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WHAT WERE JESUS AND THE PHARISEES TALKING ABOUT WHEN THEY TALKED ABOUT LAW?

David A. Skeel, Jr.*

Jesus' Legal Theory—A Rabbinic Reading opens with a startling claim. The increasing number of legal scholars who have begun exploring the relationship between Christianity and American law in the past several years have neglected to consider the insights of Jesus himself. “[N]otably absent from this literature,” Professor Saiman writes, “is any extensive examination of Jesus, and *his* views about jurisprudence and legal theory. Despite the overall diversity of his writings, there is little discussion about what Jesus thought about law, lawyers, legal rules and the legal order.”¹ What, the article asks, does Jesus’ own legal theory look like?

Many of Jesus’ clearest pronouncements on the nature and proper use of the law come in his skirmishes with the Pharisees, the forerunners of rabbinic Judaism. It is on these exchanges, and the contrasts between Jesus’ and the Pharisee’s perspectives, that *Jesus’ Legal Theory* focuses. As Professor Saiman points out, Jesus regularly resists the careful parsing of precedents. When the Pharisees ask why his disciples are plucking heads of grain on the Sabbath, for instance, he tells them “the Sabbath was made for man, not man for the Sabbath.”² Similarly, Jesus radically expands the concept of “neighbor” in the parable of the Good Samaritan. The Pharisees and their rabbinic successors, by contrast, place much more emphasis on the literal terms of the law. For them, “meticulous observance of the Torah and its commandments . . . reflects the highest form of divine service.”³ These tendencies, Professor Saiman argues, continue to distinguish Jewish and Christian perspectives today. Rabbinic reasoning “involves the application of text and precedent to facts,”⁴ whereas Christians tend to question whether law is “the correct platform through which to analyze and decide important religious and social issues. It is thought to be overly

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1. Chaim Saiman, *Jesus' Legal Theory—A Rabbinic Reading*, 23 J.L. & Religion 99.
2. Mark 2:27 (English Stand. Version).
3. *Supra* n. 1.
4. *Id.* at 105.

restrictive, and unjustifiably replaces faith and love with rules and precedents."⁵ After developing this contrast through a series of carefully argued examples, Professor Saiman concludes by exploring the similarities between the Jewish and Christian modes of interpretation, on the one hand, and, on the other, the debate between formalism and more flexible approaches in contemporary law. The Pharisees' legal reasoning emphasizes the law's letter and all of its correlates (form as opposed to substance, rule of law, originalism/textualism), he argues, whereas Jesus comes down on the side of the law's spirit (substance over form, justice in the particular case, living interpretation).

Jesus' Legal Theory is a model of law and religion scholarship. Although Professor Saiman writes from the perspective of a rabbinically trained legal scholar who is a sympathetic outsider to Christianity, his aim is descriptive, to explore Jesus' and the Pharisees' divergent conceptions of law without taking sides. For readers unfamiliar with the rabbinic tradition, he intersperses clarifying details to provide context for his analysis of the debate. His analyses of the textual reasoning that underlies the Pharisees' views on the Shabbat, the obligations to a neighbor and other issues will be especially eye-opening to those who know the Pharisees simply as rule-obsessed foils for Jesus' teachings in the New Testament.

As with any sharp dichotomy, one can quibble with this one. To give the most obvious historical counterexample to Professor Saiman's contrast between rabbinic attention to legal detail and Christian flexibility, the Catholic canon law seems (as Professor Saiman notes) to reflect the careful accretion of precedents he associates with rabbinic reasoning. But the overall point is both subtle and compelling: Jesus and the Pharisees engaged in very different modes of legal interpretation. Attending to these differences offers a multitude of insights into the New Testament, the Mosaic law and contemporary American law.

The brief discussion that follows will raise, and worry the bone of, a single question: what were Jesus and the Pharisees talking about when they talked about law?

Strictly speaking, as Professor Saiman notes at the outset of the article, the law at the heart of Jesus' disputes with the Pharisees was the law outlined in the Hebrew Bible: "the Torah or the 'Law of Moses,' i.e., the legal rules and practices observed by first century Jews."⁶ For

5. *Id.* at 106.

6. *Id.* at 100.

the purposes of the article, however, Professor Saiman defines law more broadly. "Law," he writes, "refers to a reasoning process, an ongoing conversation whereby professional jurists analyze legal texts, precedents and rules to reconcile competing social ideals and values."⁷ As this broad definition suggests, *Jesus' Legal Theory* assumes that Jesus' statements about the Mosaic law apply not just to the Mosaic law, but also to contemporary secular law and any other context that involves the analysis of legal texts.

The assumption that Jesus' stance on the Mosaic law translates directly into other contexts is, it seems to me, worth examining more closely. The recent American culture wars offer an obvious challenge. If the dichotomy outlined in *Jesus' Legal Theory* is accurate, one would expect to find Protestant evangelicals calling for flexible, open-ended interpretations of the Constitution when the courts address abortion, homosexuality and other sharply contested issues. Jesus condemned nitpicky interpretations of the law, the reasoning might go, so surely evangelicals would distance themselves from the originalist and textualist modes of interpretation that have been much debated in the past several decades. Yet this is not what we see at all. Almost to a one, the leading evangelical legal organizations decry flexible interpretations of the Constitution such as Justice Brennan's "living Constitution" and advocate strict adherence to its original terms. What gives?

If Professor Saiman's dichotomy were exactly backwards, and it was Jesus who called for formalistic interpretation, the puzzle would of course disappear. But this can't be the explanation. On any plausible reading of the Gospel narratives—and I find Professor Saiman's readings more than simply plausible—Jesus called for a broader, more flexible interpretation of the Mosaic law than his Pharisaic interlocutors, just as Professor Saiman suggests. Professor Saiman hints at a second explanation: perhaps evangelicals have lost sight of the interpretative principles that lie at the heart of their faith. "It is no small irony," Professor Saiman writes, "that groups who champion Jesus align themselves more closely with the interpretive project of the Talmudic rabbis than with Jesus' approach to both the Law of the Torah and law more generally. Similarly," he continues, shifting the shoe to the other foot, "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."⁸

7. *Id.*

8. *Id.* at 34.

I agree that the evangelical obsession with strict construction is incongruous in some respects. But I think we also need to consider whether a flexible interpretation of the Mosaic law necessarily implies a flexible interpretation of American Constitutional law. If there are good reasons to interpret Divine law and human law differently, the irony may not be quite so stark as it at first appears. To be sure, the distinctions between divine and human law are often blurred in the New Testament. When Jesus responds to a lawyer's question about who is his neighbor by telling the parable of the Good Samaritan, his answer could be construed as defining a legal obligation meant to be enforced by human authorities (what we would now call a Good Samaritan obligation), a moral obligation (overseen by God rather than men and women), or both. I take him to be emphasizing the moral obligation. In other passages, such as Jesus' Sermon on the Mount teachings that a person who lusts has committed adultery and a man who is angry at his brother is a murderer, the emphasis on God's law seems even more clear. Because human regulators and law enforcers, unlike God, cannot look into our hearts to discern our anger or lust, ordinary men and women could never systematically enforce these principles.⁹

If these observations are more or less on the mark, they suggest that one could plausibly embrace both Jesus' call to interpret the law of God expansively and flexibly, on the one hand, and a narrow approach to Constitutional and statutory interpretation, on the other.¹⁰ From this perspective, evangelicals' enthusiasm for strict construction is not as paradoxical as it seems at first. To fully develop the argument, one might also want to incorporate a theory or theories of judicial review. One obvious candidate is the familiar concern that judges are less accountable to the populace than legislators, and should therefore be encouraged to curb any enthusiasm for expansive interpretation.

Having outlined a possible justification for evangelicals' insistence on originalism and textualism, I should also note that the stridency of this insistence seems to me to reflect other factors as well. I suspect, for instance, the resonance within the evangelical community of complaints about the refusal of "unelected judges" to be bound by the statutory text also owes something to the tradition of Biblical literalism in American

9. For much more detailed analysis of the relationship between God's law and the secular law, and of the proper scope of secular law, see David A. Skeel, Jr. & William J. Stuntz, *Christianity and the (Modest) Rule of Law*, 8 U. Penn. J. Const. L. 809 (2006); William J. Stuntz, *Christian Legal Theory*, 116 Harv. L. Rev. 1707 (2003).

10. Professor Saiman does in fact briefly allude to this possibility (p. 99), but in my view it is dismissed too quickly.

evangelicalism. Were we to plumb these connections, and to put them in the context of Jesus' teachings, I do think we might indeed discover some irony in the evangelical stance.

A closely related issue of scope, in addition to the relationship between God's law and human law, is the distinction between legislation and its enforcement by courts or other decision makers. Although Professor Saiman's definition of law is capacious enough to encompass both, he seems most concerned with the *ex post* interpretative role played by courts or other decision makers. Jesus' skirmishes with the Pharisees over issues such as the role of the Sabbath have this quality, as does the analogy to Constitutional and statutory interpretation.

What, if anything, do Jesus' and the Pharisees' debates tell us about legislation? In my view, Jesus' expansive interpretation of the law of Moses actually may, for the reasons already discussed, imply a narrow view of the appropriate scope of legislation that imposes secular criminal or civil liability. As noted above, the laws Jesus describes in the Sermon on the Mount are far too expansive to be enforced by human law enforcers. Because law enforcers cannot look into a person's heart, and because they are sinful just as ordinary citizens are, a liability system that attempted to police every sin would be wholly unmanageable and would invite discriminatory enforcement. Unlike God's law, human law must play the double game of restraining the worst sins of the citizenry without giving law enforcers so much discretion that they are invited to sin themselves.¹¹

I would be curious to know how these questions of scope would play out under a rabbinic approach to law-making. I suspect that the reasoning process would differ from that of a Christian legal scholar in much the same way as it does in the judicial context.

Take, for instance, a prosaic question like the proper scope of corporate regulation. Christian legal scholars have tended to address this question by identifying a handful of general Scriptural principles and applying these principles to the modern corporation. Thus, Catholic legal scholars have debated whether the general principles known as Catholic Social Thought are best honored by vesting extensive discretion in the managers of large corporations, or by governmental intervention to promote the interests of otherwise disadvantaged

11. For elaboration, see Skeel & Stuntz, *supra* n. 9. This suggests another irony in contemporary American evangelicalism—the tendency to assume that legislation can and should be used to solve most social problems, despite Jesus' suggestion, as Professor Saiman puts it, that "law is an ill-suited medium through which to structure social relationships." (p. 100).

groups.¹² Protestant legal scholars too seem to reason from general principles.¹³ If the dichotomy outlined in *Jesus' Legal Theory* extends to the legislative context, one would expect a rabbinic scholar to construct his or her theory from the ground up, starting with the closest Biblical precedent for corporate behavior. As a dazzling young rabbinically trained legal scholar suggested to me over coffee some months ago, a rabbinic approach might look first at relevant Biblical precedents such as the public ownership of the sacrifice or the treatment of offerings made by the people of Israel. It would be fascinating and instructive to see where this analysis leads—or has led, to the extent that rabbinically trained scholars have wrestled with these issues in the past.

As these comments reflect, *Jesus' Legal Theory* has the same qualities as the very finest performances in other contexts: not only will it cause both Christian and Jewish readers to think more carefully about their own religious traditions; not only will it give them new insights into a different tradition, and give other readers rich new insights into both traditions and their influence on American law; but the article leaves this reader, as I suspect it will many others, anxious for more.

12. For a survey of this literature and the debate it has spawned, see Mark A. Sargent, *Competing Visions of the Corporation in Catholic Social Thought*, 1 J. Cath. Soc. Thought 561 (2004).

13. See e.g. Lyman P.Q. Johnson, *Faith and Faithfulness in Corporate Theory*, 56 Cath. U.L. Rev. 1 (2006) (relevance of religious conceptions of faithfulness to corporate governance).