ABSTRACTS FOR CLJL JULY 2008

1. "The Cultural Limits of Legal Tolerance," Canadian Journal of Law and Jurisprudence, Vol. XXI, Number 2 (July 2008) pp. 245-77.

Prof. Benjamin Berger
Faculty of Law
University of Victoria
Victoria, BC
V8W 3H7

This article presents the argument that our understanding of the nature of the relationship between modern constitutionalism and religious difference has suffered with the success of the story of legal tolerance and multiculturalism. Taking up the Canadian case, in which the conventional narrative of legal multiculturalism has such purchase, this piece asks how the interaction of law and religion – and, in particular, the practices of legal tolerance – would look if we sought in earnest to understand law as a component, rather than a curator, of cultural diversity in modern liberal societies. Understanding the law as itself a cultural form forces us to think about the interaction of law and religion as an instance of cross-cultural encounter. Drawing from theoretical accounts of cross-cultural encounter and philosophical literature about the nature of toleration, and paying close attention to the shape of Canadian constitutional doctrine on religious freedom (law's rules of cross-cultural engagement), this paper suggests that legal toleration is far less accommodative and far more assimilative than the conventional narrative lets on. Influential alternative theoretical accounts ultimately reproduce this dynamic because they similarly obscure the role of culture on both sides of the encounter of law and religion. Indeed, owing to the particular features of the culture of law's rule, even the more thickly cultural "solutions" proposed in dialogic theory ultimately fail. In the end, this article exposes the very real cultural limits of legal tolerance.

2. Book Review: The Constitution of Law: Legality in a Time of Emergency, by David Dyzenhaus. Canadian Journal of Law and Jurisprudence, Vol. XXI, Number 2 (July 2008) pp. 477-83.

Prof. Jamie Cameron
Osgoode Hall Law Faculty
York University

Toronto

What the rule of law means and how it constrains the exercise of state power raise issues which have been debated—without resolution—over the ages. Times of emergency bring fresh energy to the discussion, and David Dyzenhaus is one of many who have entered the fray to debate the balance between liberty and national security in the post 9/11 period. It has not been easy for those who place their trust in written constitutions to account for the way textual guarantees are diluted when the state is under threat. Rather than address that dilemma, Dyzenhaus sets his ideas apart by proposing a theory which maximizes the protection of rights in emergency circumstances, without straining the institutional capacities or legitimacy of the judiciary. This theory invokes the pedigree of the common law—and "common law constitutionalism"—and is grounded in the constitutive properties of the rule of law, or principle of legality. Dyzenhaus may not have answered the questions readers will want to ask, but he has opened up the middle ground between the competing supremacies yet more, by drawing common law constitutionalism and its rule-of-law pedigree into constitutional theories of review. More to the point, he has challenged the judiciary to draw on the moral resources of the law to make executive and legislative action as accountable as possible at all times, in emergencies as well as in normal times. Readers can and should engage, at many levels, with the complexity of his thought in this important book.

3. Critical Notice: "Reality Check: On the Uses of Empiricism": Attitudinal Decision-Making in the Supreme Court of Canada by Cynthia Ostberg and Matthew Wetstein. And: The Empirical Gap in Jurisprudence A Comprehensive Study of the Supreme Court of Canada by Daved Muttart. Canadian Journal of Law and Jurisprudence, Vol. XXI, Number 2 (July 2008) pp. 447-57.

Prof. Peter Carver
Law Centre
University of Alberta
Edmonton, Alberta

This Critical Notice deals with two recent books that report the findings of statistical analyses of Supreme Court of Canada judgments over extensive periods of time. The authors of both studies argue that empirical analysis can make significant contributions to theories of law and the understanding of what high court judges do, and

in fact, that theoretical approaches on their own are necessarily inadequate to this task. The review questions whether the studies succeed in meeting the ambitions set for them. In *Attitudinal Decision-making in the Supreme Court of Canada*, Ostberg and Wetstein fail to establish that the attitudinal model of jurisprudence developed by American political science provides a strong explanation of the performance of the Supreme Court of Canada. In *The Empirical Gap in Jurisprudence*, Daved Muttart employs such broadly stated measures of judicial reasoning that his conclusions about the Court's performance remain general in nature and do not pose serious challenges to the major, competing schools of jurisprudential thought he seeks to examine. Both studies fall back on unconvincing arguments about the prevalence of judicial activism in Supreme Court decision-making in the absence of stronger findings on their principal themes.

4. "Freedom of Religion," Canadian Journal of Law and Jurisprudence, Vol. XXI, Number 2 (July 2008) pp. 279-319.

Avihay Dorfman
Faculty of Law
Yale University
New Haven, Conn.

Why it is that the principle of freedom of religion, rather than a more general principle such as liberty or liberty of conscience, figures so prominently in our lived experience and, in particular, in the constitutional commitment to the free exercise of religion? The Paper argues, negatively, that the most prominent answers offered thus far fall short; and positively, that the principle of freedom of religion arises out of a thicker understanding of the much neglected relationship between religious liberty and democracy. Indeed, a proper account of the legitimacy of the democratic process? I argue, dissolves the mystery surrounding freedom of religion, and thus allows for an adequate justification of this principle. The thesis of this paper is that freedom of religion is a remedy that redresses the (warranted) exclusion of certain religious arguments from the democratic process. The redress is grounded in a republican concern for political self-determination while exclusion is prescribed by a liberal ideal of political legitimation.

5. "Neither Here Nor There: The (Non-)Impact of International Law on Judicial Reasoning in Canada and South Africa," Canadian Journal of Law and

Jurisprudence, Vol. XXI, Number 2 (July 2008) pp. 321-54.

Graham Hudson
Osgoode Hall Law School
Toronto, Ontario

In this paper, the author explores the question of whether formalizing the Canadian law of reception would lead to an increase in the domestic influence of international law. He begins by briefly recounting Canada's decidedly informal law of reception and, through a review of academic commentary, suggests a relationship between informality and international law's historically weak influence on judicial reasoning. Tying this commentary to seemingly sociological perspectives on globalization, judges' international legal personality and the changing forms and functions of law, he forwards the hypothesis that judges' *subjective* recognition of the authority of international law can be engendered, modified and/or regulated through the *procedural* use of more familiar domestic legal authority. This hypothesis is then tested through a comparative analysis of the impact which international law has had in South Africa, where an historically informal law of reception akin to Canada's has been replaced with clear and robust constitutional rules obligating the judiciary to consider and use international law. The author observes that there are no perceptible differences in the two jurisdictions; in neither country does international law exert a significant, regular or predictable impact on judicial reasoning. He concludes, modestly, that there is no available evidence to support the belief that Canadian judicial practice would change if the Canadian law of reception were formalized. He further concludes, less modestly, that this has significant implications for underlying legal theory and, in particular, that theories concerning how the domestic impact of international law can be augmented, though seemingly sociological, are decidedly positivist in orientation. Given that judges' subjective attitudes towards international law are not perceptibly linked to domestic legal procedures, international, comparative and transnational legal theorists must, either, find evidence to demonstrate this link, or, recognize that their theoretical allegiances are divided between two, inconsistent traditions: legal positivism and the sociology of law.

6. "Can Economics Justify the Constitutional Guarantee of Freedom of Expression?",

Canadian Journal of Law and Jurisprudence, Vol. XXI, Number 2 (July 2008) pp. 355-97.

Prof. Ian Lee
University of Toronto
Toronto, Ontario

The purpose of this article is to explore the resources available within the economic analysis of law for rationalizing the constitutional right to freedom of expression. I have sought to falsify the hypothesis that economics is incapable of supplying a rationale for the constitutional guarantee of freedom of expression. I have argued that, from an economic perspective, the guarantee may be understood as a device for the facilitation of political competition and the mitigation of the agency costs of government. Nevertheless, economics provides no support for the notion that the fact that an act is undertaken by a person in the exercise of her "autonomy" is a licence for that person to set back another individual's welfare. This applies to expressive acts as it does to all other acts that produce external consequences. There might be good reasons to require each of us to suffer the negative consequences of other individuals' self-fulfillment, or to place the information marketplace as a whole (and not only that part which relates to the political marketplace) under judicial protection. However, any such reasons do not appear to sound in economics; they require other frameworks of analysis and evaluation.

7. Discussion: "Objectivity and Subjectivity in Contract Law: A Copernican Response to Professor Shiffrin." Canadian Journal of Law and Jurisprudence, Vol. XXI, Number 2 (July 2008) pp. 399-410.

Prof. Jeffrey M. Lipshaw
Suffolk University Law School
Boston, MA 02108

This is a response to Seana Shiffrin's recent and important contribution to the continuing debate whether there is a universal moral or economic truth at the heart of contract law. While she adopts an unduly simplistic view of the divergence of morality in promise-keeping and contract law, her most significant advance toward a general theory of promise and contract is her identification of the critical moment at which the

interposition of the public in a private matter occurs or is contemplated. This essay carries that theme forward, suggesting that a universal justification for contract law is not possible because the law, by its very nature, objectifies (publicly or with that implicit threat) what was heretofore a private relationship.

8. Discussion: Canadian Journal of Law and Jurisprudence, Vol. XXI, Number 2 (July 2008) pp. 411-28.

Prof. Michael Plaxton
Faculty of Law
University of Saskatchewan
Saskatoon

In *Gosselin v. Quebec*, the Supreme Court of Canada considered whether the Quebec legislature violated the Canadian Charter of Rights and Freedoms by failing to provide unemployed adults under the age of 30 (young adults) with the level of social assistance provided to other unemployed adults. A majority of the Court concluded that the underinclusive legislation in question was not unconstitutional. The case gave rise, however, to one of the most progressive and intriguing dissenting opinions in Canadian constitutional history—a dissent made all the more interesting by the fact it was written by a judge who would later become the United Nations High Commissioner for Human Rights: Louise Arbour. Her dissent focused on the proper interpretive approach to s. 7 of the *Charter*, which states: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." She argued that the "right to life" contained in s. 7 entails a number of positive rights, including the right to a minimum level of social assistance.

This paper argues that Arbour J.'s dissent in *Gosselin* reveals an inherent flaw with the very concept of rights; namely, that they presuppose the state's authority to exclude whole populations from the protection of law. The argument has four parts. Part I reads Arbour J.'s approach to the constitutional questions raised in *Gosselin* as broadly sympathetic to Foucault's understanding of power in the modern era. Part II claims that Arbour J.'s judgment presumes that formal legal regulations, and not other, informal mechanisms of power, chiefly bear the burden of governing life. Part III examines Agamben's critique of Foucault to show why Arbour J.'s privileging of state governance

of well being is problematic; in particular, that the greater the formalization and centralization of the mechanisms by which life is governed, the greater the prospect of exclusion of groups and classes from rights regimes altogether. Finally, Part IV explains that Arbour J.'s concession to juridification is driven by an inherent problem with rights, and that the difficulties she runs into cannot be avoided; that exclusion from the rights framework is built into the very concept of rights.

9. Discussion: "Free-floating from Reality," Canadian Journal of Law and Jurisprudence, Vol. XXI, Number 2 (July 2008) pp. 429-45.

Prof. Dan Priel
University of Warwick
School of Law
Coventry, UK
CV4 7AL

Matthew Kramer has recently proposed a distinction between norms that are free-floating and those that are not. The distinction, he argued, enables us to distinguish between norms that can be incorporated into the law and those that cannot. In this essay I argue that his distinction is based on several theoretical errors, and that even if it were successful, it is unclear why his distinction is relevant for the question of the boundaries between law and morality. I also provide many examples from actual legal systems of legal norms that do not correspond to Kramer's distinction. I conclude the essay by suggesting that Kramer's argument exemplifies a prevalent problem in contemporary legal philosophy, in which much work is often based on simplistic models of law and uses them to develop 'conceptual' arguments for what closer attention to the facts shows are empirical questions. As a result many current jurisprudential debates are not helpful for understanding legal phenomena. Recognizing this point is important for reorienting legal philosophy towards other questions which would be more helpful for illuminating its subject-matter.

10. Critical Notice: "Troubled Foundations for Private Law," Canadian Journal of Law and Jurisprudence, Vol. XXI, Number 2 (July 2008) pp. 459-76.

Prof. Stephen A. Smith
Faculty of Law, McGill University

Montreal, Quebec H3A 1W9

In *The Foundations of Private Law* James Gordley argues that the modern private law in common and civil law jurisdictions is best explained on the basis of a neo-Aristotelian theory first developed by a group of 16th century Spanish thinkers known as the 'late scholastics'. The concepts of distributive and commutative justice that, according to Gordley, lay at core of the scholastics' theory and that explain, respectively, modern property law and the law of obligations (contract, tort, unjust enrichment), though ignored and disparaged for much of the 19th and 20th centuries, are today familiar to most private law scholars (thanks in part to Gordley's earlier work). Yet Gordley's understanding of these concepts and, in particular, of their relationship both to one another and to the apex idea of 'living a distinctively human life' is unique, setting his account apart not just from utilitarian and other 'modern' accounts of private law, but also from other neo-Aristotelian theories (e.g., those of Ernest Weinrib or Jules Coleman). In Gordley's presentation, commutative (or 'corrective') justice is derived from distributive justice and distributive justice is derived from the idea of the distinctively human life. Confidently traversing a wide range of historical, comparative and theoretical materials, the book's argument is at once ambitious, learned, and elegantly presented. But as a theoretical account of the foundations of the modern private law it is unpersuasive. The book's own account of property law suggests that in practice the idea of distributive justice does little, if any, work in explaining the rules we actually have. Nor is it clear how, if at all, distributive justice flows from the allegedly foundational idea of the 'distinctively human life'. As for commutative justice, it is not clear why, if is derived from distributive justice in the way Gordley believes, the courts should care about it. Finally, but perhaps most significantly, Gordley's conception of commutative justice is unable to account for central features of the law of obligations.

11. Book Review: "*Uneasy Partners: Multiculturalism and Rights in Canada*" by Janice Gross Stein, David Robertson Cameron, John Ibbitson, Will Kymlicka, John Meisel, Haroon Siddiqui, and Michael Valpy. Canadian Journal of Law and Jurisprudence, Vol. XXI, Number 2 (July 2008) pp. 485-90.

Dr. Mark Thornton
Professor Emeritus

Department of Philosophy
University of Toronto
Toronto, Ontario

This collection of essays originated in an article for the *Literary Review of Canada* by Janice Gross Stein, which prompted replies from two journalists, John Ibbitson and Haroon Siddiqui. The present volume contains essays by three political scientists, Stein, David Robertson Cameron, and John Meisel, three journalists, Ibbitson, Siddiqui, and Michael Valpy, and a philosopher, Will Kymlicka, with an introduction by Frank Iacobucci, former Justice of the Supreme Court. Since the volume has no editor, it is unclear who is responsible for the title, which holds out the promise of an in-depth exploration of problems in Canada's Charter of Rights and Freedoms. The Charter embraces both multiculturalism and rights. Are these really uneasy partners? In fact all the contributors are both pro-Charter and pro-multiculturalism. The uneasy partners turn out to be religion and equality, hardly a novel thesis. *Uneasy Partners* would have been much improved by the presence of anti-multiculturalists and non-liberal pro-multiculturalists. The three journalists do as much as could be expected of them; but the three political scientists do a mediocre job. When one considers how many political theorists have written on Canadian multiculturalism, surely a university press could have done a better job than this.