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### September 28, 2011: The End of Religious Legal Theory

Bruce Ledewitz

*Duquesne University*, ledewitz@duq.edu

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Title: The End of Religious Legal Theory

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9/28/2011--the organizers of the third annual religious legal theory conference have graciously accepted my proposed paper for a panel presentation. I say graciously because the premise of my paper is the possibility that the category of religious legal theory is now outdated--either too broad if we really mean the God of the Bible or too narrow because belief can no longer be helpfully contrasted with nonbelief. We are all secularists or all religious now. Here is the paper proposal:

Paper Proposal: Does the Evolution of Religion Undermine Religious Legal Theory or Fulfill It?

Religious Legal Theory is premised upon an intelligible distinction between what is religious and what is not religious. But in a society in which ever larger numbers of people, especially among the young, claim to be "spiritual but not religious", this distinction has become problematic. This paper will explore the implications of this new context for law and religion.

Some legal theorists, notably Christopher Eisgruber and Lawrence Sager, have elaborated equality models that would have the effect of transforming religious legal exemptions into exemptions based on "conscience" and otherwise argue against any special status for religion. Defenders of religion, for example Steven Smith, have opposed this tendency, wishing to maintain a special place for religious freedom.

Both sides have overlooked the inconsistency of equality approaches with the existing, special Establishment Clause prohibitions on the use by government of religious imagery. In the Establishment context, the sides tend to exchange their positions, with secularists arguing the special power/danger of religion and religious theorists arguing for equal treatment for religious imagery in government speech.

What is missing from this debate is a fresh consideration of the healthy possibilities that might emerge from ceasing to consider religion a category separate from other aspects of reality. The separation of church and state in a secular sense is a Christian invention. Other religious traditions do not conceptualize political life this way and, even within Christianity, voices like Dietrich Bonhoeffer and Raimon Panikkar have emphasized the sacred quality of this world without relying on a separate, religious realm.

As America becomes both more religiously diverse and more secular, it should become easier to treat traditional monotheistic claims as referring to this world, without sacrificing their supernatural meaning for monotheistic religious believers. One advantage of mixing religion and political life in this way is that secular thinking would not be as cut off from traditional religious insight as it is today and might thus develop stronger resources against materialism, relativism and despair. There might even be "a discovery of a hidden meaning of the present" available to all. On that day, religious legal theory would no longer be a species of special pleading for an interest group but would again become a source of spiritual sustenance for believers and nonbelievers alike.