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SEMIOTICS, MISCARRIAGES OF JUSTICE AND THE TRIALS OF JESUS

by

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1. *Introduction*

Bernard Jackson's *oeuvre* encompasses and successfully integrates a formidable array of subjects including biblical law, criminal law, criminal justice, legal semiotics and New Testament studies. In numerous ways and at different levels he established new and fruitful connections, opening up new avenues of discovery for future scholars. It is therefore fitting, in this *Festschrift*, to draw upon these same areas in reconsidering a controversial topic upon which Jackson has written extensively in the past, that is, the trials of Jesus.[1] Given the number of different disciplines represented by this subject, it will not be possible to interact with the vast body of thought and literature relating both to miscarriages of justice and the trials of Jesus, nor to open up for examination every aspect and dimension of these debates that might be thought relevant. Instead, and in the spirit of a *Festschrift*, this chapter is both celebratory and exploratory in style. It aims to pay homage to Jackson's interdisciplinary achievements by seeking to integrate different approaches, whilst at the same time pushing the boundaries of our perceptions of biblical texts.

Consequently, this chapter takes the form of a 'thought piece' which locates the subject of the trials of Jesus within the context of modern literature regarding

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1 Bernard S. Jackson, *Essays on Halakhah in the New Testament* (Leiden: Brill, 2008); *idem,* "The Prophet and the Law in Early Judaism and the New Testament", in *Jewish Law Association: The Paris Conference Volume*, eds. S.M. Passamaneck and M. Finley (Atlanta, Scholars Press), 67-112 (Jewish Law Association Studies VII).

miscarriages of justice, understood here as a successful appeal against a criminal conviction, since this constitutes an official systemic acknowledgment of a wrongful conviction to a person who may be innocent.[2] It presents a tapestry of themes and issues in miscarriages of justice that weaves with selected themes and issues in the trials of Jesus to bring a fresh perspective in a key area of Jewish-Christian dialogue. It explores how semiotics can help us to understand the sense-making processes that partly contribute towards miscarriages of justice and, in doing so, considers how this approach illuminates our understanding of the events in Jesus’ trial. In this way we hope to apply modern theoretical insights to an ancient case in a manner that builds upon, and also pays tribute to, Jackson’s work in this field.

2. *Semiotic Theory and Miscarriages of Justice*

We begin by briefly considering semiotic theory and its relevance to cases of miscarriage of justice. Semiotics, in its broadest sense, is the study of how human beings create meaning. Meaning is carried by a variety of elements (“signs”) which may be verbal, non-verbal, natural, artificial and so on. Semiotics is thus the study of systems of signification (how meaning is constructed) and communication (how meaning is transmitted). Semiotics helps us to explore three fundamental aspects of human activity. First, how is our world “constituted”’ as a human environment? How do signs affect the way in which we perceive and understand the world around us? Second, how do we code and decode our world so that it becomes a “specific cultural domain” consisting of a network of signs? Finally, how do we communicate and act through signs to make this domain a collectively shared cultural world?

Semiotics is relevant to the study of law in general because law is an aspect of human social activity that has to be interpreted. In several of his books, including *Law, Fact and Narrative Coherence*[3] and *Making Sense in Law*,[4] Jackson has argued that the phenomenon of legal sense construction depends on more general processes of sense construction that are in fact non-legal in origin. This includes such forms of sense-construction as processing facts in a court, interpreting the

2 We say “may be innocent” because, as will be discussed in 5 below, it is only on exceptional occasions that a person who overturns a criminal conviction on appeal achieves true vindication by having his or her actual innocence proved. For a general discussion, see Michael Naughton, *Rethinking Miscarriages of Justice: Beyond the Tip of the Iceberg* (Basingstoke: Palgrave Macmillan, 2007), 14-35.

3 B.S. Jackson, *Law, Fact and Narrative Coherence* (Liverpool: Deborah Charles Publications, 1991).

4 B.S. Jackson, *Making Sense in Law: Linguistic, Psychological and Semiotic Perspectives* (Liverpool: Deborah Charles Publications, 1995).

behaviour of witnesses and judges and the decision-making processes of juries. Jackson concludes that: "Lawyers are trained in legal concepts, and in the abstract terms which express those legal concepts. They are not trained in grammar, stylistics or discourse analysis (let alone, normally, in psychology or semiotics). But it is at these latter levels, very frequently, that vital components of sense construction are located".[5] It is thus necessary and important that the study of law should be connected with other disciplines that study meaning. Together they can make explicit all those levels of sense (innate, social, and professional) which allow behaviour to be understood.

Semiotics is closely connected to linguistics (which seeks to explain how we make sense of things in language) and has historically developed from a version of it. There are many different semiotic schools, but we may single out structuralist semiotics and, in particular, that branch of structuralism developed by A. J. Greimas as being particularly relevant in the context of criminal trials.

One of the basic claims made by Greimassian semiotics is that there is a parallel between the sense-making structures that go into the construction of a sentence and the structures that go into constructing a story.[6] Another basic claim is that sense construction is said to involve interaction among three different levels of signification. These are: (1) the surface level (that is, the sense data actually presented to us and the particular sense attributed to it), (2) the thematic level (that is, the stock of social knowledge that helps us to make sense of the surface level of the text) and (3) the deep level (that is, forms of sense making that do not derive from the environment but which are claimed to be universal and cross-cultural). A basic feature of Greimassian semiotics is its emphasis on the role of narrative in the deep structure of semiotics. In other words, it claims that the "storiness" of stories is part of the deep structure of signification in *all* forms of discourse, including legal discourse. Jackson develops the thematic level to include narrative stereotypes, frames, scripts and "common-sense" rules operating in the evaluation of evidence in a trial.[7]

This approach, which can be called "Greimassian narratology", can be used to analyse different aspects of a criminal trial. Analysts have highlighted how the function of cross-examination in a criminal trial is not simply to deconstruct and discredit an opposing witness' testimony but to construct an alternative version of

[5] Jackson, *ibid.*, 439.

[6] For a readable account see Jackson, *ibid.*, 141-163. For the use of Greimassian semiotics in the context of biblical narrative and the New Testament see N.T. Wright, *The New Testament and the People of God* (London: SPCK, 1993), 31-80. The latter is relevant in view of the connections made in sections 4 and 6 of this article with the trials of Jesus.

[7] See generally Jackson, *Making Sense in Law*, *supra* n.4, at 163-167, 177-184 and B.S. Jackson, "Truth or Proof: The Criminal Verdict", *International Journal for the Semiotics of Law* XI/33 (1998), 227-273.

the facts[8], that is to say, a competing narrative. Greimassian semiotics is also relevant to the sense-making processes of determining the truth of facts by a jury. Narrative structure and plausibility (evaluated on the basis of socially constructed stories which are acquired through social experience) are said to be a highly significant factor in making decisions about truth.[9] As a result, legal proceedings in a criminal trial are essentially narrative in their construction, even though lawyers, and others who work within the system, are trained to think about the criminal law in purely analytical terms.[10]

Semiotics is also relevant in analysing the judicial summing-up which is, of course, part of the persuasive process of the criminal trial and as such is an exercise in construction and communication. Henning, for example, has shown how the linguistic and rhetorical features in judicial summing-up can lend weight to a particular interpretation of the events tried.[11] Sometimes the summing up emphasises certain features of the case as being salient whilst at the same time omitting key aspects of the offence narrative.[12]

All of this means that semiotics is relevant to the study of miscarriages of justice. As Jackson demonstrates in relation to processing facts in court, the whole object of counsel in a trial is to present the lawyer-witness interaction in such a way as to create the desired form of sense in the minds of the jurors. Judgements made by jurors as to the truth of the evidence of witnesses are based in part on the plausibility and coherence of the stories told by witnesses.[13] The appearance of truth may be the result of narrative stereotypes, in other words, our social knowledge of the typical ways in which sequences of action occur and are meaningful to us.[14] Very often, it is at these deeper levels of sense construction that miscarriages of justice may be located.

Jackson’s analysis of the Yvonne Sleightholme case – which some have suggested may be a miscarriage of justice – provides a good example of how

8 See for example Pamela Hobbs (in the context of a medical malpractice case), “Tipping the scales of justice: Deconstructing an expert’s testimony on cross-examination”, *International Journal for the Semiotics of Law/ Revue Internationale de Sémiotique Juridique* 15 (2002), 411-424.

9 See Jackson’s discussion of Bennett and Feldman’s narrative model of fact construction in *Law, Fact and Narrative Coherence*, *supra* n.3, at 61-88.

10 See B.S. Jackson, “Towards a semiotic model of professional practice, with some narrative reflections on the criminal process”, *International Journal of the Legal Profession* 1(1) (1994), 55-79, 68-77.

11 T. Henning, “Judicial summation: The trial judge’s version of the facts or the chimera of neutrality”, *International Journal for the Semiotics of Law* 12 (1999), 171-213.

12 Paul Robertshaw, “Sentencing parricides: Text and context; rhetoric and silence”, *International Journal for the Semiotics of Law / Revue Internationale de Sémiotique Juridique* 16 (2003), 1-14.

13 Jackson, *Making Sense in Law*, *supra* n.4, at 390-423.

14 *Ibid.*, at 392.

semiotics can illuminate such a case.[15] Yvonne Sleightholme was convicted in 1991 of murdering the wife of her former lover. The prosecution made sense of events by evoking the classic tale of the jealous lover who took revenge on her rival. This stereotypical narrative could be "anchored" at various points. First, tyre tracks were found at the scene of the crime, and these were claimed to be compatible with those of the defendant's car. Second, the defendant's parents lived in a farmhouse some 15 miles away from which a .22 rifle (almost certainly the murder weapon) was stolen a few days before the murder, only to reappear the day after the killing. Third, the victim belonged to a rare blood group (found in only one person in every 250) – the same type found on and in the defendant's car. Finally, although the defendant claimed to have an alibi, this was proven to be false; it transpired that the defendant had been seen driving around the village where the crime took place on the evening the murder was committed. Such anchor points could only enhance the apparent truthfulness of the stereotypical narrative.

Against this, the defence put forward an alternative story that was far less stereotypical. They claimed Ms. Sleightholme was the victim of an elaborate conspiracy which had framed her for the murder. The defendant said she had been lured to the village by her former lover, only to be rendered unconscious at the rendezvous by several men. When she came round she was told that she and members of her family would be killed if she said anything about what had happened (thus explaining the false alibi, on her account). Supporting her version of events was the fact that, although her car boot was indeed covered with the victim's blood, no traces of blood were found on any of the defendant's clothing. In addition, a Home Office pathologist gave evidence that the angle of the bullet through the victim's head was the work of a professional and was extremely unlikely to be the work of an amateur. However, the jury was not persuaded by the defence case and the defendant was found guilty. Although the angle of shot in the Sleightholme case was falsifying evidence it arguably came too late for the jury because the prosecution had already presented a plausible narrative. This was well-anchored in the fact that the defendant had an affair with the deceased's husband, had made a date to be with him on the evening of the murder, as well as providing evidence that the murder weapon came from the defendant's family. Furthermore, as a mistress, the defendant had a motive for "doing away" with the wife whilst the fact she lied about her alibi suggested she was lying about her innocence as well.

Jackson's analysis of this particular case supports the general idea that processes of sense-construction may automatically favour the story presented by, say, the prosecution over that of the defence, regardless of whether the defendant was actually innocent. The result is a potential miscarriage of justice. In the case of Yvonne Sleightholme, the stereotypical story of the jealous lover, familiar to us

[15] *Ibid.*, at 163-167. The facts of the case are drawn from 163-166.

from a thousand soap-opera and real-life narratives, maps onto the sense-data more easily than the unfamiliar (and hence more “far-fetched”) story of a complicated “frame-up” by professional killers. This is despite the fact that the defendant’s version of events actually explains more of the sense-data than the prosecution’s story. The trouble is that the defendant’s story is neither structurally simple (in Greimassian terms) nor typical and so for these reasons (irrespective of the actual evidence) the story lacks plausibility. It is precisely because these forms of sense construction underlie proceedings in a criminal trial that Wagenaar *et al.* argue that reliance upon narrative coherence and stereotypes can easily produce unsafe convictions.[16] Consequently, they contend that constructions of fact must be safely anchored in some ground that is reliably scientific and that sub-stories, too, must be safely anchored.

Regardless of whether Yvonne Sleightholme was wrongfully convicted, the point is that, within a semiotic construction of truth, one can imagine many cases, potentially, in which innocent defendants will find themselves in danger of a miscarriage of justice, simply because of how we naturally tend to make sense of stories and events. These sense-making processes are extended to the courtroom and are applied by all the parties to the case (whether they are aware of them or not). This is despite claims that the courtroom operates according to a purely rational mode of adjudication.[17]

3. *Making Sense of Miscarriages of Justice*

Jackson’s work thus suggests some ways in which a semiotic analysis can shed light on the prevalence of miscarriages of justice and the ways in which people who may be and/or who are innocent can be wrongly convicted. In this section we explore further some of the key reasons why it is that the prosecution case is believed beyond reasonable doubt in cases that achieved a successful appeal against a criminal conviction in the appeal courts concerning people who may be, or have been proven to be, innocent. There are a number of ways in which a semiotic perspective can help us to understand issues such as: (a) how innocent people can attract false allegations and criminal charges; (b) how miscarriages of justice can be triggered by moral panics linked to high profile events; and, (c) how issues, charges and evidence that are individually weak in themselves combine to “improve” prosecutions against accused persons who may be entirely innocent. It is also relevant in seeking to understand matters such as: (d) how case construction can lead to the creation of evidence; (e) why some elements of a prosecution’s

16 Wagenaar *et al.*, cited in Jackson, *Making Sense in Law*, *supra* n.4, at 177.

17 *Ibid.*, at 392.

case can come to outweigh even countervailing defence evidence; and, (f) the problem of why miscarriages of justice seem to be legitimate. Each of these issues will be explored in the light of recent developments in modern miscarriages of justice case law.

(a) How innocent people can attract false allegations and criminal charges

There is a discernible pattern within established miscarriages of justice cases of people with "behavioural abnormalities" or "learning difficulties" becoming the subjects of false allegations. They become marginalized within their local communities because they are different compared with "normal" members of the public. This can make false allegations seem plausible and lead to charges for crimes that they did not commit.

A good example is the case of Stefan Kiszko, convicted in 1975 for the murder of eleven year-old Lesley Molseed, who had been stabbed twelve times and then sexually assaulted and whose body was then dumped on the moors above Ripponden in West Yorkshire. Kiszko, who confessed to the murder after two days of intense questioning by police without a solicitor present, suffered from a number of disorders including XYY syndrome, a condition in which the human male has an extra Y chromosome, which causes growth and behavioural abnormalities, rendering him a giant of a man with a peculiar habit of recording the registration numbers of cars if he had been annoyed by the driver. Kiszko was also likened to a "man-child" due to an immaturity disorder from a condition called hypogonadism, resulting from an underdevelopment of the male hormone testosterone. All these things contributed to Kiszko being seen by local people as an awkward loner[18] and an "odd-ball" and led, at least in part, to his wrongful conviction. At some point prior to the murder he had written down the registration of a car seen parked in a lay-by near the scene of the crime and it was argued at his trial that only someone at the scene could have known the number of this car. After serving 16 years in prison, Kiszko overturned his conviction. He could not have committed the crime because his hypogonadism meant he was physically incapable of producing the semen sample found on Lesley Molseed's underwear. This was not argued by his defence at trial.[19] More recently – 32 years after Lesley Molseed's murder – a "cold case"[20] hit on the National DNA Database (NDNAD) discovered that the

[18] Martin Wainright, "Net finally falls on right man", *The Guardian*, 12 November 2007.

[19] Jonathan Rose, Steve Panter and Trevor Wilkinson, *Innocents: How Justice Failed Stefan Kiszko and Lesley Molseed* (London: Fourth Estate Limited, 1998).

[20] "Cold cases" are unsolved crimes. With the creation of the National DNA Database, however, some of these unsolved crimes are now being solved by identifying offenders, such as Ronald Castree, who left biological evidence at the crime scene that could not be identified at the time but who,

DNA belonged to another man, Ronald Castree.[21] Kiszko's factual innocence was proven and he was vindicated entirely – a rare experience for victims of miscarriage of justice (see 5 below).

(b) How miscarriages of justice can be triggered by moral panics linked to high profile events

There is a direct link between the moral panic caused by the Irish Republican Army's (IRA) bombing campaign of the 1970s and 80s in the UK and the notorious miscarriage of justice cases of the Birmingham Six,[22] Guildford Four[23] and Maguire Seven[24] in which Irish people believed to be Irish republican sympathisers were accused and convicted for terrorist bombings.[25] Such moral panics often have a "ring of truth" about them.

History is repeating itself in the form of new "suspect communities" which have been identified in the aftermath of the bombing of the Twin Towers in New York on 11 September 2001 and in London on 7 July 2005. New moral panics have arisen regarding the danger posed by Muslim extremists in the form of Al-Qaeda: the new "enemy within". This is triggering a new wave of false accusations and convictions for criminal offences in the name of the "war against terror".[26] Thus we have seen Muslim "terrorist suspects" locked up for years in Belmarsh prison (near London) without charge or the disclosure of any evidence to support

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subsequently, committed another crime and had a DNA sample taken which was tested against DNA profiles from unsolved crimes and a link established.

21 Wainright, *supra* n.18. See also Scott Lomax, *Justice for Jill: How the Wrong Man was Jailed for the Murder of Jill Dando* (London: John Blake Publishing Limited, 2007) for details of the case of Barry George. George had a number of mental health problems and personality disorders that contributed to his being regarded as a social misfit in his local community and as an uncooperative (and therefore regarded as guilty) suspect when he was interviewed by the police for the murder of television presenter, Jill Dando. George spent eight years in prison and went through two trials before being acquitted of the charge in August 2008.

22 Paddy Hill and Gerard Hunt, *Forever Lost, Forever Gone* (London: Bloomsbury Publishing plc, 1995).

23 Gerry Conlon, *Proved Innocent* (London: Hamish Hamilton, 1990).

24 Anne Maguire, *Miscarriage of Justice: An Irish Family's Story of Wrongful Conviction* (London: Roberts Rinehart Publishers, 1994).

25 See, for instance, Paddy Hillyard, *Suspect Community: People's Experience of the Prevention of Terrorism Acts in Britain* (London: Pluto Press, 1993).

26 See, for instance, Christina Pantazis and Simon Pemberton, "From the 'Old' to the 'New' Suspect Community: Examining the Impacts of Recent UK Counter-Terrorist Legislation", *British Journal of Criminology* 49 (2009), 646-666.

the claim that they pose a real terrorist threat.[27] Moreover, when this practice was ruled illegal by the House of Lords, control orders were introduced, giving the Home Office the power to impose daily curfews of up to 18 hours with strict restrictions on who a suspect can meet and where he or she can go. This has a devastating effect on the lives of such suspects and their families. The situation has even been described by the Lord Chief Justice of England and Wales, Lord Bingham of Cornhill, as similar to prisoners in solitary confinement.[28] This suggests a broader notion of a miscarriage of justice where, even though people may not actually be in prison, their freedom is limited to the extent that they are "imprisoned" without any evidence other than suspicion of a threat by virtue of their physical appearance and/or their religious beliefs.

(c) How issues, charges and evidence that are individually weak in themselves can be combined to "improve" prosecutions against the accused in cases of possibly innocent persons

Another feature of accepted miscarriages of justice cases that have been overturned by the appeal courts is the process by which police officers and prosecutors "improve" cases against accused persons to obtain convictions. In the UK this is often referred to as the "fitting-up" of innocent suspects; in the US it is referred to as "tunnel vision." Both describe the process whereby judges, jurors, prosecution lawyers and even defence lawyers "filter" and sometimes fabricate the evidence in a case to reach a guilty verdict.[29] The process begins when the police and prosecution have an idea of how the crime was committed and who might have committed it. This leads them to construct a narrative or story of the crime that is then fitted around the suspect(s), instead of examining the facts and working outwards to see what facts attach to which people.

A good example of this is the "Cardiff Newsagent Three" case. Here, a case was "fitted" around Michael O'Brien, Ellis Sherwood and Darren Hall for the murder of a Cardiff newsagent, Philip Saunders. No account was taken of exculpatory evidence such as alibis or the lack of any physical or eye-witness evidence linking them with the murder. A false confession was extracted from one of the suspects, Darren Hall. Hall had an anti-social personality disorder and was described as having the attributes of a pathological liar. He was handcuffed to a

[27] Denise Winterman, "Belmarsh – Britain's Guantanamo Bay?" (2004), BBC News http://news.bbc.co.uk/1/hi/magazine/3714864.stm. Accessed 28 December 2009.

[28] Cited by Nigel Morris, "Law lords rule that terror suspects' curfews are 'virtual imprisonment'", *The Independent*, 1 November 2007.

[29] See, for instance, Keith Findley and Michael Scott, "The Multiple Dimensions of Tunnel Vision in Criminal Cases", *Wisconsin Law Review* 2 (2006), 291-397.

radiator during repeated questioning by the police. He subsequently claimed he broke down during the first 36 hours of his detention at the police station when he was denied access to a solicitor and simply told the police what they wanted to hear. Statements incriminating the three suspects were later found to have been obtained by a senior police officer by coercion and inducements for money from witnesses with criminal records. There was also a (claimed) fabricated statement by the same senior police officer who said that he overheard O'Brien and Sherwood confess to the murder whilst they were in police custody.[30]

Individually, the evidence against the three would have been insufficient to obtain a conviction for murder: confessions are known to be unreliable, and in this case even the prosecution expert had his doubts about the reliability of Hall's confession. Evidence from known criminals is also treated with great caution in criminal trials, as is damning evidence from the police officer leading the investigation. But the case shows how individually weak evidence, when combined, can make a seemingly overwhelming case of guilt that juries find hard to resist. Mud sticks. Juries do not consider pieces of evidence in isolation but, rather, assess them holistically. The sheer weight of inherently unreliable evidence can lead to the conviction of the innocent, despite the fact that zero plus zero plus zero still equals zero![31]

(d) The creation of evidence

Miscarriages of justice are typically seen as occurring when innocent people are convicted for crimes they did not commit. However, the "crime control spectacles" through which the police and prosecution tend to view the world[32] can result in the construction of cases that make innocent people look guilty of committing criminal offences even when no crime may have occurred at all.[33] For instance:

[30] Michael O'Brien and Greg Lewis, *The Death of Justice: Guilty Until Proven Innocent* (Ceredigion: Y. Lolfa, 2008).

[31] See also Henry Fisher, "Report of an Inquiry by the Honourable Sir Henry Fisher into the circumstances leading to the trial of three persons on charges arising out of the death of Maxwell Confait and the fire at 27 Doggett Road, London SE6" (London: HMSO, 1977) for details of the Confait Affair. This led to the wrongful convictions of three youths for the murder of Maxwell Confait and, in turn, to a governmental Inquiry. A Royal Commission concluded that the whole prosecution was geared to constructing the case against them. In response, formal guidelines on police investigations were introduced in the form of the Police and Criminal Evidence Act 1984 (PACE), and the Crown Prosecution Service (CPS) was established to take over the role of charging suspects from the police.

[32] Cf. M. Naughton, "Factual Innocence versus Legal Guilt: The Need for a New Pair of Spectacles to View the Problem of Life-Sentenced Prisoners Maintaining Innocence", *Prison Service Journal* 177 (May 2008), 32-37.

[33] M. Naughton, "Why the Failure of the Prison Service and the Parole Board to Acknowledge Wrongful Imprisonment is Untenable", *Howard Journal of Criminal Justice* 44(1) (2005), 1-11.

- Sally Clark overturned a mandatory life sentence for the murder of two of her children when conflicting forensic evidence suggested that the chances were they died of natural causes;[34]
- Patrick Nichols spent 23 years in prison for the murder of Gladys Heath, a family friend, until competing forensic science compelling argued that she had probably suffered a heart attack and accidentally fallen down a flight of stairs;[35]
- Sheila Bowler was cleared of the murder of her aunt, Florence Jackson, after she had served four years of a life sentence, when new forensic evidence showed that her aunt most probably died of accidental drowning;[36]
- Angela Canning was given a double life sentence for the murder of her two children who were, probably, the tragic victims of "cot death";[37] and,
- Kevin Callan served three years for the murder of his four-year-old step-daughter, Amanda Allman, until he, himself, became an expert in neurology and was able to counter the convicting evidence and offer the more plausible explanation that she died as a result of a fall from a playground slide.[38]

These are just a small sample of convictions that have since been overturned. They illustrate the perils of prosecutions built only on forensic science experts' witness evidence. They undermine the widespread belief in the reliability of such evidence in criminal trials. Worse, they show that when the police are called to unexplained deaths they are prone to create evidence of a crime even where one may not have occurred. This is despite the principle that people are supposed to be assumed to be innocent until proven guilty beyond reasonable doubt. These cases suggest that, when the police come onto a scene where there is a dead body, for example, they draw on a myriad of internalised crime scripts, drawn from their training, previous cases and the media in the form of television programmes, films and books. They display what Ken Norman, in the specific context of unexplained infant deaths, termed "dirty thinking".[39] Distressed mothers grieving for their dead

[34] John Batt, *Stolen Innocence: The Sally Clark Story – A Mother's Fight for Justice* (London: Ebury Press, 2005).

[35] Stewart Tendler, "Man of 70 to be cleared of murder after 23 years in jail", *The Times*, June 10 1998.

[36] Angela Devlin and Tim Devlin, *Anybody's Nightmare: The Sheila Bowler Story* (London: Waterside Press, 2000).

[37] Angela Cannings and Megan Davies, *Against All Odds: The Angela Cannings Story* (London: Time Warner Books, 2006).

[38] Kevin Callan, *Kevin Callan's Story* (London: Little Brown and Company, 1997).

[39] Ken Norman, *Lynch-Mob Syndrome* (Elton, Cheshire: Infinity Junction, 2001).

infants, for example, can utter statements in formal police interviews to the effect that their children may still be alive “if they had only been better mothers”. From a “dirty thinking” perspective such statements can be highly incriminating and may produce a miscarriage of justice. “Dirty thinking” can also lead to false and malicious allegations and to the convictions of carers and/or teachers and/or clergy. This form of sense construction takes place amid the “myth of organised abuse” that mars those professions and vocations in the context of (entirely valid and correct) concerns for child protection and safety and a climate of fear (or moral panic) around paedophilia.[40] We have also seen how “dirty thinking” can lead to false allegations that are caused by the manufacture of “satanic abuse” scares, such as those in the UK in the 1980s in Nottingham, Rochdale and the Orkneys which were also found to be based upon false evidence.[41]

(e) The power of “experts”

The concept of “dirty thinking” also resonates with the question of why it is that some elements of a prosecution’s case stick in a jury’s mind and come to outweigh countervailing defence evidence. Put simply, not all forms of evidence are received equally by judges and jurors, with forms of evidence given by forensic science expert witnesses being seen as more authoritative in the sense construction process.[42] Only experts are allowed to give opinions in court, which can often be based on no empirical evidence at all but, rather, on their theoretical hypothesis of what they think may have happened.

Examples of this can be seen in the infant death cases cited in (d) above. Here, the mothers were convicted on nothing other than the opinions of the then highly distinguished Professor Sir Roy Meadow and his theory of Munchausen Syndrome by Proxy (MSbP). This alleges that mothers harm their children to gain attention and sympathy for themselves. What became know as “Meadow’s Law” claimed that infant deaths are so rare and difficult to explain by natural causes that whilst one death in a family could be seen as a tragedy, two should be seen as suspicious and three as murder, unless there is proof to the contrary. This completely reverses the presumption of innocence without any supporting evidence.

Meadow testified in the trial of Sally Clark that the odds against her two children dying naturally was 73 million to 1, a figure derived by squaring the ratio of births to cot-death in affluent non-smoking families such as the Clarks

[40] See, for example, Richard Webster, *The Secret of Bryn Estyn: The Making of a Modern Witch Hunt* (Oxford: The Orwell Press, 2005).

[41] See, for instance, Jean La Fontaine, *Speak of the Devil: Tales of Satanic Abuse in Contemporary England* (Cambridge: Cambridge University Press, 1998).

[42] Jackson, *Making Sense in Law*, *supra* n.4, at 416-423.

(approximately 8,500:1). The jury duly accepted his opinion and found her guilty of infanticide. At Clark's successful appeal, however, contrary evidence showed that the jury should have focussed on the subtle difference between the odds that she was innocent (given the likelihood of two deaths in a family), not the odds for two deaths occurring in a family (given that she was innocent and it was not murder).[43] Meadow's statistics were thus based on the so-called "prosecutor's fallacy". Moreover, Meadow's calculation assumed that cot deaths within a single family were statistically independent factors related to a probability common to the entire affluent non-smoking population. As such, he had not considered conditions specific to individual families, such as a theorised "cot death" gene that "switches off" the immune system which might make some mothers/families more vulnerable to cot death and Sudden Infant Death Syndrome (SIDS) than others. Indeed, that cot-death/SIDS happen at all makes it likely that such conditions exist, meaning that the probability of subsequent cot deaths of children by the same mother, or within the same family, may thus be increased against the group average.[44] The broader point is that, in a secularised society, forensic science experts can be conceptualised as the new "priesthood" who are given the power to divine and proclaim the "truth" in a court setting, with no real evidentiary basis.

(f) Why do miscarriages of justice seem legitimate?

Part of the reason why miscarriages of justice may seem fair is because of widely held beliefs in the correctness of the criminal justice system. To be sure, people tend to work on the basis that their systems, whether those in law, healthcare or education function as those systems claim to function and as we expect them to – that is, to provide correct convictions, a first-class health service or an excellent education.[45]

In the criminal justice system, this is reflected in an overriding concern for and belief in procedural justice, which requires strict compliance with the prevailing procedural rules of evidence. The expectation is that criminal trials produce truthful outcomes in which only guilty people are convicted and innocent persons are acquitted. And yet, as we have seen in 3(d) and 3(e) above, potentially innocent people are currently being convicted when no crime may have occurred on the basis of the stories told by forensic science expert witnesses. In theory, the

43 Norman Fenton and Neil Martin, "The 'Jury Observation Fallacy' and the Use of Bayesian Networks to Present Probabilistic Legal Arguments", *Mathematics Today* 36(6) (2000), 180-187.

44 See John Sweeny, "Gene find casts doubt on double 'cot death' murders", *The Observer*, 15 July 2001.

45 Richard Nobles and David Schiff, "Miscarriages of Justice: A Systems Approach", *Modern Law Review* 58:3 (May, 1995), 299-320.

adversarial system provides that defendants have their own experts who will fight their corner. This further adds to the sense of legitimacy of the criminal justice process. In practice, however, research on death penalty juries in the US[46] indicates that juries have a tendency to favour prosecution witnesses and experts, especially when there are uncertainties in criminal proceedings, which are inevitable in contested trials. This can be linked with people’s assumption that the system is legitimate and their corresponding need to side with the system when there are doubts.[47]

To sum up, the foregoing, although not exhaustive, has identified a number of ways in which sense construction enables us to subject our criminal justice processes to critical thinking. It allows us to consider the ways in which innocent people can find themselves the victims of miscarriages of justice. This body of material allows us to draw interdisciplinary parallels as we turn from semiotics and miscarriage of justice to another of Jackson’s areas of interest, namely, the trials of Jesus.

4. *Reconsidering the Trials of Jesus*

We saw in 2, above, how Jackson has made connections between semiotic theory and miscarriages of justice and we have suggested in 3, above, some of the ways in which this can be applied to modern issues. Scholarship owes a far greater debt to Jackson, however, for his groundbreaking work in applying semiotic theory in biblical studies, culminating in *Wisdom-Laws*.[48] Jackson has also applied structural thinking to the trials of Jesus, pointing out the similarities between the trials of Jesus and the trials of Jeremiah.[49] It is in the spirit of these interdisciplinary achievements that we here seek to develop the debate further by considering some of the ways in which the trials of Jesus[50] may themselves be regarded as a miscarriage of justice, building on the importance of sense-construction to criminal trials which has been advanced so far.

The question of the legality of Jesus’ trial is, of course, a perennial topic of debate. Biblical scholars distinguish between the historical trials of Jesus and the

[46] Research on juries is not permitted in the UK.

[47] See, for example, Brooke Butler, “The Role of Death Qualification in Jurors’ Susceptibility to Pretrial Publicity”, *Journal of Applied Social Psychology* 37(1) (2007), 115-123; Spaeth Mills, “Bias in a death-qualified panel”, *The Writ*, http://adjuryresearch.com/pdf_docs/pubs_art_jury_selection/BiasInADeathQualifiedPanel.doc (Jan. 1995). Accessed 28 December 2009.

[48] B.S. Jackson, *Wisdom-Laws: A Study of the* Mishpatim *of Exodus 21:1-22:16* (Oxford: Oxford University Press, 2006).

[49] See *supra* n.1.

[50] Reference is made to the trials of Jesus (plural) to acknowledge the fact that there is more than one trial in both the Jewish and Roman proceedings and there is also a trial before Herod.

accounts presented in the four Gospels. This distinction recognises that the Gospel writers and the early church remembered the trials of Jesus in the light of their experience of Jesus' resurrection.[51] This means that the trials themselves are presented with this larger narrative in mind.[52] From the perspective of the early

[51] For this reason, the claim is made, in some circles, that the Gospels ought to come with an epistemological "health warning" (e.g. Haim Cohn, *The Trial and Death of Jesus* [London: Weidenfeld and Nicholson, 1970], xiv-xix). They should be handled with extreme care, it is said, because they advance an interpretation of historical events, namely, that Jesus of Nazareth is the one in whom and through whom Israel's covenant with God is at work to renew the world. But this desire to treat the Gospels as somehow different from any other historical text or potential source of knowledge does not recognise that the sort of knowledge we can reasonably claim to have of historical events is ultimately of the same order and is subject to the same qualifications as knowledge in general. As N.T. Wright points out: "Some critics have made a great song and dance about the fact that the details of Jesus' life… cannot be proved 'scientifically'; philosophical rigour should compel them to admit that the same problem pertains to the vast range of ordinary human knowledge, including the implicit claim that knowledge requires empirical verification" (*The New Testament and the People of God* [London: SPCK, 1993], 34). Wright proposes, instead, a more nuanced "critical realist" epistemology which "acknowledges the *reality of the thing known, as something other than the knower*… [hence 'realist'], while also fully acknowledging that the only access we have to this reality lies along the spiralling path of *appropriate dialogue or conversation between the knower and the thing known* [hence 'critical']" (*ibid.*, 35, italics original). Human beings are not "bath-sponges" that simply "soak up" sense-data (*ibid.*, 83); instead we reflect upon external phenomena and aim to make sense it of by drawing on a larger framework or "set of *stories* about things that are likely to happen in the world" (*ibid.*, 37, italics original). Dismissing the Gospels as "history with a spin on it" fails to recognise that *all* knowledge and *all* history has a "spin on it". Another aspect of the "spin" is recognising that we can never have exhaustive knowledge. We know in part. The only non-suspect knowledge is exhaustive knowledge, and an exhaustive account of any period of history is not possible. The Gospels are – as they claim to be – a selection from the total available material on the life of Jesus (cf. *John* 21:25); what is being "spun" is what the authors think we most need to know (*Luke* 1:1-4; *John* 20:30-31). There is nothing surprising about this: our understanding of *any* period of history is going to be partial. Consequently, the Gospels are not suspect because they are non-exhaustive. Likewise, it is possible for us to know something without needing to have complete knowledge. The Gospels do not aim to give us the same effect that we would receive from following Jesus around with a camcorder – and nor should we expect them to. The things that Jesus said and did had to be interpreted and, in the trials of Jesus, there was a real and fierce dispute regarding the sense that should be made of Jesus and his activities. The real question, then, is not whether the Gospels interpret events but whether their interpretation, like that of any hypothesis, passes the sort of test that is usually applied to hypotheses in any field, namely: (1) does it gather in all the relevant facts and explain the detail; (2) does it do so with a certain degree of simplicity and (3) does it shed light on areas beyond its immediate concern? (Wright, *New Testament*, 42). Or, to put in another way, does the overall story that the Gospels are telling about the world as a whole make more sense, in their "outline and detail, than other potential or actual stories that may be on offer"? (*ibid.*).

[52] Precisely because the Gospels represent a selection from the sum of their knowledge, based on what each Gospel writer thinks is important, the Gospel accounts of the trials of Jesus are somewhat different from each other (and summarised in Jackson, *Essays on Halakhah in the New Testament*, *supra* n.1, at 33-37). All the Gospels agree that the trial, death and resurrection of Jesus are momentous events – but the Gospel writers also think that their differences in presentation are significant. For example, Mark, uniquely, interweaves the trial of Jesus by the Sanhedrin with the trial of Peter by a servant-girl (14:53-72). Peter is portrayed as being on a downward spiral ("below in the courtyard"; 14:66) whilst Jesus is on an upward trajectory (above the courtyard, in the priest's house). Mark highlights the architecture because he wishes to draw out themes of honour and shame: Jesus is more and more exalted whilst Peter is more and more humiliated. Likewise, Luke is the only Gospel writer

church, it would be impossible to remember or make sense of the trials of Jesus in any other way, except as a miscarriage of justice. At the same time, the New Testament presents this miscarriage as one in which everyone is complicit; including the Jewish authorities, the Roman authorities, as well as lay people, both Jewish and non-Jewish (e.g. *Acts* 4:25-28). Some readers may wish to entirely discount the possibility that Jesus' trials could have represented a miscarriage of justice. However, the broad point being made in this article is that when we juxtapose the New Testament accounts of the trials of Jesus with some of the literature concerned with modern cases of miscarriages of justice, we find that it is possible to make a number of connections, especially at the level of narrative and sense construction. The purpose of this section, then, is to try to connect modern reflections on cases of miscarriage of justice with the early church's accounts of what is – in their eyes – a miscarriage of justice in the trials of Jesus.

Although the trials of Jesus moved very quickly – it was only a matter of hours between Jesus' initial arrest and his execution – the Gospels indicate that they were the culmination of a long period of mounting opposition. It was an open secret that Jesus was in the crosshairs of the religious establishment:

> Some of the people of Jerusalem therefore said, “Is not this the man whom they seek to kill?” (*John* 7:25)

The surprise was not that Jesus was a marked man but that he was still alive. To the annoyance of the religious leaders, his continued existence seemed to imply their approval of his teaching and his apparently Messianic status:

> … here he is, speaking openly, and they say nothing to him! Can it be that the authorities really know that this is the Christ [Messiah]? (*John* 7:26)

It is no surprise, then, that the Gospels record a number of assassination plots (e.g. *John* 7:1, 7:19) and attempts (*John* 8:59; 10:31-33), some of which even date from the start of Jesus' public ministry (*Luke* 4:28-29). Some are courtesy of the local lynch-mob, such as the inhabitants of Jesus' home town (*Luke* 4:28-29) but more often the instigators are what we could loosely call the “religious authorities”. They include the chief priests, the “teachers of the law”, the “elders”, the Pharisees and the Herodians. Combinations of these groups are presented as trying to bring about the arrest and/or execution of Jesus (e.g. *Mark* 3:6, 11:18, 12:12; *John* 7:32). Some of these factions were not natural bed fellows, to judge

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who includes the trial before Herod. This is because Luke finds significance in the moment – foreshadowed earlier in the Gospel According to Saint Luke (e.g. 13:31) – when the two “kings of the Jews” finally meet. Examples can be multiplied and although it would take longer to demonstrate, the differences are frequently explicable in terms of the wider accounts the Gospels are serving. This article, however, takes a homogeneous approach to the Gospels, given the brevity of this section.

from the power struggles going on in Jerusalem at that time. But if the Gospels are correct, it is an example of the way in which criminal allegations can help to build a consensus against a person among those who might otherwise be rivals. As far as the New Testament is concerned, Jesus was defined as "other" by various factions that coalesced to silence his voice.[53]

In the remainder of this section, we wish to show that it is possible to weave some of the themes and issues identified in modern miscarriages of justice with some of the themes and issues presented at Jesus' trials. It is beyond the scope of this brief summary to interact with all the relevant literature and thought on this subject, although some of the points noted in this section are developed by one of the authors in further detail elsewhere.[54] As mentioned in the Introduction, our purpose is to present a "thought piece" which pushes the boundaries by locating the subject of the trials of Jesus broadly within the context of modern literature regarding miscarriages of justice.

First, we noted in 3(a) above how innocent people who become victims of a false allegation can attract the false charge in the first place. This is relevant in the case of Jesus' trials: there are reasons why the charge of being a "messianic pretender" had the same kind of "ring of truth". It has been argued elsewhere that, by the time of Jesus' trials, he had the stigma (we should, perhaps, say stigmata) of being labelled a false prophet, a false teacher who led Israel astray and a blasphemer, as well as an all-round troublemaker who forbade the payment of taxes and who threatened the reputation of the Temple.[55] For a start, Jesus' performance of "signs and wonders", taken in combination with his teachings, could attract the stigma of being labelled a false prophet and a false teacher (cf. *Deut*. 13:1-3 / MT 13:2-4). Moreover, it is not hard to see how Jesus could have become a target of false allegations due to his apparent threat to the powerful if it became widely accepted that he was a true prophet (e.g. *John* 11:47-48, 53). Similarly, the Gospels attest to a background of social knowledge in which Jesus was perceived and labelled by some as being a blasphemer. The tone and context of some of Jesus' claims about himself could have been understood by those hearing Jesus to assert some kind of special status or equivalence before God (e.g. *John* 10:31-36). Jesus was also stigmatised following attempts to entrap him over

[53] John repeatedly refers to "the Jews" as a source of deadly opposition (e.g. *John* 8:57-59). This term – contentious in the eyes of some for its apparent anti-Semitism – refers not to Jewish people in general since John, along with Jesus and the rest of his followers, are themselves ethnic Jews. In the Passion narrative, the term refers to Jewish authorities who either act as spokespersons for the nation (e.g. 11:49-54) or who "express hostility toward the Jewish Jesus" and his followers (e.g. *John* 5:18; see Martinus C. De Boer, "The narrative function of Pilate in John", in *Narrativity in Biblical and Related Texts*, eds. G. J. Brooke and J.-D. Kaestli [Leuven: Leuven University Press, 2000], 141-158, 147-148).

[54] See generally Jonathan Burnside, *God, Justice and Society: Aspects of Law and Legality in the Bible* (New York: Oxford University Press, 2010), 427-463.

[55] See Burnside, *ibid*., at 431-438.

the question of paying taxes to Caesar (*Mark* 12:13-17; *Luke* 23:1). Finally, the stigma of being the sort of person who would destroy the Temple may have been rooted in Jesus' prophecy regarding his resurrection, where the reference to the destruction of his body is (mis)understood by others as referring to the destruction of the Temple (e.g. *John* 2:19). However, there are plenty of other examples in which Jesus does explicitly prophesy the destruction of the Temple (e.g. *Luke* 19:41-44), which could be seen, by some, as a "threat from within". As we saw in 3(b), above, such threats are regarded as more insidious and dangerous than threats from without and are hence more liable to miscarriages of justice.

Second, we also noted in 3(b) above how miscarriages of justice can be triggered by a climate of fear or by moral panics linked to high profile events. According to John's Gospel, the raising of Lazarus from the dead by Jesus triggered a gathering of the Sanhedrin which was, effectively, the first trial of Jesus. Under Caiaphas the high priest, the Sanhedrin reached the decision – in Jesus' absence – that Jesus should die (*John* 11:49-53). The decision in John 11 is historically plausible given the febrile political climate of Israel at the time. Second Temple Judaism was characterised by the emergence of a number of rival Jewish sects, some of which were opposed to the religious establishment in Jerusalem and some of whom wanted revolution against Rome. Unsurprisingly, the Temple establishment kept tabs on these movements, with the general policy of "spot it and stop it" (cf. the early investigation of John the Baptist – *John* 1:19-27 – and the plot to kill the resurrected Lazarus; *John* 12:10). This was exactly the kind of social climate in which rumours could quickly spread about false prophecy and false teaching, thus creating a "moral panic", which creates the conditions for a miscarriage of justice. One of the hallmarks of moral panics, which apply as much today as then, is that they are thought to justify extreme measures on policy grounds (cf. the justification offered by Caiaphas: "You do not understand that it is expedient for you that one man should die for the people, and that the whole nation should not perish"; *John* 11:50).[56]

Third, we noted the relationship between 3(b) and 3(d) above, and the potential, in a negative climate of suspicion, for miscarriages of justice to be initiated by a maliciously-brought prosecution. We have already noted this in relation to the gathering of the Sanhedrin described in *John* 11:49-53 ("So from that day on they [the Sanhedrin] took counsel how to put him to death"; *John* 11:53). Interestingly, the high priest is described by John as speaking "prophetically" (*John* 11:51-52). In terms of sense construction the unquestioned authority of the high priest evokes the power of modern "experts" to initiate and sustain a false conviction based purely on their hypothesis and not on any empirical evidence.

Fourth, we noted in 3(c), above, how issues, charges and evidence that are

[56] See further *ibid.*, 438-439.

individually weak in themselves can be combined to provide weight against the accused in cases of innocent persons. A number of charges were gathered against Jesus, including false prophecy / leading the disciples astray (*John* 18:19), false teaching (*John* 18:19), destruction of the Temple (*Matt.* 26:61; *Mark* 14:57-58) and blasphemy (*Matt.* 26:65; *Mark* 14:63-64). The question is why, out of all the possible charges that could have been brought against Jesus, did these particular charges emerge?[57] This is a question of sense-construction, which means we have to ask: who is making sense and to whom? There are several different groups in the trials of Jesus, including the religious establishment and Pilate,[58] each of whom constructs a particular kind of sense. As far as the religious establishment was concerned they had to make sense of Jesus and his activities for an internal, Jewish, audience. For this group, the charge-sheet intuitively "made sense" because Jesus had already acquired the appropriate stigma during his public ministry. The charges emerged naturally from the nocturnal "trawl for evidence" (before Caiaphas and the religious establishment/Sanhedrin; *Matt*. 26:57-68, *Mark* 14:53, 55-65, *Luke* 22:54) because they were already plausible. But there is more to it than that. The charge-sheet was also plausible because the offences related to each other (what is often referred to in contemporary miscarriage of justice circles as "guilty by the weight of false allegations"; see 3(c), above). Here, each allegation alone does not stand up to critical scrutiny and has no evidential basis; however, together, a plethora of false allegations can make a compelling case, especially in a climate of "no smoke without fire".[59] Moreover, unlike, say, the offence profile of a modern day recidivist, who tends to commit a whole range of crimes, the charges against Jesus are all of the same type because they are all concerned with rival kingship. (Ultimately, though, it is Jesus' voluntary response to the high priest's question ("I adjure you by the living God ["I put you to the oath"] tell us if you are [claiming to be] the Christ, the Son of God" [*Matt.* 26:63]) – in which Jesus subverts the Sanhedrin's idea of what Israel's Messiah would be and do – that provides the high priest and the Sanhedrin with the necessary evidence – in their eyes – to reach a conviction.)[60]

Finally, we saw above in 3(d) and 3(e) how evidence can be "created" in the process of case construction. In the trials of Jesus, the charges against Jesus had to

[57] See further *ibid.*, 441-447.

[58] Others include Herod, the crowd and the condemned revolutionaries who are crucified alongside Jesus.

[59] This is not unrelated to the problem of *testes singulares* in Jewish law. This is the situation where there is only a single witness to a given offence, as opposed to multiple witnesses. The question is whether and, if so in what circumstances, one can rely on a combination of inadequate evidence to a series of separate but *related* offences. See further Jackson, *Essays on Halakhah*, *supra* n.1, at 59-87.

[60] See further Burnside, *God, Justice and Society*, *supra* n.54, at 442-444, 458-462.

make sense, not only for a Jewish audience but also for a Roman one.[61] The Romans were not interested in internal Jewish religious disputes unless they threatened the *Pax Romana* (the law and order of the Empire). From a miscarriage of justice perspective it is notable how each of the main charges that were present in the Jewish proceedings (false prophecy/teaching and blasphemy) could be spun in a Roman direction. The formal *accusatio* before Pilate presents the charges in political terms:

> "We found this man perverting our nation, and forbidding us to give tribute to Caesar, and saying that he himself is Christ a king" (*Luke* 23:2; chief priests speaking).

According to Luke's Gospel this "spin-doctoring" by the Sanhedrin presents the charge of false prophecy/teaching as "perverting the nation" and the blasphemy charge as "sedition". It is an example, not so much of "dirty thinking" but of "seditious thinking". The charge of "forbidding tribute to Caesar" – which the Gospel writers do not mention as part of the trial proceedings – would have sounded plausible in the light of the stigma Jesus had already acquired as a troublemaker and lawbreaker on the tax issue. More importantly, it fitted the stereotype of Jesus as an opponent of Caesar. False prophecy and blasphemy were not capital offences in Roman law, but challenging the Emperor fell within the provisions of *laesa maiestas* (offences against the majesty of the emperor; *Digest* 48.4),[62] which was punishable by crucifixion in the case of non-Roman citizens.

For all these reasons, then, when we read the Gospels in the light of the literature on miscarriages of justice, and especially from the point of view of sense-construction, we find we can detect a number of points of connection between modern miscarriages of justice and the trials of Jesus.

5. *Vindicating victims of miscarriages of justice*

Perhaps one of the most difficult and controversial areas in modern miscarriages of justice is the problem of vindicating the victims of miscarriages of justice. This, too, is largely a matter of sense construction, owing to the particular construction of legal verdicts as they relate to guilt and innocence.[63]

True vindication occurs only when victims of miscarriages of justice are completely exonerated, that is, proven to be factually, actually, innocent of the

61 See further *ibid.*, at 447-457.

62 See generally Floyd Seyward Lear, "*Crimen Laesae Maiestatis* in the *Lex Romana Wisigothorum*", *Speculum* 4 (1929), 73-87.

63 For a discussion of the semiotics of legal verdicts, including the Scottish verdict of "not proven" see Jackson, *Making Sense in Law*, *supra* n.4, at 26-29.

charge for which they were accused and convicted. However, criminal courts determine, not whether defendants are innocent, but whether they are "guilty" or "not guilty" of the specific charges brought against them in the context of the prevailing rules on the admissibility of evidence. As we have seen in 2-3, above, this can lead to the wrongful conviction of an innocent person. In the same way, appeal courts only quash convictions because fresh evidence or fresh arguments about evidence that were not available at the time of the original trial make them "unsafe in law". They do not declare successful appellants to be factually innocent. This means that evidence of innocence which was either available at the time of the original trial or which could have been made available, may not constitute grounds of appeal. As a result, innocent people are often unable to overturn their wrongful convictions and may languish in prison for the rest of their lives.[64] As such, miscarriages of justice are best seen as entirely "legalistic": they are defined by law and can only be overturned on the terms that the rules and procedures of the criminal justice system allow.[65]

In consequence, victims and their families carry the stigma and damage of the miscarriage of justice until and unless they can prove their factual innocence,[66] prompting victims like Michael O'Brien (see 3(c), above) to take a lie detector test on national television in 2008 in a desperate attempt to convince the "court of public opinion" of his innocence.[67] This was almost a decade after he had overturned his conviction in the Court of Appeal. This highlights the importance of vindication in terms of aiding victims of miscarriages of justice to move forward with their lives. It also shows the need to ensure that allegations, charges and convictions are truthful in the first instance, as people who are convicted of entirely false allegations are not accepted as innocent, even when all of the evidence that was brought against them is shown to be fallacious.

A case that illustrates this conundrum well is the Cardiff Three (not to be confused with the Cardiff Newsagent Three in 3(c), above). They were convicted for the murder of Lynette White in 1988 but overturned their convictions in 1992. However, they did not succeed in overturning their convictions because the appeal court accepted they were factually innocent. On the contrary, in line with all successful appeals they had to convince the Court of Appeal there had been a lack of integrity in the way that their convictions were obtained, rendering them unsafe

64 Naughton, *supra* n.32.

65 M. Naughton, "Redefining miscarriages of justice: a revived human rights approach to unearth subjugated discourses of wrongful criminal conviction", *British Journal of Criminology* 45 (2005), 165-182, at 165-167.

66 M. Naughton, "How big is the "iceberg?": A zemiological approach to quantifying miscarriages of justice", *Radical Statistics* 81 (2003), 5-17.

67 See Martin Shipton, "Test says man jailed for 11 years for murder IS innocent", *Western Mail*, 2 September 2008.

in law. This was made abundantly clear in Lord Taylor’s judgement which quashed the convictions. Lord Taylor asserted that whether the admission by one of the Three to the murder was true or not was “irrelevant”, as the oppressive nature of his questioning (the defendant was asked the same question 300 times) required the interview to be rejected as evidence.[68]

Not surprisingly, perhaps, this fuelled doubts about the innocence of the Three. For the next decade the men were universally shunned as guilty offenders who “got off on a technicality” and who turned to alcohol and drugs for solace amid personal and family meltdown. So, no doubt, things would have continued, until July 2003, when the real killer of Lynnette White, Jeffrey Gafoor, was identified by a “cold hit” on the National DNA Database and was convicted for her murder. It was the first time in British legal history that miscarriage of justice victims were formally vindicated[69] (and, as we saw in 3(a), above, this has been followed by the case of Stefan Kiszko). The case highlights the difficulties that the innocent face in achieving vindication: although their actual innocence is not dependent on the conviction of the real murderer – they are either innocent in fact or they are not – appeal courts deal only with legal constructions of guilt and innocence. They are unable and unwilling to pronounce on the subject of factual, actual innocence, which is external to the system. This undermines the legitimacy of the criminal justice process from the perspective of substantive justice.

6. *Vindication and the Resurrection of Jesus*

Reading the resurrection of Jesus in the light of modern miscarriage of justice cases raises the question of whether there is evidence of such a concern for vindication in the aftermath of Jesus’ own trials. We can ask: is this part of what is being communicated by the Gospel accounts of Jesus’ resurrection? Should the resurrection then be understood in terms of the vindication of an actually innocent victim of a miscarriage of justice? In the light of what we know about the extreme difficulties of obtaining vindication for the victims of miscarriages of justice, it is an intriguing line of enquiry.

In seeking to unpack the significance of Jesus’ resurrection, as presented in the *Gospels*, we must be careful to distinguish, as Wright does, between referent and meaning. The claim made by the early church that “God raised [Jesus] from the dead” (e.g. *Acts* 13:30) *refers* to an historical event that is said to take place three

[68] *Paris, Abdullahi and Miller* (1993) 97 Cr App R 99.

[69] M. Naughton, “Wrongful Convictions and Innocence Projects in the UK: Help, Hope and Education”, *Web Journal of Current Legal Issues* 3 (2006).

days after Jesus' crucifixion.[70] This (necessarily historical) issue is separate from the question of how to make sense of the event, in other words, what *meaning* should be ascribed to it. After all, acceptance of the bodily resurrection of Jesus, even today, need not commit us to the view that Jesus was the "son of God" in the sense that the New Testament understands it. For example, Pinchas Lapide is one modern orthodox rabbi who is happy to declare that he believes Jesus of Nazareth was bodily raised from the dead.[71] However this belief does not, on its own, make him a Christian. As far as he is concerned the resurrection simply means that Jesus was and is a "paver of the way" for the Messiah, to whom Israel should have paid attention. That is all. Likewise, it was perfectly possible for Jesus' contemporaries to have concluded, variously, that Jesus' resurrection was merely proof that there was "bodily life after death" or even, simply, that it was a "funny old world" which was even stranger than they thought. The fact that Jesus' resurrection was not understood to mean such things by the early church reminds us that making sense of things is something that takes place in the wider context of story and worldview. Jesus' Jewish disciples made sense of his resurrection in the light of a characteristically Jewish story and worldview, according to which Israel's God, the creator of the world, was at work in and through Israel (and uniquely, they believed, through Jesus) to deal decisively with evil in order to restore not only Israel but the world and creation to himself.

What does this have to do with vindicating the innocent victims of miscarriages of justice? Everything. Although there was a wide spread of beliefs in Second Temple Judaism regarding the fate of the dead,[72] for many Jews, suffering under cruel empires, hope in resurrection was inseparable from the hope of vindication in the face of injustice. Resurrection and vindication were synonymous. It was for this reason that the Maccabaean martyrs died at the hands of the Syrian tyrant Antiochus Epiphanes promising their torturers they would be vindicated by means of resurrection (e.g. "Better to be killed by men and cherish God's promise to raise us again. There will be no resurrection to life for you!"; 2 *Macc*. 7:14, New English Bible translation). This association between resurrection and vindication is also thought to lie behind the denial of belief in the resurrection by the conservative Sadducees; who knew only too well that talk of resurrection encouraged revolutionary behaviour.[73] Against this background one would expect Jesus' resurrection to be understood by his followers, very early on, as the reversal

[70] N.T. Wright, *The Resurrection of the Son of God. Christian Origins and the Question of God* (London: SPCK, 2003), Vol.3, p.735. For a discussion of whether claims to the resurrection of Jesus can properly be the subject of historical investigation see *ibid.*, at 685-718.

[71] Pinchas Lapide, *The Resurrection of Jesus: A Jewish Perspective* (London: SPCK, 1984).

[72] For a summary see Wright, *Resurrection*, *supra* n.70, at 129-206.

[73] Wright, *Resurrection*, *supra* n.70, at 38-140.

of an act of injustice.[74] It reverses the judgement that was passed by all those involved in Jesus' trial. This is in fact what we do find in Peter's addresses (*Acts* 3:12-26, 4:8-12) and in Paul's message to the Jewish synagogue in Antioch, as follows:

> My brothers, you descendants of Abraham's family, and others who fear God, to us the message of this salvation has been sent. Because the residents of Jerusalem and their leaders did not recognize him [i.e. Jesus of Nazareth] or understand the words of the prophets that are read every sabbath, they fulfilled those words by condemning him. *Even though they found no cause for a sentence of death*, they asked Pilate to have him killed. When they had carried out everything that was written about him, they took him down from the tree and laid him in a tomb. *But God raised him from the dead*; and for many days he appeared to those who came up with him from Galilee to Jerusalem, and they are now his witnesses to the people (*Acts* 13:26-31; italics added, New Revised Standard Version).[75]

Jesus had been executed as a messianic pretender, as a "king of the Jews". In the eyes of the early church this verdict was now reversed by the ultimate court of appeal – God himself. Moreover, the resurrection of Jesus is not presented as vindication for the wrongful conviction of a crime, but for the wrongful conviction for a crime that did not even happen (see 5 above). Overturning the verdict also has the effect of confirming a different judgement on Jesus' status, that is, Jesus' claim at his trial to be a Messiah who "share[d] the very throne of Israel's god, [and who] would be one of the central figures in a theophany" (*Matt.* 26:24).[76]

The idea that the resurrection vindicates Jesus' claim to be "son of God" powerfully illustrates the political implications of vindicating the innocent. At this point we need to recognise that the meaning of "son of God" here has several levels. First, the resurrection of Jesus was understood to be the way in which Israel's god was fulfilling Israel's eschatological hope (albeit very differently from how Jesus' Jewish disciples originally imagined it to be). The resurrection therefore vindicated Jesus as Israel's Messiah, as "son of god" in the Davidic sense of 2 *Samuel* 7 or *Psalm* 2.[77] Now was the time for "the nations of the world to be brought into submission to Israel's god".[78] Second, although the phrase "son of

74 Although there are of course important discontinuities between beliefs in the resurrection in the Second Temple period and the resurrection of Jesus, chief among which is that Jews who believed in the resurrection tended to look forward to the resurrection of all God's people at the end of the present age, rather than (as in Jesus' case) the resurrection of a single person ahead of the "age to come"; Wright, *ibid.*, 200-206.

75 It should be noted that the leaders and people are presented as acting in ignorance (cf. *Luke* 23:24).

76 N.T.Wright, *Jesus and the Victory of God* (London: SPCK, 1996), 643.

77 *Ibid.*

78 Wright, *Resurrection*, *supra* n.70, at 726.

god" had a messianic resonance to first century Jewish ears, the title was also applied to pagan rulers, and to Caesar in particular. Calling Jesus "son of God", in this context, was confrontational in the extreme. It built on "the Jewish critique of paganism to make a statement not just about Jesus but also about Israel's god, a statement designed to confront the pagan world with news of its rightful lord".[79] In this sense, the resurrection communicates that Jesus is "the world's true sovereign, the 'son of god' who claims absolute allegiance from everyone and everything in creation".[80] As far as the vindication of the victim of a miscarriage of justice is concerned it is, on its own terms, the most dramatic form of vindication imaginable. Seen from the perspective of the New Testament, it is a divine act that judges not only the justice process that produced the miscarriage of justice, but also the world.

Regardless of what one personally thinks about the New Testament's claims regarding the resurrection of Jesus, it certainly illustrates the subversive power of vindication. It enables supporters to tell a different story to that being told by those in authority and in a way that undercuts their power. Resurrection is the ultimate "wake-up" call. It put the early Christians on a collision course with other Jewish groups (including the authorities) that were telling very different stories of how Israel's God would act. The claim that God had vindicated a man whose life, work and teaching had provoked the utmost controversy was horrifying to Pharisees like Saul of Tarsus, who wasted no time persecuting Jesus' followers (*Acts* 9:1-2).[81] The same was true for the Sadducees, who had always (rightly) seen talk of resurrection as revolutionary (*Acts* 4:1-2).[82] The massive political implications of Jesus' resurrection speaks directly into the challenge faced by those seeking to overturn and prevent the wrongful conviction of innocent people in the modern world. As Wright puts it:

> The story of Jesus of Nazareth which we find in the New Testament offers itself, as Jesus himself had offered his public work and words, his body and blood, as the answer to this multiple problem: the arrival of God's kingdom precisely in the world of space, time and matter, the world of injustice and tyranny, of empire and crucifixions… No wonder the Herods, the Caesars and the Sadducees of this world, ancient and modern, were and are eager to rule out all possibility of actual resurrection. They are, after all, staking a counter-claim on the real world. It is the real world that the tyrants and bullies (including intellectual and cultural tyrants and bullies) try to rule by force, only to discover that in order to do so they have to quash all rumours of resurrection, rumours that would imply that their greatest weapons,

79 *Ibid.*, at 725.

80 *Ibid.*, at 731.

81 *Ibid.*, at 727.

82 *Ibid.*, at 138-140.

> death and deconstruction, are not after all omnipotent.[83]

The difficulty that modern victims of miscarriage of justice have in obtaining vindication (see 5, above) illustrates the lengths to which modern authorities and criminal justice systems will go to quash what Wright describes as "rumours of resurrection", or what we might call rumours of vindication; anything in fact that might call into question their exercise of coercive or judicial power.

A dramatic illustration of this can be found in the case of Sean Hodgson, convicted in 1982 for the rape and murder of Teresa de Simone, and who recently overturned his conviction after spending 27 years in prison when DNA testing proved he could not have committed the crime. In the eyes of the public, Hodgson was totally vindicated when the Ministry of Justice gave permission to exhume the body of a man who had originally confessed to the murder in 1983, the year after Hodgson was convicted. The body of David Lace was duly dug up from Kingston Cemetery, Portsmouth and found to be a complete match with samples found at the original crime scene. Yet despite this, Alastair Nisbet, senior crown prosecutor for the Crown Prosecution Service in Hampshire and the Isle of Wight, said:

> The Crown Prosecution Service has advised Hampshire Constabulary that the evidence would have been sufficient to prosecute David Lace, if he were alive, with the offences of the rape and murder of Teresa De Simone. *But this is in no sense a declaration that he was guilty of the offences*. Had Mr Lace lived, our decision would merely have authorised the police to begin the legal process by charging him. Only after trial does a jury decide whether a person is guilty or not, on a higher standard of proof – beyond reasonable doubt (italics added).[84]

Even this dramatic turn of events was not enough to secure vindication for Sean Hodgson in the eyes of the authorities. As in the time of Jesus, judicial authorities are loathe to recognise vindication – even when it comes through raising the dead.[85]

83 *Ibid.*, at 737.

84 Cited in Alastair Jamieson, "Teresa de Simone murder: David Lace named as prime suspect after exhumation", *The Telegraph*, 17 September 2009.

85 Since the Gospels attest that, after the resurrection, Jesus only appears to his followers, it could be objected that the political authorities do not have an opportunity to vindicate Jesus, because the physical evidence is withheld from them. However, as far as the New Testament is concerned, the authorities do have an opportunity to respond to the physical evidence of the empty tomb. According to Matthew, this has great significance for the authorities in particular because it is the chief priests and the Pharisees themselves who, with Pilate's authority, make Jesus' tomb secure by sealing the stone and placing it under Roman guard to prevent grave-robbing (*Matt.* 27:62-66) and who subsequently bribe the soldiers to cover-up their experience of the events surrounding Jesus' resurrection by spreading a false rumour of how Jesus' grave came to be empty (*Matt.* 28:4, 11-15).

6. *Conclusion*

Viewing the trials of Jesus as a miscarriage of justice is a painful and difficult subject, especially for a Jewish audience. It is to Jackson's credit that, as part of his Jewish-Christian dialogue, he has not shied away from sharing his insights. It should also be said that modern miscarriages of justice themselves raise questions that are no less difficult, or awkward, nor should we underestimate the pain caused to its victims. The problems are endemic to the subject, whether we are looking at an ancient case or modern examples. The very topic of miscarriage of justice challenges our comfortable assumptions about the legitimacy of the criminal justice process. They force us to engage with its failures and limitations in a way that many find disturbing. As a result, it is an area that benefits particularly from a cross-disciplinary approach. By juxtaposing modern miscarriage of justice cases with the trials of Jesus we can see how one of the most notorious cases in history has parallels with the day to day injustices we uncover in our own time and draws together issues about which many of us would rather not speak. Semiotics has an important role to play because it is the stories that are told – and perhaps more importantly, the authority of those with the power to tell the stories about how things should be viewed – that shape our judgments. How else can we explain how innocent people are convicted?