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## **RLT: A Preliminary Examination of Religious Legal Theory as a Movement**

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# RLT: A PRELIMINARY EXAMINATION OF RELIGIOUS LEGAL THEORY AS A MOVEMENT

SAMUEL J. LEVINE<sup>†</sup>

## INTRODUCTION

In 2009, Angela Carmella opened the inaugural Religious Legal Theory Conference at Seton Hall Law School,<sup>1</sup> declaring a “This is it!” moment.<sup>2</sup> This moment brought together dozens of American legal scholars from across the country to explore ways in which religious thought might help illuminate law and legal theory. Drawing upon numerous religious traditions, participants at the conference addressed a wide range of substantive, conceptual, and philosophical areas of law. Relying on perspectives that are sometimes absent from American legal scholarship, many of these scholars offered new insights into American legal doctrine and theory.<sup>3</sup>

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<sup>†</sup> Professor of Law & Director, Jewish Law Institute, Touro Law Center. An earlier version of this Article was presented at the 2010 Religious Legal Theory Conference: Religion in Law, Law in Religion, hosted by St. John’s University School of Law and organized by Mark Movsesian and Marc DeGirolami. I thank Mark, Marc, and the other participants at the conference for helpful conversations.

<sup>1</sup> See SETON HALL, *Religious Legal Theory: The State of the Field*, [http://law.shu.edu/About/News\\_Events/lawfaithculture/upload/Legal-Theory-Program.pdf](http://law.shu.edu/About/News_Events/lawfaithculture/upload/Legal-Theory-Program.pdf) (last visited Sept. 18, 2011).

<sup>2</sup> Carmella borrowed this phrase from the title of Michael Jackson’s DVD that had been released shortly before the conference. See INTERNET MOVIE DATABASE, *This Is It*, <http://www.imdb.com/title/tt1477715/> (last visited Sept. 18, 2011).

<sup>3</sup> A number of the conference presentations were published in a volume of the *Seton Hall Law Review*. See, e.g., David S. Caudill, *On the Rhetorical Invention of a Failed Project: A Critical Response to Skeel’s Assessment of Christian Legal Scholarship*, 40 SETON HALL L. REV. 971 (2010); John F. Coverdale, *The Normative Justification for Tax Exemption: Elements from Catholic Social Thought*, 40 SETON HALL L. REV. 889 (2010); Michael V. Hernandez, *Theism, Realism, and Rawls*, 40 SETON HALL L. REV. 905 (2010); Samuel J. Levine, *Applying Jewish Legal Theory in the Context of American Law and Legal Scholarship: A Methodological Analysis*, 40 SETON HALL L. REV. 933 (2010); Mark L. Movsesian, *Fiqh and Canons: Reflections on Islamic and Christian Jurisprudence*, 40 SETON HALL L. REV. 861 (2010); Amelia J. Uelmen, *Religious Legal Theory’s “Second Wave,”* 40 SETON HALL L. REV. 955

Of course, Religious Legal Theory<sup>4</sup>—or “RLT”—did not simply appear or originate at the 2009 conference. Scholars, including many of those who presented papers at the conference, have engaged in this form of scholarship for decades.<sup>5</sup> Yet, Carmella’s observation emphasized the importance of the 2009 conference as a point in time in which scholars, who had been involved in related but largely disparate strands of a distinct form of scholarship, joined together under a common title with a broadly unifying theme. In short, RLT had the makings of a “movement.”

With the success of the second annual Religious Legal Theory Conference<sup>6</sup> at St. John’s University School of Law,<sup>7</sup> and

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(2010); Robert K. Vischer, *When is a Catholic Doing Legal Theory Doing “Catholic Legal Theory?”*, 40 SETON HALL L. REV. 845 (2010).

<sup>4</sup> The phrase “Religious Legal Theory” (“RLT”) appears to have been coined by the organizers of the inaugural conference at Seton Hall Law School. *See supra* note 1.

<sup>5</sup> In fact, Amy Uelmen has suggested that we may already be in a “second wave” of RLT. *See Uelmen, supra* note 3, at 957. For collections of some of the scholarship in this area, see generally CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT (Michael W. McConnell et al. eds., 2001); CHRISTIANITY AND LAW: AN INTRODUCTION (John Witte, Jr. & Frank S. Alexander eds., 2008); FAITH AND LAW: HOW RELIGIOUS TRADITIONS FROM CALVINISM TO ISLAM VIEW AMERICAN LAW (Robert F. Cochran, Jr. ed., 2008); JEWISH LAW AND LEGAL THEORY (Martin P. Golding ed., 1994); THE TEACHINGS OF MODERN CHRISTIANITY ON LAW, POLITICS, & HUMAN NATURE (John Witte, Jr. & Frank S. Alexander eds., 2006); Colloquium, *Can the Ordinary Practice of Law Be a Religious Calling?*, 32 PEPP. L. REV. 373 (2005); Symposium, *Faith and the Law*, 27 TEX. TECH L. REV. 911 (1996); Symposium, *Law & Politics as Vocation*, 20 NOTRE DAME J.L. ETHICS & PUB. POL’Y 1 (2006); Symposium, *Lawyering and Personal Values*, 38 CATH. LAW. 145 (1998); Symposium, *Rediscovering the Role of Religion in the Lives of Lawyers and Those They Represent*, 26 FORDHAM URB. L.J. 821 (1999); Symposium, *The Relevance of Religion to a Lawyer’s Work: An Interfaith Conference*, 66 FORDHAM L. REV. 1075 (1998); Symposium, *Text, Tradition, and Reason in Comparative Perspective*, 28 CARDOZO L. REV. 1 (2006); *see also* Caudill, *supra* note 3; Levine, *supra* note 3; Samuel J. Levine, *Emerging Applications of Jewish Law in American Legal Scholarship: An Introduction*, 23 J.L. & RELIGION 43 (2007); Russell G. Pearce & Amelia J. Uelmen, *Religious Lawyering in a Liberal Democracy: A Challenge and an Invitation*, 55 CASE W. RES. L. REV. 127 (2004).

<sup>6</sup> The call for papers issued for the St. John’s conference opened with the description: “[t]his annual symposium, to be shared among different law schools and now in its second year.” ST. JOHN’S UNIVERSITY, *Call for Papers Religious Legal Theory Conference: Religion in Law and Law in Religion*, [http://www.stjohns.edu/academics/graduate/law/pr\\_law\\_100330.news\\_item@digest.stjohns.edu%2Facademic%2Fgraduate%2Fflaw%2Fpr\\_law\\_100330.xml](http://www.stjohns.edu/academics/graduate/law/pr_law_100330.news_item@digest.stjohns.edu%2Facademic%2Fgraduate%2Fflaw%2Fpr_law_100330.xml) (last visited Sept. 18, 2011).

<sup>7</sup> *See* ST. JOHN’S UNIVERSITY, *Religious Legal Theory Conference*, [http://www.stjohns.edu/academics/graduate/law/academics/centers/lawreligion/programs/religious\\_conference](http://www.stjohns.edu/academics/graduate/law/academics/centers/lawreligion/programs/religious_conference) (last visited Sept. 18, 2011).

the forthcoming third annual conference at Pepperdine University School of Law, it is now appropriate to consider the extent to which RLT may, in fact, be characterized as a “legal movement”—or at least an intellectual movement within the legal academy. In so doing, it may be instructive to look at some other intellectual movements in American law, providing models for comparisons and contrasts with some of the salient features of RLT.

Toward that goal, this Article looks briefly at certain aspects of Critical Legal Studies, Law and Economics, and Empirical Legal Studies. For the purposes of this preliminary analysis of RLT, this Article will adopt somewhat simplified models of these movements, focusing on some of their central features, including critiques that have been leveled against them.<sup>8</sup> In turn, this Article will explore similar elements of RLT in an effort to evaluate the potential status and standing of RLT as a legal movement.

### I. RLT AND CRITICAL LEGAL STUDIES

In a list of major legal movements of the past few decades, Critical Legal Studies (“CLS”) would surely emerge as one the most interesting—perhaps most controversial—as well as, depending on the observer’s point of view, one of the most influential. While countless books, articles, and commentaries have documented and dissected the rise—and apparent demise—of CLS,<sup>9</sup> one of the most notable accounts is found in the

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<sup>8</sup> Notably, though perhaps not surprisingly, these movements share a number of characteristics, and have faced similar forms of criticism and opposition. Indeed, it is not uncommon for movements—particularly, intellectual legal movements—to share many basic features. See, e.g., Samuel J. Levine, *Richard Posner Meets Reb Chaim of Brisk: A Comparative Study in the Founding of Intellectual Legal Movements*, 8 SAN DIEGO INT’L L.J. 95, 105–12 (2006).

<sup>9</sup> See generally, e.g., MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES (1988); ROBERTO MANGABEIRA UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT (1986); Paul D. Carrington, *Of Law and the River*, 34 J. LEGAL EDUC. 222 (1984); Symposium, *Critical Legal Studies*, 6 CARDOZO L. REV. 691 (1985); Symposium, *Critical Legal Studies*, 36 STAN. L. REV. 1 (1984); Richard Michael Fischl, *The Question that Killed Critical Legal Studies*, 17 LAW & SOC. INQUIRY 779 (1992); Pierre Schlag, *Critical Legal Studies*, in 2 THE OXFORD INTERNATIONAL ENCYCLOPEDIA OF LEGAL HISTORY 295 (Stanley N. Katz ed., 2009); Pierre Schlag, *Normativity and the Politics of Form*, 139 U. PA. L. REV. 801 (1991); John Henry

observations offered by Mark Tushnet, a central figure in CLS, in his 1991 retrospective on the movement.<sup>10</sup> Writing on the “origins of critical legal studies,” Tushnet recalls that:

In early 1976 David Trubek . . . told me that he had spoken with Duncan Kennedy. They had agreed that there were a number of people doing academic studies of law that seemed to have certain common themes, and that it might be useful to gather these people, and a few others, to see whether that perception was accurate . . . . If that perception were correct, the thought was, some sort of organizational locus for that intellectual work would be useful . . . . [T]he work . . . was being done by people scattered throughout the country, often with no sense that anyone other than Kennedy might be interested in it or might make helpful comments on it. . . . [T]here were people doing similar work . . . who would want to affiliate with a group of sympathetic scholars. . . . Even at the start there was some sense that a relatively formal structure was needed to provide the location for the academic activities that Trubek had referred to . . . .<sup>11</sup>

Tushnet's description of the formation of CLS probably shares much with the formation of many movements including, perhaps, RLT. As a movement, RLT likewise grows out of the recognition that many scholars have been involved in studies on the law that seem to share certain common themes. In addition, much of the work in RLT was similarly taking place in a largely scattered manner, and many scholars who aimed to apply religious thought to their intellectual pursuits found themselves marginalized from the mainstream of American legal scholarship. In this sense, not unlike Tushnet's recollection of the need for a “location” for CLS scholarship, the conferences and affiliations that revolve around RLT help provide scholars with a community sympathetic to drawing upon religious ideas for legal insights.

At the same time, Tushnet refuses to “describe[ ] ‘tenets’ of [CLS] or dogmas to which one must adhere in order that one's

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Schlegel, *Notes Toward an Intimate, Opinionated, and Affectionate History of the Conference on Critical Legal Studies*, 36 STAN. L. REV. 391 (1984).

<sup>10</sup> See Mark Tushnet, *Critical Legal Studies: A Political History*, 100 YALE L.J. 1515, 1523–24 (1991).

<sup>11</sup> *Id.* at 1523.

self-identification with [CLS] be accepted by others who similarly self-identify.”<sup>12</sup> Taking this approach one step further, Tushnet declares candidly that:

[T]here is something awkward in talking about critical legal studies as a “movement” or “school.” As I read articles by and about critical legal studies, I not infrequently find myself puzzled. The authors of the articles provoking this reaction describe what they believe critical legal studies to be . . . . Where the articles are by people whom I regard as co-participants in the enterprise of critical legal studies . . . [and] when I find these authors taking as central to their understanding of [CLS] propositions that I find extremely problematic, or dismissing as unimportant propositions that I find central, I have to figure out what is going on.<sup>13</sup>

Again, Tushnet’s observations may be echoed by some participants in RLT who may find themselves in strong disagreement with the work done by others in the field. In fact, while Tushnet sees the divergence of views in CLS as posing something of a puzzle, RLT scholarship, by its very nature, includes positions that will be, in some ways, in fundamental opposition to one another. Some—if not much—of the work that helps comprise RLT relies on implicit or express assumptions about fundamental issues of religious faith not shared by others in the movement. Following Tushnet’s example, it may therefore be necessary to consider the validity of labeling RLT a movement, when many of its apparent proponents disagree on matters central to the identity of the movement.

For Tushnet, the “most plausible explanation” for the sharp divergence of views within CLS “is that critical legal studies is a political location for a group of people on the Left who share the project of supporting and extending the domain of the Left in the

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<sup>12</sup> *Id.* at 1523–24.

<sup>13</sup> *Id.* at 1516. In the introduction to his *Guide to Critical Legal Studies*, Mark Kelman makes a similar observation:

I by no means suggest that I can capture the essence of all the work that has been done by people who have identified themselves with [CLS] . . . much less identify the essence of what a “critical theory” of law might be in a more general sense. Many people associated with the movement would surely disagree with the substantive ideas I attribute to Critics generally and even with my view of the meaning of the particular works I identify as central or definitive.

KELMAN, *supra* note 9, at 2.

legal academy. On this view the project of critical legal studies does not have any essential intellectual component . . . .”<sup>14</sup> Tushnet explains that:

There are at best family resemblances among various versions of [intellectual] themes, and, as a matter of intellectual integrity, adherents of each version will criticize other versions for their intellectual shortcomings. Yet it turns out that the existence of the family resemblances may be the most important dimension of the work.<sup>15</sup>

Perhaps a similar explanation underlies the potential viability of RLT as a movement, notwithstanding the differences among its adherents. One of the primary functions of RLT may be to provide a “location”—not per se political, but supporting the intellectual premise that ideas rooted in religious thought can contribute to our understanding of legal issues, including American law and legal theory. Indeed, Tushnet’s metaphor of family resemblance may prove quite apt in the context of RLT, which is comprised, perhaps most basically, of the work of scholars who exercise deeply differing modes of religious belief and expression, but whose intellectual output shares the characteristic of paying respect and attention to—rather than marginalizing or ignoring—insights into law based in religious ideas.

## II. RLT AND LAW AND ECONOMICS

Despite the appeal of envisioning RLT as incorporating a variety of different voices and perspectives, the presence of a multiplicity of views that claim a central role in RLT may raise questions about the potential viability of RLT as an identifiable movement. Here again, it may be worthwhile to look at parallels in another movement, Law and Economics.

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<sup>14</sup> Tushnet, *supra* note 10, at 1516.

<sup>15</sup> *Id.* at 1524.

Like CLS, and owing, in part, to its nature as an innovative and ambitious movement, Law and Economics lends itself to different descriptions and has attracted its share of both admiration and criticism.<sup>16</sup> For the purpose of the present analysis, it may be helpful to focus again on a simplified model, this time as depicted by Anita Bernstein in her provocative 2005 article *Whatever Happened to Law and Economics?*<sup>17</sup> Unlike Tushnet—possibly the ultimate insider to CLS—Bernstein is a self-identified outsider to Law and Economics. Yet, Bernstein’s status as an outsider may enable her to uncover and articulate concerns about Law and Economics that are not as apparent to those inside the movement.

For example, Bernstein notes that, according to some within the movement, “law and economics contains multitudes—an array of literatures, submovements, and schools of thought.”<sup>18</sup> Conceding that “[p]erhaps it does,” Bernstein acknowledges that “[c]ertainly a scholar trained in both economics and law has the vocabulary to combine the two disciplines in ways that would not hew to the descriptions of Chicago-style welfare economics, or to any other fraction of the genre.”<sup>19</sup>

Still, Bernstein retorts :

[O]bservers with no stake in the cliché about diversity can see how well it serves insiders, who get from it a basis to say that

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<sup>16</sup> See generally NICHOLAS MERCURO & STEVEN G. MEDEMA, *ECONOMICS AND THE LAW: FROM POSNER TO POST-MODERNISM* (1997); RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (7th ed. 2007); Edward J. Bloustein, *Privacy Is Dear at Any Price: A Response to Professor Posner’s Economic Theory*, 12 GA. L. REV. 429 (1978); Gregory Scott Crespi, *The Mid-Life Crisis of the Law and Economics Movement: Confronting the Problems of Nonfalsifiability and Normative Bias*, 67 NOTRE DAME L. REV. 231 (1991); Owen M. Fiss, *The Law Regained*, 74 CORNELL L. REV. 245 (1989); Morton J. Horwitz, *Law and Economics: Science or Politics?*, 8 HOFSTRA L. REV. 905 (1980); Leonard R. Jaffee, *The Troubles with Law and Economics*, 20 HOFSTRA L. REV. 777 (1992); Duncan Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique*, 33 STAN. L. REV. 387 (1981); William M. Landes & Richard A. Posner, *The Influence of Economics on Law: A Quantitative Study*, 36 J.L. & ECON. 385 (1993); Arthur Allen Leff, *Economic Analysis of Law: Some Realism About Nominalism*, 60 VA. L. REV. 451 (1974); Arthur Allen Leff, *Law and*, 87 YALE L.J. 989 (1978); Levine, *supra* note 8; Francesco Parisi, *Palgrave on Law & Economics: A Review Essay*, 20 INT’L REV. L. & ECON. 395 (2000).

<sup>17</sup> Anita Bernstein, *Whatever Happened to Law and Economics?*, 64 MD. L. REV. 303 (2005).

<sup>18</sup> *Id.* at 305.

<sup>19</sup> *Id.*



their movement is big and a ready retort to semi-disavow anything in it that provokes criticism: "Well, that's one of the other schools." Law and economics can claim pluralism when pluralism suits, monolithic unity when pluralism threatens to splinter its power.<sup>20</sup>

Continuing in this mode, Bernstein asserts that:

This inclination within the movement to have it both ways impels me to take a second look at its premise that law and economics is distinct from all other disciplines yet eclectic and pluralistic, the academy's big tent. The two postures are not only in tension with each other but perhaps also, I start to suspect, questionable in isolation. For law and economics to be valid, two conditions must obtain: Law and economics needs a foundation of meaningful concepts and a boundary to fence out what it rejects or does not believe. If these two elements are missing, then its distinctive aspects may be unsound and its variations, offshoots, and alliances may be incoherent.<sup>21</sup>

Similar questions can be posed with respect to RLT, which likewise contains many different approaches to religion, law, and their combined study.<sup>22</sup> These different approaches are premised

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<sup>20</sup> *Id.* (emphasis omitted).

<sup>21</sup> *Id.* at 305–06.

<sup>22</sup> Again, it is not uncommon to find similar characteristics and critiques accompanying the development of different legal movements. *See, e.g.*, Levine, *supra* note 8. For example, similar to Bernstein's concerns about Law and Economics, scholars have raised questions about the status of both Law and Literature and Empirical Legal Studies ("ELS") as unified movements.

In a critique of Law and Literature, Jane Baron wrote:

[T]he law-and-literature movement has tended to undermine itself from within. If there is a single movement here, it is certainly a very fractured one. The concerns of its separate strands are quite disparate. Any theme broad enough to tie all the strands together can be found and stated only at a level of abstraction so high as to threaten banality; such abstraction also undercuts what some within the movement regard as a fundamental commitment to particularity as opposed to grand theory. This is a movement of many methodologies and conclusions. The multiplicity of approaches and concerns that leads some to see literature as a source of nearly endless possibilities may lead skeptics to dismiss law and literature as an empty vessel, a phrase devoid of content.

Jane B. Baron, Essay, *Law, Literature, and the Problems of Interdisciplinarity*, 108 YALE L.J. 1059, 1061–62 (1999). More recently, David Zaring offered similar comments on ELS:

[I]t strikes me that ELS has a number of different constituencies, and the common cause among them is not always obvious. . . . All of these people, to varying degrees, show up at [the Conference on ELS], and learn, I think,

on sometimes widely diverging approaches to matters of central importance to the intellectual, moral, spiritual, and emotional commitments of the participants in the movement. This phenomenon can be understood as an expression of the pluralism that characterizes RLT as a movement, allowing for different schools or modes of thought to flourish, without requiring that participants accept all of the arguments that are offered in the course of the development and expansion of the movement.

Nevertheless, such a response remains vulnerable to Bernstein's challenge to Law and Economics. Insiders to RLT might embrace the banner of pluralism; the big tent of RLT enables its participants to take part in a movement with widespread influence, but at the same time allows them to disclaim positions within the movement that they do not share on law, religion, or both. Consistent with Bernstein's observations, however, the claim to the status of a movement requires that RLT retain some form of "monolithic unity."<sup>23</sup> The question, then, is whether RLT can successfully maintain a position that seems to try to "have it both ways,"<sup>24</sup> or whether participants are simply choosing to assert either pluralism or unity whenever convenient, without accepting the arguably inherent contradiction in these positions.

In fact, these concerns may be more pronounced for RLT than in Bernstein's description of Law and Economics. First, although disputes among Law and Economics scholars

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from one another, but each of them ask rather different questions, using rather different methods. It will be interesting to see if the constituencies start their own conferences in the future, or if [the Conference on ELS] will continue to serve them all.

David Zaring, *Empirical Legal Studies Today*, THE CONGLOMERATE (Nov. 23, 2009), <http://www.theconglomerate.org/2009/11/empirical-legal-studies-today.html>; cf. Theodore Eisenberg, *The Origins, Nature, and Promise of Empirical Legal Studies and a Response to Concerns* 21 (Cornell Legal Studies, Working Paper, 2010), available at <http://ssrn.com/abstract=1727538> ("ELS can provide a common intellectual environment in which scholars from diverse disciplines communicate and collaborate."); Mark C. Suchman & Elizabeth Mertz, *Toward a New Legal Empiricism: Empirical Legal Studies and New Legal Realism*, 6 ANN. REV. L. & SOC. SCI. 557, 560 (2010) ("In truth . . . the ELS movement . . . has no single, canonical self-definition, and its boundaries remain indistinct."); *id.* at 559 ("ELS's mission remains only loosely defined."). For further comparisons between RLT and ELS, see *infra*, Part III.

<sup>23</sup> Bernstein, *supra* note 17, at 305.

<sup>24</sup> *Id.*

sometimes revolve around strongly held—and passionately argued—positions, disagreements among RLT scholars may, at times, stem from differences in scholars' deeply held religious beliefs and principles, carrying the potential for more fundamental and unbridgeable forms of division and divisiveness.

Second, arguments among Law and Economics scholars typically involve one scholar's considered evaluation and rejection of the substance and/or methodology of the work of another scholar. In contrast, because an RLT scholar's project may draw upon a particular—and particularistic—religious tradition, other RLT scholars may find themselves unable to fully understand the project. As a result, they may find themselves in the untenable position of either accepting the project “on faith” as it were, or rejecting it outright, not based on an evaluation of the project, but due to the inability *to evaluate* it.<sup>25</sup> Thus, Bernstein's

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<sup>25</sup> Jeremy Waldron has applied the concept of “mutual intelligibility” in evaluating similar concerns over political arguments that rely on religious principles. See Jeremy Waldron, *Two-Way Translation: The Ethics of Engaging with Religious Contributions in Public Deliberation* 16–17 (N.Y. Univ. Sch. of Law, Working Paper No. 10–84, 2010), available at <http://ssrn.com/abstract=1708113>. Drawing an analogy to arguments that rely on complex understanding of other disciplines, Waldron concludes that political arguments based on religious ideas need not be deemed unintelligible to “non-believers.” *Id.* at 12. As Waldron puts it:

An awful lot of what gets said and what needs to be said in the way of economics requires people to abandon their intuitive views and do some patient study, using resources available (though not superficially or easily available) in the culture. When Paul Krugman talks about the banking crisis, a certain amount of background learning is necessary to evaluate what he says.

*Id.* at 17. Waldron finds a similar option available for those who wish to understand a religious position. Waldron asserts that:

[I]n the case of religion[,] I don't believe that the issue is the “can't” of unintelligibility; I think the issue is the “won't” of intellectual refusal. Many people have resolved to have nothing to do with religious thought, and standing firm on that resolution, they demand to be spoken to in only secular terms.

*Id.* (emphasis omitted). Though not unrelated to the issues confronting RLT, Waldron's assertions would not seem to allay concerns about the limits of effective intellectual dialogue among RLT scholars. First, the analogy between economics and religious thought may simply fail on epistemological grounds, as some religious doctrines may be inherently less accessible to outsiders than are many principles of economic theory.

Second, as a descriptive matter, Waldron appears to conclude that many outsiders to a religious tradition will reject the need to engage arguments based in that tradition. Though Waldron criticizes such a response as unjustified, his

challenge to the status of Law and Economics as a movement—that it “needs a foundation of meaningful concepts and a boundary to fence out what it rejects or does not believe”<sup>26</sup>—may prove even more of an obstacle to the viability of RLT as a movement.

As RLT continues to grow, in numbers and influence, it may be helpful for its proponents to remain cognizant of these issues, and perhaps to begin to address these concerns. For example, in formulating a “foundation of meaningful concepts”<sup>27</sup> as a unifying factor, RLT may have to accept the reality that not all participants in RLT scholarship will have the ability to fully understand and evaluate the work of others in the movement. After all, when evaluating other forms of interdisciplinary scholarship, outsiders to a discipline have to apply a degree of acceptance of another scholar’s substantive depiction of the discipline, while at the same time exercising a degree of independent judgment as to the coherence of the analysis and its applicability, if any, to American legal thought.

Still, even this dynamic may prove problematic in the context of RLT. Accepting the substantive presentation of another scholar’s faith tradition may require not only a limited suspension of critical thinking on the part of the listener; it may require a degree of cognitive—or emotional—dissonance for the listener, who may find fault not with the *depiction* of the faith tradition, but with the tradition itself.

In contrast, though some may reject certain applications of economics, philosophy, or literature to law, this reaction more likely reflects skepticism about general or specific lessons these disciplines may have for legal thought, rather than an underlying rejection of these disciplines on their own terms.<sup>28</sup>

Ultimately, the willingness of participants in RLT to embrace, on an intellectual level, a broad range of religious

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description may apply to some forms of RLT scholarship as well. To be sure, unlike the “non-believers” Waldron considers, some RLT scholars, who are themselves adherents to a faith tradition, may be more willing to engage on an intellectual level with arguments premised on a different faith tradition. Alternatively, however, perhaps some believers will be even less likely to intellectually and/or emotionally engage religious positions that run contrary to their own.

<sup>26</sup> Bernstein, *supra* note 17, at 305–06.

<sup>27</sup> *Id.* at 305.

<sup>28</sup> See *supra* note 22.

traditions, including those very different from one's own, may limit the movement's adherence to Bernstein's other criterion, that the movement delineate "a boundary to fence out what it rejects or does not believe."<sup>29</sup> To the extent that RLT, by its nature, needs to rely on a big tent approach, the movement will likely fence out only those projects that are fundamentally opposed to the principles of RLT. Perhaps RLT will reject projects that advocate, without explanation, the exclusion of any reliance on religious argument in the understanding of law

and public policy, or that advocate principles—religious or otherwise—that are so repugnant as to be deemed outside the bounds of positions that merit even limited analytical deference.

### III. RLT AND EMPIRICAL LEGAL STUDIES

Finally, a preliminary examination of the status and potential success of RLT as a movement may benefit from looking at the model of Empirical Legal Studies ("ELS"), which presently constitutes the fastest growing intellectual legal movement.<sup>30</sup> Like many movements, including Law and Economics and CLS, in addition to attracting adherents, ELS has had a number of objections leveled against it.<sup>31</sup> Brian Leiter has captured one of the most basic critiques of ELS, claiming that advocates of ELS have not paid sufficiently critical attention to the volume of work

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<sup>29</sup> Bernstein, *supra* note 17, at 305–06.

<sup>30</sup> See, e.g., Eisenberg, *supra* note 22, at 7 (describing the "rapid ascendance" of ELS that "does have a revolutionary feel to it, enough to startle some observers"); *id.* at 20 (observing that ELS "has grown remarkably quickly"); Karen Sloan, *Empiricism Divides the Academy*, NAT'L L.J. (Feb. 28, 2011) ("Proponents of this movement—dubbed empirical legal studies—view it as a major trend in legal academia."). See generally *Journal of Empirical Legal Studies*, WILEY-BLACKWELL, <http://www.wiley.com/bw/journal.asp?ref=1740-1453> (last visited Sept. 18, 2011).

<sup>31</sup> For discussions of and responses to a number of these objections, see generally Eisenberg, *supra* note 22; Sloan, *supra* note 30; Josh Wright, *Empirical Legal Scholarship, Empirical Legal Scholars, and the Quality of Legal Education: A Response to Professor Bainbridge*, TRUTH ON THE MARKET (Mar. 1, 2011), <http://truthonthemarket.com/2011/03/01/empirical-legal-scholarship-empirical-legal-scholars-and-the-quality-of-legal-education-a-response-to-professor-bainbridge/>; "Stephen Bainbridge Disdains the Trend" *Towards Empirical Legal Scholarship*, STEPHEN BAINBRIDGE'S J.L. POL. & CULTURE (Feb. 28, 2011), <http://www.professorbainbridge.com/professorbainbridgecom/2011/02/ucla-law-professor-stephen-bainbridge-disdains-the-trend-towards-empirical-legal-scholarship.html>.

that is being produced under the title of ELS.<sup>32</sup> Leiter declares that:

[T]here is the danger that ELS scholars may be on their way to replicating an aspect of the CLS phenomenon of yesteryear, namely, forming a self-reinforcing mutual-admiration society, one which the rest of the legal academy (even we interdisciplinary-minded scholars!) finds increasingly mysterious and disconnected from the central normative and conceptual questions of legal scholarship and legal education.<sup>33</sup>

Leiter's observation, whatever its merits with respect to ELS or, for that matter, CLS, may strike an appropriate note of caution for proponents of RLT as an emerging movement in the legal academy. Indeed, the need for such caution in RLT may prove particularly pressing, given the likelihood that—more than in other movements—RLT scholars may have to exercise a high degree of critical restraint in their evaluation of the work of others in the same field.<sup>34</sup> As a result, RLT might experience the risk of becoming a “self-reinforcing mutual-admiration society”<sup>35</sup> in which scholars are overly deferential and overly generous to the work of others because of an unwillingness or an inability—or a combination thereof—to critique others' work, especially when it is based in a different religious faith or tradition.

Accordingly, Leiter's assertion that “the rest of the legal academy . . . finds [ELS] increasingly mysterious”<sup>36</sup> may be of even greater concern for RLT. It is not uncommon for proponents of RLT to advance the proposition that American law and legal scholarship unduly—and perhaps improperly—marginalize religious thought. RLT is intended, in part, to remedy this failure, exploring the validity and value of projects that rely on religious tradition for insights into our understanding of American law and legal thought.

If RLT is perceived by already skeptical outsiders as applying less rigorous standards, it may have difficulty avoiding

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<sup>32</sup> See Brian Leiter, *On So-Called “Empirical Legal Studies” and Its Problems*, BRIAN LEITER'S L. SCH. REPORTS (July 6, 2010), <http://leiterlawschool.typepad.com/leiter/2010/07/on-socalled-empirical-legal-studies.html>.

<sup>33</sup> *Id.*

<sup>34</sup> See *supra* Part II.

<sup>35</sup> See Leiter, *supra* note 32.

<sup>36</sup> *Id.*

the accompanying perception that RLT scholars have formed a mysterious mutual admiration society, with little, if anything, of value to say to the rest of the legal academy.<sup>37</sup> In turn, this perception will serve to reinforce resistance to projects that draw upon religious tradition. Because perceptions sometimes have the tendency to influence and transform reality, and because RLT seems particularly vulnerable to these critiques and the underlying perceptions they accompany, it behooves advocates of RLT as a movement to pay careful attention to these concerns as the movement continues to develop.

#### CONCLUSION

Through a preliminary examination of Religious Legal Theory, this Article suggests that, as RLT continues to realize its potential as an intellectual legal movement, it will likely evidence some of the characteristics—and face some of the challenges—that have accompanied the development of other legal movements. Drawing upon the experiences of Critical Legal Studies, Law and Economics, and Empirical Legal Studies, this Article identifies possible avenues for the future growth of RLT, while at the same time deriving lessons for the ways RLT might respond to potential objections and critiques of its status as a movement.

Specifically, RLT has attracted scholars from a variety of perspectives, representing diverse, deeply held, and—often—deeply conflicting approaches to law, religion, and to their combined study, who unite within a movement that looks to religious thought for insights to help illuminate our understanding of law and legal theory. Yet, despite the appeal of

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<sup>37</sup> This concern also evokes Jeanne Schroeder's "one-word critique" of Law and Economics as a "cult." Bernstein, *supra* note 17, at 307 (quoting Jeanne L. Schroeder, *Rationality in Law and Economics Scholarship*, 79 OR. L. REV. 147, 150 (2000)). Though Schroeder's claim was premised on a substantive critique of Law and Economics, Bernstein notes that, in addition to "clinging to a dogma that gets reality wrong . . . [cults] are social groups. They contain members who disdain nonmembers, and who have been known to enjoy thinking that outsiders feel hostility towards them." *Id.* To the extent that RLT is susceptible to suspicion by those outside the movement, RLT scholars should take care to avoid a sense of disdain or hostility with respect to nonmembers. In fact, RLT is premised, in part, on the ambition of relying on religious thought to derive insights into law that can be appreciated by outsiders to the movement.

identifying itself through the lens of pluralism, RLT faces the corresponding challenge of maintaining its status as a cohesive movement, notwithstanding the deep divisions that might tend to distance its proponents from one another, both religiously and intellectually. Accordingly, RLT scholars will have to continue to work to build a movement that both embraces and responds to these inherent complexities. Building on its current success, RLT will have to accept and, when necessary, accord a degree of deference to differing views, while at the same time incorporating a degree of independent critical analysis sufficient to maintain the intellectual rigor and vibrancy of the movement.