juxtaposition unhelpfully conflates issues of investigative procedure (how to best collect evidence), with fundamental principles of the criminal legal system (in doubt the accused must be acquitted). It can safely be assumed that this principle applies in German criminal courts just as it does in the English courts. Courts must not risk convicting the innocent.

So the issue at stake cannot, and must not be about the fundamental ‘rights of the accused’.

This is not a matter for debate, it cannot be argued because it refers to a fundamental principle of the legal system which nobody could reasonably oppose or suggest to abolish (to do so would mean to dismiss the principle structure of the legal system, which is not the point here).

However, to enter this point into the debate as an argument, and thereby to imply it was an issue that could be discussed, means to transform a serious and important discussion into a polarised altercation. However, this is what happens frequently in the context of debates around child witness practice and access to justice, where issues of children’s welfare are notoriously conflated with issues of credibility, criminal procedure and the best ways to collect and present accurate and detailed evidence. Following the public debate it often seems as if children’s evidence can only be heard at the cost of the defendants’ human rights, as if only compromising the principle of ‘in doubt in favour of the accused’, could
provide justice for children. This is reflected in a public debate during summer 2006 in which for example the English Prime Minister Tony Blair stated, in concordance with the ongoing debate amongst policy makers, that there was a need to balance the legal system more towards victims.\textsuperscript{274} Clearly this means, as the critics argued, to make the legal system less fair, to allow prejudicial justice and abolish the 'reasonable doubt', and despite all sympathy for children, this is a price surely we cannot pay. Hence the debate drops dead where human rights are presented as colliding with children's rights. However, does this not imply that, strictly speaking, German criminal procedure constitutes a violation of human rights? Clearly, this is an exaggerated claim, but it exposes the bizarreness of the argument about the issue of human rights versus children's rights, because there must be other ways to consider welfare, justice as well as best evidence.\textsuperscript{275}

In the light of the analysis of what constitutes protectability it is possible to disentangle this conflation.

Looking at the implicit ambiguities surrounding childhood sexual abuse, considering the structural difficulties police officers face when collecting and presenting children's evidence, and taking into account the added problems for a jury to weigh the evidence emerging in such cases, it is clear that the problem at stake has nothing to do with children's welfare as such and even less with the purported need for more changes in court procedure (particularly where those changes might make the trial unfair). Acknowledging and addressing for example structural uncertainty and the 'rush to protect' could enable the investigative system (as it is) to operate more effectively. It could allow police officers to collect better, more detailed and more accurate evidence, that in turn would be more likely to lead to prosecutions and convictions. Clearly, more detailed and accurate evidence would serve both, the child and the accused, because it would also make false convictions less likely.

I am not arguing that we need to declare children 'special witnesses', but it is about realising that they already are (positioned as) a special 'class of witnesses', and that the special measures currently operate to cement and perpetuate this status to their disadvantage. Furthermore it is not about declaring sexual abuse a 'special sort of crime', but it is about realising that it already is, and always has been, a special sort of crime in the eyes of the police officers, prosecutors, judges, experts and jury members.

\textsuperscript{274} As broadcast on BBC Radio4, the Today Program, August 2006.
\textsuperscript{275} For a wider introduction to issues of children's welfare and youth justice see also Muncie (1999).
13. Excursion to the German court: the dilemma of memory, time and protectability revisited

To enrich my analysis I would like to revisit some of the dilemmas and paradoxes that I have problematised for the English legal system, with regard to a selected instance of German child witness practice. I will not deliver an elaborate analysis, as this juxtaposition is meant to add a different perspective to the analysis of the English child witness practice. Childhood ambiguity, credibility and suggestibility are just as problematic to the German legal system as they are to the English legal system, but they are distributed differently, engendering different dynamics. These could inform and underline some of the issues raised with regard to English child witness practice.

As outlined in chapters 7 and 9, the German legal system is organised around systematic moves of accreting and layering evidence, hence the different time zones of recall will be layered, merged, and re-invoked in court where the respective witnesses are interviewed by the judges. The principle of immediacy means that it is this final, live interview in court that will weigh as evidence for the case. Still this final interview will be guided and informed by the accounts accreted previously. The judge must inquire into potential inconsistencies between those prior accounts and it is crucial to establish the appropriateness of their production. Chapter 7.4 has shown that this revisiting of the different layers of the time zones of recall is extremely difficult where child witnesses are involved.

Inevitably this kind of structure implies that child witnesses are positioned towards the court very differently to the way they are positioned in the English legal system. As outlined in chapter 9 in the German system childhood ambiguity is explicitly invited into court, where it has to be explicated and negotiated. So where in England the focus is on containment and evacuation of ambiguity, in the German system it is unfolded and exposed as the case is checked by the prosecution, by an expert, and where it proceeds further, ultimately, by the judges. However, just as in the English system, the court cannot function on the basis of multiple ambiguity, so it is for the experts and most importantly the judges to handle and to resolve it. At this point we can get an intriguing explicit glimpse at issues of time, credibility and protectability.
In the following excerpt the interviewer confronts the judge with the very problem of the inconsistencies that emerge from the layered time zones of recall. How can the court handle the fact that information from the files, or even aspects listed on the indictment cannot be substantiated in evidence? How will the court handle such a situation where it cannot be sure if the inconsistency is caused by the child, the police, the expert or the prosecution?

[Excerpt 14]

I: ...the problem (.) that for’ (.) that a circumscribed incident had been indicted but that this particular incident (1) could not quite be reconstructed from the child’s report ((hmhm)) and the question is then should this be interpreted as an inconsistency or ahm a a’h’as (chuckling ‘at’) (.) a misunderstanding by the police ((hmhm)) or as a later misunderstanding by the prosecution services] [YES]

JG1: [yes that’s a frequent] prob’ a very ((hmhm)) frequent problem which ahm naturally with the (1) with the (.) passing of time (1) and certainly also with an ongoing reflection by the child about what has happened (1) ahm a a’wishful thinking mixes into it (1) for example (.) the the classic case is that the child ahm (1) subsequently (2) invents additional details (1) that it had fought and that it had screamed for help ((hmhm)) that’s (.) happens frequently and it’ll usually not be possible to substantiate this (.) that is (2) in principle an alarm signal of ahm inconsistency and ahm we also find on the other hand pragmatically we often find (.) the explanation ahm that this is related to the fact that a’ a wishful thinking co-mingles here ahm had I well (.) you should have fought ((hmhm)) so you say you did fight ahm you could well have screamed so ya’ say tha’ ya did scream and ahh (1) yet that is (indeed) (1) well let’s say that is an alarm signal that we can still put to one side.

[see appendix A for the original German transcript]

Interestingly the judge does not really pick up on the procedural difficulties he is being challenged about. He interprets the question as indicating that there is an inconsistency in what the child has actually said at different points in time during the investigation. He qualifies this as a frequent problem and intriguingly goes on to deliver a rationale according to which it is possible to see beyond such “alarm signals of inconsistency” (14) so that they could still be “be put to one side” (18). As a legal statement this sounds slightly disquieting, because the court just seems to ‘decide’ to “pragmatically find” an “explanation” (14-15) for an inconsistency that should really be an alarm signal. Yet, within the German legal system these kind of explicit forms of reasoning are crucial for the way the court operates. It is indeed obliged to ‘reason in the open’. This is why we can follow the judge’s operation at this node of complexity in such detail, illustrating part of a dynamic that in the English
legal system is concealed in the jury’s strictly confidential reasoning. The rationale he expresses as a result of this operation bears an intriguing parallel to issues of protectability as outlined in the previous chapter, because it relates to the child’s agency, and the fact that the way children present their account (at different points in time), is not stable, but resonates with ongoing thinking and issues of self-representation.

At the centre of what the judge describes as a “classic case” (11) is the efficacy of time. As time passes, he suggests, the ongoing reflection of the witness might lead to what he calls a “wishful thinking” (10) that might lead the witness to add (or indeed ‘invent’) details to their account, such as that they had struggled and screamed to fight off the attack. While clearly he is talking about ‘details’ being ‘invented’ or added resulting in an alteration of the child’s account, which could well imply that this is the result of suggestion, or a fabricated account, there does not seem to be a clear subject related to what he calls ‘wishful thinking’. On both occasions in line 10 and in line 15 he uses the indeterminate article “a wishful thinking”. So whose wishful thinking is it that alters the account, whose wishful thinking is he talking about? Following his account literally, he seems to be pointing to the child’s wishful thinking. He indicates that by the use of direct speech in lines 16-17, voicing the child’s thought process. But intriguingly, as a result of the indexical openness of the judge’s account, further interpretations are possible.

Taking a wider view it could be the ‘wishful thinking’ of the law that mixes into it. It is the law’s fantasy of witnesses’ consistency and accuracy that collides with the witnesses’ actual inability to live up to the principles of the structure that assesses their statements; the structure of the law that would ultimately wish them to be more perfectly accurate and that struggles particularly with the ambiguity carried by children.

Still, what “mixes into it” (10) or “co-mingles” (16) with the “passing of time” (9) could also be the wishful thinking of society as a whole. The discourse of the ‘protectable’ child is resonating within this account of a form of ‘wishful thinking’ that implies the victim should have fought, struggled, or indeed complained. It is the ‘wishful’ thinking that the victim should resist physically (and even more, show physical signs of this resistance) so as to prove victimisation and to signal that they did not consent to (or provoke or even enjoy) the attack. This again is part of the ‘passiveness’ implied in protectability. Following this wider reading the judge’s account could be seen as implying the efficacy of a specific form of ‘societal autosuggestion’ triggered by time, or indeed the passing of time, making time the agent of this process.

What the judge expresses at this point as the reckoning of the court and indeed as something that the court has collected some experience of (as it is a “classic case”, 11 and
“we often find” 14), is the concept of an inconsistency in the child’s account that relates to the overall discourse of protectability. Yet here it is expressed as the child’s own reflection, as an internal dialogue about how a ‘victim’ would be expected to behave and should thus tell their story: “had I well (.) you should have fought ((hmhm)) so you say you did fight ahm you could well have screamed so ya’ say tha’ ya did scream” (16-17). Obviously there is no principle rule by which this kind of “explanation” (15) could guarantee the accuracy of an account (inconsistency and addition of details can also be signs for inaccurate or even suggested accounts). So this gives the court no assurance that it has made the correct decision. Whether or not it will be “put to one side” (18) will depend on each individual case, as well as the individual judges’ experiences and opinions. Still, it is interesting to see how the explicit reasoning of the court, based on its direct encounter with a witness and its experience with witnessing, can operate around the ambiguity of protectability in such a way. This is particularly interesting because the English legal system does not allow insights into the reasoning of the jury. Still, this is something this specific judge mentions, and other judges in the German legal system might see such matters in a different light.

Obviously such considerations do not emerge from the arbitrary reckoning of one individual court. Just as in the English legal system there are mechanisms that will balance the fact finding and keep the explicit reasoning of the court in check. This is quite evident in the next excerpt.

This account by the same judge immediately follows the previous one, interspersed only by a brief comment of the interviewer.

[Excerpt 15]277

1 JG1: yes this is a huge trauma ahm for the victims the question shouldn’t I have fought more
2 ((hmhm)) couldn’t you have fought more why didn’t ya fight much more ((hmhm)) and this is a
3 enormous source of self-reproach and the psychological problems resulting from this ((hmhm)) well yes that’s one of the main problems that the victim’s suffer
4 from and that is why during the interview with the children I always try to ahm (.) let’s say to give a kind of (.) kind of a feedback ahm (1) listen you couldn’t have done
5 anything at all ((hmhm)) and had ya screamed that would’ve made it no better ((hmhm))
6 you know it is not at all your fault that it came to that you know that’s well that’s certainly the main problem one always faces during such an interview you are as the judge presiding the court obliged to remain absolutely neutral but then you have such a
7 poor little sausage278 in front of you (1) and you know they are in a really pitiable state
8 then you have to (1) well that’s my conviction you have to give a feedback ahm in order
9 not to aggravate the problems and maybe even to help a little bit ((hmhm)) you know
10 and then one always staggers279 along on this tight rope280 between (.) between partiality

277 JudgeG1: 272-304.
278 worm/creature
279 sways/staggers/totters along
280 thin red line
and neutrality always facing the threat of rejection. (1) (by the child or) by the court ahm ahh rubbish (.) I mean by the ahm by the defence who (.) they could at any point say well what the presiding judge is saying sounds like an attribution of guilt ahm the ((hmhm)) and that means he appears to be partial you know and the mere appearance is sufficient to support (yes)) an appeal against the judge. has this ever happened (.) to you yes it does happen (.) well it hasn’t happened to me yet surprisingly but I have indeed experienced this in other trials where I wasn’t the presiding judge and that is always very awkward because ahm it interrupts the interview and it interrupts the whole proceedings potentially the child will have to come again and ahm (1) in cases where there is an adversarial defence it is used as a strategy by the defence to cause further delays and even to put more strain on the witness.

[see appendix A for the original German transcript]

Clearly the immediacy of the encounter with the witness will at the same time confront the judge with a dilemma. The judge has to appreciate the case specific details and build a rapport with the witness to ensure their cooperation. Again the judge presents the potential thought processes of a victim as an inner dialogue indicating his understanding and alignment with issues related to protectability (“shouldn’t I have fought more ((hmhm)) couldn’t you have fought more why didn’t ya fight much more”; 1-2). But at the same time he has to remain impartial towards the material fact of the case (which are still under investigation).

Here the judge demonstrates neatly how the ‘invasion’ of childhood ambiguity can affect the court and might leave the judge in a precarious position as he is walking the “tight rope” (14) between partiality and neutrality. Considered in my terms the judge expresses this as an intense version of the rapport paradox that also dominates the interviewing practice of the English police officers. Yet following his account we can see an even more distinct collision of discourses. He moves to and fro between issues of trauma and suffering and issues of legal obligations and duties. On the one hand there is a psychological discourse of “trauma” (1), “self-reproach and psychological problems” (3), and the need to deliver feedback in order not to “aggravate the problems” and “help a little bit” (13-14). On the other hand there is the legal discourse, that obliges him to “remain absolutely neutral” (10) and in the context of which he will be confronted with an “appeal” by the defence if he appears to act in a prejudicial manner.

The court is not a therapeutic setting, and while his elaborations in lines 1-4 clearly apply for victims, in court the judge cannot really know whether the witness is a victim or not. That is precisely what the court needs to establish by interviewing the witness, rather than presupposing it. Consequently this kind of psychological talk may sound a bit disquieting

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281 motion
282 conflictual
13. Excursion to the German Court: the dilemma of memory, time and presentability revisited

coming from a judge. Still, he is obviously aware of the necessary balance and the surrounding structure that can ensure impartiality, in fact he is required to simultaneously impersonate both sides. He needs to be fair and considerate towards witnesses, guaranteeing they do not suffer in court and establishing sufficient rapport to elicit detailed evidence. At the same time he represents the impartiality of the court that needs to presume the innocence of any defendant until proven otherwise.

I do not want to go into legal procedural issues here, because for me this excerpt illustrates a broader issue. The key to this lies in the judge's summary of the dilemma he faces in the interview: "...the main problem one always faces during such an interview you are as the judge presiding the court obliged to remain absolutely neutral but then you have such a poor little sausage in front of you (1) and you know they are in a really pitiable state" (9-11). It is the actual presence and noticeable state of the witness that makes the interaction so difficult and that will, almost regardless of their actual account, affect those talking to the child witness as well as those who have to judge their account. For this judge it is part of his routine operations and hence experience to make these encounters and still he considers it extremely difficult and always exhausting.

This illustrates the difficulties faced by the English police officers who handle a very similar problem, even though at a different level. While they do not conduct their interview in court, it is conducted under court conditions. How do they handle the rapport paradox, the dilemma between neutrality and partiality that an experienced German judge considers extremely challenging? What does it mean to for example "have such a poor little sausage in front of you" (10-11), while conducting a neutral and efficient inquiry.

On a different level a similar question can be asked about the jury, who, other than the police officers and judges, are unlikely to have any experience at all with such encounters. Neither do they have experience with the legal setting in which they will be presented with this evidence. How will they react to, resonate with and review the account a child witness gives of a sexual abuse?

Clearly, these are difficult questions that I cannot answer within the framework of this study. But regardless of the question whether this aspect of the German practice is particularly advantageous or not, and regardless of the fact that the English system will hardly be able (or willing) to directly adopt any of these practices, it seems important to at least raise these issues and feed material for new debates into the English framework to move beyond the old polarisations.
14. Science, law, expertise: the paradox of application

The intersection of science and the law inevitably resonates throughout every layer of this analysis and depicting it as another ‘juncture line’ would be to understate the complexity and omnipresence of the issues surrounding law, science (psychology) and expertise (see chapter 9). In this chapter I will examine firstly the conditions under which any ‘research’ can be considered ‘science’ and secondly the conditions under which science, in the form of psychology can qualify as knowledge proper to the court. I will ask how it is that expertise can be introduced to the court and, how the court views science and expertise. These questions converge onto the question of ‘expertise’, such as Ceci’s as a status, i.e. a position of power, and a ‘positioning’ i.e. a ‘performance’ in a specific context. Ultimately they converge onto the question of application.

14.1 Situating the question: the risk of generalisation

Science and the law are an awkward couple. There is a peculiar feedback between (psychological) science and the law. To put it bluntly, when considering the mutual repercussions between science and law in the field of child protection, there is a sense of ‘the tail wagging the dog’. In both Germany and England in recent years legislation to tackle the emerging problem of suggestibility and the wider problem of child protection has been drafted so as to incorporate research findings. But even as it sought to rest on psychological science law has re-shaped the discourse of what is to be regarded as good psychological science. In this sense the law has ‘made’ science rather than just being instructed by it. Still, in turn we could say that science has made law, instead of just taking its cues from it.

In both countries laws and guidelines passed and implemented have shaped strongly what is to be seen as ‘expert’ knowledge, what is to be regarded as scientifically proven and which routes of legitimisation within the scientific community are seen as appropriate and which are not. So the law has assumed an almost epistemic function. Still, this dynamic is reciprocal and it would be inaccurate to present it as hierarchical. To put it in a more
balanced way, we can say that the two different epistemic formations, or practices, have become indissociable around the specific issue of child witnesses. However, the different jurisdictions have done so in dramatically different ways.

What is considered ‘science’ and hence legally prescribed as appropriate form of assessment in Germany, does not hold true for the English legal system, where these precise techniques and perspectives are ruled out, because, as the law puts it, there is no such scientific knowledge that could be brought to bear on the question of witness credibility. As a result of this we are confronted with the perplexing situation that each of these countries apparently has their own epistemology. In Germany scientific findings and methodology have literally been implemented as law (the 1999 High Court ruling states the principle of scientific methodology, the null-hypothesis, it gives a definition for suggestibility, declares Statement Validity Assessment scientifically validated and elaborates in detail how the experts are expected to use it. See chapter 7.2). In a similar gesture but with different results in England ‘Achieving best Evidence’ (2001) provides binding guidance for police interviews and thereby embraces and in turn validates the research and recommendations provided within it. But what are the implications of different ‘national epistemologies’? What does it mean to speak of epistemologies in such a way?

Moving away from the specific context of Germany and England for a moment, it is clear that the emerging issue here is one of ‘application’ and ‘generalisation’. Using a rather blunt terminology we could say that it is the question of how science informs the real, and how the real informs science in a concrete context. Hence the issue at stake here is that of the ‘risk of generalisation’. Ceci delivers a programmatic comment about this ‘risk of generalisation’ that has been embraced widely by researchers in modern suggestibility research internationally (cf Volbert 2000).

“...In summary, there is always some risk when generalising from scientific studies to real-world cases because the two contexts are usually not perfectly analogous. Scientists believe, however, that the best basis for generalization is to extrapolate from the corpus of research, with a special focus on those studies that come closest to matching the constellation of variables that operate in the particular case before the court – even if the match is less than perfect. The alternative to basing predictions on the nearest scientific relatives to the case at bar is to eschew insights, predictions or hypotheses gained from systematic, controlled studies in lieu of anecdotes, personal opinions, and ideological views about children’s gullibility or innocence. When these take precedence over scientifically derived conclusions, we have substituted heat for light.” (Ceci & Bruck, 1995, pp. 301-302).

Calling the link between science and the real world ‘not perfectly analogous’ can be taken to imply that they are ‘almost’ analogous. This would be a rather bold statement considering the contentiousness of the criteria and procedures according to which such an analogy should be judged, let alone the difficulties arising when scientific criteria of proof meet legal criteria of evidence in court. Ceci’s rather routine mentioning of the ‘risk of generalisation’ distracts from the fact that very little is known about the concrete dynamic
of ‘generalisation’ and its actual risks, and despite the obvious urgency to systematically inquire into these dynamics they are brushed aside as merely inevitable concomitants of scientific activity. This is even more relevant as we have seen how difficult it is to actually ‘control’ suggestibility in ‘controlled studies’.

Looking back to chapter 3 and following Burman’s critical trajectory, we can see that Ceci’s distinction between ‘heat’ and ‘light’ can be understood as being part and parcel of the ideology at the heart of the dominant scientific discourse. This is an example for the rhetoric of enlightened rational science that produces such powerful and apparently unchallengeable meta-narratives which then allow it to, in the name of science, determine normal from abnormal and true from false, heat from light. So drawing on critical discursive research, we can see that by resonating with-, and catering for the needs of the legal system, scientific research itself becomes efficient and productive within a political sphere, consolidating its own power as provider of knowledge. In this sense it can be shown to answer to the broader needs of the state to control and regulate the various moral panics and societal crisis it, as Burman puts it, is also complicit in producing.

„Specifically clashes between the professional discourses of law and psychology combine with social expectations of the efficacy of psychology and the claims made by psychologists who strive to squeeze the square peg of ‘methodologically sound’ (...) laboratory study into the circular arena of the court. By such conceptual moves and elisions experimental child and cognitive psychology (along with psychoanalysis, in partial and conditional ways) restore reason to a society in crisis, rarely acknowledging their own stake and complicity in producing those preoccupations and moral panics from which they then claim to save us.” (Burman, E. 1997, p. 303).

So following Burman it is the very clashes, the apparent incommensurability of the psychological and the legal discourse combined with the scientific effort of experimental psychology to match the purported challenge set by the law, that enables psychology to establish itself as the best possible solution to the problems faced by the legal system. Hence it is in this arena that Ceci’s distinction between heat and light gains value (or even common sense value) and can obscure the fact that we know very little about the relationship between “scientific studies” and “real world cases” (Ceci & Bruck, 1995, p. 301-302).

Clearly Burman’s critique makes a crucial contribution to understanding the implications of the ‘risk of generalisation’. However, returning to my more specific question of ‘application’ and scientificity in Germany and England, we still have not grasped the concrete specificities that can lead to the perplexing issue of different ‘national epistemologies’. Additionally suggestibility has proven to be anything but a docile subject. It has proven a rather unwieldy means to manifest the power of psychology as a science in the applied context. When tracing suggestibility through research (chapter 2) and into practice (chapters 7-11), we could see the paradoxical frictions and the subversive and
resistant dynamics surrounding suggestibility, turning it into a deconstructive force rather than a confirmation of the power of psychological knowledge (see chapter 3.5). Something escapes the critical discursive perspective here, so there is a need to have an even more concrete look, to extend this perspective, and transgress it. Bearing these issues of the critical perspective in mind, the following analysis aims at a detailed, concrete examination of the precise circumstances under which the two epistemologies (of law and psychology) intersect, resonate with each other, and grow indissociable. Here I will refer to both, the German and the English data.

14.2 The politics of situating sciences in the law: the dilemma of expert intuition

I will begin with an excerpt from an interview with a psychological expert and researcher in England. In a very pragmatic way it reflects Burman’s critique, but it also points to the concrete performative dilemma I have hinted at.

[Excerpt 16]283

1 Exp2: yes the government would make available money (hmhm) to (2) recompense the people that spend their time writing the guidance (hmhm) and also of course (1) would want the guidance to be based on published research (hmhm) not on (hmhm) (1) so called expert intuition (hmhm) and the government would (.) would want to be able to defend its guidance (hmhm) if somebody said like in achieving best evidence on page fifty two why does it say that? (hmhm) the government would phone up [...] and we would need to supply them with the answer oh that was based on so and so even though it’s not cited in the document (okay)) we would be a – we would need to be able to back it up

Despite the fact that the expert talks about applied science as government guidance, that is, the “Achieving best Evidence” document, and not about expertise given live in court, there is a peculiarly performative and concrete aspect to this expertise and the way its scientificity and appropriateness are assured and indeed performed. The government acknowledges that it needs guidance and provides funds for this guidance to be written. Crucially the guidance must not be based on “so called expert intuition” (3-4), but “of course” (2) the “government would want the guidance to be based on published research” (2-3). Following the expert’s account, this is the main scientific criterion for it being ‘proper’ scientific research and not just ‘expert intuition’. This is important because the government could be challenged and needs to be able to “defend its guidance” (4-5). And here the ‘its’ indicates that this guidance is the government’s property, it belongs to the government. It is depicted

283 Expert2: 748-758.
as a piece of knowledge the government bought and does not belong to the expert who differentiates himself as 'we' (6), and as such it cannot be seen as the expert's 'product'. Because, as he goes on to explain, in case of doubt or challenges the government will phone and demand assistance with defending the guidance, to "back it up" (8), and here it is not 'the expert' as such who can vouch for the information but it is the expert's reference to the 'published research' that the guidance is based on. Crucially, 'published research' denotes 'peer reviewed' research, which again means 'empirically tested' and approved by the scientific community. (In this case, we could add as a critical reflection, this community will be based on the dominant scientific discourse of cognitive and experimental psychology).

But there is another peculiar dynamic to be observed in this excerpt. While this account implies a general definition of science, the expert seems to 'personalise' science as well as 'the government'. It is peculiar to see 'the government' depicted as a person who makes a phone call, and equally the validation of knowledge is performed by a real actual person, in this case the interviewee. While it is self-evident that 'real people' must be producing and passing on this knowledge it is nonetheless unusual to think about discursive relations of power and knowledge in terms of actual people performing the activity. And it seems even less straightforward when looking at the particularities of how exactly they do this.

Considering the meaning of this 'personalisation', another issue becomes salient. Obviously it is part of the scientific rationale to base recommendations on published research, because this is meant to ensure that we do not dogmatically follow singular opinions and to make sure the information used has been empirically tested. Nevertheless, there is a peculiar ring to the expression "so called expert intuition" (lines 3-4). If they are experts, why should they use mere common sense or layman's intuition? Would this not disqualify them as experts anyway? Or on the other hand, if it is something an expert 'knows', if it is part of their expert knowledge, why should it be inappropriate to apply this knowledge? Can we not trust the expert's assessment of their knowledge, that is, their capacity to reflect on the appropriate use of it? What exactly is the difference between expertise and expert intuition? Or should experts be considered as mere 'mediators' of knowledge? But if this is the case how does this knowledge 'pass through them', what makes it legitimate?

Referring back to the earlier analysis around issues of self-positioning and accounting, clearly there must be an element of positioning in the 'constitution' of an expert, and this should be more apparent in courtroom interaction.

The following extract is from the same interview quoted above. The expert reports how he would position himself 'as an expert' in court in order to assert and secure his statement,
when barristers try to unsettle or challenge his expertise by for example deliberately trying to lead him outside his area of expertise. Barristers might do this by deliberately asking questions that, as this expert finds, he is clearly not qualified to answer.

[Excerpt 17]284

Ex2: [...] or you know questions like (3) if this child had really been abused wouldn’t you expect it to do the following (ahh ok) and I’d say well (1) I’ve seen many many interviews with children where they make allegations and typically they’re relatively calm when describing even horrendous things and I’ve you know seen over a hundred of these and some of these children must have been telling the truth (2) so to contend that a child (1) when telling the truth will be upset about I’d say you know is not within my experience but I said if you’re asking me as an expert witness I am not an expert (1) on to what extent children get distressed when recounting EVENTS you need a properly qualified person (3) [...] I’m very clear about that and in fact in one case (1) ahm (3) before just before I finished testifying the judge indicated and he and he said to me Dr Smith I just wish to tell you that I wish every expert who came in this court was as clear about where their expertise finishes as you’ve been today and thank you very much (4) that was nice (5) I think he was being truthful not making a joke ((hmhm)) (6) (both laughing) nobody laughed anyway so I thought it was okay so yeah it’s almost always about whether they were interviewed properly

Following this account a typical question a barrister might use to lead the expert astray is one that might ask the expert to implicitly comment on or confirm that the child witness has not ‘behaved in a sufficiently traumatised’ way. The expert reports a lengthy answer he might give to this question, only to then state that actually his expertise does not cover this subject area, which means that he cannot comment on it. In lines 6-7 the expert states quite clearly what the distinguishing criteria for expertise are. He says that “it is not within my experience” (6) that children are always upset when disclosing abuse, but “if you are asking me as an expert […] I am not an expert on” (7) this and “you need a properly qualified person” (8). So the crucial distinction here is between ‘experience’ (6), which is not expertise, and expertise which is based on ‘proper qualifications’ (8). So positioning in court is again a delicate move of positioning oneself towards ‘proper qualification’ or indeed, ‘science’ that can ‘back up’ ones knowledge as expertise, while simultaneously making explicit that this is in no way related to ‘experience’, opinions or ‘expert intuition’. He underlines that being “very clear” (8-9) about the precise borders of the own expertise is absolutely vital for being able to stand up in court (see also chapter 8.3). And following the judge’s commendation on this clarity (10-12), it indeed seems that expertise is defined mainly by its boundaries, i.e. by the explicit display of being able to recognise what it is not: experience.

Still, while this positioning move seems clearly effective in court, we are still left with the question of why exactly it should be so efficient; what distinguishes, within the expert, experience or expert intuition from actual expertise, which, when applied will be appreciated by the courts?

Firstly there is the dominant discourse of science that is linked to political power of scientificity as part of a discourse of normalisation and control (as I argued above with reference to Burman), and we can see the ideological and rhetorical potential of psychology here. Secondly there is a conversational practice of accounting and positioning towards such a discourse of science in court that could be described as the ‘performance’ of expertise. But moving beyond these two forms of analysis, there still is the intriguing question of ‘expert intuition’ versus ‘expert knowledge’ at the heart of this concrete practice.

14.3 The invention of modern sciences and the dilemma of expert intuition

I would like to leave the immediate vicinity of the courtroom for a moment and unpack the issue of expertise in the context of the wider scientific framework. The philosopher of science Isabelle Stengers provides a crucial hint as to the background of this peculiar double-bind of personal and simultaneously a-personal expertise, or indeed the make up of ‘scientificity’. In “The Invention of Modern Sciences” Stengers (2000) argues that the present make up of what we know as the ‘hard sciences’ and their specific constitution of what they consider an ‘objective fact’, can be traced back to a specific type of ‘event’. This ‘event’ demarcates the discovery of a way in which superior forms of interpretations could be gained, a way in which the phenomena under examination could themselves be made to speak. Hence this event has established a certain way of constructing and presenting a particular set of occurrences as ‘scientific evidence’, and thereby as superior to other forms of interpretation.285

285 Stenger’s argument ultimately unfolds as a critique of those claims to ‘science’ that elevate what she unveils to be a perplexing but ultimately chance event (a ‘surprise’), to a purportedly merited result of true genius implying an absolute access to truth. This model of the ‘hard sciences’ thereby degrades those ‘sciences’ that as a result can be “called feeble or ‘soft’ because none of their statements avoids contention, because they have not succeeded to in inventing any reliable testimony for which they would be recognized as the authorized representatives.” (Stengers, I. 1997, p. 87). Stengers finds that crucially all knowledge emerges as a result of the ‘power of invention’, yet it gets established on different levels in the hierarchy of scientificity. So steering clear of relativism as well as ideological critique at this level Stengers traces the moves necessary to establish the rules according to which we today consider what is scientific. “I will argue – contrary to the assumptions of epistemologists who consider an objective statement as a right to which any rational scientist
"The hard sciences, which serve as a model for the others, which nourish the dream and ambitions of the "founding" candidates of science (\ldots) They follow, expressing and recalling an event, the discovery of a way of constituting a phenomenon as a reliable and unexpectedly articulate witness, the discovery of an access that they neither deserved nor had the right to expect." (Stengers, I. 1997, p. 88).

This notion of 'event' that Stengers introduces, will become central for my analysis in chapters 15 and 16. So what does Stengers mean by this ominous 'event'? All phenomena, Stengers argues, are overloaded with meanings and capable of warranting multiple interpretations. The central issue for the scientist is thus to produce a testimony that cannot be dismissed as a product of their own subjectivity, the scientist must invent and produce 'reliable witnesses', and it was Galileo who, when establishing the properties of accelerated motion, consolidated this structure of reasoning for the sciences by devising and establishing a supreme way of providing such reliable witnesses. So the prototypical event that the 'founding sciences' (and those desperate to join their ranks) are expressing and recalling so successfully is what Stengers terms the 'Galilean event', it is the moment in which Galileo establishes this 'new use of reason'. It enabled the modern sciences not just to refute other interpretations, but it also degraded other mechanisms of producing evidence.286

There are two features at the heart of this new use of reason Galileo piloted at his time. Firstly he established a distinction between 'causes' and 'properties' of things, i.e. the question of 'how' things work or function, as opposed to 'why' this is the case. Simultaneously he degraded the question of the causes, of the 'why', that had so far been at the centre of all considerations within a scientific domain occupied by religious scholars and philosophers, as being secondary to the question of 'how', elevating the inquiry into the 'properties' of things to be the primary scientific aim.

"Galileo then establishes a differentiation between the causes of acceleration (the 'why'), on which 'different philosophers have expressed different opinions,' 'imaginings' whose examination would not be very 'profitable', and the properties of accelerated motion, which he will demonstrate are indeed applicable – this is what is at stake – 'to the registers animated by a naturally accelerated falling motion.' (Stengers, I. 2000, p. 83).

By degrading the question of the cause (the 'why'), to being secondary to the question of the properties (the 'how') of things, Galileo created a hierarchy (of those ways in which it is more or less 'profitable' to address things, avoiding 'imaginings'). He thereby established

\[\text{286} \quad \text{"All phenomena that we know of are overloaded with multiple meanings, capable of authorising an indefinite multiplicity of readings and interpretations, that is, being utilised as evidence in the most diverse situations, and thus also of being disqualified as evidence. The whole question is thus, for the scientist to produce a testimony that cannot be disqualified by being attributed to his or her own 'subjectivity', to his biased reading, a testimony that others must accept, a testimony for which he or she will be recognised as a faithful representative and that will not betray him or her to the first colleague that comes along." (Stengers, I. 1997, p. 85).}\]
differentiating criteria for what can be said about things, how it can be said and who can speak in this domain (philosophers now find themselves in a secondary category, answering the inferior question of the ‘why’). Galileo thereby moulds a domain that defines what is ‘scientific’.

Secondly, and crucially for my analysis, Galileo defines how those who want to operate in this domain need to proceed, and what principles should guide their treatment of things, i.e. the scientific set up. That is, he designates what we could now term ‘scientific conduct’.

To allow for the ‘thing’ to speak for itself it is crucial that the ‘authority’ of the author, who could otherwise be suspected of just having added another interpretation by virtue of his authority, could be forgotten. This is what ‘authorizes’ science over nonscience. 287 Stengers argues that in the way Galileo uses an inclined plane and a movable object falling and then deflected along the inclined plane, he establishes an experimental apparatus that allows him to remove himself from the event. This creates the impression of ‘things speaking for themselves’, i.e. he has let nature itself be his articulate witness.

“This schema represents an experimental apparatus, in the modern sense of the term, an apparatus of which Galileo is the author, in the strong sense of the term because it is a question of an artificial, premeditated setup, that produces ‘facts of art’ - artifacts in the positive sense. And the singularity of this apparatus, as we will see, is that it allows its author to withdraw, to let the motion testify in his place. It is the motion staged by the apparatus, that will silence the other authors, who would like to understand it differently. The apparatus thus plays on a double register: it makes the phenomenon ‘speak’ in order to ‘silence’ the rivals. (Stengers, I. 2000, p. 84). (highlighted in the original).

What is established via this ‘Galilean proto-event’ Stengers describes, is the supremacy of the idea of ‘making nature speak’ while simultaneously offering an apparatus that can achieve this. The affirmation of such an (experimental) occurrence (or event) as a scientific fact requires the autonomisation of the event (i.e. the things occurring, here a moveable object dropping onto an inclined plane and the incurring motion); it is required to enable the phenomena to speak for themselves and no longer speak of the person who proposed them. This can only be accomplished by virtue of the scientist’s specific (authorial) contribution. It is Galileo’s deliberate, ‘premeditated’ invention of the ‘setup’, the experimental apparatus that proves his point. Yet simultaneously this very contribution needs to be ‘removed’, it must be allowed to be ‘forgotten’, in order for the phenomena to speak autonomously. And again this is what this ‘theoretico-experimental apparatus’ simultaneously achieves. Following this framework of ‘modern sciences’, to be an ‘expert’,

287 “What authorizes the difference between science and nonscience that authorizes them? How far will this difference be recognized as a source of authority? (…) What singularizes the science in question: Can this quality of the author be ‘forgotten’? Can the statement be detached from the one who holds it and those who take it up? Will a scientific statement if it is finally accepted, then be considered to be ‘objective’, no longer speaking of the person who proposed it, but of the phenomenon inasmuch as it remains available for other work.” (Stengers, I. 1997, p. 105).
the scientist has to situate himself or herself in relation to such an event, an apparatus that makes phenomena speak for themselves. But for this event to authorize the expert as an expert, they must also be seen to be detached from this apparatus. They must not be seen to have authorial involvement in its functioning.

This movement, this self-positioning as part of, yet as detached from the scientific event, is what is reflected in the expert's account in excerpt 16. It is ingrained in the dismissive (and apparently common sense) reference to the 'so called expert intuition'. Not everything an expert knows can be expertise! The expert can only position himself as an expert by performing the delicate manoeuvre of situating himself towards the experimental apparatus, but at the same time 'removing' his 'personal relevance', authority, or indeed 'agency', because it is the published research and within it the 'experimental data' that speaks, not himself. It is not the experts' actual knowledge, but the way in which they are able to position themselves towards and draw upon the scientific event (here present in the form of 'published research'), that can help to "defend" (5) the guidance from suggestions it was 'opinionated' or based on mere 'intuition', and thus 'back it up'. And clearly it is the same apparatus of modern sciences Ceci appeals to in the quote I mentioned at the beginning of this chapter, when demanding to stick to "insights, predictions or hypotheses gained from systematic, controlled studies" (Ceci & Bruck 1995, pp. 301-302).

The same dynamic is at work more concretely, in excerpt 17. The expert's positioning in court works because he is able to call upon the independent apparatus of scientific evidence (as is implied in 'expert' and 'properly qualified', line 8) to express his legitimacy as an expert. He does this not just by pointing to the precise knowledge he is qualified to apply, but additionally asserts it by displaying his awareness of the 'appropriate' boundaries of expertise. Here the importance of this performance of 'qualified expertise' is underlined by the judge who apparently commended him on his clarity in drawing the borders of his expertise by saying "where their expertise finishes" (11). So knowing and displaying the knowledge of the precise way in which one can represent the experimental apparatus that qualifies the expertise is a crucial part of the expert performance in court. The appeal to the structural framework almost appears a stronger proof of expertise than the actual information. The most crucial performative matter then is not the message expertise has for the court but that expertise is content to display its limits and its own proper relationship to silence.

The judge's commendation (excerpt 17, lines 10-12) also reflects a structural symmetry between the dynamic of detachment that is characteristic of the way the English legal
system operates, and the way scientific expertise is expressed in England and Wales. As I have demonstrated in chapters 8 and 9, and more explicitly in chapter 11.1 - 11.4, police officers, barristers and judges will perform a similar type of 'personal abstinence' or indeed self-detachment in order for the evidence to be seen to stand on its own, to speak for itself. Hence it is the work of gathering, selecting and presenting the evidence that has to be rendered absent, that has to be allowed to be forgotten once the 'evidence speaks in court'. (This is also reflected in the work of 'purification' that the police officers have to accomplish when conducting video interviews with children and that produces ambiguities within their practice. See chapter 11.1). Clearly the double self-positioning demonstrated by the expert in this example is something that is familiar to the court which appreciates and understands this structural move.

Still, this depiction of the dynamics of positioning has moved us towards a more rhetorical perspective. We could see why this positioning is important and how it operates, but we are still left with the concrete question of the difference between 'experience' and 'expertise' as such. We know how expertise relates to the court, but how does it relate to the 'real'?

14.4 The paradox of expert experience

I would like to turn to an excerpt by a German expert and researcher who comments on a dilemma similar to the one confronted by the English expert, but because of his relation to a different legal structure, has a very different way of expressing it. In the following excerpt the expert is dealing with the question of whether there is applicable scientific knowledge about suggestibility that can be used in an assessment and how any such knowledge should be used. Here it is crucial to remember that there is a distinct difference between the way the English and the German legal system view the quality and applicability of scientific knowledge in this same field of research (see part B, particularly chapters 7.2, 8.2 and 9). While in England it is held that generally there is no scientific knowledge that could aid the assessment of witness credibility (which must thus be left to the jury), the German legal system has ruled that even though there are no 'valid' tests to determine suggestibility, credibility assessments by experts are an important scientific aid to the court and that the court can benefit from them even in suspected cases of suggestion. Given this background it is not surprising that the German expert makes a plea in favour of 'applicable' knowledge about suggestion. The expert begins making his case for the existence of such knowledge by delivering a list of 'criteria' or indicators that, as he says, are empirically validated and can be considered warning signs of suggestion.
To begin with the expert lists a number of criteria that can be seen as indicators of suggestion: ‘continuous expansion’ (2-3) of the narrative, surreal components (3), the ‘active search’ (4) for more details and being ‘flooded by’ ideas in the sense of an autonomous expansion of the narrative (5). All of these are “warning signs” (2). And here he refers to the same framework of expertise the experts in the previous two excerpts (16 and 17) referred to. He says that this has been “demonstrated by Ceci’s research” (3-4), so there is an experimental apparatus behind this to underline the autonomous nature of these findings. But when qualifying this further he interestingly departs from this model of scientifcity by saying that this is “a sort of mixture of experiential knowledge” (6-7) and applied empirical knowledge. So does this mean expertise is experience after all? Clearly he

289 hints
290 ‘übertragenem’ - generalised
291 specific
292 affirmed, founded, assured, gesichert
293 Empirie (noun)
294 Slap each other around the ears
295 Reputable and well known English researcher in the field of experimental psychological research around witness credibility.
296 Here meaning: who has got the most criteria
297 Also: thoughts; literally: ‘head’.
cannot quite say that either and this is reflected in the delicate manner in which he now tries to differentiate the precarious position he has manoeuvred himself into by alluding to a ‘mixture of knowledges’. What is looming here is the dilemma of ‘expert intuition’, so he cannot afford to imply that there is some obscure personal experience involved (a ‘mixture of knowledges’). He has to qualify this further by carefully juxtaposing and differentiating it from the ‘applied empirical knowledge’.

Firstly he does this by pointing out that obviously “personal experience is also empirical” (8-9), which in this context is meant to add ‘evidential’ value to it (empirical is a sort of neutral scientific term, it appeals to something that is ‘really’ there, independent of an observer). But he is careful to differentiate this from what he means by ‘applied empirical knowledge’, by characterising the latter as “in a narrow sense empirically validated” (8-9). So here he appeals to the experimental apparatus of modern sciences that makes facts speak. But then he qualifies it further by referring to it as empirical in a narrow sense, that is, these “bean-counting studies” (9-10), adding that while they indeed provide validation for some criteria, “you don’t get this bean-counting empirical knowledge for each of these criteria” (11-12). So he has managed to qualify and authorise his own expertise by appealing to the scientific apparatus. But simultaneously he has downgraded this ‘empirical knowledge’ as being not just narrow (as in ‘specific’), but as being too narrow (as in ‘partial’/‘sketchy’). It is ‘bean-counting knowledge’, obsessed with detail and offering only partial validation anyway (‘you don’t get it for all the criteria’). This is the point where he has finally managed to carve out a space for the ‘experience’ knowledge to legitimately come back in, because, as he can now assert, “experien’ knowledge (.) reciprocal knowledge is in fact also relevant for individual case diagnostics” (12-13). So he has managed to legitimately have experience sit next to validated ‘empirical knowledge’, while carefully working is way around the dilemma of ‘expert intuition’ and the dangers of some obscure ‘mixtures of knowledge’.

Looking back at chapter 7 and 9 it is clear that his account partly reflects the different structure of the legal system he works in. The German legal system does not just appreciate this kind of expert knowledge, but credibility assessment obliges the expert to provide ‘single-case-diagnostics’. This sets him apart from other legal systems and expert practice in England, and it inevitably exposes him to a completely different kind and intensity of experience with regard to the ‘cases’ he assesses (routinely interviewing child witnesses in person), and with regard to his positioning and active role in court.

He points to this precise difference when he says, degrading the ‘bean-counting approaches’ even further, “this is perhaps where we differ from the Americans who beat
each other up with their ‘N’s and whatnot” (13-14), implying that they are more obsessed with numbers than with actual cases. So while the expert here refers to this as a difference in the way research is done, it indicates how strongly the way the legal system is organised influences the way experts constitute, perform and ultimately apply their expertise ‘as’ experts.

In this context another crucial difference becomes clear. While the English legal structure bears some symmetry with the evidential structure of modern sciences, and thus corresponds neatly with the self-positioning of an expert (towards the apparatus of modern sciences), the German legal system favours a different evidential model. It also demands approved scientific knowledge, but this knowledge needs to be applied to single cases. As a result the German expert faces and thereby exposes the dilemma of application of ‘legitimate science’ as single case diagnostics. And this is where experimental knowledge does not suffice, as he states quite clearly. He states that “all of that is of no interest ahm to me anymore ahm not at all” (14-15). And while he is quick to firmly reposition himself again as an expert, adding that he appreciates individual studies and that “one can learn from all of them” (15-16), he is very clear that “I cannot approach it like that” (16) because “counting everything () who has got the most and whatnot but that is all rubbish” (17-18).

He closes his account enigmatically referring back to ‘experience’ and to the actual activity of assessing a case by saying that “one has to integrate that within one’s mind” (18-19). This is what the ‘activity’ of doing assessment as an expert boils down to, integrating experience with validated empirical knowledge. So again he has delicately established why his manner of applying expertise cannot rely purely on what is conventionally seen as scientific, but must nonetheless be accepted as expertise, and thus science.

His awareness of the dilemma he is positioned within and operating around is clearly reflected in the defensive tone of his closing remark, when he says “and this is also science” (21). This is what is at stake, the question of scientificity and the question of how something can be qualified as knowledge when it cannot be shown to have passed through the experimental apparatus; or indeed, when its relationship to such an apparatus apparently does not represent a generalisation in the conventional sense, because it is ‘experience’ of an expert.

298 As we could see in chapter 7.3 and 7.4 the German experts will have to position themselves as experts (hence call upon the autonomous scientific apparatus) just as the English expert, but they have to do this with reference to a specific single case assessment and with reference to very concrete circumstances. This can produce the awkward collisions described around issues of the ‘Null-hypothesis’ being present or absent in their assessment and potential challenges around the way the minimal criteria of ‘scientificity’ are represented in general.
Notably here, at the very end of his account, this is the first time the expert uses the term 'scientific' at all, while beforehand he indiscriminately refers to both of the kinds of 'experience/expertise' he is trying to introduce as 'knowledge'. There is clearly something deliberate about the resolution to stick to the one term 'knowledge', instead of qualifying one of them as 'scientific knowledge' and the other as 'experience knowledge'. It is this resolution that causes the semantic and syntactic complications he carefully circumnavigates in lines 7-9 and 11-12.299

At this point we are back to the problem mentioned in the introduction. Does this rationale of the German expert imply that there are different epistemologies at work? If such epistemologies exist where do they originate, in the law or in science? Is there a 'German epistemology' that operates according to its own rules? Or does this mean, as we could speculate taking the English perspective, that German experts are less scientific? Do they depart from the structures of modern sciences in favour of what within the common psychological debates would (at best) be called (or indeed denounced as) 'clinical' knowledge, or indeed 'expert intuition'? Or is it in turn the case that English experts ignore, or fail to collect/appreciate (potentially valuable) experience that should be recognised as 'knowledge'?

Unsurprisingly this re-invokes Burman's critique once again and the various layers of disciplinary and political power at work. But it also takes us back to the 'risk of generalisation', because Ceci and Bruck demanded that we need to "...extrapolate from the corpus of research, with a special focus on those studies that come closest to matching the constellation of variables that operate in the particular case before the court..." (Ceci & Bruck 1995, p. 301). But what exactly constitutes this 'match'? What constitutes the relation between a (potentially 'bean-counting') study and the 'particular case before the court'? How does the 'general' relate to the concrete 'case'?!

Matters are more complex than they seem, however since there is no 'binary' distinction between two epistemologies. Looking back at excerpt 17, by the English expert, we can now see that the distinction between England and Germany is not as neat as it appeared in the context of the German expert's elaboration. Experience does play a similar role in the English expert's positioning in court, but his account shows that it is introduced in a

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299 The way this expert expresses this problem also points to the national, political dimension of research and practice, because his defence is also mounted against the dominance of an anglo-american research industry that prescribes a specific take on 'scientificity'.
different manner. Focussing on the way he reports his answer as direct speech (indicated by ‘I said’ lines 2 and 6) suggesting that this is literally what he said in court, it must be assumed that he actually delivered, or indeed voiced, the experiential ‘information’ he was not supposed to deliver. He constructs his answer as a conditional that allows him to actually report his experience to the court (and thereby to the jury) in full, while post-hoc denouncing it, re-branding it as ‘mere’ experience, to ascertain his status as an expert. He says “so to contend that a child (1) when telling the truth will be upset about I’d say you know is not within my experience” (5-6) thereby answering the barrister’s question quite clearly. With reference to the barrister’s question in line 1-2 he implies ‘no I would not expect this child to do the following’.

Additionally he elaborately qualifies his answer at various points with quite unmistakable hints to the statistical and experiential value of this information. He says “I’ve seen many many” (2) children and they are “typically” (3) relatively calm, and he has “seen over a hundred of these videos” (4); and finally appealing to common sense and probability, he adds that some of those “must have been telling the truth” (5), so even a sceptic would have to admit that. What he expresses here is a form of ‘experience expertise’ that, although different in content, is very similar to the one the German expert alluded to. It is ‘accreted’ and refined by repeated exposure to child witnesses and actual cases (even if in this case only on video), but clearly attributable to this person (author). But this means it is not valid in court, and so, after having built this compelling case the expert adds that (“if you’re asking me as an expert” 6-7) clearly “as an expert he would never say what he has just said, because he is not qualified. So the English expert solves the problem of including this information to the court by presenting it ‘in the negative’, by explicitly enunciating and demarcating the sort of things he must not say.

He does this by turning the rhetoric of the court back on itself, by formulating a rhetorical question to the barrister (his question is obviously redundant, because ‘as’ what other than an expert would the barrister want to ask him, hence he rebuts the rhetorical challenge of the misleading barrister). He manages to display and perform the paradox of providing knowledge to the court that he is not really supposed to give because it is experience and at the same time remaining laudably within the boundaries of his expertise. Obviously this is indirect information, and it is unclear what the jury will make of this (particularly as the judge might instruct them to disregard it), but it follows a pattern similar to that employed by the German expert, because it includes experience. While remaining within the confines of this legal and scientific structure it appeals to the German expert’s recommendation that “one has to integrate that within one’s mind” (excerpt 18, lines 18-19).
So does this mean experience can be expertise after all if it is performed in a sufficiently cunning way?

Once again we are referred back to the other issue of expertise in court, the performative aspect. Following the excerpt of the English expert further (excerpt 17), it is clear that this is not a very clear cut route to qualifying expertise either. The following provides an intricate demonstration of the specific difficulties an expert faces not just with regard to the way the court treats experts, but also with regard to the topic of suggestion as such.

14.5 Performative uncertainty: expertise in court, derision and suggestion

Following the English expert in excerpt 17 further through his account we get an interesting reminder of another central feature of the conversational and rhetorical dynamic that is particularly characteristic of the English courtroom, but which is no less relevant in the German legal system. Just after mentioning that the judge appreciated his recognition of the formal boundaries of expertise, the expert adds another twist by saying “I think he was being truthful not making a joke” (12-13). With this he implies that one never really knows what exactly judges mean when they say something and that exchanges in court may be based on the two ‘faced rhetoric’ barristers often use, irony or even derision. Underlining the uncertainty a witness, even an expert witness, can face in court he adds “nobody laughed anyway” (13) as if to indicate that he, as a very senior psychological researcher and experienced expert was groping for general external cues to help him make sense of the situation, in order to determine what the judge actually meant, while ultimately remaining uncertain. This comment by the expert may well be an ironic turn in its own right and it should not be taken entirely at face value. It might well have been uttered ‘tongue-in-cheek’. Still it functions as an ambiguous and ultimately amusing statement precisely because it reflects the true unease and uncertainty that witnesses can experience as a result of what they perceive as the ‘double-edgedness’ of communication in the

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300 Even though as a result of the inquisitorial structure this is less pronounced in the German court, the problem of convoluted rhetoric and conversational uncertainty is just as relevant in Germany as in England. Barristers will also try to lead and trip up experts, and witnesses (particularly experts) are exposed to an interactional culture that does not resemble everyday conversation at all. Despite the difference in legal structure we could see that in Germany certain structural collisions take place around issues of ‘correct methods’ of assessment and for example the ‘null-hypothesis’ that has been embraced so enthusiastically by legal professionals and can create the most peculiar problems for the experts’ self-positioning in court. Referring back to chapter 7.3 we can see that there is also a dilemma with regard to the language experts are expected to use. According to the legal professionals it should be simple and common sensical, but at the same time the court expects a convincing display of scientificity.
courtroom. And this is what the expert acknowledges as part of his experience of giving evidence in court.

It is interesting to see how this interview continues at this point because the next comment, following immediately after the turn presented in excerpt 17, is a vivid reminder of this ‘double-edgedness’ and the peculiar implication this might have for expert testimony.

[Excerpt 19]301

1 I: [...] if you're questioned in that way by the defence maybe and they want to lead you down a
2 certain line saying I don't think it can be true if the child hadn't cried or whatever (Yeah)
3 so that's what they want to hear it's obviously pretty dangerous to (.) to kind of over step
4 your boundary ((ABSOLUTELY)) it is because you're kind of led into saying things
5 Exp2: Oh yes that's — that's what they're trying to do yeah so I'm always very careful about that (3)
6 and I think I've been successful I don't think I've ever been led but who knows you know
7 because if you are led successfully you don't even know about it but I think I've been all
8 right (both chuckling)

Following a clarification by the interviewer, that underlines that it is indeed the maintenance of boundaries that is at the heart of the performance of expertise in court, the expert adds yet another twist to the potential ambiguity he is exposed to in court. He concedes that even though he thinks he has so far “been successful” (6) in not being led to say anything he did not want to say, the nature of ‘leading’ and in fact suggesting, implies that a successful attempt would by definition have escaped his attention (“if you are led successfully you don’t know about it” 7). And again he accompanies this with laughter.

Two things are happening here. Looking at it from the perspective of the interview itself one could say that he is positioning himself as a ‘balanced’ expert who is aware of his own potential vulnerability to failure. To just state that he was always fine would be a rather bold statement, that could be seen as unbalanced and unprofessional. Additionally he is displaying his expertise about matters of suggestion by humorously hinting at the fact that successful suggestions are those the suggestee does not notice. But secondly and strictly speaking this undermines the certainty of expertise, because it implies that paradoxically experts themselves might be suggestible and might unwittingly fall for the leading questions of barristers without ever knowing it. They are subject to the communicative uncertainties of the courtroom just like anybody else. Again this remark by the expert is likely to be uttered in jest, but it exposes the pervasiveness of suggestibility, that in itself challenges the certainty of the performance of expertise. This again highlights the double-edgedness of courtroom communication, which, even if it is not explicitly based on overt suggestion,
creates circumstances of experienced uncertainty that are conducive of multiple suggestive effects. So does that mean that scientificity after all yields to the structural and rhetorical forces and peculiarities of the courtroom? Or does the courtroom simply present a particularly probing environment for expert statements? Beyond that, if experts are suggestible, how can the court rely on their advice?302

We have arrived at a point where it is the pragmatic intersection of the epistemology of the court and the epistemology of science becomes troublesome. Should scientific facts not be above challenge, or shouldn't they at least be above this kind of legal challenge?303 Clearly scientific facts are not above challenge, but what is interesting here is the sort of challenge that is characteristic of the courtroom. One could say that it is an ‘unscientific’ challenge, that the law interrogates science from a perspective that is not its own, and hence produces these rather bizarre effects. In this sense science and the law could simply be seen as colliding systems of ‘truth finding’. Yet such a conclusion leaves us with a rather abstract rhetorical point. Or interpreted practically it leaves us with the disquieting proposition that either one of these systems must be malfunctioning, if they can have different versions of a ‘positivistic’ truth. Or does the concrete allow for different epistemologies to operate within it? Clearly we need to look at the actual instances more closely.

This ‘performative dilemma’ seems to imply a rather structural, strategic perspective, that leaves us entangled between the issue of ‘expert intuition’ versus ‘science’ on the one hand, and the rhetorical dynamics of the legal discourse colliding with the psychological discourse on the other hand. This still does not answer the question raised within the dilemma the German expert unfolded: what is the role of ‘the concrete’ for expertise and how does validated (or indeed bean-counting) empirical knowledge relate to a concrete case? And most importantly what does it mean that suggestibility in effect has evaded ‘capture’ by the theoretico-experimental apparatus so far? Interestingly the German expert unfolds this crucial dilemma around the issue of ‘scientific proof for the detection of suggestion’, and thereby points to the wider ‘scientific’ problem.

302 We have been at that point already. Because here we are running full circle to the end of chapter 2 where suggestibility itself proved suggestive and it was Ceci himself who concluded that what suggestibility research showed was that the suggestibility of researchers, their biases and preconceptions should be examined rather than children’s suggestibility.

303 Because the nature of the legal challenge is, traditionally, to enable the fact finders to distinguish lies from true statements. Or is it after all a question of the expert lying or telling the truth?! That cannot really be the case.
This is a reminder of another complication at the heart of experts' statements about suggestion and suggestibility.

Looking back at chapter 1 and 2 (and also 7.2 and 8.2), it is clear that while the theoretico-experimental apparatuses of modern sciences (to use Stengers’ expression) have guided experimental psychology in their attempts to operate as a science and they are reflected in the self-positioning of the expert, suggestibility has remained an ambiguous and unresolved topic that has continuously short-circuited the theoretico-experimental apparatuses of psychological research. Or to use Stengers’ terminology, experimental psychology has not been able to produce ‘reliable witnesses’ that speak (vouch) for the reliability and certainty of expertise in this area. At this point then we have three simultaneous (or layered) paradoxes/dilemmas experts are confronted with in court.

Firstly, the dilemma of expert intuition and application, i.e. the dilemma of presenting themselves as legitimate experts while including what could be called experiential knowledge that refers to a concrete case. Secondly the dilemma of positioning within the extremely ambiguous conversational context of the courtroom in which this needs to be accomplished. But then, there is a third one, the paradox of suggestion itself. Because what should be at the bottom of the issue of expertise and scientificity is the reference to actual (correct or at least valid) experimental findings, and suggestibility has proven to be an extremely slippery candidate in this respect.

Let me examine what suggestibility itself does to the experimental apparatus, what it says about application and how this again relates to the risk of generalisation.

14.6 Suggestibility, experimental apparatuses and the principle of sufficient reason

While the problems of generalisation and application are inevitably more acute, more palpable for German experts, the issue of generalisability and application is none the less present for English experts and researchers. The problem emerges most forcefully and most noticeably in relation to legal practice, as the following excerpt underlines. Just as outlined in part A, it is the transgressive and short-circuiting activity of suggestibility that raises these questions in a manner that can hardly be ignored.

304 While there are structural and positional differences between the way the English and the German expert will encounter and practically address this problem it is similarly relevant in both systems (German expert needs to embody expertise in court, and will have to deal with the paradox of speaking unscientifically, about the concrete case and to the court, while also positioning themselves successfully as experts; the English expert can stick to a much more formal positioning approach as the English legal system does not allow any ‘case specific’ assessment anyway, hence they can fully unfold their expert position, but will face a more hostile cross-examination).
[Excerpt 20]

1. Expl: [...] but there's also the issue about ahm (.) the reliability of the kind of measures we're taking (1) say if you administer (.) Ceci's scan (I chuckles) (2) but that ah (1) I don't know (1) "what does it tell us" (I laugh) [...] it's quite another thing to say (1) yes simply they are suggestible (2) but even if they are suggestible they will tell the truth from time to time (I laughing) AHH soo::o (chuckling) (cough) you know I think maybe that a it's just a gift to the defence anyway [...] 

This expert is referring to Ceci's suggestibility scale for children (Scullin & Ceci 2001), that represents and attempts to deliver a standardized test for suggestibility, or indeed a "scan" (2) as the expert puts it, interestingly alluding to some kind of medical procedure. With regard to Ceci's scales it is worth noting once again that it seems a peculiar move to devise a standardized measure for suggestibility, as a property, or characteristic, when suggestibility has still not been comprehensively defined or understood. Crucially, it is once more the proposition of its concrete application to legal practice that uncovers its shortfalls in the relations to the concrete. As the expert states "even if they are suggestible they will tell the truth from time to time" (4-5). So even provided there was a definition and a measure of suggestibility, it is unclear how it could productively be related to a concrete case.

So while referring to very different realities of expert practice, the sentiment expressed by the German and the English experts is very similar. They all imply the questions of the relation between validated research and a concrete case, of what it means to apply, or indeed to generalize knowledge and what risks such generalizations involve? Again, it is the intersection with legal practice that raises this question for them, concretely and tangibly with every new case. This is what gives suggestibility an almost 'deconstructive dynamic' as it enters legal and scientific practice. This is the 'node' the experts operate around, and the complexity of two divergent structures they are handling at any one moment when having to face this dilemma.

This is even more intriguing where the 'validated research', that is repeatedly called upon with reference to Ceci's work, has not quite been able to actually validate a distinct answer to the question of how to define, detect or cause suggestion and suggestibility in a concrete case. What can we learn from the specific resistance suggestibility poses to the experimental apparatus causing frictions that are exposed uneasily in court?

305 Expert1: 340-349.
At this point it is possible to re-consider the problem of the 'risk of generalisation' as introduced with reference to a quote by Ceci and Bruck at the beginning of this chapter.306 Because in the context of my analysis we can now see that what the experts problematise is much more than a mere 'imperfection' in analogy, or a "less than perfect match" (Ceci & Bruck 1995, p. 301) between 'findings' and reality. We can see that we are nowhere near even understanding the relationship between the two at all, let alone the 'degree' of a 'match'. Let me unpack Ceci's 'risk of generalisation' in some more detail.

Ceci's statement functions on the basis of what Stengers (1997) identifies as the 'principle of sufficient reason' that is implicit to the operations of the modern sciences, and that defines the way in which scientific reasoning is linked to, or relates to the phenomena, the concrete.307 Stengers unfolds her argument in relation to Galileo's definition of velocity, i.e. the speed gained by a body as it travels through space. Galileo found that this gain in velocity must be defined by an equivalent loss as the body travels through space. Leibniz later used this definition and extracted from it the principle of the equation, relating it to the understanding of the notions of cause and effect. Hence he introduced the 'equals' sign to express the relationship between cause and effect, a suggestion that at the time scandalized Leibniz's contemporaries, as Stengers outlines. "The velocity gained is 'equivalent' to the lost altitude, which for Galileo and Leibniz means that this velocity is exactly sufficient to allow the body to regain the lost altitude." (highlighted in the original) (Stengers, I. 1997, p. 25). Crucially Leibniz had grasped that by means of the 'equals sign', which would guarantee a relation between cause and effect that could be seen as independent of the ideas or preferences of the one who writes it, he could provide a fully independent definition of the relations of cause and effect.

"Leibniz had understood that the only objective definition of a cause or an effect that is not a reflection of our choices or ideas is one that acquiesces to equality: if I define cause and effect in such a way that I can write
Yet, already at that time, as Stengers elaborates, the phenomenological evidence seemed to be against Leibniz, as collisions between bodies showed to be not perfectly elastic. Some movement is always 'lost', which means that the cause was not entirely equivalent to the effect. To address this problem Leibniz used the argument that "reigns today in physics: it is because we are not perfect observers, capable of measuring the full cause and the entire effect, that we believe that some movement is lost when actually it is transmitted to small, invisible parts of bodies." (Stengers, I. 1997, p. 26). And this is what Stengers identifies as the 'principle of sufficient reason'.

"The principle of sufficient reason articulates perfection and equivalence. It defines the manner in which an observer who lets nothing escape can observe and calculate. Only an ideal observer can write the equals sign." (Stengers, I. 1997, p. 26-27).

This on the other hand means that the apparent nonequivalence observed in the processes of moving bodies could be ascribed to the (as yet) imperfect abilities of the observer and manipulator, who was not able to 'fully' observe and 'totally' grasp and control all the relevant factors, who did not have access to the fullness of the causes and the entirety of the effects. However, this saves the principle of the equation as such and allows us to dismiss apparent irregularities as the mere result of imperfect observation. So the principle upon which he/she observes and equates remains intact, which means that the results are not 'inadequate' or incorrect, but can be called 'approximations' to nonetheless fundamental laws. 308

With regard to my analysis we can see that this 'principle of sufficient reason' is exactly what makes Ceci's appeal so credible. He is able to present the problem of experimental 'imperfection' as an issue of (as yet) 'imperfect exactness' of observation and control. Following this rationale we can say that if only we knew all the factors relevant to suggestion we would be able to explain it perfectly, but currently we only know a 'few' (but those few we do know) and hence we can only approximate its actual nature. However these approximations allow us to infer suggestibility's 'fundamental principles'. Following this perspective of sufficient reason it is only a problem of a degree of imperfection that can be solved by more rigorous control and more fine grained observation. This implicit

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308 For Stengers this analysis serves to expose physic's successful dismissal of the arrow of time, because this principle enabled physicists to claim the actual equation of cause and effect and hence to cling on to the notion a reversible, absolute time (exemplified by the body that could, in principle, re-ascend), in the face of countervailing evidence.
principle of sufficient reason makes it impossible to even consider that potentially the way experimental psychology has ‘understood’ and set up its problem, i.e. the way it has constructed the question it is trying to answer, might be missing the point entirely, might be fundamentally misconstrued. So Ceci’s way to put it, and therein the ‘principle of sufficient reason’ operant in modern sciences, obscures what is exposed in the expert’s comment above (excerpt 20). Experimental research has told us very little about the actual concrete dynamics at work in suggestion in a concrete case and even less about the way those research results relate to a specific case (and this is clearly not a matter of degrees of analogy). Or, as we can add with reference to the earlier excerpts by the experts, there certainly are things that are known about the dynamics of suggestion, but these sit very awkwardly within the structure of scientific reasoning.

I would finally like to return to the courtroom and elaborate this point in relation to the legal perspective and to legal practice. Because it is, after all the court that is most specifically asking the question of application in this context.

14.7 The paradox of application

From the perspective of the court these issues can be seen to take an even more extreme and indeed paradoxical turn. In the following excerpt a German judge considers the potential impact scientific research as such could have on legal practice and paints a peculiarly extreme picture. This is even more surprising as this judge (just as all his colleagues) is very appreciative of expert’s contributions to legal procedure. Still, here he is talking about psychological research, or indeed ‘science’ as such.

[Excerpt 21]³⁰⁹

| 1  | JG1: | Well isn’t it the case that science how can I put this (1) looks at the characteristics of memory very very broadly inquiring into it from from ahhm many different individual angles (1) above and beyond the question of how witness statements come about how memory works in general and (1) ahhm sometimes I feel like a blackout when I read (.) that ahhm when I see that well there is the opinion that or (.) or it is postulated as as scientific finding that or it is inferred that well (.) sort of ahhm that all we really have are the most subjective memories and that gaps in memory are patched up instantly (1) ahhm (2) well in that case (2) you can absolutely forget about a witness statement that’s a very interesting problem (.) if you read science dogmatically then it would be pointless to even assemble in court ((yes)) if you could say nooo all the stuff you remember is total utter rubbish= |

³⁰⁹ JudgeG1: 1540-1566.
Problematising the potential impact of scientific findings this judge proposes that if we were to (or indeed had to) take seriously the research that indicates the subjectivity and constructedness of memory and perception, the court would have to abandon witness statements altogether. This is presented as a serious concern, as the judge indicates that he feels “like a blackout” (4) when reading about such findings, because this would eradicate, make redundant (even ridicule) the practices at the heart of legal procedure.

Yet, he presents this worry in a peculiarly hesitant, longwinded way. In lines 4-6 he initiates his account by saying “when I read that”, which he changes to “when I see that”, hesitating again now opting for “that there is the opinion”, adjusting his expression again to “or it is postulated as as scientific finding”, but again he reformulates this as “or it is inferred that”, to add another mitigating “well sort of that” before finally coming out with the precarious issue he is concerned about, that all memory might be subjective, “that all we really have are the most subjective memories and that gaps in memory are patched up instantly” (6-7).

So while this potential ‘subjectivity’ of memory is troublesome, his apparent inability to put a name to the way this knowledge should be spoken about, or should be said to have emerged, could be seen as an implicit search for the factual value attached to it. Or it is an attempt to avoid attaching any factual value to it in the first place, while simultaneously presenting it as a serious concern (because if it was just a ‘story’, why would the judge have to be concerned about it?!). It is something he read, saw, an opinion, postulated as scientific finding (hence not really a scientific finding), an inference. So while he seems to construct a downward spiral of decreasing assumed, attributable (or attributed) scientificity, almost dismissing what seems incredible anyway, he ultimately asserts that this is a serious problem for legal practice: “you can absolutely forget about a witness statement” (8).

In its totality this seems a rather extreme, exaggerated understanding of science, but the judge is intent to stick to it even after the interviewer has pointed out in a half playful manner that this is a rather dogmatic reading. The judge goes on to present this even more
concretely as a realistic danger saying that “luckily” (12) so far no defence barrister has introduced this to the court and demanded the dismissal of all witnesses on the ground that “there’s no memory and perception that is uninfluenced by” their own expectations (14-15). Yet again there is an ambivalence within his account, as the judge presents it as something the defence barrister may have read in a science column (13) of a newspaper, which would in principle not pass as the most reliable of sources. In fact it rather degrades the validity of such a claim. Still he asserts that “we would be in big trouble” (16) and that “it’s a massive problem” (20).

This account is perplexing in its solemn extremes. Moving beyond the question of what exactly this means to the judge, however, one can see that it demonstrates and exposes, in an exaggerated fashion, the paradox of application that resides between the court and psychology (as a science). It concretely invokes this paradox of application as it oscillates between the abstract and the concrete.

The court demands of expert statements that they be legitimized and validated by referring to the theoretico-experimental apparatus of the modern sciences. This requires experts to do their peculiar self-positioning in court. But following its structure and its own absolute positioning towards the determination of the truth of specific concrete cases, the court would consequently have to attach similar credibility to a finding that has proven to be scientific, and apply it to concrete cases. So while it is not unusual that ‘generalisable scientific findings’ make a claim to a wider truth, were they applied to a concrete case in the absolute fashion that is only imaginable in relation to legal practice, either the finding would appear absurd, or the legal apparatus becomes absurd. So one could say that what the judge’s account expresses, or highlights, is the opposite of what it (literally) says. Via the bizarreness it evokes, it manages to fold the general claims of science back against itself and exposes the fact that application must be more than just an immediate literal translation of a finding into a court relevant aspect. It must be more than an analogy, a plain absolute match.

So what makes this statement slightly bizarre (or indeed naïve), is the fact that it takes science literally as an abstract, absolute operation; the statement omits the concrete ‘work’ that needs to go into applying knowledge; hence it omits the ‘paradox of application’ and thereby exposes it. The paradox and concrete operations of application that I have examined earlier in this chapter are absent from the judges ‘thought experiment’ as he seems to suggest that the ‘facts’ that have been made to speak in the theoretico-experimental apparatuses of science, could now operate directly upon legal practice. Thereby he also obscures his own potential contribution, his own ‘work’, his own concrete
operations that only make it possible to apply these 'facts'. So in effect his account points to the paradox of application, it points to the concrete, dynamic and irreversible operations, the work that needs to go into making science effective in court, and the incalculable and always personal but at the same time abstract risks incurred when doing this. In other words the paradox of application describes the fact that at any one moment there is an a-personal person applying knowledge that is abstract (scientific) and simultaneously concrete, as it is made to relate to, indeed made to 'be' a very specific case.

More pragmatically we can say that in an extreme way the judge expresses the problem of a court that is assessing, via its own mechanisms, whether an expert statement is appropriate or not. How then can scientific expertise be present in court other than in a paradoxical way?

Implicitly the judge deconstructs the 'principle of sufficient reason', because he demonstrates what could happen (strictly speaking) if the 'inaccuracies' and imperfections of current research were really just the result of (as yet) imperfect observation and less than perfect capacity to grasp all the factors, but in principle correct. Scientific practice, as well as legal practice would suffer a 'blackout of absolute reason' if the principle of sufficient reason really applied, or indeed 'was being applied'.

Clearly, inscribed into this account is the very problem of the 'real' and the 'constructed'. The problem of having to be able to think simultaneously what the logic of representation prescribed by the modern sciences has made so difficult to grasp, the concurrence of realisation and construction, of composition/invention and reality. But having to take construction to be mere invention, results in the arbitrariness the judge fears will topple his very practice. And yet he also knows that it does not. Only he cannot grasp just 'how' he can 'know' that.

The same paradox is expressed in this account by an English judge, even though he adopts a position opposite to the one the German judge assumed. Reflecting the characteristic suspicion of English legal procedure towards experts, he goes a step further with regard to psychologists, saying they ultimately “undermine your own faith in your own judgement” (3-4).

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310 We will see in the next chapter (15) that this is the way in which the law points to the flux of change. “Far from being grounding repetition, law shows, rather, how repetition would remain impossible for pure subjects of law – particulars. It condemns them to change. As an empty form of difference, an invariable form of variation, a law compels its subjects to illustrate it only at the cost of their own change.” (Deleuze, G. 1968, p. 2).
14. Science, law, expertise: the paradox of application

[Excerpt 22]\(^{311}\)

Judge2: there's a great distrust of experts (yea) (both laughing) HA! HA! (laughing) y'know just need Ceci's lecture I mean then in a way (.) you know and we're only need Ceci's lecture I mean then in a way (.) to make you undermine your own faith in your own judgement (1) but you know we tend to think as well a' o'h no well you know show me ahh later I'll I'll sort it out and that's the good bit of that film there there's this very experienced judge (.) and I forget which way around the story goes 's wouldn't believe a word that girl said ((1: it's really good that you forgot how the story (I laughing)) yea as well ahm the same let's say this way 'round it was really good and you know that little girl they asked her so many leading questions and she was so unconvincing (1) I wouldn't ahh have believed a word she said (((hmhm)) (1) you then the film then (.) cuts (thuds hand on the table) to the father (2) in prison saying I quite right I'm in here everything my daughter said was true (both chuckling) and he pleaded guilty (chuckling) (((hmhm))) this after everyone has seen this little girl (1) and said you know (2) don't believe a word she said (((hmhm))) and there's her own father saying (.) it was all true (.) I mean "how do you do it (.) how do you do ita" (.) I a' would you train juries nana I don't know IN THE END that is sort of the best we've got and I'm not sure how you'd improve on it [...] It is psychologists, and in an exemplary position once again Ceci, who will “undermine your own faith in your own judgement” (3-4), but then unlike his German colleague this judge adds that “we tend to think as well (…) I'll sort it out” (4-5). This judge describes the training film about Ceci's implanted memory research and he delivers a narrative of a clip that showed a little girl being interviewed and displaying all the signs of an unreliable witness, "she was asked so many leading questions and she was so unconvincing I wouldn't have believed a word she said” (9-10). However the film then goes on to reveal that the accused, her father, had actually pleaded guilty and confirmed that all she said was true. Yet, he says resignedly, "how do you do it how do you do ito" (14-15), which reflects the fact that it is unclear how such knowledge can be applied, and what it means to the concrete practice. While 'training juries' would not be possible in principle, the narrative he delivers implies that it is unclear anyway what exactly a jury could be trained in if the legal system allowed this. Even though this clip seems to tell a very specific story about the fact that even a child that is asked suggestive questions and appears unconvincing, could be telling the truth, it simultaneously carries the double-edgedness that is so characteristic for suggestibility research. In scientific terms as well as in terms of application it consistently transports the 'maybe maybe not' message, that ultimately sediments as overall 'uncertainty'. So in an inverse way this exposes the paradox of application. How does this case, and thereby Ceci's research, relate to the judge's practice and decisions?!

While there is some useful information implied (alerting us to the fact that suggestion as such exists) in relation to the concrete this same research implies its opposite, namely that the exact signifiers of suggestion might coincide with an entirely true statement. So again

\(^{311}\) Judge2: 788-807.
we can see that the issue of the paradox of application is not based on a mere imperfection in the analogy between research and practice, because application seems to operate on the basis of entirely different parameters. Application operates on the principle, or the epistemology of “I’ll sort it out” (5) to use the judge’s own words. Whatever this in any one given moment means, it is this personal work, this operation, this ‘sorting it out’, that constitutes application, and that in this sense entertains an inherently paradoxical relationship to the abstract rules. Following a scientific logic of application, as the German judge demonstrates, the English judge would also have to declare himself incapable of ever again presiding in criminal proceedings, because the criteria for determining children’s credibility are utterly ambiguous.

So what is exposed in these two examples, and thus manifest in ‘pragmatic functioning’, is the paradox of application and the concrete paradoxical operations that are always already concomitant with it. Strictly speaking scientific findings (as for example presented by Ceci) cannot be ‘applied’ - they have no abstract way of their own to relate to the concrete. Trying to grasp how exactly they are made to relate to the concrete leaves us with a paradoxical sense of something very concrete and very abstract at the same time. This is the tension expressed in the still partly pending question about the relation between experience and expertise.

I would like to close this chapter by drawing out and re-emphasising three key points.

Firstly, on a pragmatic level we could see that what experts ‘do’ is not ‘expertise’ and what is applied, taken in, by the courts is not ‘actually’ or strictly science. There is a peculiar sense of impossibility about this practice when examined closely. So why does it not freeze, go into ‘catatonic arrest’, or fall apart in the face of the mounting contradictions? Why does it, apparently, ‘work’, or indeed operate and what exactly is it that is ‘working’? We could see that it is down to the constant and very concrete operations of those managing this practice, making it possible.

The analysis has provided a glimpse at the extreme effort that must go into holding all of these paradoxes together at a pragmatic level. The operators manage to operate at their nodes successfully merging and, with some effort, aligning, or glossing over the various cracks, fissures, frictions, dynamics and paradoxes. Clearly the knowledge, i.e. the expert’s advice is present in some way or other, but it is difficult to say what exactly it ‘does’, or how it is present. On the other hand courts do function and there are no ‘legal blackouts’ of the kind feared by the German judge (excerpt 21).
Looking back to chapters 7.3 and 8.3 we could see that with regard to practice, these two judges generally refer to these dilemmas in a quite resolute fashion. In relation to expert assessment the German judge stated that “the only thing we can say is we get it or we don’t” (see quote in chapter 7.3 ‘Expert Testimony in Court’) and he describes quite plausibly how the court is required to ‘make the case specific expertise’ its own, acquiring a sort of instantaneous ‘proxy expertise’. The English judge comments how “you get all these tables that are truly mumbo jumbo to us” (see chapter 8.3, ‘Psychological Expertise in Court’), when ultimately they will indeed ‘sort it out’ as he states in the above excerpt (excerpt 22). Only it is difficult to say how exactly they do it (which resonates with the judge in excerpt 22 who also wonders: “how do you do it (.) how do you do it”?, line 14).

In relation to the analysis undertaken in chapters 11 to 13, it has become clear that this happens at a certain cost. The cost is an operational degree of uncertainty that, as we could see earlier, is likely to be resolved at children’s expense.

The same applies for the paradox of application. In order to relate to the concrete case the experts have to position themselves towards the abstract apparatus of science, while simultaneously relating to the concrete case. This means that children’s evidence, even on this level, will be suspended as much of the expert’s attention is devoted to self-positioning and determining, outlining boundaries of expertise. In turn the court has to make this information operable, trying to hold together the colliding issues of having to test/assure scientific legitimacy and at the same time assess how exactly the knowledge presented should be seen to relate to the concrete case. The knowledge can neither be ignored nor fully be taken on board (German judge), it can neither be disregarded as irrelevant, nor does it indicate an actual direction (English judge). The degree of experienced uncertainty might be different for experts and judges than it is for example for police officers (see chapter 11.2), because judges and experts have different positions in the system and more authority, or detachment. But it is present in a similar manner (clearly the English judge is more detached from it because other than the German judge he does not have to make the decision).

Secondly, in this chapter we have reached a point in the analysis where matters of discourses, meta-narratives, positioning and structure appear to have collapsed into the ‘concrete’. Crucially we have reached this point by persistently returning to and clinging onto the very concrete issues resonating within the accounts, issues and problems arising. I would argue that in this sense we have gradually transgressed, and ultimately moved beyond the specific scope of discourse analysis and critical discursive research. While for example (as demonstrated at the beginning of this chapter), Burman’s critique of the material political
and regulative power operant within the discourse of psychology as a science is crucial and remains relevant, it has become clear that there is a much more concrete and volatile dimension to the actual 'risk of generalisation' and hence to application.

There is something utterly concrete and at the same time very abstract that is not grasped by examining the conversational or discoursive dynamics of this practice; it escapes those forms of analysis. The concrete, instantaneous and actual 'production' (or emergence) of what might then be identified as conversational positionings or as the dynamics of power and knowledge, follows very different, peculiar and indeed paradoxical dynamics that are anything but powerful or directive; if anything they could be described as 'intense', i.e. as being of a forceful presence (quality) but with no distinct directional power or 'intent'. For example with regard to the 'ceci-machine' (see chapter 3.5), that is the 'intense' but ultimately indistinct way Ceci's research relates to-, is present within the judges practice, as outlined above with regard to excerpt 22. Here 'science' is an intense quality, but not a directive power. It is a 'machine' producing effects.). In the next chapter I would like to follow this concrete intensity even further to see how it can help to understand the concrete tangle of the 'real' of the law and the 'real' of psychology.

I have made no explicit mention of systemic approaches, but examining the interaction of science and law, and even more examining it within different national legal systems, has inevitably evoked resonances to the workings of systems and structures that could have been explored explicitly using systems theory (Luhman 1978). Still, at this point in the analysis it is already clear that even though the dynamics uncovered here could be abstracted as relating to structures, they are in themselves not really structures. They relate to and transgress, connect and dissect what could be described as the legal systems or the system of the sciences/psychology, but they do this at a peculiarly concrete, personal level while simultaneously drawing in wider societal and political issues. It seems we have moved past, beyond or underneath such a systems abstraction. The tangle of the 'real' of psychological and legal practice needs to be examined more concretely and more abstractly, as it occurs in a dimension beyond systems.

Thirdly, the transgressive dynamic observed within practice is another example of suggestibility providing a liminal resource; suggestibility carries a deconstructive dynamic, a deconstructive force into legal and scientific practice, that is exposed at the intersection of the legal and the psychological discourse. In the next chapter I will explore the very

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312 One version of applying systems theory to issues of child witness practice has been provided by King & Piper (1990).
concrete and at the same time very abstract 'make up' of this liminal resource and its
dynamics, in order to see how it can help reformulating the question of what is at stake in
this practice, what concretely happens when for example judges 'sort it out' and how this
understanding can help to reformulate the problem of children's suggestibility and child
witness practice.
15. Recalibrating the analytic trajectory: events, voids and the pragmatics of change

"As Deleuze said to me, however (...): there is no heart, but only a problem—that is, a distribution of notable points; there is no centre but always decenterings, series, from one to another, with the limp of a presence and an absence—of an excess, of a deficiency." (Foucault, M. 1970, p. 343).

The analytic movement performed in this chapter could be described as an attempt to look at the same set of problems examined before by using a perspective that is much more concrete than those used before, but at the same time much more abstract. This analytic movement is based on the work of the French philosopher Gilles Deleuze (2004 [1980], 1977, 2004 [1969]), and I will explicitly elaborate this theoretical link as the chapter unfolds. In this context the concept of the ‘event’ will become central again and I will refer back to the work of Stengers to illustrate how this perspective can relate to practice. At this point, to put it bluntly, one could say that I am reshuffling the problem, or the components of the problem, and thereby re-calibrating the analytic trajectory, in order to be able to explicitly capture what suggestibility as a liminal resource has been exposing all along. It will become clear how suggestibility, while remaining the subject matter of the analysis, has simultaneously acted as a catalyst for certain problems. Suggestibility could be said to literally ‘slice across’ meta-questions of theory, scientific reason and the fundamental issue of the ‘relation to the real’ on the one hand, and concrete instances of personal agency and intent on the other hand, connecting, or condensing them and simultaneously providing a glimpse at what provides their adhesion. I would like to show how this glimpse provided by the momentous ‘gaps’, or indeed ‘voids’ suggestibility slices into the concrete and theoretical structures, opens interesting perspectives. I will demonstrate how these voids could constitute ‘passages for change’. In this sense suggestibility has also become a ‘method’, an analytic device that operates on an abstract theoretical level, as well as on a concrete, pragmatic level, intertwining the two levels in a specific way. On an abstract, theoretical level we could see that suggestibility operates to unsettle discourses, structures of power and knowledge. It could indeed be said to exert a deconstructive force. This is expressed neatly in the quote by Chertok and Stengers, used at the end of chapter 3.

This is a trope alluding to Deleuze’s outline of pragmatics (Deleuze, G. 1980 [2004] p. 163).
"Suggestion is capable of integrating knowledge, but, at the same time, suggestion strips this knowledge of the power it claims of defining a radical opposition between reason and illusion." (Chertok & Stengers, 1992, p. 145).

Yet, at this point in the analysis we begin to grasp the full extent to which suggestibility operates as a deconstructive force. Closely connected to these theoretical issues, on a concrete level suggestibility raises the question of individual agency, application and control. Here suggestibility turns into a catalyst for the analysis, as it raises the very concrete question of what happens to practice and application once we admit that we cannot really control it. Again, Stengers helps to readjust the focus by pointing out that rather than trying to confine, eliminate or get rid of the effects suggestibility incites (e.g. by condemning them as artefacts), we need to consider what it can 'do', how it can be utilised for an understanding of practice in a positive way.

"...it is logical to again raise the question of knowing what suggestion can do in its many diverse modalities from the moment it is stripped of the illusion that the one who suggests knows what he is doing and can control the meaning and consequences of his suggestions with regard to the one he is addressing..." (Stengers, I. 1997, p. 106).

These two quotes illustrate the more abstract (former quote) and at the same the more concrete (latter quote) perspective suggestibility engenders.

It is in this sense that I would like to explore, theorize and utilize this specific capability of suggestibility to summon, condense, multiply and integrate knowledge while simultaneously "stripping this knowledge of the power it claims to defining a radical opposition between reason and illusion" (Chertok & Stengers 1992, p. 145).

15.1 The expressed: capturing the nature of what suggestibility does – to theory – to practice

Let me first try to deliver a broader description of the phenomenon at stake, or rather, the occurrence that is still escaping the analytic grasp.

Looking back at the thesis so far we can roughly distinguish two large ‘apparatuses’, or systems, that promote and reproduce a specific kind of order. The sciences (here psychology) and the law (here the English and the German legal system), both operating upon a distinct version of what could generally be called enlightened rationality, or binary/bi-univocal logic (Deleuze 1969 [2004]). As I have demonstrated in various ways with reference to foucauldian discourse analysis, this ordering activity comprises power over those who are subject to these orderings. To a large extent this power is expressed via representations, categories, definitions that are made to work upon and are implicitly
reproduced by the subjects they apply to (see chapter 3.3). Following the analysis in chapters 11 to 14 we could see how the power of knowledge, logic and representation figures as a power of normalisation, exclusion and control.

Still what we have not really been able to grasp is the exact nature of the dynamics emergent around the acute epistemological unrest evident wherever suggestibility becomes a matter of scientific or legal scrutiny. At a glance this might sound a banal observation. As pointed out at the end of chapter 14, this 'epistemological unrest' appears to be successfully recuperated, glossed over and managed wherever it crops up. However we could also see that this always happens at a cost.

Additionally there is something about the way it is mentioned and dealt with that we have now been able to understand. If it is 'tackled' and 'glossed over', why does it continue to be expressed by the practitioners as such a peculiar and central issue? What is remarkable here is the persistence or indeed stoicism, with which suggestibility continues to return and with which it transgresses the history of psychology as a science as well as the contemporary structures of the law. And here it cuts right down to the immediate considerations of legal practitioners and experts, demanding to be attended to, requiring to be contained, but thereby exerting paradox energy that seeps out from these moments, and that is abundantly expressed by the practitioners to the extent that they appear to portray their practice as impossibly paradoxical. Let me look at these instances more closely to specify what I mean by that.

**The expressed**

In order to consider what suggestibility 'does' in the concrete context, I am shifting my analytic focus to the 'expressed'. At this point I am not so much interested in for example discursive dynamics or logical contradictions in practitioner's statements. I am now looking at the potential dynamics of what is expressed in the specific moment when for example the judge says "nine year olds can lie nine year olds can tell the truth but this this was a nine year old you are dealing with here ahhhm but wh' wha' what that actually says I'm never quite sure (laughing)" (excerpt 9). Logically speaking this is a self-contradiction, a tautology that might be seen to reveal a fatal weakness of the criteria of decision making.

Still, we could see that the judge does not 'collapse' over this peculiarity because he has a power structure to fall back on and will be likely to gloss over this problem, to move on. Yet, revealing this power structure and pointing to the fact that it enables this 'glossing over', does not capture what is expressed in this very moment and in this very laughter of
the judge when he says ‘sure’. Moreover, why does he bring this up at all? And what is so funny about it?

A similar dynamic can be observed later when the same judge explains that ‘Ceci’s research would make you lose your own faith in your own judgement’ (excerpt 22). What exactly is expressed in this moment? Just as in chapter 3.5 we can again raise the question whether Ceci is to blame for making legal practitioners feel uncertain (and, do they in fact feel uncertain)? How is ‘Ceci’ as a person, a researcher, a name, related to this expression and is this evidence of him ‘causing’ something in the judge, is he guilty of ‘confusing’ the legal system? And is the legal system (or the judge) really confused?

Again we can see that Ceci is clearly related to this statement in some way, but he can hardly be the ‘cause’ of something, because Ceci as a person can hardly be responsible for all the possible effects of his research, and on top of that the judge’s account does not express any distinct direction this potential effect might have on his ‘attitude’, ‘opinion’ towards any one case.\textsuperscript{314} But how can we then describe the manner in which ‘Ceci’ is present in the judge’s statement, or is it irrelevant then? It cannot be irrelevant, because it is undeniably present, it is being expressed by the judge; and it is being expressed with some resolution, intensity, but it cannot be narrowed down just to a position in discourse (or a fragmented position), or an attitude or a personal characteristic of the judge, it is of a more fleeting quality.

Here it seems the judge and Ceci are present in multiple ways, or ‘as’ simultaneous multiple perspectives. So devoid of cause, effect and direction, maybe we have to call it a bunch of signs, a bunch of fleeting, contradictory signs hovering over the judge, or maybe, inhabited by the judge; a bunch or a bundle of fleeting signs that, for want of a better word, emanated from Ceci’s research activity, that could be seen as a product of his activity, but not really of his agency, and that are now productive themselves in some way. So additionally this bundle of signs, while it is very concrete, very specific, is also impersonal in that it cannot be said to ‘belong’ to-, or emerge from-, or be ‘perceived’ by the judge or Ceci in particular, but still at this moment they share it, or it connects them; or indeed they are inserted into a sphere where all of these signs are ‘productive’. In chapter 3.5 I have called this ‘dynamic’ surrounding (or emanating from) Ceci’s name a ‘ceci-machine’. We can now, after having witnessed the diverse appearances and effects this ‘machine’ produced throughout practice, gain a much more complex sense of what this ceci-machine might be.

\textsuperscript{314} As outlined in chapter 14 the insight seems to run both ways, children are suggestible, children are not suggestible; this child appeared to have been under the influence of suggestion but was telling the truth.
The expressed of suggestibility as a void

What I am trying to capture with this slightly elusive terminology, is one thread of the vast proliferation of 'meaning' that surrounds issues of suggestion but that does not seem to have a distinct direction or source. Having no source and no specific 'direction' of effect, I would suggest that it cannot be reduced to being an aspect of a dominant or indeed a marginal discourse; it is a dynamic, homeless entity. At this moment when the judge makes his statement we get a glimpse of its proliferated force. And this glimpse could be termed a momentary 'gap' or an instantaneous 'void' in the powerful ordering dynamics of reason and logic (here both are implied, scientific reason as well as juridical reason).

Crucially, this 'void' is not a void in spatial terms, it is not an 'empty' space, vacuous or lacking in content. On the contrary this is a 'void' that gives a glimpse at a proliferation, an unruly abundance of meaning. This void is overflowing rather than empty. What it lacks however is shape. But it does not at all lack in content. It is a 'void' in the ordering structuring framework. It is a structural void, because it stands for a momentous lack of shape. Hence it is a void of abundant but shapeless, directionless, indiscernible meanings. At this point this might sound slightly awkward because it implies that we can differentiate between 'shape' and 'content'. How could something be only 'content'? I will, in a moment, put in place the theoretical framework that allows such a distinction. It enables to see what is referred to here as shapeless abundant 'content', in the form of intensities, or speed, and not as a 'spatial' dimension.315

Ordering structures such as 'discourses' usually require us to see a direction of sense and they imply a 'subject' of an activity, an 'identified centre' from which something is done, seen, perceived, or that is the object that suffers the effect of something. This 'void' however lets both of these distinctions (direction/subject) grow indistinct, and this void arises around, is instigated by issues of suggestibility.

Such voids are the instantaneous instances suggestibility produces. It is in this sense that suggestibility can be said to produce instantaneous incisions into the ordering fabric of scientific and legal reasoning (and while it does not ultimately 'overturn' them, it still offers an interesting glimpse at the underlying dynamic). These incisions are visible all across the history of theory, research and practice around suggestibility. Indeed, as I would like to

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315 It is a difference like the one between on the one hand the intensity of experienced passing of time (like the 'rush to protect' -chapter 12.3- where the 'quality of time' took the shape of 'mounting pressure to rescue the child'), and on the other hand the chronological number of minutes or hours that pass. In the same way as the transient intensity of listening to a piece of music, can be separated from the spatial arrangement of the notations on the score and also from the spacial capture of the sound waves travelling through the air.
demonstrate, if connected these incision, or voids, form dynamic lines that run all across the history, theory research and practice around suggestibility.

Let me unpack the theoretical considerations that motivate this rather elusive exemplification of suggestibility as a liminal resource.

With reference to the work of Gilles Deleuze (1980 [2004]; 1968; 1969 [2004]) I would like to argue that suggestibility exposes, or indeed resembles what Deleuze terms an ‘event’ (or indeed, ‘sense’, ‘becoming’). In Deleuze’s terms this means that it exposes the pragmatics of change, or becoming that constitute a vital part of the dynamic fabric of being as such and thus inevitably insist in, or subsist, any activity or act of speech, use of language. Yet, Deleuze argues, this ‘becoming’ is obscured and arrested by the power of the dominant binary logic; it is arrested by the power of representation that is at work within the institutionalised reasoning of modern sciences as well as the law.316

In short, where these ordering apparatuses exert their power by representing, categorising and stabilising (i.e. they exert their power to the effect of arresting this subsisting change/becoming), suggestibility interrupts and unsettles this process, continuously making brief incisions, producing fissures, gaps, voids. It thereby offers a glimpse at the underlying dynamic and shows that the condition even for the perpetuation and consolidation of power is the very presence of this subsisting flux of change/becoming. Following Deleuze, this flux of change is the very force that subsists in everything, holds everything together, and thus is always there but will be funnelled and reorganised, re-represented.

In this sense one could say that suggestibility resembles-, or has the properties of an ‘event’. It sends out signs, intensities, that do not just escape the ordering activity of reason, but they communicate themselves to these structures, i.e. can affect them and thus produce something. The following sections will illustrate and explore in detail what this means and how Deleuze relates to and informs this analysis.

15.2 Gilles Deleuze: the logic of sense, the expressed, and the pragmatics of change

I do not want to delve too deeply into Deleuze’s philosophical oeuvre, but we need to follow him some way to see why and how far this peculiar relationship between language

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316 I am not suggesting that there is an explanatory, or literal relationship between Deleuze’s work and the dynamics around suggestibility. Drawing on Deleuze’s work does not ‘explain’ what suggestibility does to psychology. However I would argue that suggestibility exemplifies, expresses something Deleuze has aimed to conceptualise. This is why referring to his work illuminates the dynamic of suggestibility and can help to turn it into a positive instrument for change.
(as the apparatus of representation) and the ‘event’, ‘sense’, ‘becoming’ can inform our grasp of suggestibility’s intriguing efficacy on theory, research and practice.

This way of formulating the problem indicates a possible starting point for this elaboration: language. For the sake of creating a point of departure, let me put the following argument very bluntly. Deleuze finds that language itself (as a system of order and representation) is inevitably structured according to a binary, dualistic logic. Language, or indeed words, as a system of representation, operates on the basis of a syntax and grammar of exclusion (yes excludes no, a word can only mean one thing at a time or language grows dysfunctional). It is thus predisposed to be utilised in what Deleuze terms ‘binary machines’, apparatuses of representation, that produce effects of ordering, control and exclusion.

“But in fact the binary machine is an important component of apparatuses of power. So many dichotomies will be established that there will be enough for everyone to be pinned to the wall, sunk in a hole.” (Deleuze & Parnet, 1977, p. 21)

Still, Deleuze clearly states that it is not language as such that is the problem, because language simply has to operate on the basis of a binary logic to function. But binary machines are so efficient in their work of representation and exclusion because they position the binary logic of language as absolute, as ‘all there is’. Thereby they obscure and arrest, they ‘break up’ the ‘becoming’ that always subsists within language, i.e. the flux and change.317 This is why he calls this ‘binary machine’ an apparatus of power, that breaks up, obscures the flux of change in order to firmly instate and stabilise, control its representations.

“You say that binary machines are apparatuses of power to break up becomings: you are man or woman, white or black, thinker or ‘liver’, bourgeois or proletarian?” (Deleuze & Parnet, 1977, p. 33).

This ‘becoming’, the flux of change, that is broken up by the binary machines, is synonymous with-, or has the same qualities as the ‘event’, or indeed as Deleuze elaborates in relation to language, ‘sense’. ‘Becoming’, ‘sense’, ‘event’ occupy the same dimension, they are different aspects of the same thing. While clearly Deleuze’s attacks on the ‘binary machine’ can be identified as a critique of the dialectics of representation and normalisation that is also at the heart of critical discursive research (see chapter 3.3). However, the entity at the centre of this critique, the ‘event’, ‘becoming’, ‘sense’, is a new element here. Admittedly this is also the element that has still remained slightly elusive here. What is this

317 “It must not be said that language deforms a reality which is pre-existing or of another nature. Language is first, it has invented the dualism. But the cult of language, the setting up of language, linguistics itself, is worst than the old ontology from which it has taken over. We must pass through the dualisms because they are in language, it’s not a question of getting rid of them....” (Deleuze & Parnet, 1977, p 34).
thing that is interchangeably referred to as 'event', 'becoming', 'sense', and that is said to 'undercut', or insist within, or subsist language?

One way of understanding the nature of this 'event', 'becoming', or 'sense' within language, is to follow Deleuze's distinction between expression, i.e. a word, a term, a phrase in language; and the expressed, that is, the attribute, the dynamic occurrence within the expression, i.e. the pure flux of that which 'happens' to things in the moment of expressing. This latter entity, 'that which happens' to things, the expressed, is something that language itself can only state as an accomplished static state; i.e. it assigns a word, a name to it, while the dynamic flux escapes language. This sphere of 'the expressed' is also that of 'sense'. To move into the region of sense is to “reach a region where language no longer has any relation to that which it denotes, but only to that which it expresses, that is, to sense.” (Deleuze, G. 2004 [1969], p. 31).

It is important to capture what exactly Deleuze is differentiating here. Crucially the distinction is not between two different kinds of words, or different ways to say things, but Deleuze tries to carve out a distinction between two inevitably linked dimensions of an utterance. Hence he differentiates two things that coincide within an utterance, and that form its necessary ingredients of any one utterance.

“The duality in the proposition is not between two sorts of names, names of stasis and names of becoming, names of substances or qualities and names of events; rather it is between two dimensions of the proposition, that is between denotation and expression, or between the denotation of things and the expression of sense.” (Deleuze, G. 2004 [1969], p. 31).318

On the one hand there are words denoting things, manifest states and causal relationships in a binary, static way. On the other hand, always subsisting within this, there is the dimension of sense, that is the expressed, the “attribute of the state of affair” (ibid. p. 25), or indeed the ‘event’ ('sense', 'becoming') that expresses what occurs to things in the very moment it is happening. Crucially, Deleuze stresses that this ‘event’ must not be confused with “its spatio-temporal realisation in a state of affairs” (ibid. 25) (i.e. it is content without shape, an intensity).319 We could say that it is a confluence of forces, a confluence or

318 “Sense is both the expressible or the expressed of the proposition, and the attribute of the state of affairs.” (ibid. p. 25)

319 Deleuze's concepts also rely on the differentiation of two dimensions of time, chronos and aion. Each of these corresponds with, or provides the dimension in which on the one hand language and logic operate (spatial dimension of chronos); and on the other hand the one in which the subsisting flux of change, becoming, event, sense is operating (the dimension of intensities, duration, flux of aion). “Chronos is the present which alone exists. It makes of the past and future its two oriented dimensions, so that one goes always from the past to the future – but only to the degree that presents follow one another inside partial worlds or partial systems” (ibid. p. 89). Chronos constitutes the temporality of manifest things and bodies, it is the temporality within which cause and effect operate and logical inferences are possible. Hence this is the time in which language, words, as forms of representation operate, because here they find their logical and binary frame of reference. This time of the present is opposed to Aion, the temporality of the instance, the moment. This is the time that comprises the 'becoming' or, the event (the pure attribute of that which
multiplicity of forces or passing ‘states’ rather than for example ‘bodies’. This dimension of sense, or the event (or becoming), is distinct from the sentence that expresses it (expression), however the expressed cannot exist outside of this sentence (expression), hence the expressed can be said to subsist within the sentence (expression). Deleuze exemplifies this distinction with regard to a statement, a proposition that attributes a predicate like ‘green’ to a tree.

“The attribute of the proposition is the predicate – a qualitative predicate like green, for example. It is attributed to the subject of the proposition. But the attribute of the thing is the verb: to green, for example, or rather the event is expressed by its verb. (...) To green (...) is not a quality in the thing but an attribute which is said of the thing. This attribute does not exist outside of the proposition which expresses it in denoting the thing.” (Deleuze, G. 2004 [1969], p. 24-25).

Let me capture this distinction in other words. To get to the event, the expressed, we should not say the ‘tree became green’ or the ‘tree is green now’, because both of these would imply that there is a change in the tree’s essence. To capture the expressed we should say ‘the tree greens’, because this captures the dynamism of the ‘event’, because this makes a dynamic attribution to the predicate, it expresses something that ‘happens’, an ‘event’ distinct from both, the tree and the green-ness (Stagoll 2005).

Very roughly one could say that with this distinction Deleuze is trying to establish a distinct definition, is trying to capture, the exact moment at which something happens, at which something occurs; the moment at which one thing becomes another thing, the confluence of forces, that continuously insists within, continuously provides the stream of change/becoming is the necessary ‘cohesive’ for everything. So crucially the ‘event’, ‘sense’, ‘becoming’ is not a disruption of some continuous state, but rather the state itself is always already constituted by continuous ‘events’ insisting, or underlying it; and they mark every moment of the state as a transformation (Stagoll, C. 2005).

With this we are back to the earlier point that language itself, as representational, can always only capture the state as such, as established, as something that has changed already (or will change), but it will by definition fail to grasp it ‘as’ it changes, as it is in transformation. To use another of Deleuze’s examples we can say that, it is always ‘still night’ or ‘already day’, the moment where one state ‘becomes’ the other escapes language. Language will give a static name to an event, while the moment of becoming, the event itself inevitably escapes its grasp.
This relation between language and sense also means that it is not language that creates sense, or produces sense, but sense itself is the precondition for us to begin to speak at all. It is the sphere into which we are always already introduced when we begin to speak, and this is what enables us to speak in the first place.\textsuperscript{320}

“When I designate something, I always suppose that the sense is understood, that it is already there. As Bergson said, one does not proceed from sounds to images and from images to sense; rather, one is established ‘from the outset’ within sense. Sense is like the sphere in which I am already established in order to enact possible denotations, and even to think their conditions. Sense is always presupposed as soon as I speak; I would not be able to begin without this presupposition. In other words I never state the sense of what I am saying. But on the other hand, I can always take the sense of what I say as the object of another proposition whose sense, in turn, I cannot state.” (ibid. p. 35).

To recapitulate the argument so far, we can say that speech presupposes the existence of sense, but language cannot ‘say’ its own sense, it only captures the static names. Thus the words used to form a sentence denote manifest states, and hence could be said to be static ‘names’ for things and facts. They are bound to the rules of logic which ensure the formal function of speech. As opposed to this, sense even exists in the absence of speech and independent of those ‘names’. Sense is their presupposition, they are inscribed into it, even though it appears to be produced while individuals speak. Sense lingers between speech and things, being the definition of their difference, embodying their connectedness as their immaterial, indivisible, constantly moving line of demarcation (sense is flux, change, becoming). Consequently sense is indifferent towards the effect of contrasts and contradictions, because these are characteristics of syntax and grammar which do not affect sense. It is language itself that obeys the rules of logic but within the dimension of sense, ‘contradictions’ coexist and accordingly sense persists in contradictory meanings. ‘True’ and ‘False’ equally contain sense, they do not exclude each other within the dimension of sense. Sense has to be taken as a doubling that simultaneously spreads in two directions: The intransigent promotion of divergences and simultaneous annulling of exclusiveness. (Within the flux of change something continuously and inevitably ‘becomes’ different from itself).

“Sense brings about the suspension of both affirmation and negation. (...) It is not of being; it is an \textit{aliquid} which is appropriate to non-being. As that which is expressed by the proposition, sense does not exists, but

\textsuperscript{320} Following a traditional dialectic logic we would say that language creates sense, sense emerges from the sentence. But what Deleuze elaborates with reference to Bergson, is that actually we would not be able to begin to speak at all if sense was not already there for us to settle within. And this ‘sense’ is a sort of a-personal, a-individual sort of affair (sphere, dimension), because obviously Deleuze does not mean to imply that someone else had always already understood what we were going to say (in particular) before we said it, but it means that what we say settles within a sphere of simultaneous sense that is already there and that implies the possibility for understanding just as it does that of misunderstanding or not understanding. (Sense is not the result of understanding but the precondition for any of those, from understanding to complete ignorance). (And here it is crucial to note that as sense occupies a different dimension than language, so this is not a sequential or logical problem).
inheres, or subsists in the proposition. (...) 'God is' and 'God is not' must have the same sense by virtue of
the autonomy of sense in relation to the existence of the denotatum.” (ibid. p. 39).

Now, the fact that this elaboration sounds paradoxical, contradictory (as in ‘God is and
God is not must have the same sense’), results from the simple fact that we have to use
language to speak of it, and as language is organised logically it by definition cannot capture
‘sense’ or indeed ‘becoming’, ‘event’, other than as a paradox. Sense indeed is a matter of
paradox, or a “…series of paradoxes which form the theory of sense” (ibid. p. ix) as
Deleuze states in is introduction to the “Logic of Sense”. Hence in turn we could say that
in the special case where language does speak of the ‘event’, i.e. turns into a ‘language of
the event’, it begins to appear irreal, paradoxical, loses its distinct direction of logic, and its
distinct subject-object relations.

This is what Deleuze describes in the next quote when he says that the substantives and
adjectives are carried away by the verbs of pure becoming. The substantives and adjectives
usually are the static ‘names’ for things and facts, “designating pauses and rests”. Thereby
they guarantee the ‘permanence’ of what is known or represented (savoir), and the ‘identity
of the self’ by which or about which these things are said. However they can be “carried
away by the verbs of pure becoming” where language is linked to, or expresses the pure
‘event’, ‘becoming’, ‘sense’, when it becomes the ‘language of pure events’.

“For the proper or singular name is guaranteed by the permanence of savoir. The latter is embodied in general
names designating pauses and rests, in substantives and adjectives, with which the proper name maintains a
constant connection. (...) But when substantives and adjectives begin to dissolve, when the names of pause
and rest are carried away by the verbs of pure becoming and slide into the language of events, all identity
disappears from the self, the world, and god. (...) It is as if events enjoyed an irreality which is communicated
through language to the savoir and to persons. For personal uncertainty is not a doubt foreign to what is
happening, but rather an objective structure of the event itself, insofar as it moves in two directions at once,
and insofar as it fragments the subject following this double direction. Paradox is what initially destroys good
sense as the only direction, but it is also that which destroys common sense as the assignation of fixed
identities. (ibid. p. 5).

So the “irreality” of ‘sense’, or the ‘event’ can be “communicated through language” to the
names of fixed knowledge (savoir) and to the identified subject (persons/things), but it
inevitably makes language paradoxical.

The effect of communicating the event (i.e. that which happens) in language, or the effect
of the event resonating within language is firstly, the dissolution of the representative logic
i.e. “good sense as the only direction” (that is, the exclusiveness of either/or). Secondly, the
effect of the event resonating within language is the ‘fragmentation’ of the subject because
it “destroys common sense as the assignation of fixed identities” (of things or of the one

321 This is why becoming as such, when stated in language, must appear paradox, indeed it can only be
expressed as a paradox: “The question ‘What are you becoming?’ is particularly stupid. For as someone
becomes, what he is becoming changes as much as he does himself. Becomings are not phenomena of
imitation or assimilation, but of a double capture, of non-parallel evolution, of nuptials between two reigns.”
(Deleuze & Parnet, 1977, p. 2).
who says ‘I’; the thing or subject that causes something or suffers something). Hence unsurprisingly what results in “personal uncertainty” and “doubt” are precisely what constitutes ‘the pure event itself’. ‘Personal uncertainty’ and doubt are always intrinsic to ‘what is happening’ because the certainty of one direction and the fixity of the ‘self’, identity are dissolved within this moment. In such an instance the formal structures of language (syntax and grammar) as such are dissolved, and we are beyond ‘subject’, ‘predicate’, ‘object’, or indeed first, second and third person singular/plural. This is why Deleuze calls this language of the event, i.e. the form language takes when the event communicates itself through language, the ‘fourth person singular’. While the words are (inevitably) still the same words, in the ‘fourth person singular’ they express the pure event, and thus appear paradoxical, they speak in another dimension, the ‘fourth person singular’.

I would like to argue that this momentary dissolution of ‘logic’ and of ‘identity/subject’ is present in the paradoxes that emerge around suggestibility. In other words, I argue that suggestibility makes language speak in the fourth person singular; via suggestibility the ‘irreality’ of the event is communicated through language to the ‘knowledge’ and the ‘persons’ (thereby disrupting good sense and common sense). By short-circuiting the logic of representation suggestibility provides an explicit glance at the always already subsisting sense/event and thereby it unsettles the dominance of the scientific/legal structure.322

I will unveil my argument in a moment. Let me first conclude the explanation of the relationship language entertains with and ‘sense/event’ as captured by Deleuze. Marks (1998) explains Deleuze’s point in the following way.

"In summary then, The Logic of Sense" shows us that there is a sort of madness at the heart of language, a ‘univocity’ where the distinctions of first, second and third person are abolished. This is the fourth person singular; the language of the pure event. Language in this way can express the singularity of the event. The subject of the fourth person singular is the ‘they’, but this is not the use of ‘they’ that we encounter in everyday language. It is [...] the ‘splendour’ of an impersonal ‘they’." (Marks, J. 1998, p. 88-89).

To say that there is a ‘madness’ at the heart of language may be overstating the case. But what Marks is highlighting here is the fact that when we consider the constitution of sense, as it insists at the heart of language, via the dualistic and logical structure of language itself, then ‘sense’ must appear paradoxical, or indeed ‘mad’, as Marks puts it rather unhelpfully. Still, as he goes on to explain, language could speak the ‘event’, ‘sense’, and in doing so we would need to understand it as losing its ‘conventional’ structure. It loses the distinction of

322 “Paradoxes are recreational only when they are considered as initiatives of thought. They are not recreational when they are considered as the ‘Passion of thought’, or as discovering what can only be thought, what can only be spoken despite the fact that it is both ineffable and unthinkable – a mental Void, the Aion.” (ibid. p. 86).
a first, second, third person as subjects or objects of a sentence (common sense). As its directiveness of logical exclusion dissolves (good sense), both directions are valid, 'either - or' are not exclusive anymore. This is because it would now express, or operate within, what Deleuze calls a 'fourth person' singular, an abstract and at the same time concrete 'they' (nothing to do with the conventional use of 'they'). This is exactly the process I have reported in the previous chapters. This is what Deleuze describes as the instance when adjectives and substantives are 'carried away by the verbs of pure becoming and slide into a language of events'.

What can this 'language of events' deliver with respect to the issues at stake around suggestibility and child witness practice?

15.3 Suggestibility exposing the event in language – dissolving logic (good sense) and subject (common sense)

Firstly, the paradoxical way in which 'sense' features in language links back to where I began to outline Deleuze's work as a critique of the power of rational systems of representation. Hence a critique of what he calls binary machines, and thus a critique of the excluding, categorising power of representational, binary systems. We can now see that where the logic of language, and thus representation is set as absolute, is claimed to be the only designating force, we end up within a static system of dualism and exclusion.

Where sense is thought of as subordinate to-, or the mere product of logic (as a mere characteristic of utterances), it covers just one direction and is partially excluded (we can only have one of the two: 'God is' or 'God is not'). In such a system, roughly speaking: 'yes' can render 'no' invisible, the 'false' has to be excluded in favour of the 'true', and 'reason' eclipses 'illusion'. Now following the definitiveness and directiveness dictated by a ubiquitous and absolute logic, the signifiers would have to be set in an absolute relation to things. Devoid of sense, they have to prove themselves to be the origin of speech and meaning. Sense is denied in favour of the possibility of decontextualization, in favour of the invention of universal, abstract signifiers that are cemented into this one-sided relation to things.

Consequently this formal logic of language, if it is set as an absolute representation, will obscure, arrest 'becoming', it is a binary machine and those "machines are apparatuses of power to break up becomings". Within these binary machines sense is not abolished or extinct, but it is obscured. Herein the power of representation is the power of exclusion and control.
Secondly, as I have argued above, by short-circuiting the logic of representation suggestibility provides an explicit glance at the always already subsisting sense/event and thereby it unsettles the dominance the representational systems (of the scientific/legal structure). So here we can utilise suggestibility and the effect it has on the two elements Deleuze continually points to in his critique of a binary logic. In the quote I used above Deleuze captured the effect of language being ‘carried away by the verbs of becoming’ by saying that: “Paradox is what initially destroys good sense as the only direction, but it is also that which destroys common sense as the assignation of fixed identities.” (Deleuze, G. 2004 [1969], p. 5). So firstly the paradox destroys the exclusiveness the binary logic of the ‘one direction’ (good sense) and secondly it undermines the fixed identity it refers to, the ‘subject’ (common sense).

There is an intriguing link to the two examples from my data I used earlier. Firstly the example of the judge commenting on the direction he gives to the jury, warning them that the ‘evidence was given by a nine year old boy’. And secondly the judge’s reference to Ceci’s suggestibility research and the fact that this could make him ‘loose faith in his own judgement’. Both of these statements carry multiple paradoxes and thereby make language resemble a language of events. They are instances where the event communicates itself through the language. Hence they demonstrate how suggestibility connects directly to the insisting flux of change (events) and literally causes frictions within the workings of the good will of the practitioners and researchers. Suggestibility slices through the logical arrangements of good sense and unsettles the ‘self/subject’ of common sense and thereby leaves instantaneous gaps in the texture of the scientific (and legal) order as it is performed, i.e. practiced.

I would like to exemplify the dissolution of the two elements, good sense and common sense, separately by drawing on the judge’s two different utterances. However, the two dimensions are inseparably linked, and both of them are inevitably present in both of the utterances.

15.3.1 Suggestibility dissolving ‘good sense’ – logic of one direction

Looking at this utterance of the judge about the direction he gave to the jury concerning the evidence of a nine year old boy, there was a clear sense of this utterance expressing more than an empty absurdity, a self-contradiction that cancels itself out (or is easily dismissed). It expresses the vivid flux of sense stretching both ways that for a moment escapes the ordering activity of logic.
[Excerpt 9] -fragment-

9 Judge2: (...) nine year olds can lie nine year olds can tell the truth but this this was a nine
10 year old you are dealing with here ((hmhm)) (1) ahhm but wh’ wha’ what that
11 actually says I’m never quite sure (chuckling through the word ‘sure’)

We could say this is a tautology, devoid of sense (sic), absurd, empty. But clearly it is not. It
gives a glimpse at ‘sense’ (as in ‘becoming’, ‘event’) stretching both ways, being abundant
rather than a nullity, being in flux rather than fixed. The issue with this statement is that it
summons too many signs rather than too few, there is an excess of meaning, or indeed
‘sense’ seeping out or spilling over. Or to put it more plainly, there is an excess of issues,
dynamics, implications, intensities present at this one instance and this makes the binary
logic circulate, spin around, connecting to the subsisting flux of change, ‘becoming’.
(Crucially, as we are at this point referring to a dimension beyond ‘subjectivity’, one can say
that these dynamics, implications intensities are present as such, independent of the judge
being conscious of them or not. This relates to the second element, the dissolution of
‘common sense’ as I will explain in the next subchapter.) This is why I said earlier it is an
abundant ‘void’. It is an instant devoid of shape, indissociable, annulling structure, but
nonetheless abundant, excessive in content (but this is not a spatial sort of content as we
can see now), abundant in ‘intensity’, and as we can now say, excessive of ‘sense’.

Crucially, in fusing ‘sense’ and language in such a paradox, suggestibility has opened an
instant gap, or void in the ordering structure of both, psychological knowledge and legal
structure. What is expressed here, and this is very clear for a moment, is the fact that the
‘instructive’ ‘representative power’, the fixed knowledge, of developmental psychology is
utterly irrelevant for what is at stake in this moment. In this moment and in this context
the ordering power of developmental psychology is rendered hilarious, or at best
paradoxical. Clearly the ‘age’ of this particular child will not help to determine whether it is
lying or not, so in this one instance it is clear that the ‘age warning’ of the judge cannot
really be a scientific/developmental issue. Links to ‘scientific’ knowledge have in this
moment lost their power, it is suspended.

Characterising this particular void we could say it thus constitutes a ‘development free
space’. A space/void free of directive developmental knowledge. At this very moment
there is more than just ‘positions’ or even ‘fragmented subject positions’ within a discourse,
assigning how the child can feature here. Something much more dynamic and concrete is
going on. The ‘age warning’ summons an enormous complexity of ‘sense’ stretching both
ways, an assortment of simultaneously relevant and contradictory issues. So one could say
the judge is, by engendering this 'development-free-space', producing an 'indecision-machine'. He incites a complex set of signs that make the ordering principles of legal practice as well as developmental psychology spin around in circles. Uttered in this moment this direction of the law carries an excess of meaning but is devoid of direction (sic).

Looking back to chapter 12.3 we can see that this instantaneous void will be recuperated, glossed over, as the jury assigns meaning to the advice and most likely patches this structural 'void' by inserting the dominant knowledge of developmental psychology. Hence they fix it by settling for only one direction. Similarly the judge could be said to 'laugh away' this paradox as he operates this node in order to get on with his practice.

However, and crucially for the point I am making here, the void is present in the instant, as an assembly of multiple forces. Before the energy is re-directed and funnelled into the existing structures of power (dominant discourses), it can be seen to spin and move and engender potentialities into multiple directions. These forces have to be captured by the operators, they necessitate the operation at the nodes. And this is why, as we could also see throughout chapters 11 to 14, it is such hard work to operate those nodes.

It is a continuous effort for the practitioners to redirect this energy and to assure its insertion into, and thus the functioning of the dominant structures. It takes an elaborate set of operations to manage, and still the voids recur, right in the centre of these dominant discourses and palpable to those who operate within them. With reference to the above example it is clear that in the moment of decision the developmental criteria are paradoxical/risible. Even though post hoc they will be used to legitimise a decision, at this very moment of expression, and indeed of decision there is a detachedness from the dominant developmental, or legal discourse. This detachedness is tangible for the participants within this practice and it is continuously expressed by them.

This is the 'void', the incision suggestibility makes, and that communicates the underlying flux of change, the event, to language, to the judge. This is what I have illustrated above is only one half of the aspects at stake in this dynamic. I have illustrated the unsettling of 'good sense', the logic of one direction and exclusion. But this inevitably implies the unsettling of the 'identity' the 'self' or, 'common sense'. I will exemplify this with regard to the other utterance of the same judge.

323 It constitutes, in Deleuze's terms a line of flight, that is inevitably stratified into the prevailing strata of organisation, or later continuously re-territorialised, fragmented, arrested by dimensions of power (Deleuze & Guattari, 1980, p. 146-164).
15.3.2 Suggestibility dissolving 'common sense' - the 'subject', the assignation of fixed identities

As 'common sense' constitutes the second indivisible part of logic, the dissolution of 'common sense', i.e. the 'fragmentation of the subject', is the second indivisible concomitant of making language speak in the 'fourth person singular', making it the 'language of the pure event'. This can be exemplified by thinking about the way Ceci relates to the judge's second utterance.

[Excerpt 22]-fragment-

3 Judge2: [...] we only need Ceci's lecture I mean then in a way (.) to make you undermine
4 your own faith in your own judgement (1) but you know we tend to think as well
5 a' o'h no well you know show me ahh later I'll I'll sort it out [...]

Clearly this utterance also shows the dissolution of 'good sense' as explained in the previous section. There is an even wider sense of the directiveness of logic falling apart because knowing about suggestion stretches both ways. Following Ceci's research brings home that the very indicators of suggestion can co-exist with true statements but need not necessarily do so. In a 'logical' disposition this will again cause uncertainty, doubt, but simultaneously it is not an 'empty' statement, it expresses the very issue that is so difficult to reign in by scientific reason. It again introduces an excess of sense resonating with issues of directionality. But let me turn to the second aspect. What is even more prominent in this example is the apparent excess of potential intentionalities and agencies, or indeed, the excess of 'subjectivity'. This is why the question whether Ceci might have 'caused' these uncertainties, does make sense while at the same time being utterly out of place. This is a good example of the dissolution of the second necessary part of logic, the 'subject/identity'.

One could say that in the instant the judge says 'we only need Ceci's lecture' he literally summons a bundle, a profusion, a swarm of signs that bring with them (associate/carry), or link up to a multiplicity of issues and signs. From issues around false allegations, recovered memories, abuse, suggestibility, to Jennifer and Pamela Freyd, Freud, abuse hysterias, implanted memories, Cleveland crisis etc. This is not a 'conscious' implication of the judge or 'for' a concrete observer, but it is the very abstract and at the same time very concrete sphere we are inevitably placed into at once\textsuperscript{324}. It is a bundle of signs inhabited by the judge, the interviewer, and by Ceci at the same time.

\textsuperscript{324} Even though some, or many of those signs are indeed perceived (or intended) by the judge and the interviewer, but this is not what I am talking about here.
Again we can see how this relates to the dynamics of the 'fourth person singular'. Ceci is 'present', 'related' but he cannot possibly have 'caused' all these things, and the judge makes this utterance, but it cannot be pinned down as an opinion, attitude or position of his, because he cannot possibly be conscious of, intend, or actually 'act upon' all the particulars summoned at this instant. It seems at this moment the judge, the interviewer and Ceci are present in a multitude of ways, they are fragmented subjects, but not in a static way as if occupying 'fragmented subject positions'. They are present in a multiple but dynamic, fluent way, not 'as' many 'people' but 'as' many intensities, forces.

What is expressed in the moment of this utterance is an excess of subjectivity, or specificity, but one that is not attached to a person, because while all of these signs are present, they are not necessarily all 'conscious' to the judge. Nonetheless they reverberate within what he says.

To explain this further, we can again get back to the question of 'how' Ceci, or indeed his research were present in this moment, how they related to the judge (or indeed the interviewer). As Ceci could hardly be said to have deliberately or unwittingly caused or 'effected' any of the apparent concrete 'uncertainties', but still his actions are in some way directly linked to what the judge says, they operate within the bundle of signs the judge inhabits.

As in the previous example, at the very moment the judge makes this utterance, it is absolutely clear that the reference to Ceci's 'name', to his authority as an expert, a scientist, does not help at all to legitimise or instruct a possible decision, it does not have a 'direction'. In this moment it is rendered paradoxical or risible, annulling the power that might be attached to his name as it operates within the dominant discourse of psychology. This power is annulled by the invocation and expression of the multiple forces around his name, which thereby express very clearly that by no means can 'his name' vouch for all of these things. What can later be identified as 'positions of power' within a dominant discourse, is initially, in the instant always a multiple set of simultaneous intensities, an excess of subjectivity, an excess of floating and competing singular but a-personal positions. This implies the simultaneous dissolution of 'good sense', because the excess of directions and content is always concomitant with the excess of subjectivities.

This is when I said earlier Ceci and the judge (and the interviewer) were at that moment sharing, or party to an overlapping sphere (bundle) of signs (forces) that are detached from them, nothing 'personal' to any of them, but still crowding, transgressing this moment on the level of 'sense'/ 'event', constituting the dynamic fabric of 'sense' that is subsisting within this moment.
This is precisely what Deleuze refers to when saying that in this sphere language operates in the 'fourth person singular', expressing the 'singularity of the event', and the abstract 'they' of this peculiar 'fourth person singular'. It is a sort of excess of personal presences that is thus personal in an abstract sense. In the same way as Ceci's work is a very personal affair, and simultaneously a societal issue. He is present in the judge's statement in this moment as a concrete person that gave a lecture, as proliferator of knowledge about suggestion, as 'the uncertainty' psychology inserts into the law (but peculiarly also 'as' the purported power psychology gives the law). In sum 'Ceci' is a name for the multiple and diverse range of issues, associations and particularities that are (in an abstract fashion) implied within/attached to the mentioning of his name and which thus, at once, summons, or carries 'particles' of debates around implanted memory research, miscarriages of justice, false memory etc. Strangely this 'excess' of subjectivity, of personal presence is simultaneously an 'absence' of actual individual presence. This is not about a 'person' causing something. These are a-personal dynamics. Similarly the judge is present 'as' multiple producer of abstract and concrete signs, as being/having multiple diverse perspectives/agendas, because he is expressing something that he could not impersonate or enact as a subject (contradictory, overlapping, paradox perspectives, objectives, assumptions), but that subsists, reverberates, all at once in his expressing. This sphere, this apparently specific, particular and at the same time general sphere, is that of the 'event', that of the fourth person singular, expressed in an abstract 'they'.

"How different this 'they' is from that which we encounter in everyday banality. It is the 'they' of impersonal and pre-individual singularities, the 'they' of the pure event wherein it dies in the same way that it rains. The splendour of the 'they' is the splendour of the event itself or of the fourth person. This is why there are no private or collective events, no more than there are individuals and universals, particularities and generalities. Everything is singular and thus both collective and private, particular and general, neither individual nor universal. Which war for example is not a private affair? Conversely, which wound is not inflicted by war and derived from society as a whole? Which private event does not have all its coordinates, that is, all its impersonal social singularities?" (Deleuze, G. 2004 [1969], p. 172-173).

Suggestibility is not in itself an 'event', but it peels apart the ordering structures of language to give a glimpse at the subsisting flux of events. It is the way in which suggestibility incites paradoxes, connects, in an intricate way, the logic of language and thereby that of science/law, to the subsisting flux of change. It short-circuits them particularly in those moments where they are being asserted. It does this in such a way that it turns into a subversive force. It slices into the dominant discourse, opens up voids, voids abundant with meaning, alerting us to the fact that these voids always already subsist at the centre of any dominant discourse, throwing into relief the effort it takes to re-integrate, cover over these voids. Simultaneously it provides a palpable reminder that these voids stand for a
continuous flux and instability at the centre of the dominant discourses that could just as well constitute passages for change. These voids retain a moment that always escapes the ordering activity of the sciences and the institutions of the law.

Or to put it differently: By virtue of the way that suggestibility via the paradoxes it creates, sends us circling around within a sentence, a phrase, a theoretical concept, a research question, an experimental set up, a proposition, it provides a glimpse of the subsisting force that always moves within and escapes the ordering powers of reason.

Firstly, and methodologically, the reference to Deleuze has provided a more complete capture of what is 'going on' in these paradoxical moments when for example judges 'sort it out'. It has alerted us to the nature of that which (inevitably) escapes language and subsists within, drives discourses and will thus escape a discourse analytic approach.

Secondly, and strategically, we can see that the specific way in which suggestibility produces paradoxes, slices across the ordering fabric of science and law, could offer an insight at ways to utilize these voids in a productive manner. Suggestibility, by opening up these voids, can be seen to offer a glimpse at potential passages for change, i.e. a way to utilise the inevitable instabilities that insist within discourses.325

In the following I would like to examine the potential 'subversiveness' of suggestibility and the nature of these voids as 'passages for change' in more detail, because the two examples I have used so far are very specific and thus might appear limited. They are two very specific comments by one judge and evidently did not amount to fundamental 'changes'. Indeed, as the analysis in chapters 12 and 14 has shown they were both recuperated into the dominant discourse. Hence I would like to deepen the understanding of 'event' by giving another example of its efficacy as an ongoing suspension of the ordering power.

325 This finding emerges from the productive tensions between Foucault's concept of 'pleasure' and Deleuze's concept of 'desir'. "In short, power arrangements would therefore not assemble or constitute anything, but rather assemblages of desire would disseminate power formations according to one of their dimensions." (Deleuze, G. 1994 [2006] p. 125). It is 'desire' that reverberates at the centre as the flux of change and always already escapes the stratifying movements that constitute power. "Our only points of disagreement with Foucault are the following: (1) to us the assemblages seem fundamentally to be assemblages not of power but of desire (desire is always assembled), and power seems to be a stratified dimension of the assemblage; (2) the diagram and abstract machine have lines of flight that are primary, which are not phenomena of resistance or counterattack in an assemblage, but cutting edges of creation and deterritorialisation." (Deleuze & Guattari, 1980, p. 585).
15.4 Isabelle Stengers: suggestibility, the 'Freudian event' and the untimely

I would like to exemplify the efficacy of suggestibility as a liminal resource, as a potentially subversive, or indeed creative force that is opening up voids, slicing through the fabric of scientific reasoning in more detail and specify the critical energy of this 'event'. To do this I would like to move away from my concrete data for a moment and draw on the work of Isabelle Stengers again.

Stengers uses the notion of the event as well, and while she does not explicitly refer to Deleuze, her work operates in the same philosophical framework. In chapter 14.3 I have introduced the 'Galilean event' which, in Stengers' (2000) view has inaugurated the new 'use of reason' characteristic for the modern sciences. She argues that this event had fundamental and far reaching effects for the organisation of the modern sciences. Still, it is organised following the same principles I have outlined for the 'events' incited by suggestion. The 'Galilean event' constitutes an incision into a (then) dominant organisation of knowing (the order of knowing/savoir) and it provided an instant occurrence (theoretico-experimental apparatus, or more specifically, a body dropping onto an inclined plane) that unsettled this dominant form of knowing (that was, in the sphere Galileo operated in, dominated by the dominant discourse of the catholic church). So independent of what happened later in relation to this occurrence, one can say that at this moment this 'Galilean event' operated outside the contemporary ordering structures of science and history, it is in his sense an 'untimely' event. And even though it is crucially related to Galileo, its overall 'subversive' force had little to do with Galileo as a person. It was not 'caused' by him, and indeed at his time it was very effectively recuperated into the dominant discourse by the church.326 What makes this an event in Deleuze's sense is the 'a-subjective' and 'immaterial' force that the occurrence that Galileo had made possible, was able to summon.

What makes this an 'event' is not the fact that we can now realise it has inaugurated a 'new use of reason', but the fact that when it occurred it emerged from the centre of the contemporary order of sciences and it had the quality of, or the intensity of a 'void'. That is, it constituted an incision into the dominant orderings of thought that is abundant in meaning. It incited intensities that happened to gain momentum in later times. Hence, as pointed out earlier, events in themselves carry no determinate outcome or direction, but

326 In fact, with regard to his heliocentric thesis, Galileo was recuperated into the dominant discourse of the church quite literally, physically even. After his trial, where he was ultimately forced to revoke his claims, he was put under house arrest, to work under the strict supervision of the church.
"only new possibilities, representing a moment at which new forces might be brought to bear." (Stagoll, C. 2005, p.88). Still, this shows that voids can gather momentum.

Retrospectively such an event might look like an effect, a causal link between a person's activity and the ensuing historical changes. This is due to the way conventional historical narratives represents such events. If Galileo is seen as personally responsible for the foundation of modern science, this is because the event has already been inserted into the chronological 'memory of history' that operates following the chronological/sequential logic of language and thus assigns static names (e.g. genius) to the accomplished result of change (e.g. foundation). But what thereby inevitably escapes history is the flux of the event that bears no relation to cause and effect and that is, as Deleuze finds, literally outside history. As they are 'outside history' the do not 'belong to the time of history. It is in this sense that Deleuze, with reference to Nietzsche, talks about the 'untimeliness' of events.

"Becoming isn't part of history; history amounts only the set of preconditions, however recent, that one leaves behind in order to 'become', that is, to create something new. This is precisely what Nietzsche calls the Untimely. May 68 was a demonstration, an irruption, of a becoming in its pure state." (Deleuze, G. 1990 [1995] p. 171).

The 'Freudian event' – or - voids as passages for change

Stengers identifies another 'event' that is even more relevant for my own analysis. It is one of the events that populate the broader field of my own analysis. However in contrast to the Galilean event, this 'event' has not been efficient within fundamental re-organisations. In their book “A Critique of Psychoanalytic Reason” Chertok and Stengers (1992) explore in depth the conditions and dynamics surrounding Freud's attempts to establish psychoanalysis as a science. As I have already elaborated in chapter 1.2 with reference to Chertok and Stengers, the intricately linked and paradoxical efficacies of hypnosis and suggestion are at the heart of Freud's endeavour. Chertok and Stengers argue that to establish psychoanalysis as a science, following the model of the modern sciences, Freud needed to organise his analytic technique in such a way that the analysand could emerge as an independent and reliable witnesses for the efficiency of this technique. Hence the patient needed to become a reliable witness for the fact that this technique could achieve a rational scientific insight, that is, that it could achieve the discovery of the rational, independent truth of what was at the bottom of the patients' irrational, neurotic beliefs and manifestations. While initially hypnosis and suggestion seemed to be the pure and thus primary route to these obscured insights, the uncontrollable nature of suggestion related to the issues around the 'Aetiology of Hysteria', and the problem of the patient's potential
resistance, led Freud to abandon hypnosis and suggestion. Here, as Chertok and Stengers put it, the birth of psychoanalysis as a science is demarcated by the introduction of resistance and transference as the principles by which the analyst could treat not the ‘real’ memory, but an artificial ‘doubling’ of such a memory. This doubling is a cleansed and pure manifestation that could be ‘reached’ by the analyst.

"Freud’s stroke of genius was to make resistance and transference, which had been obstacles in the ‘old’ technique based on laboratory methods, into generating principles of the new technique, principles that would, by their very application, transform patients into purified, reliable subjects – the very condition of all scientific technique. [...] The transference therefore enables Freud to substitute for an ordinary illness, which involves the analyst as well as other persons in the patient’s real life, a laboratory illness placed in the service of knowledge." (Chertok & Stengers, 1992, p. 55-56) (highlighted in the original).

However Chertok and Stengers continue, suggestion seemed to sneak in via the backdoor even during the application of this technique, because patients themselves seemed unwilling to conform to the ideal of the pure technique and ‘behaved’ as if suggestible. In consequence the therapist appears unable to control this reactivity. This problem was meant to be tackled by the correct application of the technique of transference, which should ensure the avoidance of suggestion. But then “the effects of the transference are difficult to dissociate from suggestion insofar as Freud himself defined suggestion on the basis of transference” (ibid. p. 70). A long period of re-ordering and re-thinking followed the initial establishment of transference, but ultimately, as Chertok and Stengers outline, Freud had to admit defeat. He had to admit defeat with regard to the scientific principles he had set out to satisfy. In the actual application Freud could not prove that he was able to exclude or control suggestion/hypnosis, but neither could he prevent them from re-occupying a central role within the technique.

Specifically, Freud excluded hypnosis and active suggestion because they could be neither dosed out nor controlled. The impossibility of measure and control he explained by the fact that they concealed what analysis is really dealing with, the resistances of the patient. But analytic technique ends up defining resistance as equally uncontrollable, and, correlative, “recovery” as precarious not only de facto but also de jure. What becomes, then, of what has been excluded? (ibid. p. 120).

Chertok and Stengers argue that the specific way in which Freud fails to establish psychoanalysis as a science, exposes and constitutes an event. It is the power of suggestibility and hypnosis itself that is at the heart of this event, because they cut across the order of psychoanalysis and actively question the relation between theory and practice (application). 327 Examining the continuing experimental research efforts into hypnosis Chertok and Stengers go on to show how hypnosis and suggestion also question the relationship of theory and practice within the experimental sciences that try to illuminate

327 "The greatness of psychoanalysis resides, we believe, in the fact that its failure forces us to pose the problem of ‘reason’ itself, and, more precisely, the problem of the model of rationality guiding modern sciences." (ibid. viii).
the nature of hypnosis. So this event demonstrates the way in which suggestibility and hypnosis continuously produce what Stengers calls ‘false witnesses’. In demonstrating this as part of the failure of psychoanalysis ‘as’ a science these ‘false witnesses’ ultimately force us to problematise the nature of ‘reason’ itself and to question the model of rationality guiding modern sciences. These false witnesses Stengers’ identifies within research into psychoanalysis and hypnosis, resonate closely with what I have termed the ‘voids’ opened up by suggestibility. Both carry a subversive force, implicitly subsisting within and unsettling established power relations.

“This version of reason thus presumes the power of predicting outcomes, of controlling in order to replicate, of purifying to insure that implication of a theory – the power, in sum, to make a phenomenon ‘admit’ its truth. (...) ...suggestion has become a kind of obsession for the experimental psychologist as well as for the Freudian therapist: for both, suggestion puts the ‘truth’ in question, that is, it problematizes the possibility of constructing a theory on the basis of experiment or experience. Suggestion is the impure; it is the uncontrollable par excellence.” (ibid. p. xvi-xvii).

Chertok and Stengers demonstrate how, in peculiar twist suggestion and hypnosis manage to unsettle both, experimental and experiential sciences, i.e. the clinical and the experimental perspectives. They produce ‘false witnesses’ that are abundant in meaning and hence cannot be ignored, and they continue to raise crucial questions about the actual and concrete relationship between theory, research and practice.

“The production of a false witness is an event. Examined in and on itself the production of the multiple false witnesses by hypnosis and suggestion constitutes a corpus defining the ‘puzzle’ of what we call hypnosis and of what hypnosis makes suggestion capable of.” (ibid. p. 276)

This is the point where Chertok and Stenger’s agenda converges with my own analysis. Firstly, the production of ‘false witnesses’ clearly resembles the abundant voids I have identified earlier in the comments of the judge. Secondly, in relation to Chertok and Stengers’s analysis we can see that voids can not just be found in the present practice, but they can be identified on every theoretical and historical level throughout the history of suggestibility research (as in my analytic trajectory) and the history of psychoanalysis and research into hypnosis (as in Chertok and Stengers’ analytic trajectory). These voids stir uncertainty or doubt, but also laughter (as we could see in the example of the judge), or as Chertok and Stengers put it, perplexity. Hence they alert us to the anti-representational and inventive efficacy of reason’s inescapable sense of humour (as Chertok and Stengers call it). And just as suggestibility persistently recurs and opens up voids of abundant sense into the fabric of the dominant discourse of science and law, this perplexity appears to recur and persist. It expresses the subversive power of suggestibility. This is the productive and subversive force of suggestibility as it is capable of “integrating knowledge but at the same time” stripping this “knowledge of the power it claims of defining a radical opposition between reason and illusion.” (Chertok & Stengers, 1992, p. 145).
As we could see the 'glimpse' at the event as such contains potential productive forces, but it does not carry a determinate outcome, or a direction as such. These 'voids' are not in themselves 'critical forces' with any determination or aimed at a specific goal.

This is why I would argue that for these voids to become potential 'passages for change' they need to be collected, mapped, intensified to show their existence and connectedness. It could then be possible to not just reformulate the concrete problem (here that of child witness practice), but the results of the analysis (chapters 11-14) could be fed back into research and practice by hooking up to the uncertainties and peculiarities that the practitioners are already aware of, using them as a point of relation, i.e. using the existing voids as passages for inserting new perspectives.

Looking back we can see that this whole thesis is an exercise in 'mapping' voids and detecting the 'unwanted', perplexing results authored in early and modern suggestibility research as well as legal practice.

In the following chapter (16) I would like to give a concise example of how these voids hang together and are connected across disciplines and time, across theory and practice via abstract lines, rendering the general and the particular, the societal and the personal indiscernible.
16. Mapping the voids

I would now like to systematically map some more of the voids that can be identified throughout history, theory, research and practice, and to show their connecting ‘lines’, the traces at which suggestibility cuts across the divergent orders of theory, research and practice and thereby escapes history. This whole thesis can be considered an elaborate exploration and mapping of voids. The following examples are meant to be brief spotlights, designed to further illustrate and clarify the nature and efficacy of these voids.

16.1 The void of the phenomenon

One interesting line cutting across from the point where my analysis started is the one related to the Mesmer effect. It expresses the way in which the question of suggestibility (here as the question of the magnetic fluid), slices across the contemporary political, social and scientific orderings, explicitly raising the question of the production of knowledge, and more specifically that of the experimental set up. Hence this is the question of how to legitimise and gather reliable observations, or indeed how to produce reliable witnesses for the phenomenon. The appointed Commissioners needed numerous attempts and much debate to arrive at what they saw as appropriate procedures and reliable ‘witnesses’, that is, subjects whose observations they decided they could trust. At the time the issue is finally settled by the court. The court followed the scientists’ decision for a set up that proved the phenomenon to be an illusion, product of mere imagination and manipulation. But the preceding dispute between the Royal Commission and the naturalist Jussieu, who is seconded by the magnetist Deslon, exemplifies what is at stake here. That we do not actually know what is being dismissed. We do not know what constitutes ‘just imagination’ because, as Deslon had argued, the actual phenomenon had systematically been evacuated from the experiments. Hence the excess of meaning, the paradox within, had been submitted to the dominant order of science and ultimately the law, but what had happened within, what had been expressed in the dispute, exemplifies what was to continuously haunt the order of science as well as that of the law in different ways.

However this is not meant to imply that the ‘lines’, or ‘voids’ originated at this time or with this issue around Mesmer, or were ‘caused’ by him. The search for ‘origins’ implies exactly

328 In the course natural observation was ruled out as too impure and uncontrollable and the use of actual patients fell through because these were seen to be not neutral enough, that is poor, impressionable and desperate for a cure.
the kind of developmental and causational framework that does not apply to 'events'. As outlined with reference to Deleuze's work, the 'event' operates outside of history, in a sphere, or dimension of multiple forces, beyond linearity, causation and sequentiality. The Mesmer-effect is connected to, shares a bundle of signs for example with the instance of the German High Court ruling about expert assessment in 1999, and also with the implementation of the 'Achieving best Evidence' guidelines in England in 2001. In both of these cases the law seeks to recuperate and give order to a bunch of multiple signs emerging from a void sliced open by suggestibility. Obviously the legal systems differ in structure, and the German and the English courts reach peculiarly antagonistic conclusions with regard to the existence of scientific (or indeed applicable) knowledge about suggestibility. Still, it is the same bundle of forces, issues, multiple signs that they are dealing with, it is the same kind of abundant void they are struggling to recuperate.

Following the concrete efficacies of the implementation of the German High Court ruling (1999) and the ABE in England, we can see that the voids are recurring on a different level, cutting across practice. One example is the perplexity of the German expert who reports to have been asked by a barrister to explain the 'scientific principles' of her assessment. When the expert explained her assessment but failed to explicitly mention the 'null-hypothesis' the barrister managed to declare her assessment inadmissible (see chapter 7.3). Obviously legal rhetoric plays a central role here, but what it expresses is the void of the scientific principle implied in the concept of the 'null-hypothesis' and its attempted application to the concrete case. It illustrates that as such the null-hypothesis does not guarantee proper assessment at all. While based on the principles of scientific reason, at the moment of application it causes more problems than it solves, and at the same time the power of these principles is suspended.

An example for a related void can be found on the English side where the police are required to establish child witnesses' competency by asking them whether they know the difference between truth and lies. While as a rule this makes sense, the actual moment this question is asked can render it paradoxical, because it offers for the officers, the children and the judge who is reporting some of these instances, a glimpse at the complexity summoned by this question (as in this comment by a judge).

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329 See chapters 1.1, 7.2, 8.2., and 9.
330 And again it is interesting to note the amount of irony and laughter surrounding this topic from the experts' side and the laborious attempts at clarifying that the null-hypothesis should not actually be taken literally. It is a figure of thought, a metaphor, one expert says, and the High Court was not meant to include it into the ruling literally.
Judge2: [...] what’s (laughing) the difference between truth and lies one child (1) ahh well a lie is when you say you haven’t done it (laughing) ahh that’s a good one isn’t it (.) also AND WHAT would you say if I said I was wearing a green shirt (1) ahhm (.) this is one of the questions they’ll always ask (.) ah well I’d say you are colour blind (laughing) that’s a very good child that (.) ahhm but lying is when you say you haven’t done it I think is wonderful (laughing).

The complexity summed here undermines, for a moment, the very idea of ‘children’s competency’ as something that could be generally established as absent or present in a concrete case and in relation to their concrete evidence. And again this paradox incites laughter, because the children in this example are strictly speaking most competitively incompetent (they answer not to the question but to its ‘sense’).

Looking back at the turn to the 20th century it is interesting to see that the same kind of paradoxicality features differently within psychology. McDougal (1911) for example positively embraced the peculiar paradoxicality attached to suggestion (see chapter 1.2). He proposed definitions for ‘suggestion’ and ‘contra-suggestion’ that appear to be explicitly contradictory, but he seemed to fully appreciate this complexity. Yet following the consolidation and progressing ‘scientisation’ of psychology as a discipline, and in the course of this the rise of experimental methods, such inclusiveness was not workable anymore. Hence we find Freud as well as Stern, Binet, Hull, Eysenck, Ceci and Gudjohnson (to name just a few), laboriously avoiding such explicit paradoxicality. Still, this only means that the paradox emerges as part of their operationalisations and categorisations. Yet, Binet and Stern, who seem to be operating on the verge of scientisation, constitute a special case. I will get back to this.

While the names and operationalisations of suggestibility change, the issue of isolating and recording the workings of cause and effect were just as central for Binet, Stern, Hull and Eysenck as they are for example for Goodman, Ceci and Gudjohnson. We could see how every new experimental operationalisation expressed yet another void, a gap in the fabric of the scientific order. Here we can broadly distinguish two related voids: One that unsetles the dynamic of cause and effect and another that unsetles the stability of scientific ‘names’ and categorisations.

16.2 The void of scientific concepts, names and categories

Throughout its history suggestibility has been related to issues, names, concepts as diverse as hypnosis, imitation, social contagion, conformity, compliance, decision making, imagination, changes in attitude, bias, expectancy, self-fulfilling prophecy, placebo, dissociation, coping and defence; and it has uniformly been linked to such diverse
occurrences as undergoing major surgery without anaesthetics, succumbing to a leading question, or achieving breast enlargement by repeated guided imagination (Eysenck, J. 1991). And quite fittingly there have been calls for “logical hygiene” (Gheorghiu 2000) nicely expressing the void opened up within the order of scientific categorisation. It is infested with too many ‘names’.

Another interesting example is provided by Hull who appeared to address the problem by opting for ‘phenomenological names’ that assured their accuracy in the exact representation of the activity (see chapter 1.4). For example ‘whispered autosuggestion’, ‘impersonal heterosuggestion’ or ‘personal direct suggestion’ mainly describe the way in which the suggestive influence was administered (by the participant themselves, by a phonographic apparatus and deception or by a direct comment of the experimenter). Yet, more experimental settings would have to result in more names, or every single experiment could be given a name, or indeed every single instance of suggestion could be named. Interestingly Hull was quite aware of this problem as he concedes that “investigation in this field is a little like tempting fate, it is almost to court scientific disaster” (Hull, C. L. 1933, p. 403). His findings (as do Ceci’s) remain suspended over an ambiguous ‘maybe maybe not’, as some ‘persons however appear nearly or quite unresponsive to such suggestions’.

Similar problems caused Eysenck (1991) to dismiss suggestibility altogether (see chapter 1.4). Still he concluded that it could be a numerical problem. Instead of one singular trait of suggestibility one should assume that there is a multitude of different ones, that could be named and catalogued in a taxonomy of suggestibilities. So again, inciting further creativity, suggestibility slices a void into the system of scientific categorisation, or ‘names’. It is none and many at the same time, as we can see in the next example.

So 'going empirical' with suggestibility stretches the capability of 'naming', categorising the phenomenon to the extreme. This appears to be the precise inversion of what Eysenck might have envisaged as a taxonomy of multiple suggestibilities. Gudjohnson's list seems an attempt to capture suggestibility by concisely describing what it is not. But intriguingly and inevitably this means this list can neither be complete (there must be more things suggestibility is not), nor can the categories be mutually exclusive (they spill into each other). This is another instance of suggestibility slicing, opening up a void. It is precisely in its attempt at explicitness and comprehensiveness that this list simultaneously expresses the utter paradoxicality of such an attempt. Thereby suggestibility evades and undermines the categorising power of the psychological discourse.

I would suggest that we can see the flux of change and becoming lurking within; we get a glimpse at 'sense' stretching both ways, an excess of meaning spilling out of every single one of these names as they sit next to each other. So even though this is not a 'spoken utterance' like the comments by the judge I have used as examples earlier, it clearly expresses the dissolution of the common sense of an exclusive direction and 'identical name' upon which scientific categorization is based. In its entirety, the list sends the names themselves spinning around and expresses the doubt of categorization, it expresses the fact
that ‘slicing’ ever smaller slices, and giving names to ever smaller entities will not solve the problem. This sort of list is supported by the wider discourse of experimental psychology. All the names are common denominators, names, for established concepts, and this is why Gudjohnson has used them. They are supported by, and relevant to the dominant discourse of experimental psychology in this field. However, it is precisely this dominant discourse that they unsettle, because in its present appearance in Gudjohnson’s book and in its entirety this list (and what happens between those names) carries the words to the fringes of stability. It summons a multitude of signs, issues and perspectives in an abstract and singular way, thereby rendering the distinctions and the rationale they represent paradoxical, hilarious (and they do this regardless of what the chapters actually say).

This is exactly what Deleuze describes in the quote I used earlier (see 15.2). This is what happens “when substantives and adjectives begin to dissolve, when the names of pause and rest are carried away by the verbs of pure becoming and slide into the language of events, all identity disappears” (Deleuze, G. 2004[1969], p. 5).331 This is how this void provides us with a glimpse at the flux of change.332 Unsurprisingly this list has the appeal of Borge’s Chinese encyclopaedia, that Foucault quotes in a related context (Foucault, M. 1989 [1966]). Once again this paradoxicality in turn expresses and highlights the hard work that has to go into maintaining these names, keeping them stable, making sure they can be recuperated, stratified into the dominant discourse.333

331 Full quote: “For the proper or singular name is guaranteed by the permanence of savoir. The latter is embodied in general names designating pauses and rests, in substantives and adjectives, with which the proper name maintains a constant connection. (...) But when substantives and adjectives begin to dissolve, when the names of pause and rest are carried away by the verbs of pure becoming and slide into the language of events, all identity disappears from the self, the world, and god. (...) It is as if events enjoyed an irreality which is communicated through language to the savoir and to persons. For personal uncertainty is not a doubt foreign to what is happening, but rather an objective structure of the event itself, insofar as it moves in two directions at once, and insofar as it fragments the subject following this double direction. Paradox is what initially destroys good sense as the only direction, but it is also that which destroys common sense as the assignation of fixed identities. (Deleuze, G. 2004[1969], p. 5)."

332 At the same time this example serves as a good illustration of what Deleuze develops in close relation to this, as the theory of difference, showing how representation is a form of mediation. As indicated in chapter 14 in the context of Stenger’s explanation of the principle of sufficient reason, Deleuze moves on to add another indivisible part to this finding about representation within the principle of sufficient reason, the ‘identity of indiscernibles’. I am providing the same quote again, because it gains an even richer meaning in the context of the void created by Gudjohnson’s chapter headings. “According to the principle of sufficient reason there is always one concept per particular thing. According to the reciprocal principle of the identity of indiscernibles, there is one and only one thing per concept. Together, these principles expound a theory of differences as conceptual difference, or develop the account of representation as mediation.” (Deleuze, G. 2004[1968], p. 13).

333 So for this to be a void it is crucial that all of these concepts listed in one entirety, because any single one of these concepts, or a few of them, would stand quite powerfully for itself (categorising, stabilising). But suggestibility has necessitated them all to be assembled. And the way they are all assembled in one block next to each other and juxtaposed to suggestibility, makes them spin, provides a glimpse at insistence on flux and change.
16.3 The void of causation

The void of causation is opened up, slicing across the experimental efforts to capture suggestibility by isolating, controlling and determining the exact efficacies and causes of suggestion. This is again evident in Eysenck’s attempt and final dismissal of the plan to narrow down and control the efficacies surrounding suggestion. In retrospect we could say that he might have explicitly summoned a peculiar condensed singularity by (presumably) inadvertently making the very intense contemporary dynamics of the reverberating global tensions (Second World War), operate upon his singular experimental setting. All this is condensed in his German accent as his instructions emanate from the gramophone. While the ‘factuality’ of this occurrence remains unclear, it provides a neat exemplification of condensed, singular and at the same time collective forces at work. An immense amount of intensities, signs, impinge upon, reverberate through any one of these moments: 1944, a British soldier in Mill Hill Emergency Hospital, ordered to stand upright, blindfolded, listening to Eysenck’s voice coming from a gramophone. These are the ‘co-ordinates’, the longitude and latitude of this singular event and its individuation.334

A good example for a related void can be found in the dynamic reciprocity engendered by modern suggestibility research as demonstrated in chapters 2.3 to 2.8. Every single factor that is identified does prove to be relevant, but simultaneously it turns paradoxical. This in turn encourages more complex experimental designs that consider more factors, or indeed more complex factors. While these again provide interesting results, those results, instead of narrowing down the possible relationships between factors, causes and effects, add yet another level of complexity. It began with single cognitive factors that could explain suggestibility, such as trace-strength, stress while encoding, plausibility of the information, relatedness to the body or age. As these remained ambiguous, more complex issues like interviewer bias, or the question asked where considered. Yet the issues as such, or indeed the factors seemed to turn against themselves and ultimately the false information provided in implanted memory research merged with potentially true experiences leading to indissociable, ambiguous, but abundantly meaningful results (2.6). Simultaneously the wider debate around the ethics of such research as well as the potential effects this, in itself ambiguous debate (see 2.7), had on legal decisions, meant that the power of such scientific findings looped back against the researchers themselves,

334 “So we are saying a simple thing: desire concerns speeds and slowness between particles (longitude), affects, intensities and heccities in degrees of power (latitude).” (Deleuze & Parnet, 1977, p. 95).
causing them to distance themselves from their own findings. And here Ceci's closing remark expresses, condenses, sums up this void.

"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).

This void is a good illustration of how the power of the scientific order has ended up impinging upon itself; the dominant discourse eats itself. It has carved out an abundant void of personal-collective, yet a-subjective meaning in which nobody is to blame in particular, but in general everybody is to ‘blame’. In this respect suggestibility could be said to exert a deconstructive force, but one without direction or agenda. It merely stages the moment where the dominant discourse eats itself.

Following the twists of modern suggestibility research one could also say it is rendered paranoid, it enters a paranoid system of signs. Capturing suggestibility indeed resembles what Carroll describes as the chase for the Snark (Caroll, L. 1865).

16.4 The void of singular events as names

These voids are complex instances that seem arranged around a particular date in time and a particular person or group of people. From the perspective of ‘events’ these could be described as specific condensations/contractions of multiple signs that can again link up with other voids, ‘events’. This void is best exemplified by the persistent recurrence of Ceci’s name as what I have termed a ‘ceci-machine’.

Other examples for this are the ‘Salem witchcraft trials’, the ‘MacMartin Preschool case’, Jennifer Freyd’s case of recovered memory (see chapter 2.1), the debate around Ceci’s 1994 implanted memory experiment (see chapter 2.6, 2.7), the Worms/Mainz cases (see chapter 7.2), the Cleveland Crisis or the Orkney Island case (see chapter 8.2). All of these involve very concrete occurrences involving and emerging from the specific life story of concrete individuals at a specific time and with specific personal consequences. Yet as such these are also instances of condensed bundles of signs, they mark peculiar, ambiguous disturbances sending out multiple signs. So they are singular but a-personal instances that are marked by their ‘names’ (i.e. ‘MacMartin Preschool case’, ‘Cleveland Crisis’), but what these names express at any one moment, is not something that could be causally related to the ‘things that happened then’, but the names have taken on a life of their own, spreading multiple signs, slicing, opening up voids. So again, what I am saying here is not that these people, or what happened to them ‘caused’ something, but they denote places where forces where bundled, effecting indeterminate kinds of potentialities.
16.5 The void of the ‘Binet-Stern event’

Within the broader map of voids the work of Binet and Stern deserves special attention because their research into suggestibility constitutes an explicit attempt to capture and integrate the ambiguous nature of suggestibility. Within their approaches the dynamic nature of what suggestibility ‘does’ and the description of what it ‘is’ seem to converge. Binet was among the first to approach suggestibility by using an experimental set up, but his research was also informed by the analysis of everyday observations of techniques used by teachers, doctors, magicians, writers and artists. Following his research Binet had voiced considerable doubts about the possibility and potential benefit of conceptualising suggestibility as a distinct trait or of investigating it as if there were ‘general techniques of suggestion’ as he found there is no “one unique and absolute aptitude for suggestion and (...) one is prone to suggestion from all possible directions and through every way in which one perceives and reasons…” (Binet, A. 1900, p. 389; quote as in Gheorghiu, V. A. 1989, p. 12). Accordingly 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. While within an experimental framework an entity like ‘experienced uncertainty’ must appear rather elusive, because it does not allow directions of influence to be predicted. However, positioning this finding within my analytic framework of ‘events’ and voids, ‘experienced uncertainty’ captures quite accurately the abundant but directionless dynamics at work.

The work of Stern offers an intriguing addition here. Stern pointed to the terminological peculiarity that suggestion/suggestibility lacks an adjective for the suggestees’ state of mind while under the influence of suggestion. On the basis of his own findings Stern introduces the differentiation between ‘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. Crucially from this distinction he moves to the insight that these two phenomena do not entertain any direct causal connection; they are independent of each other. While they may well coincide, they are as likely to prevail on their own, hence the occurrence of active suggestion does not necessarily ‘cause’ passive suggestion, and the existence of passive suggestion cannot be taken as an indicator for a preceding active suggestion.

From my analytic perspective one can argue that by capturing the a-causality of suggestibility Stern has basically acknowledged that it is outside the grasp of experimental
set ups; just as Binet has captured suggestibility's peculiarity of being beyond the grasp of clear conceptualisations. Combined in the context of my analysis Binet's and Stern's insights can be seen to deliver an intriguing capture of suggestibility as a liminal resource, as a dynamic force that points to the pragmatics of change. 'Experienced uncertainty' implies a concrete momentous dynamic that is linked to the very person's perspective, but clearly bears the intensity of a-subjective forces that bear upon any one instance the person experiences. Additionally it defies causality. While there are actions and circumstances that will be likely to 'cause' uncertainty, there is no way to predict, plan or determine how it will be 'experienced'. Ultimately experienced uncertainty could just as well be self-inflicted.

This instance, the abstract collusion of intensities unfolding around Binet's and Stern's work, could be called a 'Binet-Stern event', a particular accumulation of 'escaping' signs. It is one of those that have remained largely inefficient (obscure) so far. But there are lines running across, connecting this 'event' with concrete instances in child witness practice that can be seen to express a similar dynamic.335

A good example for this is the instance of structural uncertainty I have described in chapter 11.2.336 Here all the professionals (care home staff and the police officer) succumbed to the 'available suggestion' that an abuse must have happened, to relieve the experienced uncertainty of the situation, while the girl at the centre of the case (who is repeatedly questioned by the officer), maintained her account (proved unaffected by the apparent suggestion she was exposed to). This case could well be described as an instance of 'experienced uncertainty' that is not 'caused' by anyone or anything in particular, but that is the result of a-subjective intensities and complex circumstances that affect (as passive suggestion) those involved in the case.
16. Mapping the voids

16.6 Voids expressed in practice – pragmatic voids as passages for change

To finally return to my initial example, and to the crucial practical point, all of these voids also transgress and emerge within practice and they are expressed within the accounts of practitioners. While they express them, the insistent multiple dynamics of those voids communicates itself to the practitioners as well. For a moment they get a glimpse of the subsisting flux of change. Just as in the historical and research examples, there is often some kind of ‘concession to chaos’, an aside about ‘complexity and unsolved issues’, a remark like ‘research is in its infancy’, an ironic aside, a ‘tongue in cheek’ comment or indeed chuckling and laughter. Obviously I cannot (and do not wish to) infer what exactly this means to the interviewees personally, or whether and how they might consciously perceive these instances, this is not my point here. I am not claiming to have detected personal ‘insight’ or ‘self-contradiction’, or ‘defiance’. I am merely interested in pointing out the fact that these punctuations and voids recur and are indeed expressed continuously in what the practitioners say.

As the analysis throughout the thesis has shown, these voids are heavily guarded, in order to allow for them to be glossed over and thus to perpetuate the dominant scientific and legal order (broadly speaking) which presents itself as the most important and indeed most ‘real’. So for each one of the practitioners the paradoxes and voids must appear as concomitant to their personal practice, as difficulties that need to be obscured, avoided and laughed away. Giving them too much attention would ultimately mean to admit to ambiguity, which again will appear unprofessional, unscientific or indeed look like ‘bad practice’. This is why they are not just guarded or laughed away, but also unlikely to be addressed, negotiated.

However, in a very pragmatic way these voids could be the ‘hooks’ that could be used to instigate change; they could be the gaps through which this analysis could be carried back into practice. It is in this sense that I consider them as potential passages for change (in this case, change in child witness practice).

The central void I have already used to explain the theoretical framework of ‘voids’, is the one by the English judge who explains a direction he might give to the jury about a nine year old boy [Excerpt 9].

Judge2: (…) LOOK this case depends on the evidence of a nine year old boy now you you know you all know children (…) ahhh (…) nine year olds can lie nine year olds can tell the truth but this this was a nine year old you are dealing with here (hmhm) (1) ahhhm but wh' wha' what that actually [chuckling through the word ‘sure’].

His laughter here demarcates the point of maximal multiplicity/paradoxicality. He is a judge so he must be ‘sure’ about what he says in court, but simultaneously he cannot
possibly be sure as to what this direction says, because it summons too many signs. At this moment he expresses the utter pointlessness of the developmental discourse and the age warning for determining whether this child did lie. Hence in this instance the dominant discourse of developmental psychology has lost its power, just as the legal discourse of ‘directions’ is suspended. As suggested earlier, this specific void could be termed a ‘development free space’.

Another example is that of the prosecutor praising the benefits of video recorded evidence, because ‘it allows you to see what children are like’. She reports a case where a witnesses’ ‘innocence shone through on the video’, while other children might ‘look shifty’. But, she adds with paradoxical plausibility, they might look shifty and uncomfortable because it is a hideous experience and maybe they simply are uncomfortable [Excerpt 8].

This opens up a void into her ‘straightforward’ criteria of assessment, a void that again expresses the utter complexity and multiplicity of issues subsisting within the criteria for decision-making. For a moment the power of the legal discourse, as well as the power of a potential jury’s ‘common sense’ discourse around the assessment of credibility, are explicitly suspended, they are up in the air: Does this not mean that the very appearance of credibility (as innocence shining through), should be interpreted as meaning the opposite (they must be lying), while looking shifty and uncomfortable means the child is saying the truth? Clearly she does not say that either, but in this instance both and neither apply.

The similar void emerges around the rapport paradox as it is encountered by the police officers [Excerpt 6].

Clearly some things are wrong to say and others are right, and the ABE explicitly recommends for officers to “err on the side of caution” (see chapter 8.2). But in saying ‘you’ve got to be cold but also friendly enough to get the information’ the officer expresses the void within the enigma of rapport: too much and too little is detrimental, but what constitutes rapport in any one specific case remains unclear.

Suggestibility is explicitly mentioned as slicing a multiply layered void in this remark by the following expert. He (possibly) ironically comments on the perfidious nature of suggestion
that could affect the expert in court just as it could affect anybody, because successful suggestion is the kind of suggestion one does not notice. So how could the expert possibly know if he had succumbed to it or not (Excerpt 19)?

Exp2: (…) I think I've been successful I don't think I've ever been led but who knows you know because if you are led successfully you don't even know about it but I think I've been all right (both chuckling)

So it is quite clear in this moment that his status as an expert can in fact not assure that what he says is only and entirely scientifically proven and part of his expertise. He is an expert because he knows that suggestion can affect him as well, but then how can he be an expert if he cannot be absolutely sure he is in control of what he is saying (and beyond that, is what he is saying now what he really wants to say?) Again this is accompanied by laughter, as obviously this kind of paradox cannot be allowed to take hold.

All of these exemplary voids demonstrate how the dominant discourses are perforated and punctuated by suggestibility as a liminal resource. They demonstrate how issues of theory, research and practice are interrelated on an interdisciplinary level, as well as showing that the fracture lines are cutting across and connecting issues of personal relevance with general scientific or societal matters.

Looking at child witness practice there are obviously slight differences in the way the voids are handled relative to the position the practitioners are in. While irony transgresses all of the accounts, it appears to be easier for a judge to laugh the paradoxes away than for a police officer who after all will have to answer to any potential incoherences that might emerge from the resulting uncertainties. This is also reflected in the differences between the German and the English practitioners. In chapter 14.7 the German judge clearly expresses a paradox, but he is not willing to laugh about it at this point, even though the interviewer introduces irony (see excerpt 21). This might be related to the fact that he, unlike his English colleague, has to make the final decision about guilt and innocence, and is thus not as detached from those matters as the English judge might be.

Regardless of such differences, capturing the efficacy of the voids and mapping them could enable researchers and practitioners to see practice and their position within it in a new light. Feeding this analysis, and thus this complex picture of a field that is inevitably transgressed and destabilised by interconnected voids, back into research and practice could add transparency and thus help to depolarise debates. It could help to move beyond mutual accusations of bad practice (or ‘bad science’), because it would allow for the dynamic underlying presence of ambiguity and paradoxicality to be appreciated as
something that is shared between all those operating within this practice rather than being an issue of personal 'uncertainty' or one individual's 'unprofessional doubt'. As a shared issue this aspect of practice could be illuminated and embraced actively rather than being concealed or suppressed.

This would mean to try and turn practitioners into collaborators and thus conspirators for change, instead of treating them as representatives of their respective dominant discourses, disciplines or practices. This is what Chertok and Stengers express on an abstract level when declaring that the 'participants' need to be treated as 'perplexed authors' of their theories, research results and practices. We need to take seriously and examine their unwanted 'creations-come-reality', work with the 'artefacts', and try to learn from them.

"This is why we think the challenge of the 'false witnesses' of hypnosis and suggestion could be met by the practice of a 'transdisciplinary' research identifying its participants as perplexed authors and not as representatives of their respective disciplines' authority." (Chertok & Stengers 1992, p. 277).

Looking back we can see that this whole thesis is an exercise in 'mapping' voids and detecting the 'unwanted', perplexing results authored in early and modern suggestibility research as well as legal practice.

In this context it might be possible to see how far the problem of child witness practice does not so much rest with the lack of, or insufficiency of the improvements made on the basis of psychological science, but that the improvements made do not seem to apply to the problem at hand. They clearly are improvements, but they are not improvements from the perspective of the problem at hand. Indeed they obscure the fact that the problem of child witness practice has not been understood. When reinvestigating and reformulating the question it will become clear why the well-intentioned and far reaching improvements in English child witness practice appear to miss the problem.

Chapter 17 will illustrate pragmatically how these voids could be passages for change, how they could be the pragmatic entry point for subversive ideas, how practitioners could be made conspirators for change. Finally this also means to reformulate the question at stake, reconsider the 'problem' of child witness practice.
17. Conspiracy for change: negotiability, voids and interventions for practice

In this chapter I would like to give an illustration of how my analysis could be carried back into practice utilising the voids as passages for change, conspiring with the dynamics they incite, and to specify how the problem of child witness practice can be reformulated in the light of this analysis.

In part this aim has already been realised by conducting the research interviews as interdisciplinary reflexive interviews and thus literally transgressing the boundaries between different disciplines and agencies, collecting, discussing and mediating between the agencies by reporting back and forth about the experienced, shared and reciprocal problems. Additionally I have maintained contact with most of the participants throughout the writing up phase to ask follow up questions. Some of the legal practitioners and psychologists have directly contributed to the analytic and writing process by reading draft chapters and providing feedback and points of discussion.

Crucially, however, this talk of ‘carrying back’ the analysis into practice, ‘discussions’ and ‘feedback’ should not be misunderstood as being a ‘call for dialogue’ or conversation. I have deliberately used the Deleuze inspired notion of ‘conspiracy’ to describe the potential incitement of change, and not that of ‘dialogue’ or ‘conversation’, because dialogue again implies ‘insights’, ‘knowledge’, ‘dialectic arguments’ and it functions on the basis of an always already set framework of ‘positions’ that are produced and defended.337 For child witness practice for example ‘call for dialogue’ could mean to get all the agencies together and let them ‘talk it through’. This may be a well-intentioned idea, but in view of my analysis it is precisely not the form of ‘engagement’ that seems to be very productive. What I am trying to carry into practice is a ‘conspiracy with the voids’, an attempt to make practitioners, on their own terms, collaborators for change. Hence my analysis and its possible effect on practice functions in the spirit of what systemic therapists might call a ‘paradoxical intervention’. Ultimately this could mean, in Deleuze’s terms, to collaboratively invent a problem, a problem-position. In this sense this analysis itself is not to ‘instruct’ or ‘inform’ practice, rather it would now need to try and become part of it, insert itself on a pragmatic level. Reflexive interviewing could be seen as a very first attempt at initiating such a process.

Let me explicate and illustrate what this means via two central pragmatic suggestions towards the way in which the concepts gained within the analysis could be put to work in practice.

17.1 Positions of professional confidence: interagency and the negotiability of structual uncertainty

Overall we could see how the guidelines, reforms and special measures have introduced more ambiguity to the overall practice than they actually resolve. In chapter 11.2 I have identified the issue of structural uncertainty and the resulting tendency of police officers to resort to defensive practice.

I termed this dynamic 'structural uncertainty', because it is an uncertainty implicit to the positions police officers, social worker, prosecutors or judges occupy when trying to align their obligations and duties with the expectations of the guidelines and the law and the specificities of the case. Hence, what I am pointing to is the structural problem as represented for example in the laughter or asides made by the interviewees. So this has nothing to do with potential 'bad practice', or personal ignorance, obtuseness, or bias (which might also exist in some cases).

We could see how the lack of authority (and certainty) to resolve this structural uncertainty leads to defensive practice. In order to defer the uncertainty and to at least maintain their own professional integrity, practitioners focus on what is considered 'proper procedure', a safe way to follow procedure while deflecting criticism. As a result of this, practice can become formulaic and inflexible, attention is diverted from the child witness him or herself and from the demands of the specific case. This is where we could see special measures literally turning counter-productive. While the officers are assuring 'proper procedure' and deflecting possible criticism from other agencies, there is little room to pay attention to the particular child witnesses’ needs and circumstances, and to react flexibly to issues and difficulties that might arise during an interview.

This problem is reflected in the judges’ comments about police interviewing. They complain about interviews being badly paced and extremely long, while containing relatively little detail. One judge captures this problem pointedly when commenting on police officers’ video interview performance. He remarks that the officers are “so frightened of focussing” during the interviews. This means that the “pace drops all the time
(...) and then the children flounder and don’t know what is expected of them”.\textsuperscript{338} They should “ask simple questions, without leading, just ask them it is so simple” the judge recommends.\textsuperscript{339} With regard to the overall investigation the judge adds that “children are really let down by the police officers I think” because they often fail to put sexual abuse cases in context and fail to collect circumstantial evidence that would provide a broader picture about the alleged incident (“more details around the edges” are needed). As a result of this “what is presented in court collides with the listeners’ representation of such a case”, because often it ends up just being the word of the child against that of the defendant, even in cases where, as the judge states, more circumstantial evidence could have been collected. He finds officers “should treat this like any other case really”, but in child abuse cases they often “just concentrate on the child” and do not investigate as usual, “they think they are specialists for interviewing children and that’s what they’re gonna do”.

These problems can now be captured as an effect of the structural uncertainty surrounding child witness practice and the wider issues related to childhood ambiguity and protectability (see chapter 12). This provides a much wider perspective than merely speculating about the incapability, unwillingness or ignorance of the officers. So while this judge’s comments neatly demonstrate the practical manifestation of the defensive practice that results from these uncertainties, these comments also illustrate the mutual lack of insight into the other agency’s practice. We could see that interviewing children is not just about ‘asking simple questions’. Additionally it is clear how confronting the officers with such criticism (as uttered by the judge), will not be very productive. It is likely to summon their defensive resistance and the insistence on ‘proper procedure’.

I would suggest that my analysis opens a possibility to be fed back into practice to mediate and negotiate between the agencies, because it adds transparency to the complex dynamics inherent in practice. Being able to talk about the problems the judge described in terms of structural uncertainty and defensive practice creates a basis for identifying the issue at stake and negotiating these problems beyond accusations of bad practice and beyond the fear of discrediting their own professional conduct when addressing such difficulties. So in this sense the void acts as a space to reflect upon difficulties of interagency practice, and within which problems could become negotiable by moving beyond accusations of bad practice.

\textsuperscript{338} All of the quotes in this paragraph derive from verbatim notes taken in a discussion between the author and Judge 1 during a court visit.

\textsuperscript{339} This is not just confirmed by my own observations, but also by research that looked into police officers’ interviewing practice after the implementation of the Memorandum of Good Practice and the ABE (e.g. Davies et al, 1995; Davis et al 1999; Westcott & Kynan, in press; Westcott et al 2006a; Westcott, 2006).
Reformulating the problem:
It has also become clear that currently the problem is not one of insufficient guidelines, too little research, further need for technical improvements, a need for more special measures, or even a ‘balancing of legal procedure in favour of witnesses’ (as Tony Blair unhelpfully suggested echoing a public debate in summer 2006). As long as structural uncertainty undermines interviewing practice, this practice will not benefit from even more sophisticated knowledge about interviewing techniques,340 or ever more sophisticated procedures and laws to gather and view children’s evidence. Such considerations are likely once again to spark the pointless and polarising debate of how ‘re-balancing the system in favour of victims’ will mean to ‘abandon fair trial’ in favour of children’s welfare (see last part of chapter 12). Additionally it is likely that such extra measures might add further to the structural uncertainty. Already it seems that the sheer volume of improvements in place has begun to obscure the nature of the problem. Additionally it has provided all those involved with a valuable excuse as to why any remaining problems ‘cannot be their fault’. Every agency will claim that they are already following all the advice and are implementing all the procedures in the best possible manner, and hence remaining problems are likely to be the attributable to the failure of another agency. Here, shortcomings are also be blamed on ‘scarce’ resources (too few police officers, too little money and time for training, too few prosecutors who are specialised, too few judges, too many cases etc.).
Following my analysis I would argue that what is needed most urgently are not more officers or judges etc., but initiatives that can create positions of professional confidence particularly for those at the early stages of the investigative process. This is where the structural uncertainty has the most detrimental effects, and incidentally this is also where the most crucial and difficult decisions have to be made (investigating or dropping cases), by the least specialised, least authorised, most overstretched agents of the investigative process (police officers). Depolarising the debate and creating a basis for interagency negotiations is already part of such an attempt to create positions of professional confidence. Crucially, my suggestion of conspiring around the voids also implies that this is not about ‘dialogue’ or ‘discussion’, because it could be done without needing to directly ‘challenge’ any one agent, and without ‘prescribing’ more scientific knowledge to them or giving instructions (there is no need to refer to any of the theoretical background or even

340 And this research will in itself remain ambiguous as long as it sticks to the experimental framework.
the critical analysis). It is a means of opening perspectives on their own terms, hooking up to the voids as they already recognise them.

Furthermore it needs to be acknowledged that interviewing child witnesses is not at all a straightforward task, it is not just about 'asking simple questions', as the judge put it. It is difficult, demanding and can be unsettling.

Firstly this has been illustrated on a pragmatic level and in detail by looking at German child witness practice. Considering the very different structures in place (e.g. experts) for child witnesses and taking into account the comments of some experienced German legal practitioners and psychological experts who encounter child witnesses in sexual abuse cases, it is quite clear that these practitioners do not consider interviewing children a simple task at all (see chapters 8.3 and 13). The German system defers the task of assessing and making the complex and difficult decisions to the later stages of investigations, and it is shared by a number of experienced agents in the system.

Clearly the individual 'success' and appropriateness of practice always depends on those individual agents, and inevitably at this level the German legal system has its own inherent problems, as well as sharing some of those problems arising in the English legal system. So my point is not to 'prove' that it is more efficient, or per se more correct in its operations. But the juxtaposition to the German legal system has demonstrated some of the intricate difficulties of interviewing children, and the professional confidence required to do it, through the voices of experienced legal and psychological practitioners all of whom do encounter child witnesses regularly. Meeting and interviewing English child witnesses cannot be such a different experience for those who have to perform this task in England, so this as such is a valuable and possibly inspiring message.

Secondly, the fact that this indeed is a problem for the prosecution of child sexual abuse in England is underlined by research into attrition rates and factors in England (see chapter 5). In the context of the ongoing reforms it clearly is concerning to see that approximately 70 to 80% of such cases are 'No further action-ed' or for other reasons fail to even progress past the police stage of an investigation (Westcott 2006; Kelly et al 2005; Gallagher & Pease 2000).

Thirdly, the problem of interviewing children has been illustrated on an analytic level. The analysis of 'protectability' has also shown that this is a task riddled with problems that are precisely not resolvable on a formal level, but will inevitably be at the centre of every single encounter with a child witness. Hence whoever is expected to provide case specific, balanced interviewing that recognises and responds flexibly to the demands of the specific
case will need to be equipped with the skill, confidence and authority to do so. And this means being very certain about the task in order to meet the inevitable uncertainties that will emerge.

One of the social workers refers to professional confidence and captures one of the crucial issues at the heart of this practice, being able to ‘stand back from doing’.

**[Excerpt 23]**

1 SocW1: (…) professional confidence sometimes actually I think needs to be asserted and
2 people need to have that confidence to be able to say well actually we didn’t do it
3 then because or we chose not to interview this child the day after the concern came
4 to our attention because of A B and C ((hmhm)) And its that professional
5 confidence and that standing back if you like from the doing (1) that I think A
6 people find really difficult to do in any sexual abuse ((hmhm)) because people at some
7 personal () emotional () psychological () level actually do want to rescue

So interestingly professional confidence enables ‘not doing’, it could enable a more strategic approach, where there is the time and the degree of freedom to conduct the investigation in a way that is most beneficial for the child and the evidence. Being confident enough to conduct more thorough investigations and to plan for collecting better and more detailed evidence will inevitably lead to a more successful prosecution of child sexual abuse. As a by product it is also likely to reduce the number of false prosecutions, because more confident and considered investigations will also be able to avoid following false traces. Clearly, improving child witness practice does not imply making the system less fair for the accused, in fact creating positions of professional confidence would be just as beneficial for the defendant, because false allegations are also more likely to be detected.

This is what the social worker expresses later on when saying that we need to be more “single-minded” (3) about the investigation of child sexual abuse; being more strategic in setting up the child as the “primary forensic exhibit” (5) if that is what needs to be done for the prosecution to succeed. And that means to “get cleverer” (7) at collecting evidence which again implies to be able to manage “the anxiety of not being able to do something today” (8-9).

**[Excerpt 24]**

1 SocW1: (…) if we looked again we might be able to strengthen the way that we collected and sifted
2 evidence ((hmhm)) and we might be if we were really ahm (1) if we were really (2) what’s the
3 word I’m looking for ahm (2) single-minded we might actually go looking for forensic
4 evidence () not me the police on more than the child’s body right ((hmhm)) because the

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341 SocW1: 751-759.
342 SocW1: 719-730.
child potentially becomes the primary witness to their own abuse and the primary forensic exhibit (hmhm) ahm and you know that might be the only way for some children (1) but I do think that we need to get cleverer (1) at actually collecting evidence and actually finding some way of managing the anxiety of not being able to do something today but have to wait until tomorrow or sometimes next week.

Following this depiction of the matter by a social worker, it indeed seems as if it is the police who have, faced by structural uncertainty and childhood ambiguity, become a bit too ‘touchy-feely’ about such investigations, preferably (and understandably) avoiding a too close encounter with the precarious dangerous and endangered figure of the child witness.

So it is not primarily about more resources, more staff, more instructions, more technology, blaming a specific agency or even balancing the legal system unfairly in favour of victims and child protection. Protection need not eclipse children’s voice, or justice.

17.2 Practice and the quality of time: chronological versus qualitative experiential time - moving beyond ‘scarce resources’ excuses

A second pragmatic point I would like to draw out from my analysis is one about the use and efficacy of time within child witness practice. Simply speaking, throughout the analysis time appeared in a number of different shapes and forms. There was chronological time, determining the sequence of investigations. There were the time zones of veridicality and the time zones of recall pointing to specific time spans, or intervals in chronological time. There was ‘passing’ time, or the duration of certain procedures, as for example the time it takes to show a video interview in court, which closely relates to what could be called experienced time. The time experienced by the child witness, the officers, the judges, throughout the process.

Looking back at the various dilemmas and paradoxes of child witness practice it seems that time has a peculiar tendency to stretch and elongate, while on a different level contracting and condensing, as if speeding up. In chapter 12 I have discussed the ‘rush to protect’, an issue closely related to structural uncertainty as expressed in the social worker’s comments in the two excerpts above (excerpt 23 and 24). The ‘rush to protect’ is marked by the almost instinctive, visceral urgency with which child protection issues are often approached. Here the passing of time itself comprises the mounting pressure of not having intervened. This ‘rush to protect’ manifests for example in the aim of the police and the legal system to ‘fast track’ child protection cases at all cost. We could see how this fast...
tracking meant that officers would be eager to conduct a video interview within hours or days of the initial complaint, making planning and preparation virtually impossible, and this means the child will not be prepared either. As I have pointed out, this has been identified as one of the main reasons for interviews being conducted badly.

At the same time it should be noted that the overall time child abuse investigations take has increased significantly, creating a long period of waiting for children between the interview and their actual court appearance. In court they will usually face another long period of waiting (one study gives an average 11.6 month interval between interview and trial, and an average of 5 hours waiting in court, see Plotnikoff & Woolfson 2004).

Looking at the way the process is organised it seems that time is condensed and contracted at the very beginning, at the very point when calm and consideration would be crucial to plan and prepare the interview properly. After the interview however, time stretches out until the actual trial. During this period of time usually very little happens. Hence time is saved at the precise moment when it should be, and could be used to good effect, while the initial haste (and the cost of this haste), are rendered useless by the time wasted afterwards. Plotnikoff and Woolfson (2004) have pointed out in the context of their study that it is crucial to reduce waiting times and get back on track with the aim to implement speedy procedure for child witnesses. While I perfectly agree with their agenda, I suspect that this very suggestion might well backfire within the system, leading to even more pressure and structural uncertainty, and triggering the scarce resource excuses that often prevent action.

How important is time in this context anyway? What is so important about it, and about speedy procedure?

Here it could be useful to differentiate the dimensions of time, looking at it in quantitative and qualitative terms. Quantitative time could be understood as the chronological time, the number of hours and days spent waiting, or in an interview. Qualitative time on the other hand could be understood as the time as it is experienced by the police officers or by the child witness.

While the quantity of time spent waiting is certainly an issue, it seems that this relevance is crucially related to 'how' this time is spent. So what is problematic, I would argue, is not so much the actual number of weeks or months, but how children experience this time. The quality of this time could be changed, it could be used productively. If the quality of the time children spend waiting for their trial could be improved by aiming for more systematic preparation and support for child witnesses, and a systematic preparation and guidance for what will happen in court, it might be possible to considerably improve children’s experience of legal procedure. This could not just reduce potentially detrimental effects for
children but would also help to improve the quality of their evidence, reducing the risk of both, false negative and false accounts. Clearly, resources are needed to realise such a suggestion, but these resources could be freed elsewhere when re-organising the focus and the priorities of interventions. Additionally these kind of changes will be effective regardless of the actual ‘speed’ of procedure and the actual capability of the legal system to make such ‘speedy procedure’ possible. Obviously it would be even better to provide speedy procedure, but this seems an unlikely prospect. So rather than bargaining about government targets and investing energy to negotiate the promise of reducing waiting times by one month, it seems worthwhile to prioritise devising plans about how this time could be used consciously and productively. Let me make this point very clearly. I am not saying that waiting times should not be reduced. If a dramatic reduction could be achieved this would certainly be helpful. But drawing on my own experience and looking at the comments Plotnikoff and Woolfson (2004) have collected from child witnesses in the context of their study it is clear that the degree of suffering and discomfort children experience does not directly resonate with the actual number of months that they had to wait. The experience could have been similarly disturbing in five as in 11 months. So rather than pressing for numerical savings in time, ways should be explored to systematically use this time to prepare and support children above and beyond the question of ‘fast tracking’ and ‘speedy procedure’. This could also take the pressure of the police officers, allowing space for a more considerate and weighed investigative procedure. This in turn could lead to video interviews being conducted with more confidence, being paced better and being prepared better.

17.3 Coda: conspiracy for change, self-positioning and ‘paradoxical interventions’

These are only two exemplary suggestions. I am aware that they are minimal in the face of the problems arising around the prosecution of child sexual abuse. However I hope these two examples have helped to illustrate my broader structural and systemic recommendations, and the overall change in perspective and interaction that my analysis suggests. My analysis points to the need to reorganise the way in which existing resources, knowledge and skills are used and perceived, in such a way that structural uncertainty can be explicitly negotiated between the agencies, that it can be acknowledged as one of the central characteristics of this practice; and in such a way that the issues at the heart of
protectability can become explicit and be reflected in each individual case; and in such a way that professional confidence can begin to replace defensive practice.

However to make this very clear, this is not a matter of 'challenging', 'instructing', conveying insights, giving 'more scientific advice' or promoting 'empathy' amongst the agencies. Neither judges nor police officers are particularly amenable to instructions, particularly when these are issued from outside their own discourse, or even by 'researchers'. Large parts of my analysis have been concerned with analysing this precise problem, unpacking the counter-productive effects of existing inter-agency practice and instructions issued by psychologists. So clearly the aim here is not to provide another set of 'guidelines' or to suggest practitioners only needed to read this analysis to understand and change their practice.

Carrying this analysis into practice needs to be understood in a literal sense as an attempt to 'make' it part of practice. It should be thought of as a mediating encounter, something that needs to be done, actively making the spirit of this analysis part of practice, creating a pragmatic convergence, making it bear upon the individual and singular operations at the pragmatic nodes. This way practitioners might be 'moved along', might be given the space to begin to consider what they take to be their task anyway in a different light, without 'leaving' their 'discourse' or having to worry about transgressing the boundaries of their 'system' (for want of a better word). Officers might begin to operate as confident 'doubt-machines' rather than under the spell of structural uncertainty.

The fact that the pragmatic voids are recognised in some way or other by all the practitioners, indicates that there is a possible 'hook' a gap in the structure of defensive practice. Via this gap or 'passage' it could be possible to insert such ideas into practice, because they can be presented as relating to something the practitioners are all too aware of. Hence they could be transformed into a plausible basis for interaction valid to those concerned. Exaggerating, collating, mapping and feeding back the voids on a pragmatic level and in their entirety (as a presentation stripped of explicit theory or critical analytic aspects), could create a form of perplexed recognition, or indeed a recognition of the a-subjective paradoxicalities (obviously not in these theoretical terms). This again could be a starting point for different ways of talking about the same issues.

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343 Clearly, the problem would not be solved by judges being more 'understanding' of, or feeling more empathy for the difficult task of police officers. This would merely reduce blame.
The avoided object: systems theory and the pragmatics of communication

I have made frequent, but very marginal reference to systems theory and the work of Paul Watzlawick and Heinz von Foerster in particular. Systems theory constitutes the ‘avoided object’ of this thesis. It has for a long time been a crucial theoretical resource for me. Intrigued by its complex resonances with the work of Deleuze the initial aim was to give it a central position within the analysis. However I realised that the divergences and resonances between these two bodies of work are on the one hand too interesting to form the mere undercurrent of my analysis, and that on the other hand they are too complex to be understood in this context. Their juxtaposition should be the topic of an elaborate investigation in its own right. This is why systems theory is the ‘avoided object’ of this thesis. It has actively been avoided, put aside and deliberately been written out. However, the interactive dynamic described in the suggestion to create ‘untimely conspiracies’ and to carry the analysis into practice bears a direct link to a concept of systemic therapy.

My proposition alludes to what systemic therapists might call a ‘paradoxical intervention’ (Watzlawik et al 1967; 1974). I am not using this concept in a strict sense, and it is beyond the framework of this thesis to elaborate on the intriguing and complex, even if not entirely unproblematic link to these systemic theories of communication.

344 This could indeed be described as a ‘paradox intervention’ in a systems therapy sense. It is not an ‘instruction’, and there is no intention to explore with them ‘why’ something has gone wrong or to dig up the origins of the problem. But it is an intervention that ‘prescribes’ the problem to the system, to the practitioners (‘symptom prescription’) in order to shift, unsettle the system from within, enable it to form new alliances, boundaries, operational pathways (Watzlawik et al 1974).

345 In his paper “An outline of an Autopoietic Systems Approach to Emotion” Stenner (2004) provides an intriguing capture of a dynamic that directly links to my conception of the paradoxical operations of suggestibility and the pragmatics of change. Tellingly his analytic turn on the problem and the resulting move beyond the immediate confines of systems theory is informed by Michel Serre’s (1982) concept of the parasite. Where Luhmann’s concept of the paradox prescribes catatonia, Serres’ parasite injects movement. “Serres’ concept of the parasite serves as a useful supplement to Luhmann’s core concept of paradox. The system must overcome paradox to continue its operations. Autopoietic operations, that is, must be grasped as essentially de-paradoxifying operations (Teubner in press). Paradox is a logical perplexity that leads to paralysis. (…) In Luhmannian terms, systems are therefore born from a paradox to which they inevitably return.” (Stenner, P. 2004 p. 13). ‘Paralysis’ does not strike as a particularly ‘creative’, ‘inventive’ or dynamic state, so if perplexity was mere ‘stasis’ it is hard to imagine how the system could ‘move’ or recreate. This is where the parasite comes into play, to create an intriguing and dynamic ‘disturbance’ within the system, as well as in Luhmann’s theory. It is quite possible that the parasite bears similarities to the ‘event’. As it seems that the systems as such would remain static and isolated from another within Luhmann’s terms a mediator is needed. It is in this sense that Stenner closes “Communication de-paradoxifies consciousness, and consciousness de-paradoxifies organic life. Each is the parasite of the other. In each case emotions play the role of winged Hermes.” (Stenner, P. 2004, p. 18). These are clear resonances to Deleuze’s concept of ‘affect’ and ‘desire’ that are worth exploring. However it is possible that as a result of the introduction of Deleuzian concepts into Luhmannian systems theory, systems theory might become paradoxical to itself. Arguably this could be a productive ‘becoming’. Beyond this, the wider question of how Deleuzian conceptions of change and becoming relate, not just to Luhmann’s theory, but more crucially to Watzlawick’s and von Foerster’s work, is certainly best left to be negotiated between the parasite and the event. “The force of the paradox is that they are not contradictory; they rather allow us to be present at the genesis of the contradiction. The principle of contradiction is applicable to the real and the possible, but not to the impossible from which it derives, that is, to paradoxes or rather to what paradoxes represent.” (Deleuze, G. 1969, p. 86).
Very broadly speaking the resonance is that, rather than ‘instructing’ or ‘giving insights’ to ‘make understand’ what the ‘real’ problem is, or ordering the ‘admission’ and discussion of ‘faults’, this kind of intervention prescribes to the whole setting an exaggerated dosage of what it already does. This ‘symptom prescription’ is meant to bring out the paradoxical (and hilarious) entanglement from within.

For my position this also implies to try and become part of this setting, to engage with the practitioners and the discourse directly, and this means to constantly move in and out of these dominant discourses rather than ‘opposing’ it ‘from the margins’.

Clearly, this is an ambitious suggestion that can only be made tentatively. Still, the exchanges I had during the writing up period of the thesis with some of the participating legal practitioners do indicate that this might be a productive suggestion.

While writing this thesis my own work has been reflexively drawn back into the overall field I have been analysing. In 2005 I was commissioned to write a set of research and practice guidelines for teaching and training of social workers and psychologists. The document incorporates large parts of chapter 2 of this thesis. It was well received and is now used for the training of psychologists and social workers who act as experts for family courts in Adelaide (Australia) (Motzkau 2005b). I have not yet received detailed feedback, but it is peculiar to imagine the reflexive dimension and the effects the document (and thereby myself) might inject into practice. A reflexivity of similarly dubious status is caused by the fact that D. Howitt has decided to include a detailed reference to the case analysis presented in chapter 11.2 into his new textbook “Introduction to Forensic and Criminal Psychology” (Howitt, D. 2005). He referred to the published version in Motzkau (2005). Obviously I was aware of this and I was asked to give feedback to this use of my text, so I was aware of this inclusion. However, it is impossible to predict whether that means the idea has been recuperated, or if it can exert discontinuous or even subversive energy.

The question of being inside or outside the dominant discourse is a pertinent issue for any form of criticality, and others have raised the question of “Displacing or Disciplining ourselves” (Burman 1999) before. So I hope to have made a contribution to this debate.


Above and beyond questions of concrete impact, I hope to have demonstrated that the idea of moving from 'resistance' to 'conspiracy' can be productive. It is however, in principle impossible to know whether this conspiracy can constitute an 'event', hook up to the flux of 'change' as a 'becoming'; i.e. whether it can be an 'untimely conspiracy'. It might remain an untimely suggestion.
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**Online Sources:**
Organ² project: http://www.john-cage.halberstadt.de/ [last visited in December 2006]
Statistisches Bundesamt: www.destatis.de [last visited June 2006].

**Pictures:**

Title:
Reproduction of part of the score to ‘Organ²’ by John Cage. This picture originates from the home page to the Organ exponential project in Halberstadt, Germany.

Picture, last page:
Appendix A

Transcript Notations:

The transcript notations used are a simplified and modified version of the system developed by Jefferson (1984). For further discussion on issues of transcription see also Wetherell & Potter (1992) and Ashmore et al (2004).

(3) pauses appear in rounded brackets indicating seconds e.g. 3 seconds

(.) pause less than a second

underlining underlining of words or syllables indicates speaker emphasis

[square brackets] overlapping turns by different speakers are enclosed in square brackets

((yes ok)) words/phrases in double rounded brackets indicate minimal comments or acknowledgement tokens by other speakers

(laughing) comments on behaviour appear in rounded brackets and italicised

°degree signs° a word/phrase enclosed in degree signs indicates silently voiced utterances

CAPITALS words in capitals indicate a loudly voiced utterance

colons colons inserted into a word indicate elongated pronunciation by the speaker — number of colons roughly indicates degree of elongation

= a speaker’s turn is interrupted by another speaker
Abbreviations:

German data  All German transcripts are translated by the author. The original German is provided in this appendix.

Footnotes in transcripts  Transcripts translated from the German contain footnotes with alternative connotations/translations for phrases and words to illustrate their meaning.

GPol  German Police officer

STA  German State Prosecutor (Staatsanwalt)

JG  German Judge

ExpG  German Expert

Exp  English Expert

J  English Judge

CPS  English Crown Prosecutor

SocW  English Social Worker

Pol  English Police Officer
Reference to a line number in a transcript (here transcript of Judge1).
Information for interviewees:

Introduction to the Research Project:

“Cross-examining Suggestibility: Memory, Childhood, Expertise”

This project aims to compare child witness practice in England and Wales and in Germany:

- **interdisciplinary** perspective: exploring the interdependency of scientific, legal and societal debates around the issue of child witnesses in both countries.
- **multilevel** approach: depicting the scientific background of theories about children’s memory and credibility as witnesses, to see how these different approaches influence actual child witness practice.

**Background:**

Since the late 1970’s, when an awareness for child abuse resurfaced, children have been more frequently admitted as court witnesses. At the same time there has been persistent wariness about the reliability of children’s testimony and an ever growing number of studies concerned with the question of children’s memory and suggestibility. Unfortunately the research has remained riddled with contradictory findings and the scientific community itself has fragmented into a confusing multitude of approaches and theories. All this has fed into an increasingly polarised and heated series of public debates with the net effect that a circumspect evaluation of child witnesses for court proceedings has grown more and more difficult.

**Areas of concern:**

- **Lack of interdisciplinary consideration**: Despite a growing body of case law about what constitutes ‘good practice’ of dealing with child witnesses, little attention has been given to the practical, procedural and resource problems that police officers, social service professionals, legal professionals or psychological experts face in their every-day decision making when dealing with child witnesses.
- **No room for self-reflection**: Professionals in this rather polarised field lack a ‘safe space’ to address these practical difficulties without running the risk of apparently discrediting their own professional conduct and expertise.
- **Difficulty to translate ever changing research results into the complex requirements of practice**: On the one hand frequent changes and varying opinions among researchers seem to complicate any simple recommendations for interviewing practice. On the other hand interviewers do not always seem to fully appreciate scientific findings.
- **A more contextual and complex perspective is needed**: Every professional in this field, be it police officers, psychological researchers, social service or legal professionals is to some extent influenced by the public discussion of high profile cases of miscarriage of justice and public debates around new scientific findings.

**Aim:**

- Create a more transparent picture of the different practical and theoretical factors that influence the circumstances under which children speak as witnesses in a juridical context.
- Foster a reciprocal understanding and discussions between the various parties involved on the practical and on the theoretical side. Thus facilitate a practice that has children at the centre of attention.
- Illuminate the effect of different institutional and legal practices by comparing child witness practice in Britain and Germany.
- Use ‘Suggestibility’ as an exemplary focus for the study, because it is a central but also controversial aspect that runs across the disciplinary boundaries of all the different contexts involved. The scientific, the legal and the actual pragmatic considerations with regard to memory, childhood and expertise.
Methods and research design:
1. **In-depth Interviews** with: psychological- and psychiatric experts (academics and practitioners), juridical professionals (police and courts) and social service professionals who are working with child witnesses.
   * explore the nature of their work and their own position within this interdisciplinary network: theoretical and practical background of their expertise, interaction with other institutions involved
   * resources that are seen as vital for decision making
   * most frequently experienced problems
   * attitudes towards child witness credibility and the issue of suggestibility
   * revisit public debates and media coverage of scandals
   * discuss past changes in policy, and explore suggestions for prospective improvements
2. **Observation:** look at interviewer training (police, social services, psychologists), court room practice and psychological credibility assessment of child witnesses (the latter applies for Germany only).

About me:
**Origin:** Berlin, Germany.
**University:** Philosophy (University of Cologne); Psychology (Free University Berlin). Degree: 'Diplom' (state examined psychologist) degree awarded in October 2002. Specialisation in Forensic Psychology, Developmental Psychology, Child Psychiatry and Theoretical Psychology.
**Internship:** Two year internship at the Institute for Forensic Psychiatry (Free University Berlin) which included interviewing child witnesses (predominantly alleged victims of sexual abuse) and assisting expert testimony on the credibility of child witnesses for court (using Statement Validity Assessment).
**PhD:** Since December 2002 I am fully funded PhD research student at Loughborough University, Department of Human Sciences. Supervisor: Dr. Steve D. Brown (direct line: +44 (0)1509 228487; s.d.brown@lboro.ac.uk). Director of Research: Dr. Charles K. Crook.

Confidentiality and data protection:
Any data collected for this study will be treated confidential and is subject to the ethics guidelines of the ethics committee at Loughborough University. All data that might be quoted, will be anonymised to the effect that neither the interviewee nor persons or cases mentioned during the interview can be identified.

Feedback:
I would like to make the study as transparent as possible, and thus welcome any form of feedback concerning my use of the data and the analysis in progress. Yet, I am fully aware of the time constraints many of you have, so it is entirely up to you to decide to what degree you wish to be involved in giving feedback.

Johanna F. Motzkau, PhD Research Student, Dept. of Human Sciences, Loughborough University, Leicestershire LE11 3TU, UK
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Appendix A

Kurzbeschreibung des Forschungsprojektes:
Cross-examining Suggestibility: Memory, Childhood, Expertise

-Suggestibilität im Kreuzverhör: Gedächtnis, Kindheit, Expertise-

Die Studie strebt einen umfassenden Vergleich des Umgangs mit kindlichen Zeugen in England und Deutschland an.

- Interdisziplinäre Perspektive: Auseinandersetzung mit der Wechselwirkung wissenschaftlicher, rechtlicher und gesellschaftlicher Debatten um die Problematik kindlicher Zeugen in England und Deutschland.

- Mehrdimensionaler Forschungsansatz zur Analyse der Verknüpfung von Theorie und Praxis: Die Studie legt großen Wert auf die Entstehungsbedingungen wissenschaftlicher Theorien zur Gedächtnisentwicklung und zur Zuverlässigkeit kindlicher Zeugen, und analysiert die unmittelbaren Auswirkung dieser verschiedenen theoretischen Ansätze auf die aktuelle Praxis.

Hintergrund der Studie:

Problembereiche:


- Fehlender Raum für kritische Selbstreflexion: Vor dem Hintergrund der polarisierten Debatte ist es für die in diesem Bereich Arbeitenden schwierig konkrete Probleme anzusprechenden und auf interdisziplinärer Ebene zu diskutieren ohne zugleich potentiell die eigene Expertise zu untergraben.

- Wechselhafte und komplexe Forschungsergebnisse lassen sich schwer in die Praxis übertragen: Einerseits ist es aufgrund der Komplexität und Wandelbarkeit von Forschungsergebnissen, sowie widerstreitender Ansichten innerhalb der internationalen Forschung schwierig, eindeutige Praxisempfehlungen für die Befragung kindlicher Zeugen heraus zu filtern. Andererseits scheinen aber manche Interviewer den aus der Forschung kommenden Empfehlungen gegenüber generell wenig aufgeschlossen zu sein.

Ziele der Studie:

- Herausarbeiten der praktischen und theoretischen Faktoren welche die Bedingungen beeinflussen unter denen Kinder als Zeugen in einem juristischen Kontext aussagen.
- Vermitteln von Informationen zwischen den beteiligten Professionen und Institutionen, und zwischen den Personen die am praktischen und am theoretischen Ende des Kontinuums arbeiten. Anregung zum Austausch über Arbeitsweisen und Probleme um eine Praxis zu ermöglichen, bei der das Wohlergehen und die Wünsche der betroffenen Kinder grundsätzlich im Zentrum stehen.
- Der Vergleich zwischen England und Deutschland soll zeigen wie sich verschiedene institutionelle und rechtlicher Praktiken auf die Situation kindlicher Zeugen auswirken. Informationen über Entwicklungen und Praktiken im je anderen Land sollen vermittelt werden um beiderseits die Praxis zu bereichern und damit Forschungsergebnisse aus dem je anderen Land im Lichte der dortigen Praxis gesehen werden können.
- Das Konzept „Suggestibilität“ dient als Perspektive des gesamten Projektes, da es in diesem Zusammenhang eines der wichtigsten aber auch umstrittensten Phänomene ist und insofern als kontroverses Element für alle Disziplinen und Kontexte relevant ist: Es durchzieht und unterminiert wissenschaftliche, rechtliche und pragmatischen Überlegungen, bildet auf diese Art zugleich ein verbindendes Element.

Methoden und Forschungsdesign:

1. **Interviews mit**: psychologischen/psychiatrischen Experten (Forscher, Gutachter), Juristen (Richter, Anwälte), und Polizeibeamten, die mit kindlichen Zeugen arbeiten. Fragenbereiche:
   - Entscheidungsfindung: persönliche Kriterien nach denen Entscheidungen getroffen werden
   - häufig auftauchende Probleme (Problemfälle)
   - Erfahrung mit und allgemeine Meinung zur Verhältnis kindlicher Zeugen und zum Problem der Suggestibilität
   - Kommentare/Diskussion zu vergangenen Kontroversen und zur Rolle der Medien
   - Kommentar/Diskussion zu vergangenen Richtliniendebatten und Gesetzesänderungen sowie mögliche Verbesserungsvorschläge für die Zukunft
2. **Beobachtung**: Einblick in relevante Ausbildungskurse bei der Polizei, in die Ausbildung und Praxis der Glaubhaftigkeitsbegutachtung kindlicher Zeugen durch Psychologen/Psychiatren, und in die allgemeine Praxis vor Gericht.

(Interviews und Beobachtungen werden sofern möglich in vergleichbarer Form in England und Deutschland durchgeführt.)

Zur Person:

*Dipl. Psych. Johanna Motzkau*, (Geburtsort: Berlin). Seit Dezember 2002 Stipendiatin an der Loughborough University (Department of Human Sciences), Mittelengland. Die Doktorarbeit wird betreut von Dr. Steve D. Brown (direct line: +44 (0)1509 228487; s.d.brown@lboro.ac.uk).

**Studium**: Philosophie (Universität zu Köln), Psychologie (Freie Universität Berlin). Diplomabschluß im Oktober 2002 mit Spezialisierung in forensischer Psychologie, Kinderpsychiatrie und theoretischer Psychologie.

**Praktikum**: Zwei jähriges Praktikum am Institut für Forensische Psychiatrie, Freie Universität Berlin (Prof. M. Steller). Assistenz bei der Erstellung von Gerichtsgutachten zur Glaubhaftigkeit von Zeugen (bei Dr. D. Busse). In der Mehrzahl handelte es sich hierbei um kindliche Zeugen die zugleich die mutmaßlichen Opfer eines in Frage stehenden sexuellen Mißbrauchs waren.

**Datenschutz und Vertraulichkeit:**

Ich versichere hiermit, dass alles, was im Rahmen dieser Studie aufgezeichnet wird, streng vertraulich behandelt wird. Das gesamte Projekt unterliegt den ethischen Richtlinien der Loughborough University und ist Gegenstand direkter Supervision des „ethics committee“ der...
Universität. Aufzeichnungen werden sicher verwahrt und nicht in Hände Dritter gegeben. Sofern Zitate aus dem Originalmaterial für die Analyse benutzt werden sind diese so anonymisiert, dass weder die interviewte Person selbst, noch Personen oder Fälle, die im Laufe des Interviews erwähnt werden, zu identifizieren sind.

Rückmeldung:
Die Studie soll so transparent wie möglich sein, es kann also jederzeit Einblick in das Projekt genommen werden. Ich würde jede Form der Rückmeldung sehr begrüßen. Ich bin mir allerdings im Klaren darüber, dass eine solche Rückmeldung zeitintensiv ist, und möchte es daher jedem selbst überlassen zu entscheiden inwieweit Interesse an einer Rückmeldung besteht.

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Appendix A

Original German Data and Translation:

Chapter 13 - [Excerpt 14]

I: ...immer Teil des Problems das zum das was sozusagen als umschriebene Tat angeklagt
wurde nicht so richtig wieder aus dem Bericht des Kindes wieder "rauszuholen war
((hmhm)) und dann die Frage ob man das als Inkonistenz wertet oder ob man das als
Mißverständnis bei der Polizei wertet oder als späteres Mißverständnis der
Staatsanwaltschaft ((JA)) über das ((ja das is am häufigsten)) Protokoll der Polizei=

A: ein häufiges ein sehr häufiges Problem das ähm natürlich mit der mit dem Zeitablauf und
sicherlich auch einer beim Kind stattfindenden Reflektion über das was da vorher passiert
ist Wunschdenken mit reispielt zum Beispiel der Klassiker das das Kind also ähm
nachträglich Einzelheiten dazu denkt das es sich gewehrt habe dass es um Hilfe gerufen
habe ((hmhm)) das is taucht immer wieder auf und lässt sich in der Regel nich erhart en is
eigentlich ein Alarmzeichen der Inkonistenz und äh wir ham aber eben praktisch oft
auch die Erklärung, dass das damit zusammenhängt, dass ein ein Wunschdenken mit
unfiesst äh hätte a'o Du hättest Dich wehren müssen also sagte Du Du hast Dich
geweht äh Du hättest ja schreiben können also sachte Du Du hast geschrien und ah ()das
is aber "eb:en° (1) also sagen wa mal das is ein Alarmzeichen über das wa noch
hinwegkommen ((hmhm))

<table>
<thead>
<tr>
<th></th>
<th>I: ...the problem () that for () that a circumscribed incident had been indicted but that this</th>
</tr>
</thead>
<tbody>
<tr>
<td>2</td>
<td>particular incident (1) could not quite be reconstructed from the child’s report ((hmhm)) and the question is then should this be interpreted as an inconsistency or ahm a’h’as</td>
</tr>
<tr>
<td>4</td>
<td>(chuckling ‘as’) () a misunderstanding by the police ((hmhm)) or as a later misunderstanding by the prose[cution services]</td>
</tr>
<tr>
<td>6</td>
<td>[YES]</td>
</tr>
<tr>
<td>7</td>
<td>I: about [the police protocol]</td>
</tr>
<tr>
<td>8</td>
<td>JGl: [yes that’s a frequent] prob’ a very ((hmhm)) frequent problem which ahm naturally with the (1) with the () passing of time (1) and certainly also with an ongoing reflection by the child about what has happened (1) ahm aa’wishful thinking mixes into it (1) for example () the the classic case is that the child ahm (1) subsequently (2) invents additional details (1) that it had fought and that it had screamed for help ((hmhm)) that’s () happens frequently and it’ll usually not be possible to substantiate this () that is (2) in principle an alarm signal of ahm inconsistency and ahm we also find on the other hand pragmatically we often find () the explanation ahm that this is related to the fact that a’ a wishful thinking co-mingles here ahm had I well () you should have fought ((hmhm)) so you say you did fight ahm you could well have screamed so ya’ say tha’ ya did scream and ahh (1) yet that is “indeed° (1) well let’s say that is an alarm signal that we can still put to one side.</td>
</tr>
</tbody>
</table>

JGl [243 – 265]
JG1: ja is auch ein grosses Trauma äh der der Opfer die Frage hättest Du Dich mehr wehren müssen ((hmhm)) hättest Du Dich mehr wehren können warum hast Du Dich nicht mehr gewehrt ((hmhm)) und ein ein enormer Quell der Selbstvorwürfe und der daraus entstehenden psychischen Probleme ((hmhm)) ja das is mit eins der Hauptprobleme unter denen die Opfer leiden und deshalb bemühe ich mich auch immer bei den Befragungen der Kinder äh sag'n wa mal so'n so'n feedback zu geben äh (1) Du hättest ja gar nix machen können ((hmhm)) und wenn de geschrien hättest wär das wahrscheinlich auch nicht besser geworden ((hmhm)) ne Du hast ja selbst überhaupt keine Schuld an der an der Entwicklung ja des das is natürlicherweise das Hauptproblem in dem man bei so einer Befragung immer steht sie sind als Vorsitzender des Gericht's zur absoluten Neutralität verpflichtet und ham aber da so'n kleines Würstchen vor sich (1) also wirklich äh in bemitleidenswerten Zustand und müssen ja da (1) nach meiner Überzeugung ein Feedback liefern äh um die Probleme nicht noch zu verschlimmern sondern vielleicht sogar ein bisschen zu helfen ((hmhm)) ne und dann schwankt man also immer auf diesem schmalen Grat zwischen (.) zwischen Parteilichkeit und Neutralität und immer mit der Gefahr der Ablehnung (2) ((durch das Kind oder)) durch das Gericht äh also Quatsch durch de äh durch den Verteidiger der (.) könnte ja jederzeit sagen also was der Vorsitzende da jetzt erzählt (.) das is ja ne Schulduweisung äh die ((hmhm)) ((der hat der weiß offenbar schon was was passiert ist)) die ihn parteiisch erscheinen läßt ((hmhm)) ne es genügt ja der Anschein (.) ((ja)) der Parteilichkeit für einen Ablehnungsantrag

I: is sowas schon passiert (.) ihnen

JG1: es kommt vor ja (.) also mir is es noch nicht passiert erstaunlicherweise ich hab das in anderen Verfahren in denen ich nicht Vorsitzender war schon erlebt und das is immer sehr unschön weil ähm das unterbricht die Vernehmungen es unterbricht den Verfahrensgang das Kind muss eventuell noch mal kommen und äh (1) in Fällen der Konfliktverteidigung is ja gerade dieses Herauszögern und dieses den Zeugen immer weiter belasten sogar (.) Mittel der Verteidigung (2)
I: yes this is a huge trauma ahm for the victims the question shouldn't I have fought more ((hmhm)) couldn't you have fought more why didn't ya fight much more ((hmhm)) and this is a enormous source of self-reproach and the psychological problems resulting from this ((hmhm)) well yes that's one of the main problems that the victim's suffer from and that is why during the interview with the children I always try ahm (.) let's say to give a kind of (.) kind of a feedback ahm (1) listen you couldn't have done anything at all ((hmhm)) and had ya screamed that would've made it no better ((hmhm)) you know it is not at all your fault that it came to that you know that's well that's certainly the main problem one always faces during such an interview you are as the judge presiding the court obliged to remain absolutely neutral but then you have such a poor little sausage 348 in front of you (1) and you know they are in a really pitiable state then you have to (1) well that's my conviction you have to give a feedback ahm in order not to aggravate the problems and maybe even to help a little bit ((hmhm)) you know and then one always stags along on this tight rope 350 between (.) between partiality and neutrality always facing the threat of rejection (2) ((by the child or)) by the court ahm ahh rubbish (.) I mean by the ahm by the defence who (.) they could at any point say well what the presiding judge is saying sounds like an attribution of guilt ahm the ((hmhm)) and that means he appears to be partial you know and the mere appearance is sufficient to support ((yes)) an appeal 351 against the judge.

I: has this ever happened (.) to you

JG1: yes it does happen (.) well it hasn't happened to me yet surprisingly but I have indeed experienced this in other trials where I wasn't the presiding judge and that is always very awkward because ahm it interrupts the interview and it interrupts the whole proceedings potentially the child will have to come again and ahm (1) in cases where there is an adversarial 352 defence it is used as a strategy by the defence to cause further delays and even to put more strain on the witness.
Chapter 14 - [Excerpt 18]

ExpGl: 

(...) nu das kann also aber wenn so irgendwie so in das in dieses Esoterische oder Irreale gehende Komponenten vorkommen dann sind das nicht bildhafte Sprache von Kindern oder so sondern dann sind das Warnsignale das das ganze ähm auf fantastischem Boden gebaut ist hätte ich beinahe gesagt ist aber kein gutes Bild (.) permanente Weiterentwicklung ich glaub sich ergibt auch aus der Ceci Forschung bei den Kindern der ähm Inhalte Irreale Komponenten Suche aktive Suche also nich dieses überschwemmt werden von ((hmhm))) das also dieses selbständig und so jetzt hab ich vielleicht noch eins vergessen oder so aber wir ham also einige ähm einige ähm Hinweise wie ich meine ähm und die so‘ne Mischung von Erfahrungswissen sind ähm übertragenem (2) empir‘ so im engeren Sinne empirisch gesichert nich °Erfahrung ((hmhm))) ähm Eigenerfahrung is ja auch Empirie“ aber ich meine jetzt mit im engeren Sinne Empirie meine ich diese klein karierten Studien und so das man davon eben so’n paar drei oder vier ähm für nich ähm nich jeden dieser Punkte gibt’s dieses klein karierte Empirische Wissen aber Erfahrungsge‘ (.) Wissen Austausch (.) wissen und das zählt in der Einzelfalldiagnostik eben auch und darin unterscheiden wir uns vielleicht auch von den Amerikanern die sich ihre N’s und sonst was um die Ohren (1) ähm schlagen das interessiert mich alles ähm ähm schon längst nich mehr also die Einzelne Studien finde ich immer noch gut und man kann aus allen was lernen aber ich kann nicht da so rangehen also jetzt hät ich fast wieder stellvertretend Dr. XXX nennen der also da immer auszählen wer die meisten hat oder so aber das is alles Quatsch .. man muß das mal gedanklich (1) ((hmhm)) integrieren ne so da bin ich jetzt irgendwo abgedriftet also für diese Punkte gibt es und vielleicht hab ich einen vergessen weill ich jetzt nicht im Schwange des Redens ähm gibt es gute (2) ähm (4) Belege (1) so das sind auch und das is auch Wissenschaft

<table>
<thead>
<tr>
<th>1</th>
<th>ExpGl: (...) well but where you sort of get components bordering on the esoteric or surreal then</th>
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<tbody>
<tr>
<td>2</td>
<td>that is not the vivid language of a child or alike but these are warning signs [...] continuous</td>
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<tr>
<td>3</td>
<td>expansion of the children’s narrative I think that’s also been demonstrated by Ceci’s</td>
</tr>
<tr>
<td>4</td>
<td>research ähm surreal components is the search the active search well ya‘know being flooded</td>
</tr>
<tr>
<td>5</td>
<td>by ((hmhm))) well that is this autonomous and ok now I might have forgotten one odd</td>
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<tr>
<td>6</td>
<td>criterion or so but ya‘know I think we have some ähm indicators ähm and these‘re a sort of</td>
</tr>
<tr>
<td>7</td>
<td>mixture of experiential knowledge ahh applied (2) empir’ well in a in a narrow353 sense</td>
</tr>
<tr>
<td>8</td>
<td>empirically validated354 ya‘know °experience ((hmhm))) well ahm personal experience is also</td>
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<tr>
<td>9</td>
<td>empirical355 but what I mean here by empirical in a more narrow sense are these bean­</td>
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<tr>
<td>10</td>
<td>counting studies and stuff like that (.) so you can just take a few of these three or four ahm</td>
</tr>
<tr>
<td>11</td>
<td>you see (1) ahm you don’t get this bean-counting empirical knowledge for each of these</td>
</tr>
<tr>
<td>12</td>
<td>criteria but experien‘ knowledge (.) reciprocal knowledge is in fact also relevant for</td>
</tr>
<tr>
<td>13</td>
<td>individual case diagnostics and this is perhaps where we do differ from the Americans who</td>
</tr>
<tr>
<td>14</td>
<td>beat each other up356 with their ‘N’s’ and whatnot (1) ahh all of that is of no interest ahm</td>
</tr>
<tr>
<td>15</td>
<td>to me anymore ahhm not at all (.) well I still appreciate individual studies and one can learn</td>
</tr>
</tbody>
</table>

353 specific
354 affirmed, founded, assured, gesichert
355 Empirie (noun)
356 Slap each other around the ears
from all of them but I cannot approach it like that (.) well now (.)I had almost once again representatively mentioned Dr. XXX\textsuperscript{357} he's always keen on counting everything (.) who has got the most\textsuperscript{358} and whatnot but that is all rubbish one has to integrate that within one's mind\textsuperscript{359} ya'know well now I seem to have drifted off the point and maybe I forgot to mention one criterion don't know got carried away speaking ahm there is good (2) ahm (4) proof (1) so these are also (.) and that is also science

\textsuperscript{357} Reputable and well known English researcher in the field of experimental psychological research around witness credibility.

\textsuperscript{358} Here meaning: who has got the most criteria

\textsuperscript{359} Also: thoughts; literally: 'head'.
Appendix A

Chapter 14 - [Excerpt 21]

JG1: Wobei es ja auch so ist wie soll ich sagen die die Wissenschaft beschäftigt sich ja (1) sehr sehr weitschweifend und an an an äh sehr vielen Einzelstellen einhakend mit der Gedächtnisleistung (1) na ganz abgesehen davon wie Zeugenaussagen zustande kommen wie überhaupt Gedächtnisleistung funktioniert und (1) äh teilweise wird mir da auch schwarz vor Augen wenn ich das lese (.) mm wenn ich sehe, daß also die Meinung vertreten wird, daß oder (.) oder als als wissenschaftliche Erkenntnisse postuliert oder auch abgeleitet wird, daß also (.) es sozusagen äh nur die subjektivste Erinnerung gibt, daß Fehler in der Erinnerung sofort ausgebessert werden (1) äh (2) ne da (2) da kann man ne Zeugenaussage völlig vergessen.

I: Das ist ein sehr interessanter Punkt weil das is genau das Problem wenn man die Wissenschaft dogmatisch liest dann könnte man (.) müsste man sich vor Gericht gar nicht mehr hinsetzen (A: Ja) wenn se sagen nee (1) was Sie erinnern ist ja alles völliger Quatsch=

JG1: Das hat bisher glücklicherweise noch nie ein Verteidiger äh (1) aufs Tapet gebracht, daß er gelesen hätte (2) äh neulich in irgendeinem Wissenschaftsteil, daß es ja eigentlich gar keine unbereinigte also von von von den den eigenen Erwartungen unbereinigte Erinnerung und Wahrnehmung gibt (1) äh und, daß deshalb alle Zeugenaussagen äh nicht berücksichtigt werden dürfen also da würden wir ganz schön in Schwierigkeiten kommen

I: Erinnern Sie sich noch an Ihr Frühstück? (lachend)

JG1: Ja

I: So (((lachend)) aber dann kommt man]

JG1: [Naja ähm (1) faktisch ja aber (.) ich weiß nich also (.) das Problem ist enorm

| 1 | JG1: | Well isn’t it the case that science how can I put this (1) looks at the characteristics of memory very very broadly inquiring into it from from ahhm many different individual angles (1) above and beyond the question of how witness statements come about how memory works in general and (1) ahhm sometimes I feel like a blackout when I read (.) that ahhm when I see that well there is the opinion that or (.) or it is postulated as as scientific finding that or it is inferred that well (.) sort of ahhm that all we really have are the most subjective memories and that gaps in memory are instantly patched up (1) ahhm (2) well in that case (2) you can absolutely forget about a witness statement |
| 2 |  | that’s a very interesting problem (.) if you read science dogmatically then it would be pointless to even assemble in court ((R: yes)) if you could say nooo all the stuff you remember is total utter rubbish= |
| 3 |  | luckily so far no defence lawyer has brought that up (1) that the other day ahhm he had read (2) ahhm in some science column that ultimately there is no such thing as uninfluenced (.) well that there’s no memory and perception that is uninfluenced by by by the own expectations (1) ahhm and that therefore we must not consider any of the witness statements (1) well then we would be in big trouble |
| 4 |  | I: | can you still remember your breakfast? (I chuckling) |
| 5 |  | JG1: | yes |
| 6 |  | I: | well [(laughing) but then one will] |
| 7 |  | JG1: | (well ahhm (1) factually yes but) ahhm I dunno really (.) it’s a massive problem |

JG1 [1540-1566]
**Appendix B**

**[Excerpt 1] GPo1**

<table>
<thead>
<tr>
<th>1</th>
<th>I: do you get questions like that in court? [<em>about children's credibility]</em></th>
</tr>
</thead>
<tbody>
<tr>
<td>2</td>
<td>PolG1: yes and I would reply exactly the same I would say that I cannot really tell (1) you</td>
</tr>
<tr>
<td>3</td>
<td>know that's what she asked me as well (1) did their voice go wobbly and their</td>
</tr>
<tr>
<td>4</td>
<td>gaze and I well what're you on about I have to say REALLY! (<em>indignant, outraged</em></td>
</tr>
<tr>
<td>5</td>
<td>expression) (1) I mean maybe these are indicators that one wouldn't necessarily</td>
</tr>
<tr>
<td>6</td>
<td>notice you know I mean this is not somehow ah something where one could</td>
</tr>
<tr>
<td>7</td>
<td>instantly say YES (1) was the voice &quot;wobbly&quot;? what do I know (I laughing)</td>
</tr>
<tr>
<td>8</td>
<td>I: so that's something you wouldn't pay attention to (1) well I mean rubbish</td>
</tr>
<tr>
<td>9</td>
<td>certainly one would pay attention to something like that but that ahm is</td>
</tr>
<tr>
<td>10</td>
<td>somehow not your task and that's why it is not something that</td>
</tr>
<tr>
<td>11</td>
<td>PolG1: well YES I mean when I notice the voice is shaky and the whole behaviour is</td>
</tr>
<tr>
<td>12</td>
<td>somehow makes me think huh? well let's write a comment then ((ahh ok)) (1)</td>
</tr>
<tr>
<td>13</td>
<td>but ahm (1) well 'A' quite probably this behaviour isn't actually very frequent so</td>
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<tr>
<td>14</td>
<td>that one wouldn't that I myself wouldn't necessarily recognize it particularly</td>
</tr>
<tr>
<td>15</td>
<td>when I am also doing all these other things you know ((hmhm)) writing (1)</td>
</tr>
<tr>
<td>16</td>
<td>interviewing so one would overlook that ((hmhm)) (1) maybe (2) then all I can</td>
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<tr>
<td>17</td>
<td>really say is when it is really salient[<em>conspicuous, noticeable</em>] or when I have</td>
</tr>
<tr>
<td>18</td>
<td>noticed it ((hmhm)) you know that these indicators were there ((hmhm)) (3)</td>
</tr>
<tr>
<td>19</td>
<td>ultimatley there are quite a few other reasons why these ahm such indicators</td>
</tr>
<tr>
<td>20</td>
<td>come up it doesn't always have to be because something isn't true or maybe it is</td>
</tr>
<tr>
<td>21</td>
<td>only partly true or well then this still doesn't mean you could say it isn't true</td>
</tr>
<tr>
<td>22</td>
<td>((hmhm)) you know how do you do it?</td>
</tr>
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I: gibt's vor Gericht so Fragen?  
GPo1: ja also die würd ich genauso beantworten da würd ich sagen ich kann des nich sagen ich kann (1) ich mein hat se mich auch gefragt ob die Stimme gezittert hat und der Blick und ich also sagen'se mal also da muß ich auch sagen ALSO (1) des sind ja vielleicht Erkennungszeichen die man gar nicht unbedingt mitbekommt ne also des is ja nich was man wo man dann gleich sagen JA (1) weiß ich ob die Stimme gezittert "hat" [I lacht]  
I: aber auf sowas achten Sie dann nicht (1) also äh ich meine quatsch natürlich achtet man auf sowas aber das ähm is sozusagen nich Ihr Auftrag und deswegen is das nichts was=  
GPo1: na DOCH also wenn mir auffällt die Stimme zittert und es ist also vom ganzen Verhalten so das ich denke hält dann schreib ich doch mal nen Vermerk ((ach so hmhm)) (1) aber ähm (1) also A is es wahrscheinlich so das dieses Verhalten gar nicht so oft da is das man es das ich es selber nich erkenne unbedingt gerade wenn ich auch noch mit dem Rest beschäftigt bin ne ((hmhm)) Schreiben (1) Befragen das man des übersieht ((hmhm)) (1) vielleicht (2) ich kann dann halt wirklich dann nur sagen Wenn's sehr auffällig ist oder wenn's mir aufgefallen ist ((hmhm)) ne das diese Zeichen da waren ((hmhm)) (3) letztendlich gibt's ja auch noch andere Möglichkeiten warum diese äh so ne Zeichen dann zustande kommen es muß ja nich immer mit was zu tun haben das es nich stimmt oder das vielleicht nur ein Teil stimmt oder also es is ja deshalb trotzdem nich zu sagen et stimmt dann nicht ((hmhm)) wie schnibbeste dat²

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[849-871]
STA1: Yea well in youth criminal procedure and with the less serious child protection cases well ahm often the conduct isn’t very sensitive \(^{360}\) ((hmhm)) there are defence lawyers who have not the least idea that it is possible to interview witnesses in different kinds of ways and and or about what suggestion is generally and similarly there are judges who give a damn about this they do not even stick to the basic rule that they should let the accused or ahm a witness report in context and at length first and to only ask questions subsequently ((hmhm)) this is ((hmhm)) what the StPO prescribes but they will from the start ask exactly what they want to hear yep that does happen ((hmhm)) and ahm well it varies a lot ahm sensitivity ((hmhm)) is generally present to very different degrees amongst the legal professionals at the regional court you will find this rarely you know that’s where they usually are a bit more sensitive ((hmhm)) the ones who work there well after all more severe punishments are at stake here ((hmhm)) and ahm well overall you’ll find that’s where the versed lawyers are more versed (.) sometimes the judges are also versed (I chuckles) but not always

STA1: Ja also im Jugendstrafverfahren und in den kleineren Jugendschutzsachen da äh wird da oft nicht besonders sensibel mit umgegangen ((hmhm)) also es gibt Verteidiger die auch überhaupt keine Ahnung davon haben dass man auf unterschiedliche Art und Weise einen Zeugen befragen könnte und und was überhaupt Suggestion ist und genauso gibt es auch Richter die sich ’nen Teufel drum scheren die noch nicht mal sich daran halten ’nen Beschuldigten oder ’nen äh Zeugen erst mal am Stück erzählen zu lassen und erst später ((hmhm)) Fragen zu stellen so ist das ja in der ((hmhm)) StPO schon vorgeschrieben sondern die von vornherein abfragen was sie hören wollen das gibt’s ja ((hmhm)) und äh also das ist ganz unterschiedlich so was die Sensibilität ((hmhm)) anbetrifft also die ist ja unterschiedlich verteilt unter den Justizpersonen am Landgericht erlebt man das selten also da sind die meistens schon ’nen bisschen sensibler ((hmhm)) die da auftreten da geht’s ja auch um größere ((hmhm)) Strafen und ähm im Allgemeinen treten da auch versiertere Anwälte auf versiertere manchmal sind auch die Richter versiert (I lach) aber nicht immer

\(^{360}\) delicate
[Excerpt 3] JudgeG1

<table>
<thead>
<tr>
<th></th>
<th>JG1: I will sit at the witness table with the children without my gown and ahm the child slightly turned to one side so that while speaking it doesn't have to see the defendant all the time and that's usually really quite a little island on which we are talking to each other and then we will let's say get to the topic but then move away from it again and so on that really often creates an atmosphere where the children speak very very openly and one does get the impression that they ahm do remember the events quite vividly (hmhm) and then at times they might indeed report things well I mean such details that hadn't emerged at all earlier (hmhm) you know and well I must say I do manage that quite well I think not to put too much strain on the children because as soon as I notice that it gets critical that one should also calm it a bit</th>
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<tbody>
<tr>
<td></td>
<td>A: ich setz mich dann mit den Kindern an einen der unteren Tische ohne Robe und ahm das Kind auch so'n bisschen weggedreht dass es also nich immer den Angeklagten schen muss wen's sprich und da is denn schon auch immer schon so'n kleiner Insel in der wir uns miteinander unterhalten und dann eben mit diesem sagen wir mal zum Thema kommen und wieder ein bisschen weggehen und so weiter das schafft schon eine eine Atmosphäre oft in der die Kinder sehr sehr frei erzählen und man auch den Eindruck hat das sie sich ahm an an dieses Geschehen doch recht plastisch erinnern (hmhm) und dann also auch teilweise eben Dinge erzählen so so wie diese Einzelheit eben die früher gar nicht so aufgetaucht ist (hmhm) ne und also das muss ich schon sagen das schaff ich immer ganz gut dass also ich glaube auch mit nicht all zu hoher Belastung für das Kind ahm zu bewerkstelligen weil wenn ich merke dass es kritisch wird, dass man dann auch ein bisschen abwiegt</td>
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</table>

A: ich setz mich dann mit den Kindern an einen der unteren Tische ohne Robe und ahm das Kind auch so'n bisschen weggedreht dass es also nich immer den Angeklagten schen muss wen's sprich und da is denn schon auch immer schon so'n kleiner Insel in der wir uns miteinander unterhalten und dann eben mit diesem sagen wir mal zum Thema kommen und wieder ein bisschen weggehen und so weiter das schafft schon eine eine Atmosphäre oft in der die Kinder sehr sehr frei erzählen und man auch den Eindruck hat das sie sich ahm an an dieses Geschehen doch recht plastisch erinnern (hmhm) und dann also auch teilweise eben Dinge erzählen so so wie diese Einzelheit eben die früher gar nicht so aufgetaucht ist (hmhm) ne und also das muss ich schon sagen das schaff ich immer ganz gut dass also ich glaube auch mit nicht all zu hoher Belastung für das Kind ahm zu bewerkstelligen weil wenn ich merke dass es kritisch wird, dass man dann auch ein bisschen abwiegt
### [Excerpt 4] JudgeG2

<p>| | |</p>
<table>
<thead>
<tr>
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<tbody>
<tr>
<td>1</td>
<td>(...) but well it differs hugely if you get to the incident to the accused incident relatively quickly or ahm or if you have to seek contact to the child first of all ((hmhm)) because you know that well we've also had that we've experienced that you know sitting there (imitates sitting with the body hunched over) ahm we've also had disabled children ahm who only said yes and no ((hmhm)) very difficult situation whether that's at all according to the code of criminal procedure with regard to the style of questioning because then obviously the accusation of suggestive questioning is always looming [everywhere] you know ((hmhm)) where a child can only say yes and no that's always different than where elaborate answers are given within context you know ((hmhm)) those are the very extreme cases we have seen here</td>
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<tr>
<td>JG2: wobei das eben sehr unterschiedlich ist ob man relativ schnell zu dem Tatgeschehen zu dem vorgeworfenen kommt ähm oder ob man erst mal überhaupt Kontakt suchen und finden muss zu dem Kind ((hmhm)) weil das also so und auch das haben wa erlebt so da sitzt (deutet eine kauernde Sitzhaltung an) ähm wir hatten auch behinderte Kinder schon äh die dann nur ja oder nein ((hmhm)) gesagt haben ganz schwierige Situation ob das nach Strafprozessordnung überhaupt fragetechnisch weil natürlich immer der Vorwurf dann von suggestiven Fragen im Raum ist ne ((hmhm)) wenn ein Kind nur ja oder nein sagen kann dass das immer was anderes ist als wenn im Zusammenhang geantwortet wird ne ((hmhm)) das sind das sind so ganz die Extreme die wa hier erlebt haben</td>
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<td></td>
<td>[823-833]</td>
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</table>
Pol1G: well I don't know let's say in the beginning I did find trials uncomfortable well in the beginning and often it is really about they will look for mistakes you have made you know ahm weak points or somehow (.) well I guess those are aspects where you can attack ((hmhm)) and tha' (1) is uncom' well I did find it uncomfortable sometimes to be pointed to my own mistakes or whatnot and well ok next time I could formulate that better or what but you'll always take something home from that and today I would indeed say (1) well if I can't remember I can't remember and if that is what I wrote (1) then that's what must have happened but I really can't [a colleague enters the room] well you know I just don't know

A: naja weiß ich nich also sagen wa am Anfang fand ich die Gerichtsverhandlungen unangenehm also am Anfang und meistens geht's ja wirklich die suchen ja auch nach den Fehlern die man selber gemacht hat ja also Schwachstellen oder irgendwie (.) also das sind ja die Angriffspunkte denk ich ((hmhm)) und des (1) is schon unan' also fand ich schon teilweise unangenehm so auf die eigenen Fehler oder irgendwie was hingewiesen zu werden und des nagut des könnt ich nächstes mal besser formulieren oder was aber da nimmt man ja was mit und heute würd ich schon sagen (1) na wenn ich mich nich erinnere dann erinnere ich mich nich und wenn ich das so geschrieben hab denn (1) muß es so gewesen sein aber ich kann mich da nich mehr (Kollegin kommt rein) also weiß ich nicht also
STA: Yes but I think that is the court’s problem and not the problem of the expert. (ok but the expert) yes in this one case with the expert Dr. XXX and the police women from XXX [place name] that’s exactly what happened and that was also a case where the complainant had in the interview with Dr. XXX [expert] delivered a particularly detailed and graphic and very plausible description of an incident that had not been charged at all [was not on the indictment] and then it was a big problem throughout the trial that this witness was quite happy to talk about this story and we all knew very well how it ended but this was an incident that had not been charged (laughing) the incidents we had to prove were completely different ones ((yes that)) that was that really () well but then the person who ahm writes the indictment [files the charge] once the initial investigation is closed cannot really anticipate into which direction [which element] the memory of the complainant will be most accurate later on ahm during the trial that will take place later on you know ((hmhm)) as a prosecutor one has to decide strictly on the basis of the file and if during the police interview the story they could tell best was the one about the incident that happened on the living room sofa but then a year later when talking to the expert the one they can tell best is the story about the incident in the father’s bedroom in the attic then that’s that ((hmhm)) you can’t know that in advance you know

STA1: Ja das ist dann aber das Problem des Gerichtes finde ich und nicht das Problem des Gutachters (klar aber der Gutachter) ja in dem einen Verfahren mit dem Dr. XX und der xxx Polizistin da war’s auch so dass die Geschädigte bei Herrn Dr. XXX insbesondere einen Vorgang sehr ausführlich und sehr plastisch und gut nachvollziehbar geschildert hatte der gar nicht angeklagt war das war dann immer in dem Prozess ein unheimliches Problem dass sie sehr gerne von dieser Geschichte erzählte wir kannten das Ereignis auch alle sehr gut aber das war ein Ereignis das nicht angeklagt war (STA lach) nachweisen mussten wir andere Ereignisse ((ja das)) das war halt einfach ja das kann dann aber auch ahm eben die Person die die Anklage erhebt nach Abschluss der polizeilichen Ermittlungen nicht unbedingt vorhersehen in welche Richtung die Erinnerung des Geschädigten dann ah bei dem später stattfindenden Prozess am besten ist ne ((hmhm)) da muss man als Staatsanwalt eben wirklich dann nach Aktenlage entscheiden und wenn die bei der polizeilichen Vernehmung die Geschichte im Wohnzimmer auf dem Sofa am besten erzählen konnte und dann ein Jahr später beim Gutachter aber die Geschichte unter dem Dach ((hmhm)) im Schlafzimmer des Vaters am besten erzählen kann das ist eben so ((hmhm)) das kann man nicht vorher wissen ne