Introduction (dharmaśāstra)

Law is the theology of ordinary life. It is both the instrument and the rhetoric by which the most familiar, repeated, and quotidian of human acts are first placed in a system or structure larger than individual experience. Law thus provides the initial movement toward a transcendence of personal consciousness and meaning that makes possible the higher order coordination of human activity, the vision of meaning in life abstracted, and the achievement of ethical, social, political, economic, and religious goods. Law, or rules if you prefer for now, are a key part of every child's socialization into a family, a school, or a team. The communal rules to which we subject our children and ourselves impart meaning and purpose to the collective of which we become a part. As the scope and scale of such rules increase to approach the level more commonly understood as law, the sense of achievement, good, and transcendence provided by the law becomes more abstract and distant. Nevertheless, at every level, the plurality of laws by which we lead our lives encode assumptions and ideas about what we aspire to as human beings and what we presume about ourselves and others. Those assumptions, ideas, and presuppositions I call theology, and they pertain to ordinary life, things near to us like family, birth, death, sex, money, marriage, and work – all common themes in the law.

In staking this claim, I am obviously asking the reader to set aside or extend commonplace notions of law that exist today. One cannot deny the increasing global acceptance of a once parochial notion of law as rules backed by sanctions enforced by the state. This very modern, very European notion of law is not natural, not a given; it was produced at a specific moment in history and promulgated systematically and often forcibly through the institutions of what we now call the nation-state, especially those nations that were also colonial powers.[1] Many now argue that

[1] See Harold Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge: Harvard University Press, 1983), p. vii; Gerald Postema, *Bentham and the Common Law Tradition* (Oxford: Clarendon Press, 1986), p. 15.

"particularly in the developed West, contemporary law posits a fundamental conceptual divide between sacred and secular … [but] the assertion of that divide has its own history, one that defines Western modernity itself."[2] The restriction of law to state-based rules and institutions led in the twentieth century to a kind of backlash against understanding law exclusively as legal positivism. Two important results were the legal realism and, later, legal pluralism movements (among others). Legal realism emphasized the elements of law in practice that had little or nothing to do with the interpretation of legislative statutes and the application of rules in court. Legal pluralism in turn emphasized other normative domains that often served functionally similar roles to state-based laws but without or beyond the control or oversight of the state itself.

First and foremost, therefore, this is a book about the nature of law, and more specifically its dependence and influence on religion.[3] When thinking about law, many of us think exclusively in terms of what the law and its institutions do *to* us, rather than focusing on what the law does *for* us. In other words, we tend to highlight what law restricts and constrains rather than what law enables and achieves. This emphasis derives from the thoroughgoing efforts to "secularize" the law by removing all elements of religion from the law and placing exclusive control over the law in the hands of the state. "Secularization," a term that could mean simply the process of the emphasizing of this world and worldly affairs – a process that does not necessarily exclude religion – has also come to mean the process of eliminating religion from public and civic life. Two centuries of "secularization," however, have hardly removed all religious elements from the law, even in the most secular, liberal, democratic nations. The language of secular theology includes words such as justice, order, security, family, tolerance, equality. In other words, a very similar range of ideas as any transcendental theology.

The formulation of law as the theology of ordinary life may at first seem unusual, even strident, but it is an extension of existing scholarship on the relation of law and everyday life. The key in this scholarship has been to find a way to connect law and everyday life without collapsing them

[2] Martha Merrill Umphrey, Austin Sarat, and Lawrence Douglas, "The Sacred in Law: An Introduction." In *Law and the Sacred* (Stanford: Stanford University Press, 2006), p. 1.

[3] It is important, however, to state up front that I do not intend to reduce law to religion in the form of theology in any historical or chronological sense that might be taken as a crass Durkheimian originalism. Rather, the relationship of law and religion I examine here is conceptual and mutual, though it has important institutional consequences as well.

indistinguishably. What I propose in this book is that the practice of theology helps us see how actions and events of ordinary life first instigate lawmaking through theological reflection and are then in turn influenced by those very laws. Theology is the attempt to understand or to give meaning to the transcendent significance of acts. Normally, we think of theology as directed, as its etymology clearly tells us, toward God or gods, i.e., to otherworldly affairs. However, most, if not all, theological traditions in this sense also direct attention toward the affairs of the mundane world.[4] When they do so, I suggest that theological reflection takes shape as the law. The act of reflection converts a mere act, a movement of the body, into an obligation. This kind of reflection, focused as it is on the ordinary world and ordinary actions, is theological because it is a reflective attempt to impart meaning and purpose to quotidian acts.

There are many ordinary acts that are rarely, if ever, subject to theological reflection in the sense I intend – blinking, for instance – but many other acts of this kind do become the subject of theological concern – take urination, defecation, and even breathing (think here of the rules/laws for meditation). It is the intrusion of such theological consideration into an otherwise taken-for-granted action that brings it into the realm of law. When the act in question is more deliberate or by nature requires more attention, it is all the more likely to be considered theologically.

Take an example: walking one's children to school. It is obvious that this act by itself, no matter how often done, does not create law. However, as soon as one begins to think about or reflect upon why and how one gets children to school, a host of important questions arise. Suppose, for instance, that one decides that two factors, being a good parent and ensuring the child's safety, take precedence over all other factors in motivating this act. Immediately, two values, two ethical goods, have been identified through self-reflection and reflection on the mundane world. Now, unless such reflection is meant to remain idiosyncratic, motivating only one person, we are faced with a situation in which many people may agree that these are suitable motivations for walking one's children to school. Parents should be good and children should be safe. These crude, reductive conclusions when set in the context of reflection on the specific act of walking children to school beg in fact for the creation of legal restrictions and guarantees that people can achieve their goals to be good parents

[4] Compare, for example, Ball's notion of "nonreligious theology" as a "performance" necessary for any understanding of law. See Milner S. Ball, *The Word and the Law* (Chicago: University of Chicago Press, 1995), p. 2.

and have safe children. Thus arise severe speed limits for vehicles near schools and the provision of crossing-guards or crossing-flags at major intersections.

In the city where I live, the city government recently included appropriations to pay crossing guards. The mayor announced this decision with some fanfare at a local school saying, "This is one of those things that is, and should be, a priority; we should be protecting the health and safety of kids."[5] He also associated the move with public health and promoted it as part of the city's fitness initiative. A document prepared by three national organizations with guidelines for crossing guards further suggests, "The presence of adult crossing guards can lead to more parents feeling comfortable about their children walking or bicycling to school."[6] Most interesting to me was the fact that almost every picture of children crossing a street included in the brochure also pictured a parent. One might think that the presence of crossing guards would lead to fewer parents accompanying their children to school, but the opposite seems true. Clearly, more than safety is involved in the demands made for crossing guards, crossing flags, and vehicle speed limits. The demands and the laws that emerge from them result from assumptions and aspirations about what it takes today to be a good parent and to have safe children. Those assumptions and aspirations in turn are part of an effort at worldly transcendence, a way of making parts of the ordinary world meaningful and ethically good. In this way, the law encodes theological ideas about ordinary actions.

Surely, the two goals are shared by parents even in communities that do not demand legal limitations and enablings that support this specific act. But, it is a theological reflection on this specific ordinary action in a specific community at a specific time that leads to the creation of laws that are prompted by an attempt to give meaning to what might otherwise be an unreflective habit.

Take another example, this time from South Asia: bathing. It would certainly be a stretch for many people in Europe or the United States to see how bathing as an act of ordinary life could possibly be the subject of theological reflection and, thus, in my formulation, of law. However, almost every system of religious law contains rules for bathing, both the appropriate times or occasions for cleaning the body and the methods

[5] *Badger Herald*, October 4, 2005, "City Allows for Crossing Guards," available at http://badgerherald.com/news/2005/10/04/city_allows_for_cros.php.

[6] "Adult School Crossing Guard Guidelines," prepared by the National Center for Safe Routes to School, available at www.saferoutesinfo.org/guide/crossing_guard/pdf/crossing_guard_guidelines_web.pdf.

used while bathing.[7] Among most Hindus in India, for example, it would be unconscionable to worship at a temple without first having bathed. Traditionally, that bath itself would also have taken place in the temple tank. Bathing and rites of ablution are prominent in the Hindu law texts.

For instance, consider just some of the explicit instructions for bathing given in the *Laws of Manu* (5.134, 136–7):

> To purify oneself after voiding urine or excrement and to clean any of the twelve impurities, one should use a sufficient amount of earth and water . . . A man intent on purifying himself should apply one lump of earth on the penis, three on the anus, ten on one hand, and seven on both. This is the purification for householders. It is twice that much for students, three times for forest hermits, and four times for ascetics.

Here again, there is no need to explain to people how to clean themselves. That is completely beside the point. The context at hand in the text is the purification of people and things in order for both to be effective participants in, or tools for, religious rituals, and also for social interactions. The ordinary action of bathing becomes through a theological connection to religious purification more than mere hygiene. It is now both a rite and a law that enhances and enables other acts, as also a set of restrictions that must be observed in order to participate in those acts.

Moreover, even hygiene, defined as both biological and social cleanliness, is at the root of rules, even laws, regarding bathing even in the West. One need only refer to showers being required before swimming, before returning to work, before incarceration, and so forth. Biological cleanliness is by no means the only criterion at work in such circumstances. It is the issue of social cleanliness and courtesy, being mandated through rules (admittedly rarely enforced), that take the simple act of bathing into the realm of theology. Yes, it is a worldly theology, but one that is as old as mankind, as Mary Douglas's work on dirt and defilement has shown.[8]

I have thus settled on this mode of thinking being *theological* reflection instead of ethical, ideological, or philosophical reflection for several reasons. First, theology signals the strongly religious element involved when turning ordinary acts into rituals and thereby giving them a transcendent, if still worldly, significance or meaning. Second, theology frequently connotes an abstract, even abstruse, intellectual activity. For

[7] Compare Abraham Cohen, *Everyman's Talmud: The Major Teachings of the Rabbinic Sages* (New York: Schocken, 1995 [1949]), pp. 241–59; Nu Ha Mim Keller (trans.), *Al-Maqasid: Nawawi's Manual of Islam*, rev. edn (Beltsville, MD: Amana, 2002), pp. 12–31.

[8] Mary Douglas, *Purity and Danger* (London: Routledge, 1966), pp. 34–40.

Gladstone, "Theology is ordered knowledge; representing in the region of the intellect what religion represents in the heart and life of man."[9] At its root, theology is the process of making sense of religious institutions and experience to oneself and to others. This definition would seem to beg the question of how to place a boundary around religion itself, but in my view theology is the very process of making that boundary. Everyone does this, but not everyone's ideas count for the same or have equal influence beyond themselves. Plural theologies emerge just as plural legal orders emerge, and in relation to one another. The abstract or abstruse quality of theology is associated with its more professionalized forms, the theologies of priests, rabbis, pandits, and mullahs, and these tend to be hegemonic for many people, though never fully so. Finally, theology also connotes an agenda informed by shared teleological ends toward which the system works. Those ends may be ethical, political, soteriological, or ideological, but the act of reflection that coordinates these ends I will call theology.

There are several advantages to conceiving of law as the theology of ordinary life. First, the gap between rule and behavior is acknowledged and recognized. Law and society studies have insisted on this point for some time. Law and the actions of ordinary life connect but do not collapse into one another. Second, the sometimes stark division between law and everyday life is bridged through the mediating concept of theology. That bridge insists neither on total interpenetration nor on real separation, but rather clarifies the manner in which the two tend to overlap or come together. Theology, even in classic formulations such as St Anselm's "faith seeking understanding" (*fides quaerens intellectum*), captures the liminal position of humanity in living between unconscious sentiment and rationalized discourse. Third, this conceptualization indicates that law is a special kind of theology focused on ordinary human activities, institutions, and events. Other theologies surely exist, but when the theological perspective is brought to bear on ordinary life, the result is law. Fourth and finally, the associations of theology with religion bring out the sense of higher purpose involved whenever law is invoked, and do so in a way that challenges all-too-easy understandings of religion itself as mere belief. If law is the theology of ordinary life, then religion is not a phenomenon directed solely at otherworldly ends, at God or gods, or at escaping or circumventing the practices of ordinary life. In this way, transcendence does not have to imply denial of or disengagement from the world. Law is both

[9] W.E. Gladstone, "Proem to Genesis," *The Nineteenth Century* 19 (1886): 1–21, quote from p. 19.

a means and an end for giving ordinary life meaning and value through a worldly transcendence. This is why law is often connected with other human goods such as order and justice.

Turning to the other element of the opening definition, whether we speak of everyday, ordinary, day-to-day, or workaday life, *Alltagsleben*, or *la vie quotidienne*, we are obviously grasping for something elusive – a way to capture the flux of human experience in its most immediate and most dominant sense. One might dispute whether we can do this at all given that this kind of experience changes faster than it can be fixed or named by language. Still, investigations into that flux are as old as the Buddha and we constantly strive to categorize and fix our lived experience in words. The now fairly large secondary literature on everyday life has argued for various ways to conceive of both the theoretical and the actual place of everyday life in relation to other more palpably defined human institutions. Some, like de Certeau, want to see everyday life as the social location for the contestation of power by ordinary people, the point at which coercive and oppressive social and political pressures are negotiated and resisted in the lives of people.[10] Others, like Das, want to find in everyday life a safe haven of routine and the social location for coping with the intrusions of social and political power.[11] So, when we turn to law, what are we looking for with respect to ordinary life?

In their seminal thematic essay on the topic, Sarat and Kearns argue that an examination of law in everyday life allows us to avoid what they call the "law-first" perspective on the role of law in society. Two basic views of law in everyday life have dominated legal scholarship. The first, the instrumental view, "posits a relatively sharp distinction between legal standards, on the one hand, and nonlegal human activities, on the other."[12] Instrumentalists are "centrally interested in law's effectiveness,"[13] or the degree to which laws achieve their intended effects on society. Moreover, in this view, "'Law' or 'the legal system' . . . is a distinctly secondary body of phenomena. It is a specialized realm of state and professional activity that is called into being by the primary social world in order to serve that world's

[10] Michel de Certeau, *The Practice of Everyday Life*, trans. S. Rendall (Berkeley: University of California Press, 1984).
[11] Veena Das, *Life and Words: Violence and the Descent into the Ordinary* (Berkeley: University of California Press, 2006).
[12] Austin Sarat and Thomas Kearns, "Beyond the Great Divide: Forms of Legal Scholarship and Everyday Life." In A. Sarat and T. Kearns (eds.), *Law in Everyday Life* (Ann Arbor: University of Michigan Press, 1993), p. 21.
[13] *Ibid.*, p. 24.

needs."[14] The second, the constitutive view, "suggests that law shapes society from the inside out, by providing the principal categories that make social life seem natural, normal, cohesive, and coherent."[15] Constitutivists tend to see the effect of law in terms of "meaning and self-understandings rather than in the results of sanctions."[16] Following Geertz, the constitutive view argues that "law, rather than being a mere technical add-on to a morally (or immorally) finished society, is, along of course with a whole range of other cultural realities . . . an active part of it."[17] Finally, advocates of the constitutive view usually take this view because they are in fact critical of the hegemony of law in Gramsci's sense, i.e., the way in which law pre-structures and predetermines nefarious social realities concerning race, gender, class, religion, sex, and so forth. The strong advocates of one view or the other aside, Sarat and Kearns make a compelling case that everyday life shapes the real effects of law, even as it is simultaneously constituted by law, if only partially. In other words, both the instrumental and the constitutive views are partially correct.

In the end, the instrumental and constitutive views of law and everyday life differ quite dramatically over the question of whether law and everyday life are separate and distinct or together and intermingled. Sarat and Kearns try to offer a way out of the either/or quality of the two views by asking us to step outside what the two views share, namely an emphasis on law as the first site of intellectual reflection. Viewed instead from the perspective of everyday life, it is easy to see how law is both an instrument that hammers away at human actions, sometimes very ineffectively, and a pervasive influence over the way we live our lives. So, asking questions from the perspective of everyday life toward the realms of law seems to avoid some of the problems in beginning with law. Still, I can't help thinking that the difference boils down to: if you want to see law everywhere, you can; if you don't, you won't. Instrumentalists emphasize the gap or separation between law and everyday life. Constitutivists emphasize rather their interpenetration. Is there another alternative?

When Sarat and Kearns claim that both views put law first, I think they really mean state law, primarily in the form of legislation and judicial precedent. What seems missing so far from their discussion of law and everyday life is a thorough consideration of legal pluralism. The fact

[14] Robert Gordon, "Critical Legal Histories," *Stanford Law Review* 36 (1984): 60.
[15] Sarat and Kearns, "Beyond the Great Divide," p. 22. [16] *Ibid.*, p. 27.
[17] Clifford Geertz, "Local Knowledge: Fact and Law in Comparative Perspective." In *Local Knowledge: Further Essays in Interpretive Anthropology* (New York: Basic Books, 1983), p. 218.

of plural legal regimes undermines clear boundaries between law and everyday life in the same manner described by the constitutivists, but it also reveals the definite limits of legal regimes of the state to make change and control action. Engel recognizes this in his use of the term "domain" to speak of coordinations of law and social context that vary widely in scope and power: "the continuum of normative orders ranging from the 'law' of the supermarket check-out line to the constitutional interpretations of federal courts."[18] Still, even Engel struggles to avoid collapsing law and everyday life without any distinction, and he recommends finally that we "reconsider one of the most obvious facts about 'official' law in relation to everyday life: its externality … the norms, procedures, and sanctions of law are generally extrinsic to particular social domains."[19] Engel is surely right to point to law's potential to be external to the social domain it purports to govern. At the same time, Engel has to revert to the notion of "official" law in order to make this point, a term that tends to be understood as "real" law, i.e., what we really mean by law, academic contortions aside.

The advantage of legal pluralism as a model for understanding law and everyday life is that it opens up the possibility for nuanced, multi-level descriptions that show a close relationship between law and ordinary practice at some levels and considerable divergence at others. The disadvantage of legal pluralism, however, is that we lose clarity about the boundaries of both law and everyday life, when we call several different normative orders "legal" and incorporate even wider swaths of human action under the label "everyday." Nevertheless, I want to accept that studies of law and everyday life must be more informed by the fact of legal pluralism because I think the trade-off is worth it and because I think categories like law and everyday life are always contestable and fluid. In fact, it is their very elasticity that helps make expansions and contractions of their scope productive intellectual endeavors for understanding the world around us. Moreover, and more importantly, thinking of law as the theology of ordinary life allows us to think of the same process operating at different scales and in different social contexts, while still maintaining a shared quality. The distinctiveness of law, therefore, is not to be found by arguing for some social

[18] David Engel, "Law in the Domains of Everyday Life: The Construction of Community and Difference." In Sarat and Kearns, *Law in Everyday Life*, pp. 125–6. Engel acknowledges his debt to Moore's well-known articulation of law as a "semi-autonomous social field."

[19] *Ibid.*, p. 168.

or institutional level as the best cut-off point, but rather by articulating the common process and subject matter of law – theology and ordinary life, respectively.

RELIGIOUS LAW, HINDU LAW, AND DHARMAŚĀSTRA

Focusing on a religious legal system has the advantage of a contrary emphasis to that of thinking of law in terms of legislatures, courts, police, and the state.[20] Religious law emphasizes the role of law in the service of religious goals, or how the law helps accomplish religious ends.[21] One could just as easily look at other traditions of religious law such as Jewish law, Islamic law, or Canon law for similar cues about the close relationship of religion and law. In fact, several existing studies do just that.[22] Too often religious law is classified together with natural law, when in fact all religious legal systems recognize a diversity of the sources of law, including sources that are natural (reason, deity), positive (ruler's edict, legislation), and traditional (custom, precedent). Because of the way they persist in contemporary political and legal contexts as the province of clerics, priests, and rabbis, religious laws are regularly portrayed as dogmatic, primitive, irrational, and anti-modern. Modern nation-states can permit no competition in the domain of law and, for structural reasons, must seek to destroy the real pluralism that exists in every national jurisdiction. That structural commitment is based on a misrepresentation of religious legal systems as inherently against this world and only interested in the not-of-this-world transcendence associated, wrongly in my view, with Christianity.

[20] Robert M. Cover, "Foreword: *Nomos* and Narrative," *Harvard Law Review* 97 (1983–4): 4–68, suggests that these elements are "but a small part of the normative universe that ought to claim our attention" (4). In terms of law's fecund capacity for "jurisgenesis," Cover writes, "Law is a resource in signification that enables us to submit, rejoice, struggle, pervert, mock, disgrace, humiliate, or dignify" (8).

[21] To my mind, the change of emphasis from what law restricts to what law enables defines religious law. Part of the argument here is to suggest that every legal system must contain at least some religious elements and presuppose some goods and some ethics that may be understood in religious terms. Other scholars are less comfortable with the label "religious law." See Andrew Huxley (ed.), *Religion, Law and Tradition: Comparative Studies in Religious Law* (London: Routledge, 2002).

[22] For example, Berman, *Law and Revolution*; Bernard G. Weiss, *The Spirit of Islamic Law* (Athens: University of Georgia Press, 1998); Calum Carmichael, *The Spirit of Biblical Law* (Athens: University of Georgia Press, 1996); R.H. Helmholz, *The Spirit of Classical Canon Law* (Athens: University of Georgia Press, 1996); and Geoffrey MacCormack, *The Spirit of Traditional Chinese Law* (Athens: University of Georgia Press, 1996).