

# Tulsa Law Review

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Volume 55 | Issue 3

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Spring 2020

## The Silence of Jesus and Its Significance for the Accused

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### Recommended Citation

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# THE SILENCE OF JESUS AND ITS SIGNIFICANCE FOR THE ACCUSED

Hala Khoury-Bisharat & Rinat Kitai-Sangero\*

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*Though Jesus' trial is probably the most famous trial in history, the literature's reference to Jesus' silence during the trial is relatively limited. By addressing possible reasons for the silence of Jesus before the Sanhedrin, before Herod Antipas, and before the Roman Prefect, Pontius Pilate, this Article attempts to undermine the intuitive tendency to infer guilt based on silence, and to demonstrate that innocent defendants may have good reasons to remain silent, and hence, that silence is compatible with innocence. It argues that Jesus' silence may be of broader relevance to the connection between the right to*

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## I. INTRODUCTION

Jesus' trial is probably the most famous trial in history.<sup>1</sup> According to the canonical Gospels of Matthew, Mark, and Luke, Jesus was put on trial before the ancient Jewish judicial body called the Sanhedrin for the religious offenses of blasphemy, false prophecy, false teaching, leading Israel astray, and intending to destroy the Temple, and Jesus was also brought before the Roman Prefect of Judea, Pontius Pilate, under Roman law for the political offense of treason or sedition.<sup>2</sup> John mentions on its face only one trial, which was conducted before Pilate, and Luke informs of a third trial before Herod Antipas, the tetrarch of Galilee. Irrespective of the dispute over the Sanhedrin's competence to inflict a death penalty in the time of Jesus,<sup>3</sup> it is certain that Pilate sentenced Jesus to crucifixion.<sup>4</sup>

Much of the literature on Jesus' trial addresses the conduct and attitudes of the Jewish religious leadership, the Jewish crowd, and the Roman Prefect, Pontius Pilate, and as a result reference to Jesus' silence during the trial is relatively limited. This article fills this gap by focusing on Jesus' silence during his trials. In fact, Jesus' silence was selective:

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1. 2 WALTER M. CHANDLER, *THE TRIAL OF JESUS FROM A LAWYER'S STANDPOINT: THE ROMAN TRIAL*, 158 (1908); JONATHAN BURNSIDE, *GOD, JUSTICE AND SOCIETY: ASPECTS OF LAW AND LEGALITY IN THE BIBLE* 427 (2011). Virtually, all we know about Jesus' trial comes from the accounts of the Gospels. PAUL W. GOOCH, *REFLECTIONS ON JESUS AND SOCRATES: WORD AND SILENCE* 4 (1996).

2. BURNSIDE, *supra* note 1, at 431 (regarding the nature of the charges against Jesus); 2 CHANDLER, *supra* note 1, at 10–11 (1908); JOSEF BLINZLER, *THE TRIAL OF JESUS: THE JEWISH AND ROMAN PROCEEDINGS AGAINST JESUS CHRIST DESCRIBED AND ASSESSED FROM THE OLDEST ACCOUNTS* 168 (Isabel & Florence McHugh trans., 1959). *But see* Edith Z. Friedler, *The Trial of Jesus as a Conflict of Laws?*, 32 *IRISH JURIST* (NEW SERIES) 398, 399 (1997) (stating that “there was only one trial and it was before Pontius Pilate”); Catherine P. Best & Isidor M. Wolfe, *The Trial of Jesus, Revisited*, 50 *ADVOC. (VANCOUVER)* 199, 201–03 (1992) (arguing that there was probably no trial conducted before the Sanhedrin). Some scholars note that it is unclear whether a whole trial or only an investigation was conducted by the Sanhedrin. *See* S.G.F. BRANDON, *THE TRIAL OF JESUS OF NAZARETH* 92 (1968). Supporting the opinion that the Sanhedrin only conducted a preliminary examination rather than a formal trial, *see* DARRELL L. BOCK, *BLASPHEMY AND EXALTATION IN JUDAISM: THE CHARGE AGAINST JESUS IN MARK 14:53–65*, at 191–92 (2000).

3. For an argument that Sanhedrin did not have the power to execute a sentence of death, *see, e.g.*, BLINZLER, *supra* note 2, at 157; BRANDON, *supra* note 2, at 90–92; BURNSIDE, *supra* note 1, at 440; 2 CHANDLER, *supra* note 1, at 18 (1908); 1 WALTER M. CHANDLER, *THE TRIAL OF JESUS FROM A LAWYER'S STANDPOINT: THE HEBREW TRIAL* 56, 182–83 (1908); M. DUPIN, *TRIAL OF JESUS BEFORE CAIAPHAS AND PILATE: BEING A REFUTATION OF MR. SALVADOR'S CHAPTER ENTITLED “THE TRIAL AND CONDEMNATION OF JESUS”* 59–64 (n.p., Cambridge Press 1839); GRESHAM GEORGE FOX, *JESUS, PILATE AND PAUL* 92, 94 (1955); ERNEST RENAN, *RENAN'S LIFE OF JESUS* 251 (William G. Hutchison trans., Lonson, Walter Scott Publ'g Co., 1897); Best & Wolfe, *supra* note 2, at 201–02. For an argument that the Sanhedrin could have passed a death sentence but could not have executed it, *see* William J. Gaynor, *The Arrest and Trial of Jesus Viewed from a Legal Standpoint*, 11 *AM. LAW.* 241, 245 (1903). *But see* Haim H. Cohn, *Reflections on the Trial and Death of Jesus*, 2 *ISR. L. REV.* 332, 335 (1967) (the Sanhedrin retained the power to inflict a death penalty). On the dispute regarding the jurisdiction of the Sanhedrin, *see* DAVID W. CHAPMAN & ECKHARD J. SCHNABEL, *THE TRIAL AND CRUCIFIXION OF JESUS: TEXTS AND COMMENTARY* 15–16 (2015). According to recent studies, the Sanhedrin was “not a permanent administrative institution but a consultative body convened ad hoc by the incumbent or a former high priest for the purpose of deliberating political questions as well as investigating religious offenses.” *Id.* at 16.

4. PAUL WINTER, *ON THE TRIAL OF JESUS* 9 (1961); William A. Herin, *The Trial of Jesus*, 7 *U. FLA. L. REV.* 47, 52 (1954); CHAPMAN & SCHNABEL, *supra* note 3, at 161 (stating that “Pilate had alone the authority to try capital cases in the province”). Jesus was executed by crucifixion, which was a classic Roman method of execution. BRANDON, *supra* note 2, at 91; MAX RADIN, *THE TRIAL OF JESUS OF NAZARETH* 253 (1931). It was not recognized by Jewish law. 1 CHANDLER, *supra* note 3, at 101.

he remained silent during various parts of his trial but responded to questions concerning his identity.

Silence on the part of the accused is intuitively interpreted by the average person as a sign of guilt. Innocent persons do not need to resort to silence as they have nothing to hide. On the contrary, innocent persons will seek to clear themselves as quickly as possible by providing explanations to refute the suspicions against them.<sup>5</sup> As Bentham reasoned, innocence claims the right to speak, while guilt demands the privilege to remain silent.<sup>6</sup> Hence, silence implies guilt.

When it comes to Jesus' silence, however, the intuition of the average person retreats in the face of the belief that Jesus was an innocent victim. Jesus' silence is exalted as "dignified,"<sup>7</sup> as well as "noble and majestic."<sup>8</sup> By addressing possible reasons for the silence of Jesus, this Article attempts to undermine the intuitive tendency to infer guilt based on silence, and to demonstrate that innocent defendants may have good reasons to remain silent and silence is compatible with innocence.

Because the four Gospels differ in their narrations of the course of the criminal proceedings, distinguished by additions, omissions, and slight contradictions, Part II of the article sets out the descriptions of Jesus' trial provided in each Gospel and contemplates their common characteristics. This article is based on the accounts set forth in the Gospels for purposes of discussion<sup>9</sup> and does not address the criticism on the accounts portrayed in them. However, this article expands in the appropriate places the literal readings of the Gospels. Part III considers possible reasons for the silence of Jesus in light of the Gospels' accounts, and Part IV concludes with the insights that emerge from the article.

## II. THE GOSPELS' ACCOUNTS OF JESUS' TRIAL

### A. *The Account of Matthew*

Matthew describes two trials. The first trial was held before the Sanhedrin.<sup>10</sup> The chief priests, and indeed the entire Sanhedrin, sought false witnesses against Jesus.<sup>11</sup> Two such witnesses eventually came forward and testified that Jesus stated that he was able to destroy the Temple of God and build another in three days.<sup>12</sup> This accusation attests to the perception of Jesus as an internal threat to the Jewish community.<sup>13</sup> This threat was real.

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5. Department of Justice, Office of Legal Policy, "Truth in Criminal Justice" Series Office of Legal Policy: *Adverse Inferences from Silence*, 22 U. MICH. J.L. REFORM 1005, 1049–50 (1989); LARRY LAUDAN, TRUTH, ERROR, AND CRIMINAL LAW 152 (2006).

6. JEREMY BENTHAM, A TREATISE ON JUDICIAL EVIDENCE 241 (M. Dumont ed., Rothman & Co. 1981) (1825).

7. RENAN, *supra* note 3, at 258.

8. 2 CHANDLER, *supra* note 1, at 126.

9. We assume the reliability of the Gospels' accounts, while remaining cognizant that the Gospels were not purported to be historical documents, but rather intended to convey religious messages. On this point, see, e.g., Best & Wolfe, *supra* note 2, at 199; Cohn, *supra* note 3, at 333. For an opinion according to which the Gospels should be treated like any other historical texts, see BURNSIDE, *supra* note 1, at 428–29.

10. *Matthew* 26:59.

11. *Matthew* 26:59.

12. *Matthew* 26:61.

13. Jonathan Burnside & Michael Naughton, *Semiotics, Miscarriages of Justice and the Trials of Jesus*, in JEWISH LAW ASSOCIATION STUDIES XXI 'WISDOM AND UNDERSTANDING': STUDIES IN JEWISH LAW IN HONOUR

Scholars believe that Jesus did indeed speak of physical destruction of the Temple since he preached for mercy instead of sacrifice and offered a lifestyle that rendered the Temple redundant.<sup>14</sup> Essentially, Jesus' past actions in the Temple had already temporarily suspended the activity in it.<sup>15</sup> Furthermore, though the members of the Sanhedrin knew that Jesus did not claim himself to be a Messiah of the same kind as other pretenders, Jesus threatened to destroy sacred symbols of Judaism, such as the Sabbath, and was perceived by them as a false prophet, capable of driving the Israelites out of the way of fulfilling the commandments.<sup>16</sup>

The High Priest demanded Jesus to respond to the Temple accusation.<sup>17</sup> His demand, however, was met with silence.<sup>18</sup> The High Priest did not pursue this accusation further, but rather interrogated Jesus about whether or not he was the Messiah, the Son of God.<sup>19</sup> While the majority of the people of second-temple Judaism believed in resurrection under a Messiah, this idea posed a political threat to the Sadducees (the aristocrats that the High Priest was appointed from).<sup>20</sup> The Sadducees opposed the concept of life after death.<sup>21</sup> After all, the threat of death is a powerful weapon for the ruler, and without it, the ruler's ability to threaten the subjects is substantially weakened.<sup>22</sup>

Jesus indirectly admitted that he was the Messiah, the Son of God, with the words, "You have said so. But I tell you, from now on you will see the Son of Man seated at the right hand of Power and coming on the clouds of heaven."<sup>23</sup> On its face, this statement was brazen in the extreme, given that Moses himself only had the honor of seeing God from behind.<sup>24</sup> With this assertion, Jesus identified himself with God,<sup>25</sup> and perhaps relegated God to the status of a man, in the eyes of members of the Sanhedrin, who regarded Jesus as a man.<sup>26</sup> Additionally, such a statement could have been interpreted as a false prophecy.<sup>27</sup> Matthew recounted that Jesus had indeed told his disciples that he was the Son of God.<sup>28</sup> Assuming that Jesus was speaking literally,<sup>29</sup> then by claiming divine attributes and placing himself on an equal footing with God or so close to God, it is likely that Jesus did indeed commit the religious transgression of blasphemy.<sup>30</sup> Upon hearing

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OF BERNARD S. JACKSON 17, 34 (Leib Moscovitz & Yosef Rivlin eds., 2012).

14. N.T. WRIGHT, *JESUS AND THE VICTORY OF GOD* 61, 335 (1996).

15. BURNSIDE, *supra* note 1, at 437.

16. WRIGHT, *supra* note 14, at 547–49.

17. *Matthew* 26:62.

18. *Matthew* 26:63.

19. *Id.*

20. N.T. WRIGHT, *THE NEW TESTAMENT AND THE PEOPLE OF GOD* 211–12 (1992).

21. *Id.*

22. N.T. WRIGHT, *THE RESURRECTION OF THE SON OF GOD* 730–31 (2003, reissued 2017).

23. *Matthew* 26:64. On this regard see: 1 CHANDLER, *supra* note 3, at 198.

24. *Exodus* 33:18–23; see also JOHN DUNCAN M. DERRETT, *AN ORIENTAL LAWYER LOOKS AT THE TRIAL OF JESUS AND THE DOCTRINE OF THE REDEMPTION* 31 (1966).

25. 1 CHANDLER, *supra* note 3, at 198; Burnside & Naughton, *supra* note 13, at 33.

26. DERRETT, *supra* note 24, at 31; BURNSIDE, *supra* note 1, at 437.

27. Burnside & Naughton, *supra* note 13, at 33.

28. *Matthew* 20:23; *Matthew* 24:36.

29. For this assumption see: Cohn, *supra* note 3, at 354.

30. 1 CHANDLER, *supra* note 3, at 207–08; Gaynor, *supra* note 3, at 244; WRIGHT, *supra* note 14, at 550; BURNSIDE, *supra* note 1, at 436–37. The threat regarding the Temple could also be considered blasphemous. Roger P. Booth, *We Have a Law: The Trials of Jesus of Nazareth*, 6 DENNING L.J. 1, 12 (1991). However, some

Jesus' statement, the High Priest flatly declared that because Jesus had blasphemed, no further witnesses were needed.<sup>31</sup> The attendants decided that Jesus deserved to be put to death.<sup>32</sup>

At any rate, the Sanhedrin did not execute Jesus but instead handed him over to Pilate on the following morning.<sup>33</sup> Some scholars posit that only the Roman Prefect was authorized to execute a death sentence, and hence a new trial was necessary.<sup>34</sup> The sole accusation before Pilate seems to have been Jesus' kingship. While blasphemy and false prophecy were not offenses under Roman law<sup>35</sup> and the Romans had no interest in internal religious disputes among the Jews,<sup>36</sup> claims to kingship constituted the grave offense of treason against Rome and challenged its authority, since Caesar alone was the King of Judea.<sup>37</sup> Furthermore, as a revolutionary Messiah, Jesus was capable of stirring riots in the country and disturbing public peace.<sup>38</sup> His claim of being so close to God and his perception of himself as a judge alongside God constituted a threat to both the political and religious establishments.<sup>39</sup> Therefore, as Burnside put it, "there is . . . clear continuity between the charges in the Jewish and Roman proceedings, both of which cohere around the idea of kingship."<sup>40</sup>

Jesus responded, "You say so" to Pilate's question, "Are you the King of the Jews?"<sup>41</sup> One could argue that, with this response, Jesus admitted to being the King of the Jews,<sup>42</sup> or, conversely, that he implicitly denied it by identifying it as Pilate's claim, not his.<sup>43</sup> However, by restating the accusation against him, Jesus neither confirmed nor denied it, and his response was evasive.<sup>44</sup> This response by Jesus may also be considered

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scholars posit that the claim to be the Messiah was not considered blasphemy. Cohn, *supra* note 3, at 355; DAVID R. CATCHPOLE, *THE TRIAL OF JESUS: A STUDY IN THE GOSPELS AND JEWISH HISTORIOGRAPHY FROM 1770 TO THE PRESENT DAY* 132 (1971); Booth, *supra*, at 8–9. For the opinion that the "expression 'Son of the God' was common among the Apocalyptists," see SOLOMON ZEITLIN, *WHO CRUCIFIED JESUS?* 168 (1942). Darrell Bock provides a thorough discussion of the reasons for conceiving Jesus' answer as blasphemy. According to Bock, though the very claim to be Messiah is not blasphemy, and though Jesus did not express God's name in an insulting manner, his words were blasphemous. See BOCK, *supra* note 2, at 2, 230–31. By his personal self-exaltation of being so close to God and of being eschatological judge, Jesus attacks both the unique honor of God and God's chosen leaders. *Id.* at 28–29, 110–12, 182–83, 202–09, 231, 234–36; see also BURNSIDE, *supra* note 1, at 443. Bock emphasizes that the blasphemy is expressed in Jesus' "self-claim to share authority with God." BOCK, *supra* note 2, at 202; see also BURNSIDE, *supra* note 1, at 444.

31. *Matthew* 26:65.

32. *Matthew* 26:66.

33. *Matthew* 27:1–2.

34. BLINZLER, *supra* note 2, at 166. See also *supra* note 3 and accompanying text.

35. 2 CHANDLER, *supra* note 1, at 106.

36. Burnside & Naughton, *supra* note 13, at 36; BURNSIDE, *supra* note 1, at 453.

37. 2 CHANDLER, *supra* note 1, at 109–12; WRIGHT, *supra* note 22, at 575 (stating that the Jewish authorities knew that "a would-be rebel king would be of more interest to Pilate than a Jewish blasphemer"); see also Burnside & Naughton, *supra* note 13, at 36.

38. WRIGHT, *supra* note 14, at 549.

39. BOCK, *supra* note 2, at 208–09.

40. BURNSIDE, *supra* note 1, at 453.

41. *Matthew* 27:11.

42. Compare to *Matthew* 25:26 ("Then Judas, the one who would betray him, said, 'Surely you don't mean me, Rabbi?' Jesus answered, 'You have said so.'"). For an opinion that this response was an admission that was sufficient for conviction according to Roman law, see Cohn, *supra* note 3, at 337.

43. FOX, *supra* note 3, at 92.

44. MATTHEW L. SKINNER, *THE TRIAL NARRATIVES: CONFLICT, POWER AND IDENTITY IN THE NEW*

a refusal to answer on the merits.<sup>45</sup> Some scholars have described his response as enigmatic.<sup>46</sup> To Pilate's astonishment, Jesus maintained silence in the face of further accusations leveled against him by the chief priests and the elders.<sup>47</sup> The nature of these accusations is not stated.

Without announcing the verdict, Pilate asked the crowd whether he should release a prisoner named Barabbas or Jesus who was called the Messiah for the Passover feast.<sup>48</sup> Knowing that Jesus had been handed over to the authorities for reasons of envy, Pilate decided to spare Jesus; Pilate was also probably influenced by his wife's pleas not to harm Jesus following a dream she had of his innocence.<sup>49</sup> However, swayed by the chief priests and the elders, the crowd chose Barabbas over Jesus.<sup>50</sup> Upon Pilate's question regarding Jesus' due fate, the crowd demanded that Pilate crucify him.<sup>51</sup> Then came the episode, which only appears in Matthew, in which Pilate washed his hands in front of the crowd to signify his own absolution of responsibility, following which Pilate proclaimed himself innocent of the shedding of Jesus' blood. The crowd took the responsibility on themselves and on behalf of their children.<sup>52</sup> Pilate then scourged Jesus and delivered him to be crucified.<sup>53</sup> The accusation inscribed and attached on top of the cross read, "This is Jesus the King of the Jews."<sup>54</sup> Jesus was condemned, then, on the charge of being the King of the Jews.

### *B. The Account of Mark*

The first trial was held before the Sanhedrin. The chief priests and the rest of the council sought incriminating testimony against Jesus but did not obtain it.<sup>55</sup> Though many false witnesses came forward, there was no consistency in their testimony.<sup>56</sup> Some of the false witnesses testified to have heard Jesus say that he would destroy the Temple made with human hands and in three days would erect another without hands, but their testimonies were also contradictory regarding this point.<sup>57</sup> The High Priest attempted to elicit a response from Jesus by asking him, "Have you no answer? What is it that they testify against you?" However, Jesus "was silent and did not answer."<sup>58</sup> The High Priest seemed then to have abandoned the Temple charge, for which the burden of proof had not been satisfied.<sup>59</sup> Placing him under oath, the High Priest repeatedly asked Jesus whether

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TESTAMENT 44 (2010).

45. RADIN, *supra* note 4, at 114.

46. SKINNER, *supra* note 44, at 35 (regarding a similar response in Mark).

47. *Matthew* 27:12–14.

48. *Matthew* 27:17.

49. *Matthew* 27:18–19.

50. *Matthew* 27:20–21.

51. *Matthew* 27:22–23.

52. *Matthew* 27:24–25.

53. *Matthew* 27:26.

54. *Matthew* 27:37.

55. *Mark* 14:55.

56. *Mark* 14:56.

57. *Mark* 14:57–59.

58. *Mark* 14:60–61.

59. GIOVANNI ROSADI, *THE TRIAL OF JESUS* 179 (1905).

he was the Messiah, the Son of the Blessed One. Thus Jesus was actually asked about his identity and not about any utterances he had made about it.<sup>60</sup> We know, however, that Jesus did indeed proclaim himself the Messiah.<sup>61</sup> Jesus affirmed his identity, replying, “I am . . . and you will see the Son of Man seated at the right hand of the Power and coming with the clouds of heaven.”<sup>62</sup> This was a clear confession. The High Priest undoubtedly understood the response as such, for he “tore his clothes and said, ‘Why do we still need witnesses? You have heard his blasphemy! What is your decision?’ All of them condemned him as deserving death.”<sup>63</sup> The Sanhedrin, then, passed a death sentence,<sup>64</sup> or, alternatively, decided that sufficient evidence for a conviction had been gathered in accordance with Roman law.<sup>65</sup>

In the morning, after holding consultation, the chief priests handed Jesus over to Pilate,<sup>66</sup> and the second trial took place. To Pilate’s question, “Are you the King of the Jews?” Jesus did not answer directly, responding, “You say so.”<sup>67</sup> The chief priests then levelled numerous accusations at Jesus, which Mark does not record. Nor does Mark relate to the strength of the evidence presented against Jesus. After hearing the accusations, Pilate asked Jesus whether he had an answer to the many charges brought against him.<sup>68</sup> “But Jesus made no further reply, so that Pilate was amazed.”<sup>69</sup> Despite his surprise at Jesus’ silence, Pilate asked the Jews whether he should release the King of the Jews for the Passover feast. The Jews chose to spare Barabbas’ life and called for Pilate to crucify Jesus. “So Pilate, wishing to satisfy the crowd, released Barabbas for them; and after scourging Jesus, he handed him over to be crucified.”<sup>70</sup> The inscription attached to the top of the cross read, “The King of the Jews.”<sup>71</sup>

At the Roman trial, Jesus replied evasively to the question of whether he was the King of the Jews and declined to answer the further accusations brought against him. He was convicted of being the King of the Jews. It may be that his evasive response was interpreted as a confession.

### C. *The Account of Luke*

Luke makes no mention of any interrogation conducted by the Sanhedrin prior to trial. In Luke’s account, Jesus was taken to the Sanhedrin after being arrested and beaten by one of the guards.<sup>72</sup>

The only question the judges asked Jesus to answer was whether he was the

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60. *Id.* at 179.

61. *Mark* 8:29–30.

62. *Mark* 14:61–62.

63. *Mark* 14:63–64.

64. BLINZLER, *supra* note 2, at 125.

65. Booth, *supra* note 30, at 10.

66. *Mark* 15:1.

67. *Mark* 15:2.

68. *Mark* 15:3–4.

69. *Mark* 15:5.

70. *Mark* 15:15.

71. *Mark* 15:26.

72. *Luke* 22:63–64.

Messiah.<sup>73</sup> It was the only matter about which Jesus was interrogated. Jesus' reply was evasive and reflective of his doubts that his words would be accurately understood: "If I tell you, you will not believe; and if I question you, you will not answer. But from now on the Son of Man will be seated at the right hand of the power of God."<sup>74</sup> Then "[a]ll of them asked, 'Are you, then, the Son of God?' He said to them, 'You say that I am.'"<sup>75</sup> The judges interpreted these words as an explicit confession and declared, "What further testimony do we need? We have heard it ourselves from his own lips!"<sup>76</sup> Jesus did indeed proclaim himself before his disciples to be the Messiah.<sup>77</sup> No mention is made of a verdict pronounced by the Sanhedrin.<sup>78</sup>

According to Luke, Jesus did respond to the accusations before the Sanhedrin, which revolved solely around his Messiahship. Though Jesus did not confess, one may argue that he admitted obliquely to be the Son of God.

After the Sanhedrin trial, Jesus was transferred to Pilate.<sup>79</sup> The assembly made specific accusations against Jesus, stating, "We found this man perverting our nation, forbidding us to pay taxes to the Emperor, and saying that he himself is the Messiah, a king."<sup>80</sup> These accusations were at least partially false because Jesus had expressed his loyalty to Rome by endorsing the obligation to pay the tribute due to the Roman Caesar in his famous saying, "Render to Caesar the things that are Caesar's and to God the things that are God's."<sup>81</sup>

No witnesses who substantiated the charges are mentioned. After hearing the accusations, Pilate questioned Jesus solely on the subject of whether he was the King of the Jews, to which Jesus replied, "You say so."<sup>82</sup> Pilate then announced to the chief priests and to the crowds that he had found no basis for the accusations against Jesus.<sup>83</sup> The chief priests and the crowds insisted that there was a case against Jesus and added that "[h]e stir[ed] up the people by teaching throughout all Judea, from Galilee where he began even to this place."<sup>84</sup>

Luke is the only Evangelist who documented the story of the conflict of jurisdictions. When Pilate realized that Jesus was a Galilean, he claimed to have no jurisdiction over him and sent him off to Herod Antipas, the tetrarch of Galilee (and the son of Herod the Great), who was himself in Jerusalem at the time.<sup>85</sup> Pilate probably wanted to rid himself of the case and to have Jesus acquitted by Herod.<sup>86</sup> Herod was eager to meet Jesus, about

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73. Luke 22:66–67.

74. Luke 22:67–69.

75. Luke 22:70.

76. Luke 22:71.

77. Luke 9:20–21.

78. SKINNER, *supra* note 44, at 71.

79. Luke 23:1.

80. Luke 23:2.

81. Luke 20:25; *see also* Matthew 22:21; Mark 12:17. *But see* BURNSIDE, *supra* note 1, at 437 (stating that Jesus' response may have been interpreted as subversive).

82. Luke 23:3.

83. Luke 23:4.

84. Luke 23:5.

85. Luke 23:6–7.

86. BLINZLER, *supra* note 2, at 196.

whom he had heard much, and hoped to see him perform a miracle.<sup>87</sup> Herod questioned Jesus at some length, but Jesus did not respond.<sup>88</sup> The topics of the questioning are not specified. Herod did not claim jurisdiction over Jesus, but returned him to Pilate with contempt and derision. It may be that Herod understood Jesus' silence as evidence of his inability to perform miracles<sup>89</sup> or that his silence left Herod feeling incensed and humiliated.<sup>90</sup>

From that point on there was not even a semblance of a trial.<sup>91</sup> Some scholars argue that Jesus had already been convicted by Pilate, who stayed the execution in order to allow Herod to assert his own jurisdiction and judge Jesus himself.<sup>92</sup> Other scholars contend that Pilate did not hold a trial, but rather confirmed the death sentence already passed by the Sanhedrin.<sup>93</sup> However, as we have seen, the Sanhedrin probably could not have passed a death sentence.<sup>94</sup>

At any rate, after Herod declined to take responsibility for Jesus' sentence, Pilate negotiated with the chief priests, the leaders, and the people. He declared that neither himself nor Herod had found fault in Jesus that would warrant putting him to death and that Jesus should be whipped and then released.<sup>95</sup> The derisory manner in which Herod handed back Jesus indeed implies that he did not consider Jesus and his claims to kingship to be dangerous.<sup>96</sup> Given that Herod ordered the execution of John the Baptist without trial, the release of Jesus could have been construed as a declaration of Jesus' innocence.

No verdict of guilt, then, was pronounced,<sup>97</sup> and the suggestion to whip Jesus despite his innocence of the charges against him was intended as a compromise.<sup>98</sup> The crowd, however, demanded that Pilate release Barabbas and crucify Jesus. Having failed to persuade the crowd, Pilate finally yielded to them.<sup>99</sup> The inscription attached to the top of the cross read, "This is the King of the Jews" in Greek, Latin, and Hebrew lettering.<sup>100</sup>

Jesus, then, maintained silence before Herod and gave evasive answers to Pilate regarding the question of whether he was the King of the Jews.

#### D. *The Account of John*

John does not mention on its face any role that the Sanhedrin played in Jesus' trial.<sup>101</sup> He only records one question that was directed at Jesus following his arrest by

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87. *Luke* 23:8.

88. *Luke* 23:9.

89. 2 CHANDLER, *supra* note 1, at 125.

90. *Id.* at 127; F.L. Grant, *The People of Israel vs. Jesus of Nazareth*, 6 *DICTA* 17, 22 (1929).

91. 2 CHANDLER, *supra* note 1, at 156.

92. RADIN, *supra* note 4, at 204.

93. BLINZLER, *supra* note 2, at 199.

94. *See supra* note 3 and accompanying text.

95. *Luke* 23:13–16.

96. *See* BLINZLER, *supra* note 2, at 12–13.

97. 2 CHANDLER, *supra* note 1, at 148.

98. *Id.* at 157.

99. *Luke* 23:18–25.

100. *Luke* 23:38.

101. Matthew, Mark, and Luke are dubbed the Synoptics, while John "is curiously different in detail, focus and approach." GOOCH, *supra* note 1, at 4. Perhaps the Sanhedrin had not conducted any trial at all but rather an

Annas, the father-in-law of the High Priest. The High Priest questioned Jesus about his disciples and about his teaching. Jesus answered him, “I have spoken openly to the world . . . and I spoke nothing in secret. Why do you question me? Question those who have heard what I spoke to them; they know what I said.”<sup>102</sup> As a result of Jesus’ refusal to cooperate, a representative of the High Priest struck Jesus across the face.<sup>103</sup> Jesus answered him, “If I have spoken wrongly, testify of the wrong; but if rightly, why do you strike me?”<sup>104</sup>

Jesus was brought to Pilate’s headquarters in the morning.<sup>105</sup> The accusations against him were not specified. To Pilate’s question about the nature of the accusations against Jesus, Jesus’ opponents replied only that were he not a malefactor, they would not have handed him over to Pilate.<sup>106</sup> Their answer was plainly evasive and vague.<sup>107</sup> The opponents made it clear that they believed Jesus deserved to be put to death. When Pilate asked them why they did not judge Jesus in accordance with their own law, they alluded to their lack of authority to impose a death penalty.<sup>108</sup> Pilate’s suggestion and the response of Jesus’ opponents are comprehensible in light of the assumption that the Sanhedrin had no power to adjudicate capital offenses.<sup>109</sup>

After hearing his opponents, Pilate asked Jesus whether he was the King of the Jews.<sup>110</sup> Since the opponents had cited no specific charges, Pilate’s question indicated his familiarity with at least the charge of kingship.<sup>111</sup> The idea of the kingdom of God had both a political and a theological significance. It expressed the Jews’ historic expectations that God would serve as their king and, consequently, free them from the reign of any foreign rulers and reestablish the kingdom of Israel. It also expressed the theological concept according to which the God of Israel is the only one worthy of reign.<sup>112</sup>

Jesus asked Pilate whether Pilate had asked the question of his own initiative, or whether others had prompted him to do so.<sup>113</sup> With this question, Jesus probably sought to examine whether his claim to the kingdom should be weighed from a Jewish or a Roman perspective.<sup>114</sup> Pilate replied that he was not a member of the Jewish people and that Jesus’ own nation, including the chief priests, had handed him over and asked Jesus what he had

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investigation. See Friedler, *supra* note 2, at 399 (stating that “there was only one trial and it was before Pontius Pilate”); Best & Wolfe, *supra* note 2, at 201–02 (arguing that there was probably no trial conducted before the Sanhedrin); BRANDON, *supra* note 2, at 92.

102. *John* 18:20–21.

103. *John* 18:22.

104. *John* 18:23.

105. *John* 18:28.

106. *John* 18:29–30.

107. 2 CHANDLER, *supra* note 1, at 149.

108. *John* 18:31.

109. See *supra* note 3 and accompanying text; see also Booth, *supra* note 30, at 13 (learning from this answer that the Sanhedrin indeed had no authority to impose the death penalty, and that if John had erred in quoting the answer about the Sanhedrin’s lack of authority, he would probably have been corrected by others).

110. *John* 18:33.

111. SKINNER, *supra* note 44, at 95.

112. WRIGHT, *supra* note 20, at 303; WRIGHT, *supra* note 14, at 203–04.

113. *John* 18:34.

114. Grant, *supra* note 90, at 21; Robert L. Stearns, *The People of Israel vs. Jesus of Nazareth*, 6 *DICTA* 4, 14 (1929).

done.<sup>115</sup> Following Pilate's response, Jesus made it clear that his kingdom was not of this world, adding that had his kingdom been a worldly kingdom, his servants would have fought for him.<sup>116</sup> Some scholars claim that, in a general climate of resistance to Rome, the very proclamation of the coming Kingdom of Heaven and the arrival of the Messiah constituted a political threat to Rome.<sup>117</sup> This is evidenced by the concerns among the Jewish leadership that Jesus' miracles would bring harsh Roman reaction.<sup>118</sup> Other scholars, however, opine that Jesus actually did respond by way of confession and avoidance.<sup>119</sup> At any rate, Jesus made it clear that his kingdom in no way clashed with the Kingdom of Rome.<sup>120</sup> Perhaps still bothered by the political implications of speaking about kingship,<sup>121</sup> Pilate asked Jesus again if he was a king, and Jesus confirmed that he was, adding that he had come into the world to testify to the truth.<sup>122</sup> Pilate then asked Jesus the famous question: "What is truth?"<sup>123</sup> He did not wait for Jesus' answer, or did not receive an answer to that question,<sup>124</sup> probably because he was not interested in the truth.<sup>125</sup> It is indeed difficult to imagine that Pilate was sufficiently competent to discern the truth.<sup>126</sup> Pilate then informed the crowd that he had found there to be no case against Jesus.<sup>127</sup> He probably understood that Jesus' pretensions posed no threat to Rome and that Jesus was not a political offender.<sup>128</sup> At this point Pilate had to set Jesus free. However, Pilate nonetheless treated Jesus as a convicted person and asked the crowd whether they wanted to release the King of the Jews for the Passover feast.<sup>129</sup> The Jews shouted back that it was Barabbas who should be granted amnesty.<sup>130</sup>

Pilate then flogged Jesus, and his soldiers mocked and struck him.<sup>131</sup> Pilate once again told the crowd that he had found no case against Jesus.<sup>132</sup> When the chief priests and the police saw Jesus wearing the crown of thorns and the purple robe, they cried out, "Crucify him! Crucify him!"<sup>133</sup> For the third time Pilate said that he had found no case against Jesus and suggested that his opponents crucify Jesus themselves.<sup>134</sup> The opponents insisted that Jesus should die in accordance with the law for proclaiming himself to be the

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115. *John* 18:35.

116. *John* 18:36.

117. BRANDON, *supra* note 2, at 145.

118. *John* 11:48.

119. 2 CHANDLER, *supra* note 1, at 151.

120. Grant, *supra* note 90, at 21; Stearns, *supra* note 114, at 14.

121. SKINNER, *supra* note 44, at 96.

122. *John* 18:37.

123. *John* 18:38.

124. *Id.*

125. 2 CHANDLER, *supra* note 1, at 114–15; BLINZLER, *supra* note 2, at 193.

126. SKINNER, *supra* note 44, at 96.

127. *John* 18:38.

128. 2 CHANDLER, *supra* note 1, at 153.

129. *John* 18:39.

130. *John* 18:40.

131. *John* 19:1–3.

132. *John* 19:4.

133. *John* 19:6.

134. *Id.*

Son of God.<sup>135</sup>

Pilate was afraid when he heard this accusation.<sup>136</sup> He asked Jesus where he was from but got no answer.<sup>137</sup> In astonishment, Pilate asked a taciturn Jesus whether he indeed refused to speak to him and whether he was aware that he had the power to either release or crucify him.<sup>138</sup> Thus, it appears that silence was an unusual reaction by a defendant. Jesus replied that Pilate's power came from above and that the sin of those who delivered him was greater than Pilate's sin.<sup>139</sup> After this exchange, Pilate attempted to release Jesus in certain unrevealed ways.<sup>140</sup> However, the crowd insisted that Jesus be crucified, and issued an implicit threat to Pilate by informing him that if he were to release this man then Pilate was no friend of Caesar, as anyone who claims to be a king speaks against Caesar.<sup>141</sup> Following the crowd's repeated calls to crucify Jesus and their claims to have no king but Caesar,<sup>142</sup> Pilate handed Jesus over to them for crucifixion.<sup>143</sup> Above the cross was written, "This is the King of the Jews" in Greek, Latin, and Hebrew lettering.<sup>144</sup>

According to John, Jesus answered Pilate's questions regarding his kingship. Though Pilate found no real guilt on the part of Jesus, he yielded to the demands of the crowd, fearful of releasing a person who spoke of being a king. Jesus stayed silent only in response to Pilate's question about where he was from, but it was not his silence at that point that led to his conviction.

### *E. Common Characteristics*

All four Gospels, while differing in their accounts of the trial, portray a picture of passivity on the part of Jesus. According to all the Gospels' accounts, Jesus did not mount a serious defense. He contested neither the accusations nor the punishment. Apart from the minor exception recounted by John, according to whom Jesus told Pilate that his kingdom was not of this world, Jesus did not offer a defense and did not attempt to refute the accusations against him. He did not try to explain his actions or thoughts to his judges and made no real attempt to persuade them of his innocence. He did not examine the witnesses against him and did not produce evidence on his own behalf. Jesus' selective silence was a clear expression of this passivity. It may be the case that his silence contributed to, or even brought about, his crucifixion.<sup>145</sup>

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135. *John* 19:7.

136. *John* 19:8.

137. *John* 19:9.

138. *John* 19:10.

139. *John* 19:11.

140. *John* 19:12.

141. *Id.*

142. *John* 19:15.

143. *John* 19:16.

144. *John* 19:19–20.

145. See Robert Morgan, 'Nothing More Negative...' *A Concluding Unscientific Postscript to Historical Research on the Trial of Jesus*, in *THE TRIAL OF JESUS* 135, 140 (Ernst Bammel ed., 1970) (concluding that Jesus' execution occurred "because the man who is the subject of the investigation remains so strangely silent"); WRIGHT, *supra* note 14, at 553; BURNSIDE, *supra* note 1, at 450 (stating that "the problem for Pilate is that Jesus is no help whatsoever in constructing a defense"). Pilate, however, did not conclude guilt from Jesus' silence. *Id.* at 459. For a different opinion regarding the contribution of Jesus' silence to his crucifixion see *supra* notes 172–173 and accompanying text.

The article now turns to the question of why Jesus took a passive stance and did not address the merits of the accusations against him.

### III. POSSIBLE REASONS FOR JESUS' SILENCE

#### A. *Placing the Obligation and Burden of Proof on the Prosecution*

Under modern law, the state bears the burden of proving guilt. Accused individuals do not need to prove their innocence.<sup>146</sup> They are not required to explain their behavior and may remain passive during the criminal process. The United States Supreme Court clarified that “[t]he government in its contest with the individual [is required] to shoulder the entire load.”<sup>147</sup> The prosecution bears the burden of establishing the defendant’s guilt beyond a reasonable doubt in order to secure a conviction at the conclusion of the trial.

The prosecution is not only under an obligation to meet the burden of proof at the end of the trial, but should also make a *prima facie* case against the defendant by the close of its case. If the prosecution does not introduce sufficient evidence for conviction at this point so that no reasonable fact-finder would convict the defendant on the basis of the evidence produced, defendants are entitled to submit a claim of “no case to answer” and, if it is accepted, to an acquittal on the spot.<sup>148</sup>

Somewhat similar principles were well established in the Jewish law of the first century. Jewish law allows for conviction only on the basis of the testimony of at least two witnesses whose testimony is consistent with regard to the material details.<sup>149</sup> Given this standard, in the absence of reliable witnesses who provide consistent testimonies, as was the case in the account of Mark,<sup>150</sup> no *prima facie* case was made against Jesus and a verdict of acquittal should have been pronounced. Jesus was, therefore, not required to offer a defense and could instead have opted to remain silent.<sup>151</sup> Thus, as one scholar suggests, his reply to the High Priest, as described by John, “Why question me? Ask those who have heard me. Surely they know what I said,”<sup>152</sup> “could well represent the reply of a prisoner in such circumstances: rather than incriminate himself, he suggests that his

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146. STEFAN TRECHSEL, HUMAN RIGHTS IN CRIMINAL PROCEEDINGS 348 (2005).

147. *Murphy v. Waterfront Comm’n of N.Y. Harbor*, 378 U.S. 52, 55 (1964) (quoting 8 JOHN HENRY WIGMORE, EVIDENCE 371 (McNaughton rev., 1961)).

148. *The Queen v. Noble*, 1 S.C.R. 874, 897 (S.C.C. 1997); Penny Darbyshire, *Criminal Procedure in England and Wales*, in CRIMINAL PROCEDURE IN EUROPE 39, 58 (Richard Vogler & Barbara Huber eds., 2008); Rosemary Pattenden, *The Submission of No Case—Some Recent Developments*, in CRIME AND THE CRIMINAL LAW 558, 565 (1982); J.A. Coutts, *No Case to Answer*, 27 J. CRIM. L. 230, 233 (1963); Gregory W. O’Reilly, *England Limits the Right to Silence and Moves towards an Inquisitorial System of Justice*, 85 J. CRIM. L. & CRIMINOLOGY 402, 420 (1994); David S. Rudstein, *Retrying the Acquitted in England Part III: Prosecution Appeals Against Judges’ Rulings of “No Case to Answer”*, 13 SAN DIEGO INT’L L.J. 5, 15–20 (2011).

149. 1 CHANDLER, *supra* note 3, at 147, 275; JAMES C. MCRUER, THE TRIAL OF JESUS 48 (1964); John E. Richards, *The Trial of Jesus from a Jurist’s Standpoint*, 7 LAW. & BANKER & S. BENCH & B. REV. 358, 361 (1914); *see also Deuteronomy* 19:15 (“One witness is not enough to convict anyone accused of any crime or offense they may have committed. A matter must be established by the testimony of two or three witnesses.”).

150. *Mark* 14:56–59.

151. CHARLES EDMUND DELAND, THE MIS-TRIALS OF JESUS 212–13 (1914); Charles A. Hawley, *The Trial of Jesus*, 4 KY. L.J. 25, 30 (1916); Herin, *supra* note 4, at 50; *see also* BURNSIDE, *supra* note 1, at 442 (stating that “the Gospels report Jesus as saying only that the Temple will be destroyed, not that Jesus would perform this act himself. Jesus’ silence implies that there is no case to answer”).

152. *John* 18:21.

interrogator gathers the information required for himself.”<sup>153</sup> The High Priest’s officer struck him for giving this reply. Jesus responded to the blow, as described by John, with the words, “If I have said something wrong[,] . . . testify as to what is wrong. But if I spoke the truth, why did you strike me?”<sup>154</sup> Here, Jesus gives a clear indication of the fact that no implicating evidence was produced against him.

According to Matthew and Luke, however, incriminating evidence against Jesus was introduced through the testimony of false witnesses before the Sanhedrin. John notes that when Jesus made the statement attributed to him by the witnesses that he would destroy the Temple and rebuild another in three days,<sup>155</sup> he was referring symbolically to the temple of his body and not to the literal building of the Temple.<sup>156</sup> Notably, however, John does not mention that the Temple charge was presented during the trial (recall that John does not mention a trial before the Sanhedrin at all). Some scholars emphasize that Jesus did not say that he would destroy the Temple, but had only spoken hypothetically, stating that if the Temple were to be destroyed he would be able to rebuild it,<sup>157</sup> or that he was forecasting the future destruction of the Temple.<sup>158</sup> As we have seen, however, the Temple charge did have merit.<sup>159</sup>

One way or another, and irrespective of the truth of the testimonies on their merits, it seems that, according to Matthew and Luke, *prima facie* evidence of Jesus’ guilt was introduced at the trial before the Sanhedrin.

As for the trial before Herod, Luke mentions no specific accusations against Jesus. In the absence of *prima facie* evidence, there was no need for defense and response.<sup>160</sup>

Before Pilate, Jesus was essentially charged with treason or sedition and condemned for claiming to be King of the Jews. The Gospels noted no specific charges against Jesus, with the exception of certain specific charges mentioned by Luke alone and consequently no proof of guilt was provided. The United States Supreme Court related an ancient anecdote attributed to the Roman Emperor Julian. According to this anecdote, Emperor Julian, who judged the matter of a Roman governor more than three hundred years after Jesus’ era, ruled that mere claims without proof were insufficient to secure a conviction, and he acquitted a defendant without requiring him to respond to the accusations against him. To the prosecutor’s exclamation: “‘Oh, illustrious Caesar! if it is sufficient to deny, what hereafter will become of the guilty?’” to which Julian replied, “[i]f it suffices to accuse, what will become of the innocent?”<sup>161</sup> Pilate should arguably have conveyed the same message: without sufficient proof to convict, no defense is required.

If no sufficient proof for conviction is introduced at the close of the prosecution’s case, silence is a good defense tactic. By declining to answer, Jesus was simply “standing

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153. BRANDON, *supra* note 2, at 131.

154. *John* 18:23.

155. *John* 2:19.

156. *John* 2:21.

157. 1 CHANDLER, *supra* note 3, at 192–93; DUPIN, *supra* note 3, at 44; ROSADI, *supra* note 59, at 184–85; *see also* BURNSIDE, *supra* note 1, at 442.

158. Booth, *supra* note 30, at 11.

159. BURNSIDE, *supra* note 1, at 437; WRIGHT, *supra* note 14, at 335.

160. DELAND, *supra* note 151, at 227.

161. *Coffin v. United States*, 156 U.S. 432, 455–56 (1895).

strictly upon his rights as a Jew under the law.”<sup>162</sup> Accused persons have a right to defy accusations by silence and to plan their strategy not by presenting a defense, but by relying on the prosecution’s failure to meet the burden of proof required for conviction.<sup>163</sup> “Through silence, the accused person challenges the prosecution: ‘So prove your case, if you have any.’”<sup>164</sup>

The use of silence to defy may protect an innocent person from a wrongful conviction.<sup>165</sup> The common-sense view that the innocent will incur no harm by telling the truth is misleading.<sup>166</sup> Innocent persons may be convicted at trial due to reliance on confused or inaccurate statements made as a result of absentmindedness, distractedness, an unreliable memory, stress or pressure, or a misunderstood statement.<sup>167</sup> People sometimes contradict themselves when in a state of fear and agitation. The knowledge of their own innocence does not necessarily lessen the sense of fear, anxiety, and even paranoia to which innocent persons may succumb.<sup>168</sup> Not all innocent persons facing criminal accusations are capable of providing coherent explanations with which to defend themselves.<sup>169</sup> In such cases, their prospects may improve if they elect to remain silent.

In Jesus’ case, it is claimed that he made no answer before the Sanhedrin because he knew that his responses would be misinterpreted.<sup>170</sup> As Blinzler put it, “[h]is steadfast silence deprived the court of the possibility of exploiting, for its purpose, despite its lack of unanimity, the evidence given.”<sup>171</sup>

Indeed, according to Mark, it seems that the accusations against Jesus regarding the destruction and rebuilding of the Temple were abandoned and that Jesus’ silence rendered the prosecution’s task of providing proof of his guilt impossible. Had Jesus also maintained his silence before the Sanhedrin regarding his identity as the Son of God, and before Pilate, regarding his identity as King of the Jews, there is a reasonable likelihood that his conviction on these charges, too, would have been untenable.<sup>172</sup> As stated above, the prosecution failed to make even a prima facie case against Jesus, and an accused person “should not be compelled to provide the first evidence against himself.”<sup>173</sup> Jesus’ silence

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162. Richards, *supra* note 149, at 361.

163. Rinat Kitai-Sangero & Yuval Merin, *Probing into Salinas’s Silence: Back to the “Accused Speaks” Model?*, 15 NEV. L.J. 77, 101–03 (2015).

164. *Id.* at 103.

165. Roger Leng, *The Right to Silence Debate*, in SUSPICION AND SILENCE: THE RIGHT TO SILENCE IN CRIMINAL INVESTIGATIONS 18, 27 (David Morgan & Geoffrey M. Stephenson eds., 1994).

166. Danny Ciracò, *Reverse Engineering*, 11 WINDSOR REV. LEGAL SOC. ISSUES 41, 67–68 (2001).

167. Akhil Reed Amar & Renée B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 MICH. L. REV. 857, 900–01 (1995). For instances of misunderstanding, see Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2 WIS. L. REV. 291, 338 (2006). About lack of memory, see generally Steven B. Duke, Ann Seung-Eun Lee & Chet K.W. Pager, *A Picture’s Worth a Thousand Words: Conversational Versus Eyewitness Testimony in Criminal Convictions*, 44 AM. CRIM. L. REV. 1, 15–16 (2007).

168. Alan Hirsch, *Threats, Promises, and False Confessions: Lessons of Slavery*, 49 HOW. L.J. 31, 51–52 (2005).

169. Leng, *supra* note 165, at 33.

170. BLINZLER, *supra* note 2, at 101.

171. *Id.* at 101–02.

172. S. Srinivasa Aiyar, *Legality of the Trial of Jesus*, 22 LAW. & BANKER & CENT. L.J. 121, 123 (1929).

173. Vincent Martin Bonventre, *An Alternative to the Constitutional Privilege Against Self-Incrimination*, 49 BROOK. L. REV. 31, 59 (1982).

certainly supports the right to remain silent until a prima facie case was presented. It accords with the Latin maxim “*nemo tenetur prodere seipsum*” (no man is bound to accuse himself), which was recognized by *ius commune* in the sixteenth century.<sup>174</sup> Though this rule was quite limited in its scope compared with modern Anglo-American law,<sup>175</sup> it recognized the accused person’s right against being made the object of a charge in the absence of significant indications of guilt.<sup>176</sup>

### *B. Challenging Authority and Separating Citizens from the State*

Some scholars opine that Jesus’ silence was rooted in his unwillingness to cooperate with the Roman government in order not to legitimize its authority to judge him.<sup>177</sup> Jesus regarded Pilate as unqualified to judge him because Pilate’s perception of power and authority was completely different from the concept of power and authority in the Kingdom of Heaven. Through his silence, Jesus distanced himself from Pilate and his authority, and made it clear that there was no point of connection between the nature of his kingdom and the earthly rule of Pilate.<sup>178</sup>

Furthermore, Jesus’ non-recognition of Pilate’s authority to judge him did not necessarily stem from the Roman occupation, or even from Pilate’s own personal character and whether or not it rendered him unqualified to serve as a judge. Jesus apparently did not challenge the authority of a specific institution or persons, but rather disbelieved in the feasibility of human justice itself. On several occasions, Jesus expressed his deep disbelief in the legitimacy of judgments made by human beings. He famously instructed the people: “[D]o not judge, so that you may not be judged. For with the judgment you make you will be judged, and the measure you give will be the measure you get.”<sup>179</sup> And again, “[D]o not judge and you will not be judged. Do not condemn, and you will not be condemned. Forgive, and you will be forgiven.”<sup>180</sup> Since everyone is a sinner, no one has the moral standing to cast the first stone or judge others.<sup>181</sup> From this standpoint, judgment may come solely from God. Indeed, when Pilate asked Jesus whether he was aware that he had the authority either to release or to crucify him, Jesus replied that Pilate had no authority except that granted to him by God.<sup>182</sup>

Even without casting doubt on the legitimate authority of the state to exercise judicial powers, however, a defendant may believe that, in light of the limitations of human judgment, he has no chance of being acquitted and thus that there is no point in mounting a defense. For example, a defendant may feel helpless in the face of overwhelming

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174. R.H. Helmholz, *Origins of the Privilege Against Self-Incrimination: The Role of the European Ius Commune*, 65 N.Y.U. L. REV. 962, 967 (1990).

175. *Id.* at 983.

176. *Id.* at 984; Helen Silving, *The Oath: Part I*, 68 YALE L.J. 1329, 1346 (1959). See also Pat McInerney, *The Privilege against Self-Incrimination from Early Origins to Judges’ Rules: Challenging the Orthodox View*, 18 INT’L J. EVIDENCE & PROOF 101, 105–06 (2014) (regarding the oath *ex officio* procedure).

177. Earl Schwartz, *The Trials of Jesus and Paul*, 9 J. L. & RELIGION 501, 503–04 (1992).

178. SKINNER, *supra* note 44, at 45 (adding that Jesus’ silence “suggests neither frustrated resignation nor obedience to a call to suffer”).

179. *Matthew* 7:1.

180. *Luke* 6:37.

181. *John* 8:3–11.

182. *John* 19:11.

evidence given by false witnesses or mistaken eye-witnesses.

One, albeit relatively rare, reason for defendants to exercise the right to silence is their non-recognition of the state's authority to judge them. This non-recognition may stem from various reasons such as the secular nature of the government, in the view of some religious extremists, or in the case of a corrupt regime.

Moreover, a state's jurisdiction is always limited. And just as a state cannot require a person who has no connection to it to submit to its authority, so Jesus, who declared that his kingdom was a heavenly kingdom, did not recognize the authority of any earthly regime to judge him.

Through his silence, Jesus drew a line between the Kingdom of Heaven and the kingdoms of Earth. Likewise, the right to silence creates separation between the government and the citizen. The right to silence is essential to establishing equilibrium between the state and the accused and to bridging the gap of power between them. The idea that the state should make concessions towards accused persons because of its superior power was ridiculed by Bentham, who dubbed it the "fox hunter's argument."<sup>183</sup> Bentham's criticism does have merit. The state's superior power does not preclude it from using relevant and probative evidence against the accused.<sup>184</sup> However, the right to silence does and should place limits on the state's power. The fact that accused persons can elect not to respond to their accusers and that they maintain an inviolable autonomous space helps to safeguard their dignity as human beings. The right to silence further makes it clear to law enforcement authorities that their ability to overpower the will of the accused is limited and that this will must be respected. The accused is not a mere tool in the hands of the authorities. Thus, the privilege against self-incrimination "preserves a subject before the law who does not bow to the interrogator's demand and remains a subject."<sup>185</sup> A sense of unlimited power is dangerous; it may lead to arbitrary rule and dictatorship. There is "a tendency in human nature to abuse power."<sup>186</sup> By placing limits on the state's power, the right to silence curbs misconduct by law enforcement authorities. It forces them to convince rather than to coerce accused persons to cooperate.<sup>187</sup> Abolishing the right to silence would leave accused persons helpless against the power of the state. Accused persons would be compelled to answer any questions put to them by accusers who may display confidence in their guilt. They may be forced to answer questions that affront their dignity or that are posed to them in an insulting manner and even if their accuser screams at them: "Stop lying! Do you think that I'm stupid?" They would similarly be required to answer repetitive questions from their accusers, over and over. And, as Dean Wigmore warned, "If there is a right to an answer, there soon seems to be a right to the expected answer,—that is, to a confession of guilt."<sup>188</sup>

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183. 5 JEREMY BENTHAM, *RATIONALE OF JUDICIAL EVIDENCE* 238 (Rotham & Co. 1995) (1827).

184. Steven Penney, *Theories of Confession Admissibility: A Historical View*, 25 AM. J. CRIM. L. 309, 378 (1998).

185. Leigh Gilmore, *How We Confess Now: Reading the Abu Ghraib Archive*, in *MODERN CONFESSORIAL WRITING* 180, 185 (Jo Gill ed., 2006).

186. *Ullmann v. United States*, 350 U.S. 422, 428 (1956).

187. Richard A. Leo, *The Impact of Miranda Revisited*, 86 J. CRIM. L. & CRIMINOLOGY 621, 670, 678 (1996) (analyzing *Miranda's* impact on police interrogation practices).

188. 8 WIGMORE, *supra* note 147, at 309.

Interrogations are quite often not conducted under the protection of the presumption of innocence. Interrogators frequently assume that the accused person is the offender they are looking for and set up the interrogation in accordance with that assumption.<sup>189</sup> In Dostoyevsky's Book, *The Brothers Karamazov*, Mitya, who is mistakenly accused of parricide, believes that a short explanation will suffice to bring about his release: "But to business, gentlemen, I am ready, and we will make an end of it in one moment; for, listen, listen, gentlemen! Since I know I'm innocent, we can put an end to it in a minute. Can't we? Can't we?"<sup>190</sup> Proceedings are not, however, organized on the basis of the innocent accused person's belief. Thus, the right to silence enables accused persons, inter alia, to bring an excessive interrogation to a halt. After making a declaration of their innocence, they do not then have to endure an interrogation that is interminable and relentless.<sup>191</sup>

When Jesus was interrogated by the High Priest, he declined to answer him directly. Instead, with his reply of, "Why do you ask me? Ask those who heard what I said to them; they know what I said,"<sup>192</sup> he separated himself from his accuser. The police who struck Jesus on the face<sup>193</sup> refused to respect his choice to set limits on the power of the state. The right to silence aims to ensure that this choice is respected.

### C. *The Unfairness of the Proceedings*

A central possible explanation for Jesus' silence may be the unfair nature of the proceedings held against him. On the assumption that a formal trial, rather than a preliminary examination, was conducted,<sup>194</sup> the proceedings before the Sanhedrin were patently unfair, biased, and even illegal. The legal proceedings as described in the Gospels do not conform to the criminal procedures prescribed by ancient Jewish law. Some scholars conclude that this discrepancy, taken together with the fact that the trial by the Sanhedrin was not mentioned before Pilate, indicates that such a trial never took place and that only one trial, conducted before Pilate, was in fact held.<sup>195</sup>

Undoubtedly, the trial recounted in three of the Gospels was fraught with procedural

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189. John Baldwin, *Police Interrogation: What Are the Rules of the Game?*, in SUSPICION AND SILENCE: THE RIGHT TO SILENCE IN CRIMINAL INVESTIGATIONS 66, 67 (1994); Jonathan Simon, *Recovering the Craft of Policing: Wrongful Convictions, the War on Crime, and the Problem of Security*, in WHEN LAW FAILS: MAKING SENSE OF MISCARRIAGES OF JUSTICE 115, 120 (Charles J. Ogletree, Jr. & Austin Sarat eds., 2009); Saul M. Kassin, *On the Psychology of Confessions: Does Innocence Put Innocents at Risk?*, 60 AM. PSYCHOLOGIST 215, 219 (2005); Saul M. Kassin, *Human Judges of Truth, Deception and Credibility: Confident But Erroneous*, 23 CARDOZO L. REV. 809, 814 (2002); Wayne T. Westling & Vicki Wayne, *Videotaping Police Interrogations: Lessons from Australia*, 25 AM. J. CRIM. L. 493, 502 (1998).

190. FYODOR DOSTOEVSKY, *THE BROTHERS KARAMAZOV* 356 (Constance Garnett trans., 1933).

191. George C. Thomas III, Book Note, *Miranda's Illusion: Telling Stories in the Police Interrogation Room*, 81 TEX. L. REV. 1091, 1111 (2003) (reviewing WELSH S. WHITE, *MIRANDA'S WARNING PROTECTIONS* (2001)).

192. *John* 18:21.

193. *John* 18:22.

194. For an assumption according to which the procedure used is consistent with a preliminary examination rather than with a formal trial, see BOCK, *supra* note 2, at 194.

195. Cohn, *supra* note 3, at 344; Friedler, *supra* note 2, at 431.

irregularities.<sup>196</sup> The arrest at night was illegal.<sup>197</sup> Legal proceedings should not have been conducted before a single judge.<sup>198</sup> The trial was conducted on the eve of Passover, even though Jewish law forbids the conduct of trial on a feast day or on the Sabbath.<sup>199</sup> This illegality is particularly striking given the significance of Passover.<sup>200</sup> The Sanhedrin condemned Jesus on the day of the trial, in violation of the Jewish law, which mandates a deliberation of at least two days prior to conviction.<sup>201</sup> Furthermore, according to Jewish law, the youngest of the judges should have voted first in order to avoid being influenced by the elder and more experienced judges. However, in Jesus' trial the High Priest voiced his opinion before the balloting.<sup>202</sup> If the verdict was unanimous, then it was illegal under Jewish law, which assumes that a verdict of condemnation wherein no judge made a point in favor of the defendant is indicative of mob violence rather than meticulous judicial review.<sup>203</sup> Moreover, in Jewish law even a voluntary confession is inadmissible at trial and cannot serve as a proof of guilt,<sup>204</sup> while Jesus was condemned by the Sanhedrin on the basis of his uncorroborated confession.<sup>205</sup> Given that the rules of procedure and evidence in Jewish law make it extremely difficult to prove the defendant's guilt,<sup>206</sup> the ease with which Jesus was condemned casts serious doubt on the fairness of the proceedings. We do not know, though, whether the laws portrayed in the Mishna, written around the year 200 A.D., were in force at the time of Jesus' trial.<sup>207</sup> However, even setting aside the detailed tenets of Jewish law, there is no doubt that in the trial of Jesus, as described in the Gospels, no minimal guarantees of due process were observed.

The judges of the Sanhedrin decided in advance that Jesus deserved a death sentence.<sup>208</sup> The Pharisees plotted to kill Jesus since he had broken the rules of the

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196. MCRUER, *supra* note 149, at 52–53. *But see* ZEITLIN, *supra* note 30, at 69–83, 163–66 (making a distinction between the political Sanhedrin, which had jurisdiction over political offenders, was subservient to Rome, and was not bound by the regular rules, and the religious Sanhedrin, which had jurisdiction over religious offenders, was independent of Rome, and had no involvement in the trial of Jesus. Jesus was tried only as a political offender).

197. 1 CHANDLER, *supra* note 3, at 227, 255–59.

198. *Id.* at 238–42; Hawley, *supra* note 151, at 28. *But see* BLINZLER, *supra* note 2, at 143–44 (noting that Annas interrogated Jesus unofficially and not in his capacity as a judge).

199. 1 CHANDLER, *supra* note 3, at 263–66; Richards, *supra* note 149, at 358; BLINZLER, *supra* note 2, at 134.

200. BLINZLER, *supra* note 2, at 134; Friedler, *supra* note 2, at 414.

201. ROSADI, *supra* note 59, at 163; 1 CHANDLER, *supra* note 3, at 267–70; *see also* Friedler, *supra* note 2, at 414.

202. 1 CHANDLER, *supra* note 3, at 292–94; Richards, *supra* note 149, at 362; BLINZLER, *supra* note 2, at 135.

203. 1 CHANDLER, *supra* note 3, at 279–86. However, because this rule is not mentioned in the Mishna but only in the Gemara, it is probable that this rule was not in force in this period. BLINZLER, *supra* note 2, at 136.

204. 1 CHANDLER, *supra* note 3, at 141, 271–78; Herin, *supra* note 4, at 47; Aiyar, *supra* note 172, at 44; ROSADI, *supra* note 59, at 180; MCRUER, *supra* note 149, at 52–53; Booth, *supra* note 30, at 10. On this fascinating rule, see, e.g., Irene Merker Rosenberg & Yale L. Rosenberg, *In the Beginning: The Talmudic Rule Against Self-Incrimination*, 63 N.Y.U. L. REV. 955, 976 (1988); Samuel J. Levine, *An Introduction to Self-Incrimination in Jewish Law, with Application to the American Legal System: A Psychological and Philosophical Analysis*, 28 LOY. L.A. INT'L & COMP. L. REV. 257, 264 (2006).

205. 1 CHANDLER, *supra* note 3, at 252. However, it is argued that Jesus' very statement was an offense: AARON KIRSCHENBAUM, *THE CRIMINAL CONFESSION IN JEWISH LAW* 199–200 (2005).

206. On this regard see 1 CHANDLER, *supra* note 3, at 159–70.

207. For a positive opinion, see *id.* at 187. For doubts concerning this question see, e.g., DONALD JUEL, *MESSIAH AND TEMPLE: THE TRIAL OF JESUS IN THE GOSPEL OF MARK 60–61* (1977); BLINZLER, *supra* note 2, at 134; CATCHPOLE, *supra* note 30, at 258–60; RADIN, *supra* note 4, at 232–33.

208. 1 CHANDLER, *supra* note 3, at 304–05; BLINZLER, *supra* note 2, at 144–45; RENAN, *supra* note 3, at 250.

Sabbath, on their understanding, and because of his deeds in the Temple,<sup>209</sup> and the chief priests and the elders schemed to arrest Jesus in secret and to kill him.<sup>210</sup>

The haste with which the proceedings were conducted testified to the determination of the Sanhedrin to convict Jesus.<sup>211</sup> The charges against Jesus were not clearly presented at the outset of the trial, and when the High Priest realized that Jesus could not be convicted on the charge attributed to him, the High Priest questioned him about another charge.<sup>212</sup> The judges were clearly biased and hostile.<sup>213</sup> According to Luke, the High Priest did not react or protest when one of his arresters beat Jesus.<sup>214</sup> According to Matthew, the judges actively sought false witnesses against Jesus.<sup>215</sup> During the trial, the High Priest expressed his opinion of Jesus' guilt.<sup>216</sup> Jesus was given insufficient time to prepare his defense<sup>217</sup> and was not provided with the opportunity to defend himself, or to call witnesses on his own behalf.<sup>218</sup> Under such circumstances, Jesus could not have expected to receive justice from his judges.<sup>219</sup>

The unfairness of the proceedings may explain Jesus' decision to remain silent. Given the circumstances of the trial, any defense before the Sanhedrin seemed futile.<sup>220</sup> Given the vagueness of the charges brought against Jesus, Chandler rhetorically asks, "Are we not justified in supposing that the silence of Jesus in the presence of His accusers was at least partially attributable to His failure to comprehend the exact nature of the charges against Him?"<sup>221</sup> Chandler adds that, at any rate, by remaining silent, Jesus exercised an ordinary right conferred on every Jewish defendant.<sup>222</sup>

Based on the account of Luke, the unfairness of the proceedings continued when Jesus was brought before Herod. While one scholar surmised that Jesus' silence before Herod emanated from his decision "to stand upon his constitutional rights,"<sup>223</sup> others have concluded that Jesus deemed Herod unworthy of his response, because Herod most likely asked Jesus irrelevant questions, because of Herod's vulgar personality, and because Jesus believed that Herod lacked the authority to judge him.<sup>224</sup> Indeed, Herod exhibited mere curiosity toward Jesus, made no attempt to uncover the truth, and conducted no real trial.

Unlike the Sanhedrin, Pilate was not biased against Jesus. On the contrary, he attempted to secure Jesus' release and sentenced him only under pressure, according to all of the Gospels. Nonetheless, Pilate conducted a "primitive trial" in which no witnesses

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209. *Matthew* 12:14; *Mark* 3:6; *Mark* 11:18; *Mark* 14:1; *Luke* 19:47; *Luke* 22:2; *John* 5:16, 18.

210. *Matthew* 26:3–4.

211. ROSADI, *supra* note 59, at 155 (regarding the assembly of the Sanhedrin at nighttime).

212. 1 CHANDLER, *supra* note 3, at 250–51.

213. Gaynor, *supra* note 3, at 245.

214. *Luke* 22:63–64.

215. *Matthew* 26:59.

216. Richards, *supra* note 149, at 362; BLINZLER, *supra* note 2, at 135.

217. Gaynor, *supra* note 3, at 244.

218. 1 CHANDLER, *supra* note 3, at 309–15.

219. BLINZLER, *supra* note 2, at 86.

220. RENAN, *supra* note 3, at 250; DELAND, *supra* note 151, at 213.

221. 1 CHANDLER, *supra* note 3, at 251.

222. *Id.* at 274.

223. Stearns, *supra* note 114, at 15.

224. 2 CHANDLER, *supra* note 1, at 126–27; see Grant, *supra* note 90, at 22 (stating that "by his silence he denied his jurisdiction").

testified, no proof of guilt was offered, and, according to all accounts but Luke's, the charges brought against Jesus were not even stated.<sup>225</sup> Pilate pronounced a sentence of death "against his conscience," while declaring Jesus to be innocent.<sup>226</sup> No wonder, then, that some scholars treat the sentence of crucifixion as a judicial execution rather than a simple miscarriage of justice.<sup>227</sup>

It is likely that Pilate condemned Jesus to death by crucifixion because he was worried that the Jewish leadership would submit a complaint against him to Tiberius Caesar.<sup>228</sup> It should be borne in mind that, due to the complex and problematic family relationships of Pilate with Tiberius Caesar (Pilate was married to Claudia, the daughter of Julia, who was the divorced wife of Tiberius, and the daughter of August Caesar), and due to Tiberius' suspicious nature, particularly toward potential traitors, Pilate could hardly have afforded to acquit a person presented before him as a political adversary, an enemy of Caesar, and a traitor to Rome.<sup>229</sup> Even without this complexity, Pilate, as the Emperor's representative, could not ignore such a serious accusation and faced accusation of disloyalty to Caesar.<sup>230</sup> Therefore the trial of Jesus for sedition may, in fact, be viewed as a political trial, or as a set of sham proceedings designed to eliminate an enemy of Caesar who directly attacked the established order.<sup>231</sup> Jesus' fate was then sealed by the very accusation that was brought against him before a Roman governor, and the judgment against him was predictable. Pilate had no reason to risk himself for Jesus. The inevitability of the result rendered any defense by Jesus futile, and as Gooch suggests regarding Jesus' whole trial, "the silence of Jesus stands . . . not only as an assertion of innocence, but also as a rebuke to false words."<sup>232</sup>

#### *D. Inability to Offer a Credible Defense*

Even if one assumes that the trial was conducted fairly, it is still difficult to see how Jesus could have defended himself. It might have been the case that Jesus was viewed as a blasphemer for attempting to dismantle established religious conventions.<sup>233</sup> If Jesus had

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225. ROSADI, *supra* note 59, at 295, 301; 1 CHANDLER, *supra* note 3, at 216.

226. Aiyar, *supra* note 172, at 252.

227. ROSADI, *supra* note 59, at 301; 2 CHANDLER, *supra* note 1, at 158.

228. RENAN, *supra* note 3, at 258.

229. Richards, *supra* note 149, at 365–66. Pilate's position was not especially strong because he had been appointed in 26 A.D., the same year in which Tiberius retired to the island of Capri, leaving Sejanus in charge of the Empire, and was actually appointed by Sejanus. RADIN, *supra* note 4, at 188–89. On the suspicious nature of Tiberius and his aversion of treason, see 2 CHANDLER, *supra* note 1, at 70–71.

230. Grant, *supra* note 90, at 21; WRIGHT, *supra* note 14, at 547.

231. See generally OTTO KIRCHHEIMER, *POLITICAL JUSTICE: THE USE OF LEGAL PROCEDURE FOR POLITICAL ENDS* (1961). In his book, Kirchheimer defines political trials as instances in which "court action is called upon to exert influence on the distribution of political power." According to Leora Bilsky:

The term 'political trial' is popularly associated with 'show trials' like the Moscow Purge trials that were conducted by Stalin during the 1930s. Such trials represent an extreme example of political repression and are viewed as sham legal proceedings designed by the authorities to dramatize specific political campaigns and/or to eliminate prominent individuals.

Leora Bilsky, *Political Trials*, in *INTERNATIONAL ENCYCLOPEDIA OF SOCIAL AND BEHAVIORAL SCIENCES* 11712, 11712 (Neil J. Smelser & Paul B. Baltes eds., 2001).

232. GOOCH, *supra* note 1, at 59.

233. RENAN, *supra* note 3, at 250–51.

defended himself by claiming that he was truly the Son of God, a religious establishment that believed only in an abstract God would have rejected his defense. It is also doubtful whether such a claim could be proven. Jesus recognized his inability to explain his true nature to the Sanhedrin, and when they asked him whether he was the Messiah, he replied, “If I tell you, you will not believe.”<sup>234</sup>

Some scholars posit that a claim to higher status than Caesar indeed constituted treason under Roman law.<sup>235</sup> However, through his reply, “My kingdom is not of this world,” Jesus was attempting to explain to Pilate that he had not violated Roman law. He did not plan to establish a terrestrial government and therefore had no rivalry with Caesar.<sup>236</sup> Pilate could not, of course, grasp the idea of a kingdom of heaven, and a serious attempt to explain to him the nature of this kingdom was doomed to fail.<sup>237</sup>

While there is a world of difference between a defense that conflicts with the known reality, such as being the Son of God, and a claim that is anchored within reality, some defendants feel that they cannot offer a credible defense. Defendants who cannot support their defense by relying on external evidence, who were at home alone, for example, may remain silent out of fear of their inability to prove their innocence. One can also imagine a bizarre, but true, scenario in which a defendant was staying over at his mistress’s house when a stranger burst in and murdered the mistress. Such a defendant may remain silent on the assumption that his story would be rejected out of hand as mendacious and absurd. Hence, silence can stem from a lack of faith in the plausibility of one’s defense. What is more, some defendants who do have a credible defense to offer may doubt their ability to convey that defense in a convincing manner to the fact-finder.<sup>238</sup> After being accused of wrongdoing despite their innocence, defendants whose behavior or defense has been misconstrued and rejected by the law enforcement authorities who charged them may view silence as their only remaining option.

### *E. Destiny*

Jesus’ choice to remain silent during his trials, rather than vigorously maintaining his innocence, may have stemmed from his knowledge that his death was predetermined and that the ultimate outcome of the trial depended not on his words but on a predestined divine plan.<sup>239</sup> According to the Gospels, Jesus informed his disciples that, pursuant to a divine decree, he must travel to Jerusalem, be killed, and resurrected after three days.<sup>240</sup> On this view Jesus did not want to be saved. His death on the cross was essential to the fulfillment of his mission on Earth. Jesus was doomed to suffer in order to expiate the sins of the people. He accepted his passion and understood that his sacrifice was necessary and

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234. *Luke* 22:67.

235. Grant, *supra* note 90, at 19.

236. 2 CHANDLER, *supra* note 1, at 113; Richards, *supra* note 149, at 368.

237. Schwartz, *supra* note 177, at 504.

238. See Burnside & Naughton, *supra* note 13, at 21–22 (regarding the lack of trust on the fact finder’s part in a true narrative that seems implausible).

239. *John* 12:33; *John* 16:16; see DELAND, *supra* note 151, at 213.

240. *Matthew* 16:21–23; *Matthew* 20:18–19; *Matthew* 26:2; *Mark* 8:31; *Mark* 9:31; *Mark* 10:33–34; *Luke* 9:22; *Luke* 18:32–33; *John* 2:9–21.

inevitable for the accomplishment of his tasks.<sup>241</sup> His silence was therefore intended to bring about his conviction and death. Although, as Rosadi emphasizes, Jesus was not condemned for the accusations about which he remained silent,<sup>242</sup> his refusal to mount a defense undoubtedly militated against him. Jesus broke his silence only to affirm his being the Christ, the Son of God, and this identification was necessary to fulfill his divine mission.<sup>243</sup> Notably, the right to silence does not normally allow accused persons to conceal their identity.<sup>244</sup>

Furthermore, there are striking similarities between the account of the trial in the Gospels and the prophecy that appears in Isaiah chapter 53.<sup>245</sup> The relevance of this chapter was explicitly stated in the Acts, when Philip the Apostle realized that the Ethiopian eunuch was reading this chapter.<sup>246</sup> The prophet Isaiah speaks of the servant of the Lord who “was oppressed and afflicted, yet he did not open his mouth; he was led like a lamb to the slaughter, and as a sheep before its shearers is silent, so he did not open his mouth.”<sup>247</sup> Jesus’ warning to his disciples not to tell others about him or his abilities to heal<sup>248</sup> was consistent with the prophecy of Isaiah, according to which, “He will not quarrel or cry out; no one will hear his voice in the streets.”<sup>249</sup> The notion of the redemption is based, *inter alia*, on the relevant verses in Isaiah chapter 53.<sup>250</sup> According to this conception, Jesus’ silence was actually a fulfillment of prophecy and thus predestined.<sup>251</sup>

Obviously, common defendants cannot rely on a divine decree to justify their silence. It is interesting to note, however, the underlying rationale for the preclusion of confessions in Jewish criminal trials (a rule that, as mentioned above, was not necessarily in force during Jesus’ trial).<sup>252</sup> Maimonides, who referred to it as a “divine decree,” also explained that this rule was rooted in a fear that persons suffering from deep depression could give a false confession in order to bring about their own execution.<sup>253</sup> Just as the trial of Jesus was supposed to lead to his death, Maimonides was concerned with defendants who may view the trial as a means to end their misery in life through a false confession leading to death. Rabbi David ben Zimra explained the rule of excluding confessions by the prohibition on disposing life via a confession, since the giving and taking of human life is the purview of God alone.<sup>254</sup> According to both explanations, God imposes the ban on waiving the right to silence with respect to incriminating statements

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241. WRIGHT, *supra* note 14, at 603–05 (analyzing the essence of Jesus’ tasks).

242. ROSADI, *supra* note 59, at 191.

243. MCRUER, *supra* note 149, at 50.

244. TRECHSEL, *supra* note 146, at 355; *Hiibel v. Sixth Judicial Dist. Court of Nev.*, 542 U.S. 177, 189–91 (2004).

245. DERRETT, *supra* note 24, at 57.

246. *Acts* 8:32.

247. *Isaiah* 53:7.

248. *Matthew* 12:16.

249. *Matthew* 12:19.

250. DERRETT, *supra* note 24, at 16.

251. *See* GOOCH, *supra* note 1, at 53; BURNSIDE, *supra* note 1, at 458–61.

252. *See generally* Leo *supra* note 187.

253. Levine, *supra* note 204, at 267–68; Rosenberg & Rosenberg, *supra* note 204, at 1033–34.

254. Levine, *supra* note 204, at 267; Rosenberg & Rosenberg, *supra* note 204, at 1036–38.

because of the sanctity of life.

Furthermore, while there is no direct parallel with the fulfillment of biblical prophecy in the figure of Jesus, it is easy to imagine defendants who feel like sheep being led to the slaughter and who remain silent before a predatory system which, to the best of their understanding, will do everything in its power to convict them. Such defendants understandably feel powerless to change their fate and may resort to silence.

#### *F. Faith in Salvation*

One can make the argument that Jesus stayed silent because his knowledge that the outcome of the trial rested with God alone, which left him indifferent to the judgment of human beings. Jesus may have placed his trust in divine intervention to prevent his death.<sup>255</sup> Jesus did attempt to change his fate, on the condition of God's approval by "[g]oing a little farther, he threw himself on the ground and prayed, 'My Father, if it is possible, let this cup pass from me. Yet not as I will, but as you will.'"<sup>256</sup> The famous statement, "*Eli, Eli, lema sabachthani?*" that is, "My God, my God, why have you forsaken me?"<sup>257</sup> may testify to Jesus' hope that a change in God's plan would allow him to continue his earthly mission.

This theological reason can be compared to the silence maintained by accused persons who believe that their silence will not bring them any harm for various reasons, such as the weakness of the evidence against them, or the prospect that the real culprit will be identified. As Burnside put it, "in modern miscarriage of justice cases, people sometimes remain silent because they believe the judicial process itself will expose the false allegation. After all, how could they be convicted for something they have not done?"<sup>258</sup> It goes without saying that ordinary defendants do not elect silence out of an expectation of divine intervention.

#### *G. Silence as a Personal Example and as a Sacrifice*

Jesus' silence may be viewed as a personal example of the message that he conveyed during his earthly life. Jesus chose silence over war. He ordered his disciples not to fight against his arresters, explaining to them, "for all who draw the sword will die by the sword," and asking them rhetorically, "[d]o you think that I cannot call on my Father, and he will at once put at my disposal more than twelve legions of angels?"<sup>259</sup> He neither attacked his opponents nor defended himself. His passivity was consistent with his preaching of surrender to one's opponents, which culminated in the Sermon on the Mount. "But I tell you, do not resist an evil person. If anyone slaps you on the right cheek, turn to them the other cheek also. And if anyone wants to sue you and take your shirt, hand over your coat as well. If anyone forces you to go one mile, go with them two miles."<sup>260</sup>

Jesus' silence, then, symbolizes sacrifice. According to Luke, Jesus expressed

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255. See FOX, *supra* note 3, at 90–91.

256. *Matthew* 26:39; *Mark* 14:36; *Luke* 22:42.

257. *Matthew* 27:46.

258. BURNSIDE, *supra* note 1, at 458.

259. *Matthew* 26:52–53.

260. *Matthew* 5:39–41.

forgiveness towards his opponents while on the cross, uttering the words, “Father, forgive them; for they do not know what they are doing.”<sup>261</sup> Jesus conveyed the message of forgiveness and sacrifice in his life and death. Seen through the lens of consequence, the death of Jesus was a necessary means for him to alter the course of human history. And, indeed, the sense of indignation at the miscarriage of justice that took place in Jesus’ trial has made a considerable contribution to the dissemination of his doctrine of forgiveness and sacrifice throughout the world.

#### IV. CONCLUSION: WHAT IS TRUTH?

During his trial, Jesus maintained silence in the face of the charges against him and responded solely to questions about his identity. His silence remains an enigma.<sup>262</sup> This Article has offered several possible reasons for Jesus’ silence before his accusers. All of them are anchored in the New Testament. Some of them, such as the unfairness of the legal process, Jesus’ disbelief in human justice, and the connection between silence, destiny, submission, and sacrifice, may be cumulative.

This Article’s main goal has been to emphasize the complexity of silence and the various reasons that may underlie an individual’s choice to take recourse in it, and to demonstrate that innocent individuals may exercise and benefit from the right to remain silent when faced with the accusations against them. As we have seen, if Jesus maintained his silence throughout his trial and not responded to questions about his identity, he might have evaded conviction in the absence of sufficient incriminating evidence against him.

Jesus consciously chose to remain silent during the majority of his trial. His silence may be of broader relevance to the connection between silence and innocence. It imparts the message that silence does not necessarily imply guilt. Furthermore, silence may be noble. It forces the state to shoulder the onus of proving guilt and places limits on the state’s power over individuals. Silence is essentially a challenge to authority. It is a statement. It prevents the unlimited accrual of power by law enforcement authorities. Jesus’ silence also sharply demonstrates the limits of human knowledge and human ability to access the truth. Recognition of the complexity of silence, its significance, and the various reasons for its use should prevent infringement of the right to remain silent.

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261. *Luke* 23:34.

262. Friedler, *supra* note 2, at 399 (regarding the whole trial).

