

## JESUS' LEGAL THEORY—A RABBINIC READING

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### INTRODUCTION

These are heady times in America's law and religion conversation. On the campaign trail in 1999, then-candidate George W. Bush declared Jesus to be his favorite political philosopher.<sup>1</sup> Since his election in 2001, legal commentators have criticized both President Bush and the Supreme Court for improperly basing their decisions on their sectarian Christian convictions.<sup>2</sup> Though we pledge to be one nation under God, a recent characterization of the law and religion discourse sees America as two sub-nations divided by God.<sup>3</sup> Moreover, debate concerning the intersection between law, politics and religion has moved from the law reviews to the *New York Times Sunday Magazine*, which has published over twenty feature-length articles on these issues since President Bush took office in 2001.<sup>4</sup> Today, more than anytime in the past century, the

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1. See Stephen Buttry, *Des Moines Register: Candidates Focus on Christian Beliefs*, <http://archives.cnn.com/1999/ALLPOLITICS/stories/12/15/religion.register/> (Dec. 15, 1999).

2. See Geoffrey Stone, *Religious Rights and Wrongs*, [http://uchicagolaw.typepad.com/faculty/2006/07/religious\\_right.html#more](http://uchicagolaw.typepad.com/faculty/2006/07/religious_right.html#more) (July 22, 2006) (critique of President Bush); Geoffrey Stone, *Our Faith-Based Justices*, [http://uchicagolaw.typepad.com/faculty/2007/04/our\\_faithbased\\_.html](http://uchicagolaw.typepad.com/faculty/2007/04/our_faithbased_.html) (Apr. 20, 2007) (critique of "faith-based Justices").

3. See Noah Feldman, *Divided by God: America's Church-State Problem—and What We Should Do About It* (Farrar, Straus & Giroux 2005).

4. Noah Feldman, *Universal Faith*, *NY Times Mag.* 13 (Aug. 26, 2007) (examining the role of God and faith in schools); Mark Lilla, *The Politics of God*, *NY Times Mag.* 28 (Aug. 19, 2007) (contrasting the doctrine of separation of Church and State in the West with theocratic philosophies in the Muslim world); Russell Shorto, *Keeping the Faith*, *NY Times Mag.* 38 (Apr. 8, 2007) (examining Pope Benedict XVI's views on the dangers of secularism and why a return to Christian values is necessary for the survival of Europe); Ann Hulbert, *Beyond the Pleasure Principle*, *NY Times Mag.* 15 (Mar. 11, 2007) (arguing that despite being less religious than previous generations, today's young people are generally more conservative on certain moral issues, e.g., on abortion); Gary Rosen, *Narrowing the Religion Gap*, *NY Times Mag.* 11 (Feb. 18, 2007) (commenting on the fact that in the 2008 Presidential race, Democratic candidates generally are being very open about their faith while some Republican candidates are being more guarded); Emily Bazelon, *Is There a Post-Abortion Syndrome?*, *NY Times Mag.* 40 (Jan. 21, 2007) (exploring the pro-life position that a "post-abortion syndrome" can adversely affect a woman's

ideas of an itinerant first-century preacher from Bethlehem are relevant to American law.

Corresponding with the renewed focus on Christianity in public and legal discourse, members of the American legal academy have produced three collections of essays discussing the relationship between Christianity and the law. *The Teachings of Modern Christianity on Law, Politics and Human Nature* explores the role of the church and the Christian faith in defining the content and boundaries of the modern, heterogeneous democratic state.<sup>5</sup> Its two volumes offer a variety of Christian views on the constitution of the secular City of Man and sacred City of God. The volumes, which display a transnational orientation, discuss topics such as: whether political authority and law come from God, or whether they are contrivances of Man; whether law should aim only to set baselines of conduct for temporal life, or whether law should have moral and spiritual aspirations as well; whether government and law are necessary responses to the fallen state of mankind, or would be necessary even in an ideal state of human nature; and which conditions justify disobedience of civil law on grounds that it conflicts with divine

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mental-health); Russell Short, *Contra-Contraception*, NY Times Mag. 48 (May 7, 2006) (examining conservative Christian views on contraception and possible links to moral decay in society); Strawberry Saroyan, *Christianity, the Brand*, NY Times Mag. 46 (Apr. 16, 2006) (profiling Christian public-relations strategist, Larry Ross); Jack Hitt, *Pro-Life Nation*, NY Times Mag. 40 (Apr. 9, 2006) (discussing pro-life trends toward criminalizing more, if not all, abortions); Sean Wilentz, *Bush's Ancestors*, NY Times Mag. 18 (Oct. 16, 2005) (exploring the historical roots, religious and political, of modern Republican conservatism); Noah Feldman, *A Church-State Solution*, NY Times Mag. 29 (July 3, 2005) (exploring the history of, problems concerning, and solutions to, United States church-state relations); Russell Shorto, *What's Their Real Problem With Gay Marriage? It's the Gay Part*, NY Times Mag. 40 (June 19, 2005) (discussing why certain Christian groups oppose gay marriage on the grounds that homosexuality is inherently flawed and adversely impacts society); Michael Sokolove, *The Believer*, NY Times Mag. 56 (May 22, 2005) (discussing the impact of Senator Rick Santorum's Catholic faith on his conservative political values); Matt Bai, *Democratic Moral Values?*, NY Times Mag. 25 (Apr. 24, 2005) (examining the moral views of the Democratic Party); Ron Suskind, *Without a Doubt*, NY Times Mag. 44 (Oct. 17, 2004) (exploring why a belief that President George W. Bush's actions might be divinely-mandated is cause for concern for both conservatives and liberals); Garry Wills, *With God on His Side*, NY Times Mag. 26 (Mar. 30, 2003) (examining the role that President George W. Bush's faith has on his decisions concerning the War on Terror); Lorenzo Albacete, *Mixed Blessings*, NY Times Mag. 15 (Jan. 21, 2001) (criticizing "faith based initiatives" as potentially subjecting religious groups to manipulation); Alan Wolfe, *The Final Freedom*, NY Times Mag. 48 (Mar. 18, 2001) (observing that the ability to decide for oneself what is right and wrong may be the defining freedom of the 21st century); Eyal Press, *Faith-based Furor*, NY Times Mag. 62 (Apr. 1, 2001) (noting the problems faced by those who claim religious-based discrimination under President Bush's faith-based initiative program); Natalie Angier, *Confessions of a Lonely Atheist*, NY Times Mag. 34 (Jan. 14, 2001) (arguing that it is hard to be an atheist in a religious society such as the United States).

5. *The Teachings of Modern Christianity On Law, Politics & Human Nature* (John Witte Jr. & Frank S. Alexander eds., Colum. U. Press 2006).

law.<sup>6</sup> The understanding of “law” laid out in *The Teachings* is fairly broad and abstract, more similar to the way a theologian or political theorist, rather than a lawyer, interprets the term. The perspective of a more conventional lawyer/scholar—one necessarily tied to the detailed rules of a specific jurisdiction—is somewhat deemphasized in these volumes.<sup>7</sup>

*Christian Perspectives on Legal Thought* is a more topically (though less theologically) diverse work that speaks more directly to the American legal academy.<sup>8</sup> The book opens with essays on the relationship between Christianity and the liberal state, and then continues to examine twentieth-century legal and social movements (e.g., realism, law-and-economics, feminism and civil rights activism) from several Christian perspectives. The book concludes with a few articles that seem intentionally balanced between left and right-leaning approaches to discrete areas of the law, causing one sympathetic observer to note that the book’s implicit message is to demonstrate that mainstream, center-right and center-left perspectives can all fit comfortably under the heading “Christian legal theory.”<sup>9</sup> The takeaway lesson is that, even in these heady days of ideologically and religiously driven politics, the mainstream legal-academic establishment need not fear the emergence of a dogmatic Christian approach to law.

The most recent addition to this literature, *Faith and Law: How Religious Traditions from Calvinism to Islam View American Law*, follows the path delineated in *Christian Perspectives*.<sup>10</sup> As its title suggests, this is the most ecumenical of the collections, and roughly one fourth of its pages are devoted to non-Christian (Jewish, Islamic, Buddhist and Hindu) perspectives. The book seems more focused on specific legal issues than the other volumes and it covers many traditional law and religion topics (e.g., abortion, gay rights and euthanasia) as well as issues less commonly addressed in this discourse (immigration, self-incrimination and victim compensation). Nevertheless, the book does not veer far from the traditional City of

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6. See Kent Greenawalt, *Reflections on Christian Jurisprudence and Political Philosophy*, in *The Teachings of Modern Christianity On Law, Politics & Human Nature* 716 (John Witte Jr. & Frank S. Alexander eds., Colum. U. Press 2006).

7. See David A. Skeel, Jr., *The Unbearable Lightness of Christian Legal Scholarship* (unpublished ms. Aug. 2, 2006) (abstract available at <http://ssrn.com/abstract=929850>).

8. *Christian Perspectives on Legal Thought* (Michael W. McConnell, Robert F. Cochran, Jr. & Angela C. Carmella eds., Yale U. Press 2001).

9. See William J. Stuntz, *Christian Legal Theory*, 116 Harv. L. Rev. 1707 (2003).

10. *Faith and Law: How Religious Traditions From Calvinism To Islam View American Law* (Robert F. Cochran, Jr. ed., N.Y. U. Press 2007) [hereinafter *Faith and Law*].

God/City of Man framing and mainly interprets “law” as a term roughly interchangeable with “social policy.”

The sheer breadth and diversity of these volumes, in terms of both the arguments presented as well as the theological and political background of their authors, tell us much about the writers’ understanding as to the relationship between Christianity and law. Notably absent from this literature however, is any extensive examination of Jesus, and *his* views about jurisprudence and legal theory.<sup>11</sup> Despite the overall diversity of the writings, there is little discussion about what Jesus thought about law, lawyers, legal rules and the legal order.<sup>12</sup>

Whereas Christian interpretations focus on the role of the state, its boundaries with the Church, and the interaction between democracy, liberalism, natural law and church doctrine, the rabbinic reader is naturally (if somewhat ironically) drawn directly to Jesus, and specifically to his debates with the Pharisees—the forbearers of rabbinic Judaism. Jesus and his followers sought to decrease the overall importance and density of the Torah’s legal regime, a view most succinctly expressed in Paul’s assertion that “for the letter kills, but the spirit gives life.”<sup>13</sup> The rabbis, however, assume exactly the opposite. Not only did the Talmudic rabbis mandate meticulous observance of the Torah and its commandments but also they went so far as to claim that study of the Torah’s law—wading waist-deep into the particularity and picayunity of its details—reflects the highest form of divine service.<sup>14</sup> Thus, the Talmud teaches that since the Temple was destroyed, God finds no comfort within this world save for within the narrow confines of *halakha* (Jewish Law).<sup>15</sup>

This paper explores Jesus’ legal theory from a rabbinic perspective. By engaging in a comparative reading of the Gospel and rabbinic texts, I

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11. A similar trend can be seen in Islam. One scholar has noted “students of Islamic law have a rather odd habit: They tend to leave to the Prophet himself out of consideration when analyzing the development of Islamic law.” See Lawrence Rosen, *Muhammad’s Sociological Jurisprudence in The Justice of Islam: Comparative Perspectives on Islamic Law and Society* 176, 177 (Oxford U. Press 2000). For a notable exception to this trend, see Jeremy Waldron, “Dead To the Law”: *Paul’s Antinomianism*, 28 *Cardozo L. Rev.* 301 (2006), and in a different vein, Emily Fowler Hartigan, *Law and Mystery: Calling the Letter to Life through the Spirit of the Law of State Constitutions*, 6 *J.L. & Religion* 225 (1988).

12. For a discussion of some of the complexities of this type of discussion in a prelude of a yet-to-be-published book tackling the subject, see John P. Meier, *The Historical Jesus and the Historical Law: Some Problems Within the Problem*, 65 *Cath. Biblical Q.* 52, 63 (2003).

13. 2 Cor 3:6 (all Biblical citations are taken from the NKJV).

14. See e.g. Talmud Shabbat 127a; more generally, Norman Lamm, *Torah Lishmah: Torah for Torah’s Sake* (Ktav Pub. 1989) (author translation).

15. Talmud, Berakhot, 8a.

look to draw out the jurisprudential assumptions embedded in the foundational documents of each religion. This reading demonstrates that the debates between Jesus and the Pharisees resonate with contemporary discussions, not only within the field of "law and religion" but also regarding the province of jurisprudence more generally. Jesus, no doubt, rejects the rabbinic assertion that the legal-interpretive enterprise forges the most direct path to the divine. But he goes further, claiming that law is an ill-suited medium through which to structure social relationships and resolve interpersonal conflicts. Thus, the rabbinic reading focuses on Jesus' (and Paul's) bold, radical and subversive claims about the role, rule and domain of the law.

Two preliminary notes about scope and method are necessary. First, within the ambit of theological and historical studies, the question of "Jesus and the law" usually refers to a longstanding debate, going back to the New Testament itself, regarding which elements of the Mosaic Law Jesus and/or Paul sought to abrogate, change, fulfill, reaffirm or abolish, etc.<sup>16</sup> In this context, law refers to the Torah or the "Law of Moses," i.e., the legal rules and practices observed by first century Jews. In this paper, however, law is defined more broadly. *Law* refers to a reasoning process, an ongoing conversation whereby professional jurists analyze legal texts, precedents and rules to reconcile competing social ideals and values.<sup>17</sup>

The second relates to the usage and reading of texts. I read both the Gospels and the Talmud<sup>18</sup> as composite literary units, much in the way each work is traditionally read by many within its faith community. Thus, while the methods of text and source criticism can shed much light on the development and formation of ideas within each tradition,<sup>19</sup>

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16. See e.g. Acts 15 & Gal 2 (unless otherwise noted, all Biblical citations are from the RSV). More recently, see e.g. Robert Banks, *Jesus and the Law in the Synoptic Tradition* 242 (Cambridge U. Press 1975); E.P. Sanders, *Jesus and Judaism* (Fortress Press 1985); Alan Watson, *Jesus and the Law* (U. Ga. Press 1996); William R.G. Loader, *Jesus' Attitude Towards the Law: A Study of the Gospels* (W.B. Eerdmans Publg. 2002); John P. Meier, *A Marginal Jew: Rethinking the Historical Jesus* (vol. 4, 2007).

17. Were I were more inclined toward continental legal thought, I might describe law as an "epistemic subject" formed by a set of "discursive practices" that leads to the "production of an autonomous social reality." See e.g. Gunther Teubner, *How the Law Thinks: Towards a Constructivist Epistemology of Law*, 23 L. & Socy. Rev. 727, 732 (1989).

18. The Mishna is a legal code that expounds the Bible and constitutes the core of Oral Law. It was compiled and edited by Rabbi Judah the Prince in the early third century. The Talmud is a collection of records of academic discussion, homiletical exposition and judicial administration of Jewish Law by generations of scholars during several centuries after 200 c.e. The Talmud consists of the Mishna and the Gemara, which is an expanded commentary on the Mishna.

19. A recent account of this question from the text critical tradition can be found in Loader, *supra* n. 16, at 509-518.

this paper takes a broader view and focuses on the general differences between the legal cultures of the Gospels and the Talmud. For this reason, the description of Jesus is not of the historic person, but rather of the persona presented within the canonical texts. Similarly, the debates between Jesus and the Talmud, while anchored in textual narrative, place little emphasis on the actual conversations that may or may not have occurred, but offer a jurisprudential account of the debate between the emerging Christian and rabbinic traditions.

The paper proceeds in five parts. I open by recounting my experience talking to a modern-day church group about how the Talmud rabbis think. The conversation revealed vast differences not only as to the underlying theology, but also relating to the role of law and the space allotted to it within the religious consciousness. Parts II and III draw out these themes through a comparative reading of the foundational texts of each religion. Part IV turns to a broader discussion of the role of law within each religion's consciousness. Part V concludes by applying the results of this comparative study to the central questions of contemporary legal theory.

#### I. A RABBI WALKS INTO A CHURCH . . .

I was recently invited to speak to an adult education class at a mainstream Presbyterian church. The topic of the lecture was how the rabbis read the Bible. I began by asking the group, "What is the first commandment in the Bible?" After a short pause, I received two responses: "love the Lord your God" and "love your neighbor as yourself." Both fine answers, but neither was what I was looking for. The group apparently interpreted me as asking either: what is the first of the Ten Commandments (Decalogue), or, what is the first, i.e., primary, commandment? The question I intended to ask (and what every talmudically-trained Jew would have understood) was: beginning in *Genesis* Chapter 1, what is the first commandment one encounters in the Biblical text?

After a short discussion, I told the group that the Talmudic rabbis maintain that the first "commandment for generations" (applicable beyond Adam and Eve) was to "[b]e fruitful and multiply."<sup>20</sup> The group nodded in approval, and I sensed we were then on the same page. Next, I asked a simple, almost inevitable, question from a Talmudic perspective, but one deeply foreign to my audience.

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20. Gen 1:28.

C.S.: "How many?"

Group: "How many what?"

C.S.: "How many children?"

Group: "What do you mean, how many children?"

At this point I realized that we reached a bit of a brick wall, so I backed up.

C.S.: "Do you believe the Bible is the word of God that expresses His Will?"

Group: "Yes."

C.S.: "Do you believe you have to follow it?"

Group: "Yes."

C.S.: "Well, then how do you know when you have done it? How do you know when you have been sufficiently fruitful?"

Again, blank stares from the audience. It was clear that the last question produced some discomfort. I proceeded to explain that when the rabbis read the Bible, they look to put it into practice, to operationalize it. Thus, most of their questions, and the rabbinic discourse as a whole, look to define the nature and scope of various provisions in the Bible and Talmud. And much like a good law professor, the rabbis dream up some rather bizarre hypotheticals to test the limits of each rule. When the rabbis read the verse "be fruitful and multiply," they immediately attempt to define the properties and scope of this commandment, or *mitzvah*.<sup>21</sup> Here the issue boils down to how many children are required to fulfill the Biblical command.

This seemed to clarify the issue to the assembled audience. I explained that the rabbis assume that producing two children would satisfy the Biblical duty of fruitfulness. There is, however, a debate: The School of Shammai holds that the children must be two males, while the School of Hillel finds that one needs a male and one a female.

In the Talmud's way of thinking, this is only the beginning. The tradition continues to wonder: If one remarries, must he or she have children again?<sup>22</sup> Is the obligation binding upon the man, the woman or the marriage?<sup>23</sup> What about children from an adulterous or illicit relationship?<sup>24</sup> If the children are incapable of reproducing, do they

21. See Mishna Yevamot 6:6 & Talmud Yevamot 61a-63b.

22. *Id.*

23. Mishna Yevamot 6:6

24. See *Minhat Hinukh*, § 1.

count?<sup>25</sup> What if the children were capable of reproducing at birth, but sustained genital defects later in life?<sup>26</sup> Must a couple have more children if the first set of children die?<sup>27</sup> If the deceased children themselves had children, are the grandchildren counted in lieu of their parents?<sup>28</sup> What if under the holding of the School of Hillel (requiring one male and one female), the daughter dies but leaves behind two male (grand)children?<sup>29</sup>

Not surprisingly, at this point I was beginning to lose the group. I got the bug-eyed, “you’ve got to be kidding,” expression from nearly everyone, as if to say, “If this is what the Talmud is about, then the criticism of the Pharisees is dead on.”

I then paused, saying, “Let’s leave the rabbinic answers to these questions for now, but let me hear how in your tradition, you reason towards the answers. Surely you want to fulfill the word of God, so how do you know when you have done it?”

The most obvious and telling response was the ensuing silence. The uneasy quiet indicated that the group had never thought to break down this question into the level of detail found in the Talmud. The command was not conceptualized as binding or operational in quite the direct way the rabbis assumed. While all agreed that the Biblical directives are binding, in the churchgoers’ minds the Biblical commandments took on a less concrete form. The assembled group did not interpret the verses as having the same degree of presentness and immediacy as assumed by the rabbis.

The answers clustered into a few categories. Some thought that it was not a command to individuals as much as a charge to society as a whole, such that the verse did not direct individuals to undertake specific acts. The majority, however, responded with something like, “as many as you can handle,” “read the Bible and let the holy spirit guide/inspire you to the correct answer” or “discuss it with a pastor and other members of the faith community in order to reach the conclusion that is right for you.”

Though the responses of the church members are a product of twenty-first century Christianity, they nevertheless capture some of Jesus’ ambivalence toward the Talmudic habit of dwelling on legal technicalities, and particularly the Talmud’s practice of dreaming up

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25. Talmud Yevamot 62b.

26. Minhat Hinukh, § 1.

27. Talmud Yevamot 62b.

28. *Id.*

29. *Id.*

bizarre hypothetical situations to test the limit and scope of each rule. Repeatedly, the churchgoers told me that by focusing on the law rather than the heart, by not allowing faith to guide the answers and by legalizing what should be an intensely spiritual experience, the Talmud completely misses the point.

It is worth pausing to contrast how a similar conversation would have occurred at a traditionally-oriented synagogue. To be sure, many congregants would be unaware of the debate between Hillel and Shammai and even fewer would display familiarity with the technical issues developed in the Talmud and subsequent commentaries. Most, however, would understand the basic premise of the question, and assume that the rabbis would try and articulate the nature and scope of each Biblical commandment. In other words, even lay Jewish worshippers are familiar with the overall culture, texture and method of *halakhic* reasoning. Having heard analogous discussions on everything from the earliest time one can begin the morning prayer service to how many ounces of *matza* one must eat at the Passover *Seder*, the practicing Jew fully expects a similar discussion regarding the question of childbearing. They may not know the answer, but a synagogue audience certainly gets the question.

Stepping back, it became clear that I was watching radically different methods of Biblical and textual interpretation at work. The Mishna and Talmud, and in their wake rabbinic Judaism, conceptualize each of these questions as inherently legal. The reasoning process involves (to use the modern lawyer's terminology), reading statutory language, examining relevant case law, identifying the latent ambiguities and employing conventional forms of legal analysis to arrive at a conclusion. Thus, even as the Talmud's initial premise (reading the Bible as a legal text) might be a bit foreign to American lawyers, once the basic framework is accepted, there is little in the rabbinic process that surprises the classically-trained legal mind.

The perspective I heard at the church that morning was very different. Very little of it resembled "law" in the way lawyers would use the term. In fact, many in the group felt that supplanting the letter with the spirit was the central goal of Jesus' ministry. Jesus spoke to the heart. While Christians of other eras or persuasions might have responded by raising moral, ethical or philosophical issues, they would share the view that Jesus resisted the Pharisees' impulse to refract the religious experience through the prism of law. The aversion to Talmudism extends beyond a basic lack of familiarity. It expresses a theological commitment embedded deep within the Christian worldview.

The divisions between the approaches can be usefully, if somewhat crudely, articulated in the terms of contemporary legal thought. The rabbinic view tends towards solving these problems via the application and analysis of rules, while the church group approach tended to resist rules and favored the application of broader, less fact-specific standards. Moreover, on its own account, *halakhic* reasoning is understood to be objective. It involves the application of texts and precedents to facts, and at least in theory is unrelated to the faith or spiritual temperament of either the questioner or the rabbi charged with answering him. Finally, and most broadly, the Talmudic mode assumes that any issue relevant to religious, social or economic life is both justiciable and answerable within the normative bounds of the *halakhic*-legal framework.

The Christian (particularly the contemporary Protestant) mode inhabits a very different discursive realm. Law is not the relevant platform through which to analyze and decide important religious and social issues. It is thought to be overly restrictive, and unjustifiably replaces faith and love with rules and precedents. Instead, the reasoning process is instead directed inward, and exhibits more overtly religious, spiritual and subjective modes of reasoning. While a discourse, premised on seeking inspiration from prayer, Bible reading, and conversations within the fellowship, may produce fewer specific guidelines, the believer readily trades rabbinic legalism for a method that actively engages the hearts and souls of the faithful.

These differences are not accidental. As the succeeding sections demonstrate, contemporary assumptions about the role and rule of law trace their roots back to the first and second centuries—the era when the Gospels and Mishna were produced and disseminated.

## II. SHABBAT AND THE SABBATH

In the Gospels, one of the most contested issues between Jesus and the Pharisees is the proper meaning and observance of Shabbat, or the Sabbath. Throughout the synoptic texts, the Pharisees are presented as maintaining a rigid and legalistic view of Shabbat, while Jesus argues that Shabbat must mean more than the mechanical adherence to technical legal rules. The Gospels contain a number of healing narratives, wherein Jesus, in apparent contravention of then-binding law or custom, heals people on Shabbat, much to the astonishment of the populace and the chagrin of the Pharisaic establishment.<sup>30</sup> Similarly, the

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30. See Matt 12:1-13 & Mark 3:1-12. See also Sharon H. Ringe "Holy, as the Lord your God commanded you": Sabbath in the New Testament, 59 Interpretation 17 (2005).

Gospels of *Mark*, *Matthew* and *Luke* recount Jesus' revolutionary teachings regarding the laws of Shabbat.<sup>31</sup> In each pericope, Jesus is portrayed as a teacher who scales back the Shabbat restrictions, while the Pharisees favor a more rigid interpretation of the Torah's texts.

The encounter, as recorded in *Mark* Chapter 2, reads as follows:

23: One sabbath he was going through the grainfields; and as they made their way his disciples began to pluck heads of grain.

24: And the Pharisees said to him, "Look, why are they doing what is not lawful on the sabbath?"

25: And he said to them, "Have you never read what David did, when he was in need and was hungry, he and those who were with him:

26: how he entered the house of God, when Abi'athar was high priest, and ate the bread of the Presence, which it is not lawful for any but the priests to eat, and also gave it to those who were with him?"

27: And he said to them, "The sabbath was made for man, not man for the sabbath;

28: so the Son of man is lord even of the sabbath."<sup>32</sup>

The extent to which Jesus intends to abrogate the then-existing Shabbat laws has long been the subject of scholarly debate amongst Christian scholars and exegetes.<sup>33</sup> The text itself seems to pull in two directions. On the one hand, the analogy to David's incident with Abi'athar indicates a localized exception based on the extenuating circumstances. Alternatively, Jesus makes a series of bolder, more global claims, declaring first that Shabbat should conform to Man rather than Man conforming to Shabbat, and then that Man lords over the Sabbath. Further, to the extent Jesus intended to limit his teaching to exigent circumstances, he could have used a more localized precedent from the book of Maccabees which records an explicit decision to violate Shabbat in order to save human life, and avoided making a more theologically audacious claim regarding Man's mastery over the law.<sup>34</sup>

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31. See Matt 12:1-13, Mark 2:23-28, Luke 6:1-11. A text-critical account of these stories can be found in, John Meier, *The Historical Jesus and The Plucking of the Grain on the Sabbath*, 66 *Cath. Biblical Q.* 561 (2004). For a complete account of Jewish and Christian attitudes to Shabbat in the ancient period, see Herold Weiss, *A Day of Gladness: The Sabbath Among Jews and Christians in Antiquity* (U. S.C. Press 2003).

32. Mark 2:23-28.

33. E.g. Robert Sherman, *Reclaimed by Sabbath Rest*, 59 *Interpretation* 38 (2005).

34. See 1 Macc 2:29-42.

Thus, while some scholars see a narrowly tailored exception on account of the students' dire hunger, others see a significant reassessment of the binding authority of Mosaic law.<sup>35</sup>

Textual ambiguities aside, mainstream Christian interpretations have generally focused on the claim that Man is master over Shabbat.<sup>36</sup> By deemphasizing the role of Shabbat's legal strictures, Jesus rejects the Pharisaic assumption that grain-plucking creates a legal issue in the first place. Jesus moves the discussion away from what man can and cannot do towards how man should use the Shabbat for his moral and spiritual development. (Though the exact purpose is debated within Christian theologies).<sup>37</sup> Following Jesus, Christian theologians engage that question directly rather than getting caught up in the minutiae of the rabbinic discourse.<sup>38</sup>

In Paul's terminology, Jesus rejects the letter of the law and reaches for its spirit. Using modern legal vocabulary, the Christian approach looks behind the rules of Shabbat to determine its overarching policy—an idea that is not reducible to positive legal rules. The Christian understanding of Shabbat thus shies away from formulating specific definitions of approved and forbidden behavior.<sup>39</sup> Man has mastery over Shabbat means that the rules of Shabbat are not intrinsically valuable, but are simply a method of achieving the ultimate goal. Unlike the Pharisees, Jesus understood that he had the authority to direct the hearts and minds of the people away from the rules and towards what modern lawyers would call the "policy objective" of the Shabbat.<sup>40</sup>

The Talmudist differs with Jesus' argument on at least two points. First, the Talmudist would insist on determining exactly how hungry

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35. See Watson, *supra* n. 16, at 40. Yet other scholars argue that a purpose, if not the purpose, of the passage is to illustrate Jesus' authority. See e.g. Banks, *supra* n. 16, at 116. See also e.g. Loader, *supra* n. 16, at 33-36, 55.

36. See Mikeal C. Parsons, *Mark 2:23-28, 59 Interpretation 57* (2005).

37. See Sherman, *supra* n. 33.

38. *Id.*

39. Puritan sabbatarianism was a notable exception. See Winton U. Solberg, *Redeem the Time: The Puritan Sabbath in Early America* (Harv. U. Press 1977). But while the Puritans certainly had a penchant for restricting activity on the Sabbath, unlike the rabbis, the Puritans displayed little appetite for theorizing about scope, properties and limitations of each technical detail.

40. See Sherman, *supra* n. 33, at 49. ("The mistake of sabbatarianism is to suppose that the object of our allegiance is the Sabbath itself, thus subordinating humanity to a divine instrument rather than to God himself. Historically, such an instrumentalist approach has tended to equate the quality of proper observation with a multiplied quantity of obligations and prohibitions."); see also Dorothy C. Bass, *Christian Formation in and for Sabbath Rest, 59 Interpretation 25* (2005). Although they use different terms, this work is very much the spirit of Pope John Paul's 1998 apostolic letter, *Dies Domini*.

were Jesus' disciples.<sup>41</sup> Were they "gee, I could use a snack" hungry or "I might die of starvation" hungry? To the extent the disciples were in mortal danger, the Talmud concurs with Jesus' ruling. But the Gospel text does not suggest that the "hunger" rose to such extreme levels, and Mark's Gospel does not even claim the disciples were hungry at all. The narrative brings to mind a leisurely stroll through the wheat fields, rather than a ravenous search for sustenance. Moreover, the lack of interest in this detail in both the Gospel and the ensuing interpretive literature portends the de-legalization of this issue in the hands of the Christian interpreters.<sup>42</sup>

The disagreement, however, is deeper. The rabbis view the *corpus juris* of the Torah as having a dense and intricate legal architecture, whereby each area of the law has its unique rules and principles. The laws of Shabbat are distinct from the laws of the Bread of the Presence, and in general, violation of Shabbat is treated more severely than consuming the food designated for the Priests.<sup>43</sup> In order to make this analogy viable, Jesus would have to explain what principle is common to both Shabbat and the Bread of the Presence.<sup>44</sup> To the rabbinic ear, Jesus' argument is the equivalent of an American lawyer arguing that because something is not counted as property for procedural due process purposes in constitutional law, it does not count as income for federal income tax law. Without greater elaboration, the analogy falls flat.<sup>45</sup>

41. By contrast the Talmud assumes that David was in mortal danger and was therefore permitted to eat the holy bread. See Talmud Menahot 95b-96a. The Jerusalem Talmud takes this idea even a step further and assumes that David was so hungry that he ate all twelve loaves of the Bread of the Presence himself. Jerusalem Talmud Yoma 8:5. Hyperbole aside, the rabbis assume that David's actions were legitimate *only because* he was in mortal danger of starvation.

42. Sherman, *supra* n. 33.

43. The punishment for intentional desecration of Shabbat is stoning, Mishna Sanhedrin 7:4, which is the most severe form of capital punishment, see Talmud Sanhedrin 49-50 & Maimonides *The Laws of Sanhedrin* 14:4. By contrast, eating of the Bread of the Presence is considered *me'eila* (private use of temple property), Mishna *me'eila* 2:8, and Maimonides, *The Laws of Me'eila* 2:7. The punishment for *me'eila* is lashes and is thus considered a lower degree of offense than violation of Shabbat. See Sanhedrin 93a & 94a, Maimonides, *The Laws of Me'eila* 1:3.

44. See for example the discussion in Sanhedrin 93-94.

45. Interestingly, *Yalkut Shimoni* preserves a rabbinic tradition that frames the David and Abi'athar incident in terms of the laws of Shabbat. In this reconstruction, David argues that since he is in mortal danger, the laws of Shabbat are suspended, and David is allowed to partake of the Bread of the Presence. One of the glossators understands David to argue that since the fear of mortal danger is serious enough to suspend the Shabbat laws, *a fortiori*, the lesser prohibition of eating Temple foods is suspended. See *Yalkut Shimoni* to 1 Sam 21, § 130 & comments of Eytz *Ra'ana'an* ad loc. The Talmud, Menahot 95b, debates whether the enigmatic verse of 1 Sam 21:6, permits the Priest's to bake the Bread of the Presence on Shabbat. Both of these sources suggest traditions that link the David incident to abrogation of Shabbat laws, and raise the possibility that Jesus' invocation of the verses in Samuel was to the same effect. Nevertheless, the Christian exegetical tradition has by and large neglected this legalistic construction of Jesus'

The differences in the approaches to Shabbat become even clearer when contrasting Jesus' reformulation of the Shabbat policies with the detailed treatment of the laws of Shabbat in the Mishna. Whereas Jesus moves away from the discourse of technical rules and searches for the underlying policy and meaning of Shabbat, the rabbis move in the opposite direction, erecting a complex and multi-layered framework of Sabbatical rules and regulations.

The Bible instructs that one may not perform *melakha* (alternately translated as "work" or "labor") on the Shabbat day.<sup>46</sup> The Mishna further divides the *melakha* prohibitions of Shabbat into thirty-nine base categories.<sup>47</sup> The first eleven of these "labors" represent the stages in the bread-baking process (the others relate to the manufacture of clothing and construction of shelter). Thus, the Mishna teaches that sowing, plowing, reaping (likely the issue in the New Testament passages), harvesting, threshing, winnowing, sorting, grinding, sifting, kneading and baking are all prohibited forms of labor.<sup>48</sup> Each of the base categories is then further divided into sub-categories.<sup>49</sup> Cooking, for example, is thought to fall under the general category of baking.<sup>50</sup>

Not content with these definitions, the Talmud looks for more particular definitions. What constitutes cooking? What is the minimum heat (of either the dish or the water) required for something to cook?<sup>51</sup> How long must something be on the fire before it is considered cooked?<sup>52</sup> Is direct heat even needed? What about leaving an egg near a bubbling kettle or in the hot sun?<sup>53</sup> Is defrosting something equivalent to cooking it?<sup>54</sup> Is salting vegetables equivalent to preserving them and thus too similar to cooking?<sup>55</sup> And what is the scope of the prohibition? If A brings the fire, B brings the wood, C brings a pot, D fills the pot with water, E adds spices to the water and F stirs the pot, are they all liable? (yes).<sup>56</sup> Would the answer be different if the fire came at the end rather than the beginning? (yes).<sup>57</sup> Further, does state of mind matter?

argument.

46. *E.g.* Exod 20:10.

47. Mishna, Shabbat 7:2.

48. *Id.*

49. Talmud, Bava Kamma 2a-b.

50. Talmud, Shabbat 74b.

51. Talmud, Shabbat 40b.

52. Talmud, Shabbat 20a.

53. Mishna, Shabbat 3:3. Talmud, Shabbat 38b-39a.

54. Talmud, Shabbat 40b.

55. Shulkhan Aruch, Orah Hayim § 321:3. *See also* Mishna Berura & Arukh Ha Shulkhan ad loc.

56. Talmud, Beitza 34a.

57. *Id.*

What if you forget it is Shabbat, or forget that cooking is prohibited on Shabbat?<sup>58</sup> Or if the cooking is an inevitable,<sup>59</sup> potential<sup>60</sup> or incidental<sup>61</sup> byproduct of some permitted action?

In the Talmudic tradition, each of these questions is answered through a detailed inquiry into the nature and scope of the underlying rule.

For example, one of the base thirty-nine *melakhot*-labors is the prohibition against writing. The Mishna teaches as follows (and the discussion gets even more intricate in the Talmud):<sup>62</sup>

Whoever writes two letters

With either the right hand or the left hand,

Whether the same letters or different letters,

Or different signs

In any language

is culpable.

...

Who ever writes in ink or other permanent dyes,

On two angles of a corner

on two tablets that adjoin as to be read together

is liable.

One who writes on his body is liable,

If one scratches on his body, the matter is disputed.

...

However, one who writes with colored liquids

Or with fruit juices

In the dirt or on anything that is not permanent

He is exempt.

One who writes in an unusual manner;

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58. See Maimonides, *The Laws of Shogeg* 7:3.

59. This is known as the concept of *p'sik reisha*. See e.g. Maimonides, *The Laws of Shabbat* 1:5.

60. This is known as the concept of *davar she'eino mit'kaven*. See Maimonides, *id.* at 1:5; Shulkhan Arukh, *Orah Hayim* 337:1.

61. This is known as the concept of *mit'assek*. Maimonides, *The Laws of Shabbat* at 1:8.

62. Adaptation of Mishna Shabbat 12:3-6.

Such as with the back of the hand,  
Or with his foot  
Or with his mouth or elbow-joint;  
Or if he wrote a single letter alongside an already written letter,  
Or one letter on the ceiling and the other on the floor  
Or on two pages of a ledger that cannot be placed side-to-side  
(i.e., like a legal pad)  
He is exempt.  
If one writes a one lettered abbreviation,  
The matter is then debated.

This is exactly the discourse that Jesus takes pains to avoid. Prefiguring the charge associated with legal realism, Jesus fears that rather than clarify the core principles of Shabbat, the Pharisee's discourse gets lost in its own conceptual gymnastics and distorts, or even subverts, the ultimate goals of the legal regime. Rather than discuss how Shabbat can be made into a more spiritually edifying experience, the Talmudist begins to worry about whether opening a curtain in a room with houseplants is deemed a derivative form of "planting," (i.e., aiding the growth of plants) because he has let in additional sunlight.<sup>63</sup> Even more dangerously, the Talmudic dialogue generates a culture that celebrates the thrust and parry of legal argumentation and the endless wrangling over size and scope of each principle,<sup>64</sup> at the expense of context-sensitive discussions regarding the underlying purpose of the *halakhic* doctrines. As the common law's long and tortured history bears out, intricate doctrinal analysis has the uncanny ability to restrict the lawyer's field of vision, making it easy to lose sight of the intended purpose of the regulation at hand.<sup>65</sup> Likely, it was this mode of thought that caused Jesus to charge the Pharisees with legally sanctioned hypocrisy.<sup>66</sup>

For these reasons, Jesus is unconcerned with the aptness of his analogy to David. It is not because he failed to understand the

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63. See e.g. Dovid Ribiat, *The 39 Melochos*, vol. 2, 274, nn. 70-77 (3d rev. ed., Feldheim 1999).

64. See Jeffrey L. Rubenstein, *Talmudic Stories: Narrative Art, Composition and Culture* (Johns Hopkins U. Press 1999).

65. See S.F.C. Milsom, *Reason in the Development of the Common Law*, 81 L. Rev. Q. 491 (1965).

66. See Matt 23:1-14.

analogical problems, but because he thought they were beside the point. While the David analogy offers something to the Pharisees on their own terms, the real message lies in the more radical idea that Shabbat is for Man. Jesus' refusal to engage in legalistic considerations stems from his theological and philosophical opposition to a discourse that focuses on the wrong set of ideas and ideals, or as Paul would phrase it, "the letter kills." Christian interpretation thus understands Shabbat as a state of mind, emphasizing its moral rather than legal message, where love and devotion overcome the technical regulations championed by the rabbinic caste.<sup>67</sup>

Not surprisingly, the rabbis have a different reaction. They find Jesus' rejection of the legal framing of Shabbat laws to be an overbroad response to what lawyers call "hard cases." In fact, Jesus' articulation of the relationship between Man and Shabbat is found, nearly word for word, in the Talmud itself. Echoing Jesus, Rabbi Jonathan interprets the verse, *Exodus* 31:14, "You shall keep the sabbath, because it is holy *for you*," to mean, "Shabbat is given over to you, but you are not given over to the Shabbat."<sup>68</sup>

Writing in the sixteenth century, and summing up Talmudic and medieval views on healing on Shabbat, the *Shulkhan Arukh*, the Code of Jewish law, explains:

One who has a minor discomfort on Shabbat and he is strong enough to engage in daily activities as a healthy person; it is forbidden to desecrate the Shabbat on his account. However if one is sick in a way that there is danger to life and limb, it is a commandment to violate the Shabbat on his account, and whoever is more expedient in this matter is praised. If one hesitates to ask a Rabbi whether violation is permitted, it is as if he commits murder.

Any sickness that the doctors claim is dangerous . . . one is allowed to violate the Shabbat on his behalf. If one doctor says to violate and another finds that it is not needed, we violate the Shabbat. There are those who maintain that one does not even need to consult the doctors since all persons are deemed somewhat expert on these matters, and in cases of even a chance of loss of life, we are generally lenient.<sup>69</sup>

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67. John MacArthur, Jr., *Hebrews* 95 (Moody Press 1983). "Sabbath rest was instituted as a symbol of the true rest to come in Christ. That is why the Sabbath could be violated by Jesus, and completely set aside in the New Testament. When the true Rest Land came, the symbol was useless." *Id.* at 101.

68. *See* Talmud Yoma 85.

69. *Shulkhan Arukh*, Orach Hayyim § 328.

While Jesus sees the conflict between human needs and the law as a reason to reject the legalistic framing of Shabbat, the rabbis see this tension implied in the Bible itself and incorporate these considerations into the legal framework of the Shabbat rules. The Talmud thus rules that one need not die or even endanger himself on account of Shabbat. This principle, however, is understood as an *exception* to the general rules which apply only under exigent circumstances. The *halakhic* discourse engages in a detailed balancing of the facts, and looks for a narrowly tailored approach towards reconciling exigency with the requirements of Shabbat. In other words: How hungry were the students? How sick is the patient? Can we heal by only breaking a rabbinic decree as opposed to a Biblical injunction? The legal analysis always centers on how to save lives while violating as little of Shabbat law as possible. In this way, the Talmud expresses Jesus' boundary-breaking insights squarely within the normative confines of *halakhic* legalism.

The rabbis respond to Jesus' charge by arguing that a nuanced mode of legal analysis can identify workable solutions to hard cases at a fraction of the cost in terms of the law's stability, predictability and authority. Echoing the formalist response to realist claims, the rabbis find that Jesus' approach fails to give any form or content to Shabbat, transforming it into a wholly subjective enterprise. Since the Christian approach resists the Talmudic-styled discourse, the rabbi is not surprised that Christians interpreted Shabbat as an idea that could be transferred to Sunday—a move inconceivable to the Jewish tradition in light of the text in the opening chapters of *Genesis*. Some Protestant circles have gone so far as to argue that since Shabbat is more a state of mind than a series of rules and restrictions, it should be applied throughout the entire week and not be confined to a single day.<sup>70</sup> While many Christians disagree with these interpretations, the Talmudist sees this as a predicable consequence of the policy-oriented jurisprudence promoted in the Gospel texts.

With the Mishnaic information as background, the stakes of Jesus' debates with the Pharisees become clearer, not only in terms of the religious politics of first-century Palestine but also in the wider context of jurisprudence and legal philosophy across the ages. Jesus favors standards over rules, policy over doctrine and abstract generalities over particular directives. The debates over Shabbat bring to mind debates

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70. The English Protestant reformer Robert Barnes said "For the Christian, . . . every day is a Sabbath day and a festal day and not only the seventh day." See Solberg, *supra* n. 39, at 23. See also Sherman, *supra* n. 33.

regarding the Supreme Court's Due Process jurisprudence, or what is sometimes known as the "levels of generality" debate.<sup>71</sup> Justice Harlan, for example, could not conceive that the famous clauses enshrined in our foundational document were limited to a list of particular grievances maintained by the eighteenth-century colonists.<sup>72</sup> In a move paralleling Jesus' view of Shabbat, Harlan looked to abstract a wider set of commitments extending beyond particular British abuses in the waning years of colonialism. Justice Brennan would later build on this model and develop his vision of Living Constitutionalism.<sup>73</sup>

Justice Scalia, among others, strongly disagrees with the "policy/generalities" approach.<sup>74</sup> He fears that the unguided inquiry into the broad goals and policies of the Constitution will wind up reflecting the judge's personal views and biases rather than ideals embedded in either law or tradition. This position resonates strongly with the Talmudic view of Shabbat. Like Scalia, the rabbis assume that the most legitimate form of legal interpretation addresses the issues through concrete rules and doctrines stated at their lowest level of generality, and are deeply skeptical of a method that asks what Shabbat is "really" about. And while virtually every act of legal interpretation involves constructing abstract rules from particular cases—and both Justice Scalia and the Talmudic rabbis are remarkably skilled in this method—the difference emerges most clearly when the methods are viewed comparatively. Overall, there is a qualitative difference between the abstractions used by Justice Scalia versus those of Justice Brennan, and the interpretation of Shabbat put forward by the Talmud as opposed to Jesus.

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71. See e.g. Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. Chi. L. Rev. 1057 (1990).

72.

[T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. [Liberty] is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; . . . and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints.

*Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting).

73. See e.g. William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, in *Interpreting the Constitution: The Debate Over Original Intent* 23 (Jack N. Rakove ed., N.E. U. Press 1990).

74. *Michael H. v. Gerald D.*, 491 U.S. 110, 127-128, n. 6 (1989) (plurality) ("Though the dissent has no basis for the level of generality it would select, we do: We refer to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified.").

## III. THE GOOD SAMARITAN

Perhaps the most famous confrontation between Jesus and the law is the parable of the Good Samaritan. The Lucan narrative informs that a *lawyer*, likely a figure associated with the proto-rabbinic Pharisees, stands up “to put [Jesus] to the test” asking what he must do to inherit eternal life.<sup>75</sup> Jesus guides the lawyer to answer his own question, to which the lawyer responds that he must love one’s neighbor as himself.<sup>76</sup> The lawyer, however, seeks to “justify himself” proceeding to ask Jesus “who is my neighbor?”<sup>77</sup> Jesus responds with the parable of the Good Samaritan, which instructs the lawyer to love everyone.<sup>78</sup>

The lawyer is described as attempting to “justify himself”—presumably to justify behavior that does not conform to the plain meaning of the Biblical mandate. The Gospel presents the lawyer’s question as irritating and unwarranted, perhaps even displaying a fundamental lack of faith. In the Talmud, however, the lawyer’s question is entirely appropriate. He asks, when must I treat another as myself, or more generally, what are the limits to the Biblical mandate towards altruism? Whereas the Gospel rebukes the lawyer, and Jesus refuses to fully engage the question, the Talmud welcomes the opportunity to identify the scope and limits of the duty to aid principle.<sup>79</sup>

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75. Luke 10:25.

76. See Luke 10:27.

77. Luke 10:29.

78. The entire text of Luke 10: 25-37 reads:

And behold, a lawyer stood up to put him to the test, saying, “Teacher, what shall I do to inherit eternal life?” He said to him, “What is written in the law? How do you read?” And he answered, “You shall love the Lord your God with all your heart, and with all your soul, and with all your strength, and with all your mind; and your neighbor as yourself.” And he said to him, “You have answered right; do this, and you will live.” But he, desiring to justify himself, said to Jesus, “And who is my neighbor?” Jesus replied,

A man was going down from Jerusalem to Jericho, and he fell among robbers, who stripped him and beat him, and departed, leaving him half dead. Now by chance a priest was going down that road; and when he saw him he passed by on the other side. So likewise a Levite, when he came to the place and saw him, passed by on the other side. But a Samaritan, as he journeyed, came to where he was; and when he saw him, he had compassion, and went to him and bound up his wounds, pouring on oil and wine; then he set him on his own beast and brought him to an inn, and took care of him. And the next day he took out two denarii and gave them to the innkeeper, saying, “Take care of him; and whatever more you spend, I will repay you when I come back.” Which of these three, do you think, proved neighbor to the man who fell among the robbers?

He said, “The one who showed mercy on him.” And Jesus said to him, “Go and do likewise.”

79. See Bava Metiza 30; 32.

To the extent the Good Samaritan parable is meant to critique rabbinic Judaism, the text in Luke is hyperbolic. As presented in the Mishna and Talmud, Jewish law holds that if there is even a doubt as to whether the robbed man was in mortal danger, *halakha* imposes a duty to rescue, and even the High Priest or the most respected rabbi is commanded to drop everything to aid the distressed traveler.<sup>80</sup> This is because, under Jewish law, virtually every commandment gives way to saving a life. At this level, the Gospel reads as a polemical exaggeration.<sup>81</sup>

Despite this reservation, the gist of the Gospel's depiction of the rabbinic-lawyer is not wholly off-base. While the Talmud has no direct parallel to the Good Samaritan parable, a discussion in Tractate *Bava Metzia* understands verses in *Exodus* Chapter 23 and *Deuteronomy* Chapter 22 as creating a duty to assist in rescuing or preserving another's *property*. In the course of establishing the nature and scope of this duty, the Talmud brings up a number of considerations reminiscent of the Good Samaritan parable.

The Talmud understands two Biblical passages as relevant to the duty to aid.

—*Exodus* 23:5 provides: “If you see the ass of one who hates you lying under its burden, you shall refrain from leaving him with it, you shall help him to lift it up.”

—Similarly, *Deuteronomy* 22:4 provides: “You shall not see your brother's ass or his ox fallen down by the way, and withhold your help from them; you shall help him to lift them up again.”

The Talmud is initially bothered by two tensions between these verses. First, why does *Exodus* mandate the assistance of “one who hates you” while *Deuteronomy* legislates a duty to aid one's “brother,” a discrepancy that may very well stand behind the lawyer's question of “who is my brother?” Secondly, the Talmud questions the repetition found within the Biblical text; why are both verses needed? Proceeding under the standard rabbinic view, the Talmud finds that the *Deuteronomy* passage adds something not otherwise apparent in the *Exodus* text. The majority view concludes that while *Exodus* refers to *unloading* the payload from an ox that has collapsed under its weight, *Deuteronomy* mandates assisting the traveler in *re-loading* his animal in the event the payload falls off. The Talmud refers to these duties as the “unloading” and “loading,” respectively.<sup>82</sup>

80. See Talmud Sanhedrin 73a; Maimonides, *The Laws of Murder* 1:14.

81. See Talmud Sanhedrin 74a; Maimonides, *The Laws of the Foundation of the Torah* 5:1-3.

82. See Talmud, *Bava Metzia* 32a-b.

The Talmud finds that the two acts do not implicate the same interests. While the loading obligation protects only the interests of the animal's human owner, the unloading duty not only assists the owner but also takes interest in the animal's welfare as well (by literally getting the load off its back). The Talmud concludes that while unloading (which aids both man and beast) must be done for free, a Good Samaritan can demand payment for his assistance in reloading the payload onto the animal's back.

The Talmud then considers several limitations to this duty. For example, the obligation does not attach if the accident is more than roughly one mile away from the would-be Good Samaritan.<sup>83</sup> Additionally (and here we sense echoes of Jesus' rebuke), a *kohen* (priest) is exempt from the commandment if assisting would require him to become ritually impure (i.e., by walking through a graveyard).<sup>84</sup> Likewise (again hearing echoes of Jesus' parable), a distinguished person, for whom "it is not fitting with his dignity" to get down and dirty and load beasts of burden (i.e., he would not do the same where his own property is at risk) is similarly relieved of the duty to aid, though the Talmud suggests that a respected elder *should* go beyond the letter of the law and offer assistance regardless.<sup>85</sup>

Having laid out basic rules, the Talmud moves into an even more analytic mode, investigating the core issue behind the Biblical duty to aid: is it solely predicated on man's responsibilities toward a fellow man, i.e., toward the animal's owner, or does it also include an element of concern for the animal's well-being as well? The difference: under the second conception, one would be required to assist an animal even if human distress/loss were not at issue.<sup>86</sup> The Talmud resolves this issue by investigating the legal principles embedded in prior authoritative rulings.

This simplified sketch of the Talmudic dialogue opens a window into its discursive mode. As in the Shabbat example, the Talmud examines the rules of the loading/unloading command looking to define the scope and nature of the obligation. When does it apply? How does it apply? Can one seek payment for services rendered? And to what degree must one sacrifice his own welfare for the assistance of others? Finally, like the classical common and Roman law, the Talmud looks to

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83. *Id.* at 33a.

84. Talmud, Bava Metzia 30a.

85. Talmud, Bava Metzia 30a & commentaries ad loc. See also Shulkhan Aruch, *Hoshen Mishpat* 263:3 & 272:3.

86. Talmud, Bava Metzia 32a-b.

use abstract legal principles from the existing materials in order to resolve novel and hard cases.

With the Talmudic discussion in the background, we return to the Good Samaritan story. The lawyer's question clearly elicits a negative reaction. But why? Isn't at least some version of the Talmudic/lawyerly discourse necessary? In order to apply the "love your neighbor" principle to concrete factual scenarios, further elaboration is undoubtedly required. Moreover, a devout Christian might confront his pastor or priest claiming, "I cannot afford to put up the robbed wayfarer for two months in a hotel," or, "What if I will be endangered by going down to the ravine (or stopping the car late at night in a questionable area of town)?," or, "Should I save the money for my child's college fund, tithing to the church, pay my home mortgage or pay the stranded traveler's hotel bill?" Certainly, the pastor would not deem these concerns insincere.

No doubt, a perspective grounded in the Gospels would have little patience for the Talmud's priestly prerogative (later abolished in Jewish law), or for the exemption given to the elder statesman for whom loading up animals is thought to be beneath his dignity. Jesus would have found the Talmud's distinction between loading and unloading overwrought, and would cringe at the suggestion that one can demand payment for the "loading" half of the Good Samaritan duties. (Which could lead to some interesting behavioral law-and-economics research as to whether people are more likely to offer assistance under the Talmud or Gospel view.) But eventually, in one way or another, some prudential calculus must occur. One must assess how much of a personal and financial sacrifice is mandated by the divine command. Why then the hostility to the lawyer's question?

I do not take Jesus' opposition as directed to the lawyer's question as much as it is to the discursive mode that the lawyer inhabits. The command to love cannot be reduced to rules or to a dry and technical discourse. By rulying, reifying and legalizing the command, Jesus finds that the lawyer/Talmudist misses the point. This mode of inquiry invariably focuses on the legal limits of what one *must* do for the other rather than the unlimited scope of what one should *want* to do. While at the point of application, Jesus would agree that some legalistic considerations must be taken into account, the point of the Good Samaritan parable is that at the fundamental level, one must overcome the boundaries that naturally exist between one person and his fellow man. The discourse of law must give way to the discourse of love. The lawyer's question, according to Jesus, leads the lawyer to consider his

own material, ritual and hierarchical status, allowing him to ignore the human pain and suffering that lies directly at his feet.

Generalizing a bit further, Jesus fears that as the lawyer wades knee-deep into the legal details, he inevitably loses sight of the law's ultimate objectives. Rules are, by definition, both over-and under-inclusive, and there is often a gap between the underlying rationale for a legal rule and the conduct that results from a straightforward application of the rule.<sup>87</sup> For example, strict fidelity to the law can lead to a result that subverts the idea standing behind the Biblical mandate.<sup>88</sup> Moreover, since the thrust of the discourse is oriented toward doctrinal and technical precision rather than the human dimension of the issue, Jesus fears that the Talmudic interpretation leads to what modern critical theorists have called the dehumanizing aspect of legal discourse.<sup>89</sup>

Needless to say, the Talmud disagrees. At the most basic level, since the Biblical commandments embody God's will, the Talmud assumes that it must know exactly what God commands and when that duty is satisfied. Moreover, the Talmud assumes that rulings on narrow points of law are themselves embedded with further meaning which can be extracted via the legal/analytic process. Therefore, even if the case of choosing between helping an enemy load or a friend unload never arises under the clinical parameters described in the Talmudic text, this hypothetical case assists later Talmudists in determining whether the law incorporates a principle of animal welfare. These technical debates, and the Talmud's near endless stream of law school-style hypotheticals, form the data set from which further legal propositions are either proven or rejected. Through this inherently legal discourse the Talmud is able to use a finite canon of texts to formulate guidelines regarding the extent of the Good Samaritan principle, the justifiable reasons to refuse aid and when restitution can be demanded for services rendered. For this reason, no detail is too arcane or specific to be considered within the Talmud's meandering dialogue.

Thus while the Talmudic approach invariably produces a denser and more differentiated legal architecture than is favored by Jesus, the case law regarding loading/unloading is used to sort out the tension

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87. See e.g. Larry Alexander *The Gap*, 14 Harv. J.L. & Pub. Policy 695 (1991).

88. See e.g. *Responsa Havot Yair* § 191 & *Responsa Ridbaz* vol. 2, § 728 who interpret the Bible's duty to aid narrowly and technically. These authorities maintain the duty applies only to the loading and unloading of *animals* but does not impose a general obligation to assist *persons* in distress. But see *Responsa Rashba* § 252 & 256 (rejects this approach) and *Responsa Yehave Da'at* vol. 5, § 65 (collecting numerous authorities rejecting *Havot Yair's* view).

89. See e.g. Robert W. Gordon, *Unfreezing Legal Reality: Critical Approaches to Law*, 15 Fla. St. U. L. Rev. 195 (1987).

between altruism and individualism that lies at the heart of every duty-to-aid scenario. The unloading requirement (which must be done *gratis*) gives expression to the purely altruistic ideal. On the other hand, the loading requirement allows the Good Samaritan to demand payment for services rendered and gives expression to the countervailing interests of individualism. The dense and technical discourse of unloading and loading establishes the boundary line between Man's obligations to himself and his brother.

#### IV. THE ROLE OF LAW IN RELIGIOUS CONSCIOUSNESS

The pattern identified in the Shabbat and Good Samaritan examples resonates throughout both the Jewish and Christian canons. While Jesus accuses the rabbis of worrying about how to tithe mint, dill and cumin, thus forgetting the weightier matters of the law,<sup>90</sup> the Mishna proudly discusses in which situations "savory, hyssop and thyme" are deemed *food* and thus subject to the laws of tithing.<sup>91</sup>

Moving beyond the Gospel texts, the Didache records the Lord's Prayer, and instructs that each believer should "Pray this three times each day."<sup>92</sup> While the Mishna similarly requires prayers to be said thrice daily, it immediately suggests differentiation as to both the timing and content of the morning, afternoon and evening prayers. Further, the Mishna debates whether morning prayers can be recited "until noon" or in the opinion of Rabbi Judah, "until the fourth hour."<sup>93</sup> Following these comments, the Talmud cannot keep itself from asking, "does Rabbi Judah mean until the beginning of the fourth hour, or until the end of the fourth hour?"<sup>94</sup> And so the Talmudic wheels go round and round.

We might also consider the example of baptism/*mikva* rituals. Both traditions contemplate the idea of a spiritual purification via immersion into a pool of water. The New Testament's view is fully theological in tone. The *Book of Acts* speaks of baptism in terms of forgiveness of sin and participation in the Holy Spirit.<sup>95</sup> Paul similarly

90. Matt 23:23 ("Woe to you, scribes and Pharisees, hypocrites! for you tithe mint and dill and cummin, and have neglected the weightier matters of the law, justice and mercy and faith; these you ought to have done, without neglecting the others.").

91. Mishna, Maaserot 3:9.

92. Peter Kirby, *Early Christian Writings, The Didache*, ch. 8, <http://www.earlychristianwritings.com/text/didache-roberts.html> (accessed July 28, 2007). *Didache* is the title of one of the earliest church documents, designed to prepare gentile Christians for membership in the church. *Harper's Encyclopedia Religious Education* 189 (Iris V. Cully & Kendig Brubaker Cully eds., Harper & Row 1990).

93. Mishna Berakhot 4:1.

94. Talmud, Berakhot 26a-b.

95. Acts 2:38.

stresses how baptism creates a spiritual bond between the believer and Jesus,<sup>96</sup> and allows for “regeneration and renewal in the Holy Spirit.”<sup>97</sup> Even more suggestive for our purposes, Paul understands that those who have been “baptized into Christ” are no longer subject to the discipline of the law.<sup>98</sup>

Moreover, even the *Didache*, generally considered the most legalistic of the early Christian texts, says rather little about the baptismal process. The text’s overall message is that the ritual technicalities should not interfere with the process of spiritual conversion; it’s the conversion of the heart that matters most.<sup>99</sup>

In contrast to Paul’s theological discourse, the *Mishna* deals with the question from a decidedly legalistic perspective. The ten technical chapters of *Mishna Mikva’ot* address nearly every hypothetical question that an imaginative legal mind can construct from a rule requiring immersion in a pool of water (what counts as *immersion*, what defines *in*, what qualifies as a *pool*, and what constitutes *water*?). Despite the *Mishna*’s prolixity, nowhere in the tractate is there any discussion that approaches the theological issues that interested Paul. This tendency becomes even more pronounced in the *Talmud*, where *Mishna*’s ruling, regarding one who immersed in a pool that was later found to lack the requisite amount of water, becomes an abstracted legal principle that travels across several substantive fields of law. The *Talmud* interprets this case as a precedent relevant to determining the scope of evidentiary presumptions, permitted inferences, the use of circumstantial evidence and establishing the burden of proof.<sup>100</sup> What this has to do with the

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96. Col 2:11-13.

97. Titus 3:5.

98. Gal 3:23-29.

99. Kirby, *supra* n. 92, at ch. 7 (“[B]aptize into the name of the Father, and of the Son, and of the Holy Spirit, in living water. But if you have no living water, baptize into other water; and if you cannot do so in cold water, do so in warm. But if you have neither, pour out water three times upon the head. . .”).

Like the *Didache*, the *Talmud* also proscribes guidelines for performing the immersion ritual under sub-optimal conditions. In certain cases one can substitute complete immersion in a ritual pool with pouring a lesser amount of water over the body and head. See *Mishna Mikvaot* 3:4. Unlike the *Didache* however, the *Talmud* sees this exception as a cause for further analysis, inquiring both under what circumstances is one entitled to rely on the more lenient method and as to whether immersion and pouring methods are fully interchangeable. See *Talmud Berakhot* 22a-b. Later commentators would push this inquiry further wondering whether (i) the pouring method is simply an exception to the general rule or (ii), whether it establishes an alternate mechanism to achieve ritual purification. See generally, Chaim Saiman, *Legal Theology: The Turn to Conceptualism in Nineteenth Century Jewish Law*, 21 *J.L. & Religion* 39, 55-57 (2005). In the rabbinic tradition, even exceptions established for dire circumstances are appropriate subjects of technical and formal analysis.

100. *Talmud, Nidda* 2b.

ritual/spiritual transformation accomplished by the *mivka* ritual is far removed from the Talmud's mind.

These differences can be similarly expressed in terms of the role of law within the relevant religious consciousnesses. The most dramatic illustration emerges from a Talmudic account of the workings of the celestial retinue. The Talmud describes a rabbinic disagreement regarding some particular details of the skin affliction (commonly translated as leprosy) detailed in Chapter 13 of *Leviticus*. While the question at issue is fairly typical of the Talmudic debate, the disputants are certainly not.<sup>101</sup>

They were arguing in the Academy of Heaven:  
 If the discoloration of the skin preceded the white hair  
 He is impure;  
 If the white hair preceded the discoloration of the skin  
 He is pure.  
 If there was doubt as to which came first:  
 The Holy One, blessed is He, says he is pure;  
 While the rest of the Academy of Heaven says he is impure.  
 They asked: "Who will adjudicate this issue?"  
 It was decided that Rabba b. Nachmani  
 Who had singular knowledge of this area of the law  
 Would come to resolve the debate.

One could scarcely imagine a more Talmudic, and less Christian, description of the divine.<sup>102</sup> First, there is an "Academy of Heaven" which apparently sits around debating the finer points of Jewish law just like the Talmudic academies below. Moreover, God himself participates in this debate, not as the arbiter/judge, but as a disputant! Finally, God himself must submit to the expertise of the Talmudic sage whose knowledge of the law is called upon to settle the dispute between God and the angels.<sup>103</sup>

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101. Talmud, Bava Metiza 86a.

102. In fact, Peter Vernerabilis (1094-1156) one of the first Christian polemicists to attack the Talmud cites this passage as Exhibit A of the Talmud's heresy. See Yitchaq Brand, *The Oven of Achnai—A Story at the Heart of a Polemic*, 75 Tarbitz 438-440 (2006) (Hebrew).

103. A similar motif is found in another famous Talmudic story regarding the Oven of Achnai. See Bava Metzia 59.

This is certainly not the only depiction of God to be found within Jewish literature. In the Bible, and even in the Talmud, God more typically assumes an adjudicative role. But the fact that such a description of God is *even possible* speaks volumes to the role of law within the Talmudic and Jewish experience. And despite the multifaceted nature of Christian theologies and cosmologies, I am unaware of any Christian portrayal that has God debating the finer points of Mosaic law with his ministering angels.

Moreover, whereas Christian scholars have long debated the relative merits of faith versus works, the Talmud debates which is paramount: works or the study of Torah. While the “works” half of each equation remains constant, in Christianity works stand in opposition to faith,<sup>104</sup> while in the Talmud, works stands in opposition to the lifelong commitment to the study of the law.<sup>105</sup>

Similarly, Christian scholars understand themselves as addressing theological questions, and since the Middle Ages, churches and universities have maintained chairs and then departments of theology. There is however, no word for theology in the rabbinic/Talmudic lexicon. A religious scholar, by contrast, is known as a *talmid hakham*—a term that has no parallel in English (or in Christian thought) and is best translated as “a scholar of the law.” Thus, when a *halakhic* Jew seeks guidance from his rabbi, he conceptualizes himself as asking the rabbi a legal, rather than theological, question. The rabbi, in turn, formulates his response—much as a lawyer does—by reasoning through the relevant provisions with the Talmud, legal codes and *responsa* (rabbinic case law) literature. Moreover, even when the issue draws on the rabbi’s role as a moral and spiritual guidance counselor, competency to address such issues is understood to flow from the rabbi/*talmid hakham*’s ability to see the issues from the perspective of Jewish law.<sup>106</sup>

Finally, rabbinic Judaism does not understand law to be the specialized discourse of the select few. *Halakha* expects each Jew—even the wood chopper and the water carrier<sup>107</sup>—to set aside time every

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104. Gal 2:16.

105. See Talmud Kiddushin 40b.

106. Over the past century, this view has expanded considerably. In contemporary ultra-orthodoxy, many assume that a rabbi’s extensive knowledge of the Talmud and Jewish law grants him unique insights into issues of communal governance, social and national policy and even as to the appropriate course of medical treatment. See Jacob Katz, *Da’at Torah—The Unqualified Authority Claimed for Halakhists*, 11 *Jewish Hist.* 41 (1997); Lawrence Kaplan, *Daas Torah: A Modern Conception of Rabbinic Authority*, in *Rabbinic Authority and Personal Autonomy* (Moshe Sokol ed., Jason Aronson Inc. 1992).

107. Deut 29:11.

day to study Torah and gain proficiency in the *halakhic* literature. It is quite common for groups of laymen to come together several times each week and struggle over recondite Talmudic texts. The congregation's comfort with legal ideas trickles down to many areas of synagogue life. For example, it is not at all uncommon for a rabbi to begin his sermon saying:

Last week one of you came to me and asked me the following: . . . . Initially, I thought *A* based on Talmudic passage *Y*. Then I saw the comments of *Z*, which made me think *B* was the more correct approach. I then realized that in truth the answer to this question depends on the well known debate between Rabbi<sub>1</sub> and Rabbi<sub>2</sub> in source *W* (which initially seems unrelated to the question at hand).

I suspect that even to the most legally oriented Church community this degree of verisimilitude with the substance of religious law is inconceivable. There are, no doubt, scores of rather exhaustive rulebooks governing Christian doctrine and practice. But there is a vast difference between having many rules, and the Talmudic worldview that elevates immersion in the "sea of the Talmud" to the center of religious observance.<sup>108</sup> Similarly, while the rabbinic tradition has also talked about Shabbat and *mikva* in tones reminiscent of the messages stressed by Jesus and Paul, the majority of Talmudic dialogue explores these issues in a way contrary to the central messages of Jesus' teachings. Whether measured by the intricacy of legal analysis, the diffusion of legal knowledge and skills amongst the populace, the range of issues thought to be justiciable within the normative bounds of the legal system or the contact points between the parishioner-layman and the law, the conclusion is the same. These two religions have very different understandings about the territory claimed by law's empire.

#### CONCLUSION

Past attempts to discuss the Talmud in light of Church doctrine have ended rather badly, at least for the Talmud.<sup>109</sup> For this and other reasons, I do not take a stand on which is the better method of law, anymore than I will attempt to decide which is the better religion (also a question that historically has not ended well for Jews). Each mode of

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108. See e.g. Moshe Halbertal, *People of the Book: Canon, Meaning and Authority* (Harv. U. Press 1997).

109. See e.g. Chen Merchavia, *The Church Versus Talmudic and Midrashic Literature: 500-1248* (Bialik Inst. 1970) (Hebrew); David Berger, *The Jewish-Christian Debate in the High Middle Ages* (Jewish Publication Socy. 1979).

legal thought comes with a predicable set of pros and cons, and comparative analyses of the New Testament and Talmudic material further confirms this view. The virtues of the rabbinic/lawyerly view are thought to be predictability, objectivity and grounded authority. But the constant fear is that under- and over-inclusive rules will distract the law from its true aims, or as Paul would have it, the letter kills. Thus, the frequent—and not altogether unfair—critique of Talmudic Judaism, and of conventional legalism more generally, is that it gets so concerned with legal minutia that the overall purpose of the laws (or The Law) gets lost in the shuffle.

The contrary position has its own drawbacks. This view of law is typically faulted for giving too much discretion to the ultimate decision maker, leading to haphazard, self-interested and even corrupt applications of the law. As more than one pastor has lamented, the route from Jesus' "Man is Lord over the Sabbath" to Sabbath as "doing what makes me happiest" turns out to be a short one indeed, and much of the criticism of the living constitutionalist's Due Process jurisprudence has a similar argumentative architecture.

Pros and cons aside, the analysis suggests several conclusions about both Jesus' and the rabbis' conception of law.

First, comparative reading of the sources suggests that Jesus and his early followers had a set of ideas that can legitimately be identified as comprising a legal theory. Though this is not the type of theory that dictates certain outcomes in every case (but which legal theory does?) it forms a set of related interpretive proclivities and jurisprudential assumptions regarding the nature of legal rules and texts and the advisability of refracting social questions through the legal framework. In the early centuries of the common era, Judaism and Christianity parted paths over how to read the Biblical verses and the degree to which Biblical directives should be subjected to formalized legalism. Further, despite important counter-examples (*aggadah*, *kabbalah*, medieval philosophy and liberal/reform movements on the Jewish side; the Scholastics, Calvinist Geneva, Puritans and Catholic moral theologians and ethicists on the Christian side), echoes of this early debate can be felt throughout the ages. Finally, these differences extend beyond the early theological debates regarding the ongoing relevance of the Torah's rules. Though Jesus' approach to the Biblical directives is undeniably predicated on his understanding of Man's relationship with God, it has implications for Man's encounter with his fellow Man as well. Jesus and the rabbis staked out opposing positions towards the law that later centuries would discuss in terms of legal theory.

Secondly, despite the recent uptick in writing by legal academics regarding religion (particularly Christianity) and law, I am unaware of any writer who has framed the Christian contribution to *legal* thought in terms of the victory of the Spirit over the Letter. As mentioned at the outset, seen from the Talmudic perspective, Jesus' relationship to law is at the very core of his ministry—an impression only strengthened in the Pauline epistles. But because the “law and theology” discussion has largely ceded the definition of “law” to the theologian, the perspective of the lawyer is underrepresented, an impression confirmed by *The Teachings, Christian Perspectives* and *Faith and Law*. In line with the theme of this paper, I suggest the de-legalization of the Christian religious consciousness has been so successful that contemporary inhabitants of this tradition have difficulty recognizing that the early Church was grappling with issues which squarely implicate the central questions of legal theory and interpretation. Thus, even while in the past generation New Testament scholars have returned to consider Jesus' Jewish roots,<sup>110</sup> there has been no corresponding movement focusing on the jurisprudential implications embedded within these foundational texts.

By bringing the Talmudic tradition back into this conversation, I hope to expand the discourse on law and religion, particularly, the relationship between law and theology. Theological commitments obviously influence the law at the grand level, e.g., the constituent nature of the church and state; questions of death penalty and medical ethics; the longstanding discussions of natural law and capital “J” Jurisprudence—all of which fall into the usual corners of the law and religion discourse.<sup>111</sup> But there is another dimension which speaks to the framing of legal issues; the level of generality applied to legal analogies; the relative appetite for rules over standards; the line between factual and legal questions; and most significantly, the desirability and consequences of refracting difficult social questions through the legal prism. Even more provocatively, we might wonder whether the discourse of legal constructs and lawyerly argumentation sufficiently legitimates the coercive practices carried out under the banner of “law.” By raising these issues, I hope to locate more common ground between legal and religious discourse, and enrich our understanding of how

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110. E.g. E.P. Sanders, *Jesus and Judaism* (SCM Press 1987); E.P. Sanders, *Paul, the Law and the Jewish People* (Fortress Press 1985); John Meier, *A Marginal Jew: Rethinking The Historical Jesus* (4 vols.); *Early Christian Thought in its Jewish Context* (John Barclay & John Sweet eds., Cambridge U. Press 1996).

111. See Skeel *supra* n. 7.

religious commitments are translated into legal arguments and policy preferences.

Finally, Paul was certainly correct to realize that a central dichotomy divides the jurisprudence of *Letter* from that of *Spirit*. While the terms of this debate have shifted over the centuries, the core distinction between letter and spirit has been a focal point of jurisprudential debate throughout the history of legal thought. In each of the following sets of oppositional terms, letter jurisprudence resonates with the right, while spirit jurisprudence resonates with the left.

<i>Left</i>	<i>Right</i>
Substantive justice	Procedural justice
Equality of outcome	Equality of opportunity
Fairness ex post	Fairness ex ante
Equity	Law
Justice of the case	Rule of law
Living interpretation	Originalism / Textualism
Substance	Form
Legal functionalism	Legal formalism
Purposive interpretation	Grammatical interpretation
Standards	Rules
Context	Text

Presented at this level of generality (which invariably runs roughshod over many specifics and particulars), it seems accurate to talk about Jesus' legal theory as embodying those positions associated with the left, while the rabbinic texts sway right. While this organization may be intuitive to the reader of the Bible, Gospels, Epistles, Acts, Mishna and Talmud, it runs contrary to the dominant representation of Jesus' values and legal theory in contemporary American law and politics.

In the current political landscape, Jesus' legacy is most commonly associated with the rule of law, limited role of judges, rules over standards, text over context and procedural rather than substantive fairness. While these commitments are expressed most vociferously in the context of constitutional interpretation, they extend to the reading of statutes, and all the way down to the reasoning employed in ordinary criminal and commercial cases. It is no small irony that groups who champion Jesus tend to align themselves more closely with the interpretive project of the Talmudic rabbis than with Jesus' approach to the Law of the Torah and law more generally. Similarly, those most likely to deny that Jesus has anything to teach us about American law

may inadvertently be bearing witness to Jesus' conception of law.

I do not mean to advocate that every Christian must adopt the interpretative commitments characterized as *Spirit*, any more than every Jew must become a strict adherent of *Letter* jurisprudence. Religious traditions are far too diverse and complex to produce such a simple one-to-one ratio, and in any event these questions are further refracted through other theological and philosophical commitments. Moreover, there are many reasons to think that reading the Bible is different from reading a statute, and why the correct approach to the eternal Divine law is, and should be, different than the best approach toward the temporal law of Man. Jesus himself argued that certain areas are rendered unto Caesar,<sup>112</sup> and in the centuries since, Christian theologians have expanded upon this distinction considerably.

But there are also compelling reasons to assume that these interpretive enterprises are rather similar. Both involve the search for meaning and truth within ancient, sacred and quasi-sacred texts, which require translation and interpretation in light of shifting legal and cultural meanings. Both deal with how individuals and societies are governed by the specific rules and general commands of a sovereign yet distant author.

Moreover, throughout his ministry, Jesus issues challenges to both the existing spiritual *and* temporal orders. When Jesus criticizes the Pharisees for wanting to stone the adulteress,<sup>113</sup> when he challenges the priests and scribes over their administration of the Temple,<sup>114</sup> or when he expresses solidarity with the sinners and tax collectors,<sup>115</sup> Jesus is engaged in acts of both "religious" as well as "political" dissent. Like the rabbinic writers, the Gospel authors found the distinction between the temporal and the spiritual realm far less real or relevant than we moderns imagine. While the theology of two separate Kingdoms or spheres would later feature prominently in Christian theology, the dichotomy was of far less significance to Jesus and his first century audience.

Finally, the operating premise of many Christian legal theories is that the Bible (and Jesus' teachings in particular) are relevant to contemporary debates in law, policy and politics.<sup>116</sup> Particularly in its

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112. Matt 22:21.

113. John 8: 1-11.

114. Mark 11:15-19; Matt 21:12-17; Luke 19:45-48.

115. Mark 2:13-17. *See also* Matt 9:9-13 & Luke 5:27-32.

116. *See e.g.* the following essays in *Christian Perspectives on Legal Thought*, *supra* n. 8: W. Burlette Carter, *What's Love Got to Do With It? Race Relations and the Second Great Commandment* 133; Thomas L. Shaffer, *The Radical Reformation and the Jurisprudence of*

Protestant iterations, Christian legal scholarship looks to extract lessons from the Bible and apply them in both the personal and political domains. On its own terms, Christian legal theory assumes that Jesus' teachings are, at least partially, designed to teach proper conduct in the administration of law and justice in the temporal realm.

The attempt to create a composite of Jesus' and rabbinic approaches to law necessarily elides a host of complicated historical, methodological and theological issues. The problem only gets worse as we extend the project from "Talmudic" to "Jewish" and from "Jesus" to "Christian." But this is exactly why the comparative perspective proves its utility. Comparative readings draw attention to the salient and distinguishing features of each discursive community. To argue that Judaism is law-obsessed begs the question, as opposed to what? But the contrast between the Talmud's penchant for legal concepts, liminal cases, and law school-styled hypotheticals with the Gospels reveals a sustained set of institutional and intuitional differences. Here, comparative analysis has done its job and the conclusion is easier to prove and sustain.

This paper examines how two traditions confront shared source material. What questions are raised, and what answers are given? What issues stand at center of the conceptual and intellectual universe? The debates between Jesus and the rabbis are not haphazard. They reflect a consistent set of systemic differences regarding the interpretation of Biblical texts and formulation of legal traditions. Long before the New Deal, the administrative state, judicial review, the drafting of the American Constitution, the early-modern debates over natural and positive law and even the Magna Charta, Jesus and the rabbis parted paths over the fundamental questions that are continually debated by contemporary legal theorists.

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*Forgiveness* 321; John Copeland Nagle, *Christianity and Environmental Law* 435; Catherine M.A. McCauliff, *A Historical Perspective on Anglo-American Contract Law* 470; Joseph G. Allegretti, *Can Legal Ethics Be Christian?* 453. See also e.g. Stuntz, *supra* n. 9; Robert F. Cochran, Jr., *Evangelicals, Law and Abortion*, in *Faith and Law*, *supra* n. 10.