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March 14, 2012: The Break-Up of a Section

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3/14/2012—I'll be telling my students a story today, the story of the break-up of a field, the field of law and religion, and the break-up of a Section of the American Association of Law Schools—the Section on Law and Religion. What is happening is that people who have known each other a long time and used to be able to talk about religion and public life are increasingly on opposite sides of a divide. They no longer can agree about the nature of religion, whether it is basically good. Or at least that is the case with regard to organized religion. Some religious believers in the Section sound bewildered by the change. One said, with regard to a well-known law professor, "I used to be able to talk with her, but not anymore." On the other hand, the secularly oriented, who may or may not be believers themselves, are increasingly fed up with the demands religion is making in the public square and in particular with the perceived war on women. Then there is an additional factor—believers within legal academia are also increasingly assertive, in an intellectual sense. They are beginning to challenge the secular assumptions of what might be called the settlement of the secular paradigm.

There is a lot here. I'm calling this the End of Law and Religion. I'm speaking on it at Duquesne on April 13. Here is a précis.

The rubric for discussion of issues relating to religion in American public life has been "law and religion". That phrase appears in the titles of law school courses, in journals, in specialized centers for legal study and, most revealingly, is the name of the American Association of Law Schools section devoted to this field. The phrase, especially its benign-sounding "and" has connoted a secular law confronting, and in its constitutional guise, regulating an autonomous and admittedly important, but potentially divisive, social practice known as "religion." These assumptions about the nature of religion and its role in public life, assumptions also known as the secular paradigm, have served as a large umbrella allowing persons of differing views about the value and nature of religion to join in shared, even friendly, academic exchange. But today, in a manner reminiscent of the crumbling of shared national institutions at the time of the crisis over slavery, the field of law and religion is beginning to fracture into its secular and religious components. From the secular side, there has emerged a more penetrating critique of religion that refuses to continue to cede to religion unique normative authority. Increasingly, the uniqueness of religion is denied, the justification for religious exemptions from law is contested and the acceptance of religious imagery in the public square is attacked. At the same time, voices defending religion are beginning to challenge the fundamental, traditional assumptions of law and religion that secular justifications for law can be successful and that constitutional law is an appropriate vehicle for the regulation of religion in American public life. Reflecting a sharpening debate in the culture at large, there seems less and less common ground between believers and secularly oriented academics. Evidence of these changes is adduced from several recent and well-known events in the American legal academy. The author at the end of this article seeks to blunt these trends by recourse to an older paradigm of law and religion, one associated with the Vietnam-era draft cases, that suggested that religion itself is the large umbrella under which many nonbelievers and believers can meet.