Proposed Research Project for the Sabbatical at King's College, London (23.2.2020-7.4.2020)

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Background

In the professional research literature, particularly American and Canadian, it is almost unanimously agreed that mistaken identification is the most common cause of miscarriage of justice and is the primary cause of wrongful convictions.

In my doctoral dissertation[[1]](#footnote-1), I asserted that it is not possible to come to terms with a situation in which a criminal conviction can rely upon a single piece of evidence that is so unsound. There are defects both with respect to the inadequacies of human perception and memory, and in the functioning of the various investigatory units with regard to obtaining identification evidence. At times these units work without adequate supervision and oversight and there are no binding rules set forth in legislation to guide them. It is not surprising, therefore, that this situation leads to an unacceptable number of cases in which an individual is convicted of a criminal offense and only through forensic examinations at a later stage is he proven innocent. In my dissertation, I provided a basis for the assertion that the time is ripe to engage in a comprehensive reform of **Israeli law** relating to conviction of a defendant based on a single piece of identification evidence. I proposed a model for structuring a new approach to identification evidence, including an amendment to the law and implementation of a requirement for an evidentiary supplement that is contained in a proposed bill for “**Conducting Lineups, 2016**,” which I have formulated for this purpose and which was presented at the end of the thesis. This model is in effect a code, a comprehensive legislative enactment, that regulates all of the various aspects of the lineup in criminal law and which is based on four principal layers: (1) a comparison and confrontation between the underlying legal presumptions and the underlying psychological scientific presumptions regarding identification evidence (2) the requirement for additional evidence in Israeli law, (analogous to the requirement for “additional scintilla of evidence,” to convict on the basis of a defendant’s confession given outside of court) (3) the court’s invalidating rule as set forth in the **Yissacharov** case[[2]](#footnote-2); (4) English law.

Prior to setting forth the proposed model, I dealt In my dissertation with the difficulty inherent in the interface between Israeli law and identification evidence .As shown, This difficulty is multi-faceted. It stems, first and foremost, from the fact that although identification evidence is evidence of an inherently problematic nature, (difficulty evaluating its trustworthiness; susceptibility to many biases liable to influence the identifying witness and to lead him to make a mistaken identification; and great risk of wrongful convictions arising from this evidence) the Israeli case law has failed to establish a requirement for supplementary evidence as a condition for conviction based upon this single evidence.

Conclusive proof of the great risk involved in convicting a defendant on the basis of a single piece of identification evidence is provided by findings from **the *Innocence Project***,[[3]](#footnote-3) the initiative of two scholars, Barry Scheck and Peter Neufeld, of Cardozo School of Law, Yeshiva University. These findings demonstrate that 84% of wrongful convictions—where the defendants were later exonerated through the work of the Innocence Project in the wake of DNA examinations—have been based (at least in part) on mistaken frontal identification by eyewitnesses or victims of the crime. Such mistaken identifications occurred sometimes as a result of inherent biases and weaknesses of human memory and sometimes as a result of defects in the conduct of the identification process by the investigatory unit. In other words, 84% of all convictions proven wrongful relied, at least to some extent, upon identification evidence

In Israel, the only thing that exists with respect to identification evidence is case law. A well thought out and comprehensive doctrine of identification evidence has yet to be created. Moreover, an examination of the rules demonstrates that they are often unable to provide the defendant with appropriate protection against wrongful conviction and many of the rules are inconsistent with scientific research in the field of human memory and cognitive psychology.

Indeed, alongside the case law, the Israel Police has made an effort to formulate the rules for holding a lineup, and they are included in the internal guidelines of the Investigations and Intelligence Branch. , However, these guidelines do not have normative binding force, and when violated entail no sanction of a punitive or evidentiary nature whatsoever. Furthermore, many of the guidelines are drafted solely as recommendations. Moreover, as with the case law, a careful analysis of the internal guidelines shows that some of them are not consistent with scientific research and at times even clearly contradict it.

This lack of a well-regulated body of law with respect to identification evidence, including the absence of rules set forth in legislation, has a clear impact at all levels of this issue.

An additional aspect of the problems existing in the interface between the Israeli law and the identification evidence is expressed in the fact ,that the case law has yet to set forth a clear and well-regulated evidentiary ranking of various kinds of lineups. This is particularly incomprehensible, in my opinion, in view of the findings from many scientific studies in the field which demonstrate different evidentiary weights for different types of lineups.

Moreover, Israeli law, generally speaking, does not sufficiently recognize the problematic and complex characteristics of the issue of identification and is therefore insufficiently equipped to grant defendants the protection necessary from wrongful convictions. For example, it would seem that up to now both the judiciary and the legislature have failed to understand the anomalies of identification evidence, anomalies that are expressed, *inter alia*, in the one-time nature of this evidence. As discussed extensively in my doctoral dissertation , normally the investigatory unit has only one opportunity to obtain such evidence, with no possibility of “improving” or “amending” it later. For the defendant it is difficult, and indeed almost impossible, to refute such evidence after it has been obtained. Granting this, there is great importance in being scrupulous with respect to the rules that are intended to ensure the propriety of the lineup. However, because the courts and the legislature have not internalized that what is involved is an unusual and “one-time” piece of evidence, one will search in vain in the legislation or regulations for any binding rules regarding the manner of obtaining identification evidence or a well-regulated doctrine in the case law.

Changes in Israeli law since completion of the dissertation

Since completing the dissertation, (moderate yet significant changes have taken place) changes in Israeli law as to evidence has been enacted. This past year, the Justice Minister has appointed a public committee chaired by (retired) Supreme Court Justice Yoram Danziger to examine and correct false convictions.

The first topic chosen by the committee is the failure to identify and I had the honor of appearing before the committee and presenting them with my findings. Recently (on September 2, 2019) the Commission published its interim report[[4]](#footnote-4), in which most of my suggestions were integrated regarding necessary changes in police work and the need to change police internal procedures. While the Commission has not yet accepted my final proposal to regulate the issue of identification in primary legislation, it is also clear that its recommendations in the interim report are an important step toward changing and correcting potential false convictions as a result of the courts' practice of single-identification evidence.

A preliminary review of the Danziger Commission's interim report indicates that—after conducting many sessions in which it heard from renowned experts on eyewitness testimony and identification evidence and from representatives of the Israel Police who routinely handle such testimonies and evidence—the Commission found that identification evidence should be regarded with extreme caution and granted little weight. The Commission further found that a defendant should not be convicted solely on the basis of a single identification, and that identification should only be granted the weight of supplementary evidence.

In addition, the preliminary review of the Commission's report indicates that the Commission concluded that the time is ripe for change in all aspects of the approach to identification evidence. Its conclusion was based in part on the insights I presented in my doctoral dissertation from the dramatic data that was presented as part of **the Innocence Project** in the United States, and the insights in **Simon’s** inspirational book ***In Doubt: The Psychology of the Criminal Justice Process*** [[5]](#footnote-5)regarding the inherent difficulties in the manner in which investigators are often influenced by biases and trapped by mistaken conceptions with regard the identification evidence primarily on matters relating to the decision regarding the type of lineup used, the manner in which it is conducted, and the behavior of those conducting the lineup at the time**.**

In the spirit of the aforementioned, the Commission found that the investigatory unit should be instructed to give utmost consideration to the **systemic variables** within its own control, to which I referred in my research, and which could potentially reduce the evidentiary value of identification evidence, including: the type of lineup that the investigatory unit uses; the awareness of the policeman in charge of conducting the lineup as to the identity of the suspect and his/her placement in the lineup; whether the policeman in charge has given instructions or warnings to the identifying witness (prior to the lineup and during the course of it) the significance of feedback given to the identifying witness (prior, during or after); the number of people, suspects, and identifying witnesses taking part in the lineup; documentation of the lineup by the investigatory unit; the level of confidence the identifying witness expresses and how it is documented by the investigatory unit. One of the many resulting recommendations is to require the investigatory unit to include these variables in its report of the lineup.

One of the Commission's significant recommendations in this context is not to rely solely on a single piece of identification evidence obtained by reviewing a mugshot album.

In addition, the Commission found that the investigatory unit should be instructed to give utmost consideration to **extra-systemic variables** beyond its control, to which I referred in my research, and which could potentially reduce the evidentiary value of identification evidence, including: the criminal incident itself; the characteristics of the identifying witness; the length of exposure to the event; the distance between the identifying witness and the suspect; the level of lighting during the event; cultural-social characteristics; the age of the identifying witness and the like.

Research proposal

My research project during the sabbatical in London would be to examine the police's implementation of the committee's interim recommendations and the impact of the report's recommendations on the various courts' approaches to cases based on single identification evidence, and draw up a comparison to the way English police units conduct lineups.

As distinguished from Israeli law, the English legislature and the regulatory authorities have treated the issue of identification seriously. The Code D regulations[[6]](#footnote-6) deal with the issue of identification in a broad and detailed manner, relating to most of the secondary issues arising in the various cases, rules there even being consistent with the up-to date findings of psychological scientific studies. The rationales and advantages inherent in making a comparison to foreign law for the purpose of carrying out legal reform are discussed, particularly when the comparison involves drawing inspiration from a legal system similar to our own, such as the English legal system.

It is clear that an examination of the research questions at issue will take time, particularly given that the Commission's interim report was published quite recently. Likewise, it is clear that the process of legal change can take considerable time. I therefore believe that, in conjunction with my ongoing examination of the extent to which Israel's law enforcement agencies and courts are internalizing the Danziger Commission's recommendations, it would be appropriate to draw on English law as a comparative body of law and assess the parallel process that took place there, as well as the manner in which law enforcement agencies addressed the practical aspect of the changes in English law relating to identification evidence.

As part of my research project, therefore, I intend to examine the current approach to identification evidence on the part of law enforcement agencies in England, and to compare it with the Danziger Commission's recommendations for internal guidelines to be adopted by the Israel Police. It is important to note in this context that the comparative study I intend to conduct regarding the practices of law enforcement agencies in England is not aimed solely at reviewing the law as practiced in England, but rather at extracting operational guidelines for use by law enforcement agencies in Israel so as to facilitate the process of incorporating the Commission's recommended guidelines. Naturally I do not overlook the different legal cultures of the two legal systems or the cultural-social-institutional difference between Israeli law and the law practiced in England. Nonetheless, I believe that an examination of the processes that took place in England can illuminate the course of my research and, at the very least, provide a basis for inspiration.

1. NOGA SHMUELI-MEYER, A New Approach to Identification Evidence: Proposed model amendment to Israeli law and implementation of the demand for supporting evidence ,University of Haifa, Faculty of Law, November 2016. [↑](#footnote-ref-1)
2. CrimA 5121/98 *Yissacharov v. Chief Military Prosecutor*, IsrSC 61(1) 461 (2006). [↑](#footnote-ref-2)
3. BARRY SCHECK, PETER NEUFELD & JIM DWYER, ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED 246 (2000). [↑](#footnote-ref-3)
4. Interim Report of the Public Commission for the Examination and Correction False Convictions, chaired by Justice Yoram Danziger. [↑](#footnote-ref-4)
5. Simon, Dan. In doubt: The psychology of the criminal justice process. Harvard University Press, 2012. [↑](#footnote-ref-5)
6. Code Of Practice For The Identification Of Persons By Police Officers, Code D to the Police and Criminal Evidence Act 1984 [↑](#footnote-ref-6)