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Jeffrey L. McNairn

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Intersecting Legal and Intellectual Histories

JEFFREY L. MCNAIRN

Canadian legal history is thriving. The field addresses itself to both legal scholars and historians of Canada and beyond. It is capacious in subject matter and approach, even as an impressive synthesis is emerging. Amidst these positive developments, the field seems little troubled by the methodological doubts voiced over the last decade or so, especially in the American context.[1] Eric H. Reiter's splendid *Wounded Feelings* exemplifies the best in Canadian legal history, but shares its reticence to discuss methodology. The book advances the project of historicizing the law in Canada by foregrounding the affective aspects of interpersonal disputes in Quebec across eight decades. The range of themes — from family honour and the history of death to medical malpractice and racial discrimination — is as impressive as the diverse cast of litigants is compelling. Reiter calls the book "a legal history of emotions" (8), but has more to say about the history of emotions than legal history. Still, the book's sterling quality invites an attempt to reconstruct its approach to legal history retrospectively. Such a reconstruction suggests that *Wounded Feelings* lies at the intersection of legal and intellectual history.[2] Positioned this way, the book offers an effective, if implicit, response to criticisms of recent legal history and an endorsement of a principled pragmatism in matters concerning methodology. Such a reading highlights three themes for further reflection: the relationship between emotions and morality, the dichotomy between the subjective and objective, and liberalism as a framing device.

Varieties of Legal and Intellectual History

Civil- and common-law traditions are frequently contrasted as proceeding by different methods, which, in turn, map onto different varieties of legal history. As Reiter puts it, the former "tends to emphasize principle and doctrinal development more than the particularities of individual cases" (22). *Wounded Feelings* emphasizes both to great effect and addresses objections levelled at the type of legal history associated with each. The history of doctrinal development occupies a prominent place despite the rather apologetic characterization of part of that discussion as an "excursus into the arcana" of French law.

Focused on legal thought, the first and last chapters develop one of the book's key arguments: that there was a shift between the 1870s and about 1950 from legal analysis rooted in situational stories of feelings that had been wounded by a defendant who had acted with "no right" to more abstract legal analysis of violations of a plaintiff's rights. It is not unusual to trace the origins of human rights to eighteenth-century humanitarian sympathy that recoiled from the deliberate wounding of fellow human beings. Yet if Reiter's account underlines the legal salience of such sympathy, it nonetheless bolsters intellectual and legal histories that posit a much shorter history of human rights, such as Samuel Moyn's.[3] Discussion of legal doctrine occurs in other chapters as well, on specific issues such as breach of promise, alienation of affection, and the bar against damages for "solace of grief" despite the civilian norm "that any injury caused by fault should be compensated" (41, 8, 26).

Chapters 2 through 7, however, exemplify another variety of legal history, the case-in-context method or legal archeology. While historians in numerous fields have long experimented with micro- and narrative histories and with "thick description," legal archeology is especially prevalent in the legal history of common-law jurisdictions, which includes Canada. In part, this reflects the fact that legal principles and reasoning are elaborated through precedent-setting or "leading" cases, allowing history to be integrated into law school curricula more readily (6).[4] The method uncovers and re-incorporates into its analysis aspects of the case stripped from the published reports of appellate court decisions that focus on answering particular legal problems. Something of the individuals and strategies involved, the source of the dispute, and the factors that influenced the legal outcome are thereby recovered. Sometimes, the case turns out to have been about something other than the legal principle with which it has come to be associated.

Despite its ubiquity, legal archeology has been criticized on grounds of selection, scope, and significance. Selecting legally significant cases skews historical analysis towards higher courts and away from the more common tribunals most people encountered. However "leading" is defined, emphasizing the discrete case also narrows the scope of analysis to the episodic or fragmentary. As Jim Phillips points out, this misrepresents the significance of the single case in the "messy" process of judicial reasoning with its "false starts and blind alleys, old forms and ideas co-existing with contradictory ones, until a new way of thinking

becomes the dominant, accepted practice."[5] Others instead complain that emphasizing local contexts and the contingency of judicial outcomes obscures underlying structures. It thus disables a progressive politics that seeks to use legal history to say more to present injustice than the typical conclusions of rigorously contextualist histories: "it depends" and "it might have been otherwise."[6]

Reiter's use of legal archeology reaps the method's rewards while avoiding its shortcomings. To extend the method to the civilian tradition, Reiter begins with reported cases and then digs down into the judicial archives and out to extralegal sources. Even as his examples tend towards the upper echelons of the judicial hierarchy, Reiter casts his net widely. Across dozens of cases, a telling variety of litigants and social contexts are captured to reveal the role of emotions as evidence that an injury had occurred or of the character of the litigants or as a motive for litigation. The method allows Reiter to give us an almost novelistic evocation of these litigants, whether the eccentric Jewish music teacher tormented by his perception of his wife's actions or the widow's anguish at the loss of control over her dead husband's remains that she read as her in-laws' rejection of her as a member of the family, to the humiliation of the Black bellhop denied entry to Montreal's Academy of Music in front of the date he had sought to impress and a crowd of gawking spectators. Many of these cases are not especially famous or legally noteworthy. Moreover, rather than adopt the common approach of devoting a chapter to contextualizing a single case, the book is organized by emotion — betrayal, grief, humiliation at individual or family dishonour, mortification at unwelcomed bodily interference, and indignation at discrimination — that juxtapose a diversity of litigants and legal actions. While quantitative claims may need adjustment in light of future research on unreported cases, reported cases were crucial to the construction of legal authority and lawmaking over time.[7] More immediately, the number of cases in each chapter woven together with discussions of the relevant doctrine reveals patterns of judicial decision-making, change over time, and the impact of different contexts in ways the singular case study could not. Reiter skillfully marries doctrine and archeology in "a social legal history of how feelings and sentiments were expressed" (9). Interpreting such expression by contextualizing the textual evidence of it, Reiter's use of these two varieties of legal history makes a major contribution to Canadian intellectual history, both substantively and methodologically.

This is most obvious in the history of legal doctrine. Once central to legal history, it has fallen into relative decline and even disrepute as too "internal" in its approach to the law: too interested in jurists and other elite legal commentators, and too prone to teleology with a concern for the origins, development, and normative merits of present legal principles.[8] *Wounded Feelings* should instead help revitalize such histories by demonstrating their importance, the variety of intellectual-history methods that can be used, and the ability to address these standard criticisms.

The book introduces us to leading Quebec jurists and their treatises, including Maximilien Bibaud, François Langelier, and Michel Mathieu, and to their conceptualizations of injury, interests, rights, and so on. The thought of mostly French and German legal thinkers is also explored to help paint a rich picture of the intellectual world of the Quebec legal community. As Reiter has done elsewhere, concrete links can be traced in a form of intellectual history akin to book history just as similarities in intellectual content can be mapped.[9] In *Wounded Feelings*, Reiter attends to how both words and concepts functioned in this world. The same word — injury, for instance — not only had different technical and vernacular meanings but Reiter tracks which usages predominated and gained or lost traction over time, their migration from one area of the law to another, and when continuity in vocabulary masked innovation in meaning. "Terminological fluidity" in alienation of affection cases, for instance, signalled deeper uncertainty about the purpose of the action. To this almost lexicographic method, Reiter adds a conceptual one. His conceptual history of rights in Quebec private law belongs to the branch of intellectual history most associated with Reinhart Koselleck. Absent a concept of informed consent, few cases of patient grievance against medical procedures could arise. Similarly, without conceiving of a right to equality, the few cases of racial discrimination that arose before the twentieth century were argued and reported in terms of property and contractual rights. The refusal of this legal erasure of race by the press and the Black community underlines how concepts made topics visible or invisible (200–1, 158, 260, 278, 280–1).[10]

Closely related to the lexical and conceptual aspects of meaning is a renewed interest in structuralism. Such an approach is concerned less with the ideational content of legal doctrine than with the law's underlying grammar: its assumptions, categories, contradictions, and techniques of argumentation that might transcend disagreements

about particular points of law and about which practitioners might remain unconscious. As Justin Desautels-Stein has emphasized, such a language system or mode of legal thinking provides context internal to the law that secures the meaning of the legal text.[11] In *Wounded Feelings*, judges sometimes struggle to present their choices and innovations as legal necessities mandated by existing categories and forms of argumentation (117, 238, 283). Reminiscent of the early structuralism of Duncan Kennedy, which emphasized underlying contradictions in legal consciousness, Reiter deftly probes the contradiction between English and French traditions, the living and the dead, and the individualism of defamation law and the collectivism of family honour. Such contradictions were mediated or obscured by the legal notion of a ricochet injury: legal actions involving family honour could proceed if it could be shown or just assumed that the injury inflicted on the memory of the dead ricocheted to harm the living individual who litigated the action (107–8, 118).[12] Finally, the emphasis on subjectivity and claims to knowledge, whether medical or the insurance calculations of risk, opens the door to analyses more explicitly indebted to Michel Foucault.[13]

Readers with greater familiarity of the common-law world will find it instructive to be drawn into Bibaud's *Commentaires sur les lois du Bas-Canada* rather than William Blackstone's oft-cited *Commentaries on the laws of England*. Yet parallel titles were no coincidence; Bibaud had prepared an abridgement of Blackstone in preparation for his admission to the Quebec bar. Thus, *Wounded Feelings* contributes to a third variety of legal history — comparative — which dovetails with the increased interest among intellectual historians in the transnational and global. Within Quebec, Reiter traces the "competing pulls of French and English traditions," "authorities," and "influences" and the resulting "hybridity" or "m*ixité*." In the local, Reiter finds the global processes of migration, encounter, translation, and adaptation (65, 102, 107, 227).[14]

By gesturing towards multiple intellectual-history approaches, the history of legal doctrine offered by *Wounded Feelings* avoids many of the criticisms levelled against it. The book points to external influences on doctrinal developments, including the "Romantic ideas of sensibility" and a kind of "Catholic ultramontanist jurisprudence" (202, 44). It also avoids overstating the importance of jurists, noting when particular ideas were criticized or ignored or when practising judges "fudged," finding vagueness more efficacious than doctrinal

clarity and coherence (167, 233, 297). As already noted, the inclusion of doctrine in the chapters devoted to legal archeology shows how jurisprudential questions are indispensable to understanding how individual cases were argued and decided and to situating them in the broader history of the law. In turn, individual cases contributed to the work of legal conceptualization (10, 108).

Finally, those who criticize current legal histories for emphasizing context and contingency at the expense of normative questions in legal scholarship are offered much. When Reiter notes that the *Civil Code of Quebec* was amended in 1971 "to guarantee the inviolability of the human person," his point is not to emphasize the similarity of the past with the present by providing a telos to order earlier developments (161).[15] Rather, it is to emphasize how the past was different. The legal person was conceived of differently and thus cases were conceptualized, argued, and decided in terms distinct from those in seemingly similar disputes in other periods. Thus, Reiter's account is rigorously historicist while still inviting a more historically informed debate about what has been lost as well as gained in our current, more rights-centric, jurisprudence.

Impressive as this intellectual history of legal doctrine is, *Wounded Feelings*'s legal archeology also speaks to the potential of intellectual histories of law. It expands the social range of legal actors and the variety of legal texts that made meaning. Of one case, Reiter concedes that "untangling exactly what had happened is impossible" from the legal archive; "still, for our purposes, what actually happened is less important than how the parties themselves viewed their situation and described their emotional injuries." Precisely. *Wounded Feelings* is less a history of emotions than an intellectual history of emotions, a history of the ways litigants and others construed what happened and how their responses were structured — but not determined — by social relations and the law. Intellectual history is located where individual and collective experiences are already constituted and expressed in language and where that language was put to further use. Time and again, Reiter takes seriously the nuances of different word choices, the creative tension of trying to fit social understandings into legal categories, the mediation of litigants' narratives by their lawyers, and the power of the questions asked and the audience addressed to give new meanings to those narratives. All those words were made to do things by self-reflective agents striving to navigate the structures they helped to reproduce. They harmed or warned, accused or excused,

revealed or disguised, evoked sympathy or instilled fear, and persuaded or disarmed alternative narratives. The law was an especially formal interpretative context and Reiter is wonderfully attentive to the specificities of the archive it created (176).[16]

Emotions and Morality

Situating *Wounded Feelings* at the intersection of intellectual and legal history illuminates its methodological resonances and strengths, but also throws up three questions for further reflection. First, isn't it a legal history of morality and of a style of moral reasoning as much as it is of emotion?

The *Civil Code of Lower Canada* (CCLC) defined the moral subject for legal purposes: "Every person capable of discerning right from wrong is responsible for the damages caused by his fault to another" (Article 1053). Affective responses to the action of others — tears, trembling hands, fury — were at once a claim to the status of a moral being capable of discerning right from wrong and evidence of injury. Such evidence manifest on the body was visible to others who could then attest to it in legal proceedings in ways that an injury that was neither physical nor material was not. By sympathetic imagination of the suffering of fellow human beings, others could come to a judgment about its validity and the appropriate response. Thus, in the case that opens the book, which involves Mary Sophia Grange's wounded feelings at the breaking off of her engagement, her male lawyer sought identification from the men the law placed in judgment over her: "I cannot open plaintiff's breast and tell what her inmost feelings were," her lawyer conceded, "but I can imagine the state of her feelings, and so can you, gentlemen." Witnesses were repeatedly asked to imagine themselves in a litigant's shoes. In a case involving family honour, "Almost all the witnesses were asked whether similar allegations about their own father would have affected them"; a neighbour in a breach of promise to marry case testified that "not for a thousand dollars would he want something similar to happen to his own daughter"; and, in another concerning the alienation of marital affections, a defence witness conceded "that he would not want something similar to happen to him." In these moments of mutual recognition, intersubjective consensus was sought — that "'any man' would consider it all a grave affront." Sometimes, sympathetic identification failed or was refused. Refusal could involve emotion too. To the judge, a security guard at

Dominion Park "'appears to have been governed by anger'" in his treatment of a visitor. The guard had failed to govern himself appropriately, and thus had exiled himself from the moral community that bound judge to visitor (30, 6, 123, 196, 207, 61).

This is all in the book. Yet it is seen largely through the keen eye of a social historian as propriety and a social code or consensus, a consensus that "had boundaries defined by gender, class, race, and the individual backgrounds of particular judges." Tracing how such boundaries altered the production of meaning and legal reasoning is a major feat of the book. Yet emotions linked the normative and social orders. The social consensus was revealed, created, and challenged. Something of the slippage in the book between emotion and morality becomes visible in the discussion of cases of bodily intrusion. As Reiter argues, the injury had not only physical effects but "also included an emotional aspect related to the lack of consent" from which "feelings of intrusion" arose. Wasn't this, then, a moral violation, not "an emotional injury?" It was not the "mere feelings" Quebec judges were reluctant to recognize, but feelings as evidence of fault the law did recognize (8, 160-1).[17] More deliberately reading moral sentiment in these cases as an empiricist way of knowing, a type of moral character, and a measure of cultural similarity and difference would orient *Wounded Feelings* more squarely towards intellectual histories of morality and enduring debates about the relationship between law and morality.[18]

Subjective and Objective

Second, might an intellectual-history reading of *Wounded Feelings* recast its dichotomy between the subjective and objective? Individuals with their emotions, narratives, and rights are repeatedly labelled subjective. Community norms and social attitudes are called objective with equal frequency. Thus, individual notions of honour are contrasted to "objectified" honour as the law tried to move "beyond the purely subjective level into the realm of shared social codes" (69,109, and also 7–9, 48-9, 63, 106, 124, 157, 295). The distinction between the individual or personal and the collective or shared is clear enough. Yet is objective the right term for the latter? To answer "yes" is to adopt the standpoint of those who sought to legitimate the law as an especially rational and impartial response to interpersonal conflict, a system of adjudication devoid of the emotional and personal. Of course, Reiter

takes no such stand. His book is about the role of feelings in the courtroom, including the feelings of judges who often (but not always) failed to empathize with litigants who were too unlike themselves and thus wrote social norms over wounded feelings. Better to cast the distinction as subjectivity and the search for intersubjectivity (or the view of an impartial spectator) rather than objectivity. Doing so relates the individual and collective as conjoined features in a shared process of meaning-making rather than divorcing them. It also lets us see that part of law's power was to reproduce what it claimed, albeit with varying degrees of credibility.

Overlaid on this dichotomy is a second one between a damage that was "incalculable," "vague," and "arbitrary" and a damage that "lent itself readily to tabulation," "itemization," and "precise" calculation. To denote something as objective because it could be expressed numerically and displayed in a table is again to adopt the perspective of those who sought to claim an apolitical neutrality for the law. Historians of knowledge suggest it is also to mistake precision for objectivity (48–50, 193).[19] Small wonder judges felt anxious when forced to set damages they could not credibly claim were the result of impersonal calculation.

Liberal and Not

Third, wouldn't reading *Wounded Feelings* as intellectual history disrupt the use of "liberal" as a blunt analytical category of contrast more than a historical category of explication? Liberalism or, echoing Ian Mckay's now-fading program, the liberal project appears with some prominence in the introduction and in the third chapter on family dishonour, but only sporadically elsewhere. In the introduction, we are told that "law was certainly a central part of Canada's liberal project. But moral injury shows clearly how law also preserved older ways of thinking and feeling that privileged relationships, emotions, and social codes of honour, propriety, and virtue" (8). The persistence of ideas of long lineage is part of Reiter's welcome care to give continuity its due as well as change, but it was not then necessary to array them chronologically as two antithetical ways of thinking, one defined as liberal. In chapter 3, we are told that "family honour thus engaged in complex and sometimes contradictory ways with Canada's liberal order project" (8, 107).[20] The project itself never seems especially complex or contradictory.

In the main, liberal values (typically plural) and the liberal project (always singular) are equated to atomistic individualism, materialism, rationalism, and "market-driven concerns" in sharp contrast to the relational, familial, affective, and moral (10, 25, 41, 52, 99–100, 104-5, 107, 111, 212). The dichotomy bolstered claims for a qualified Quebec exceptionalism rooted in Catholic faith and family, an identity threatened by the corrosive individualism and materialism of *les anglais* manifest most clearly in contract and property law (42, 236–8). The dichotomy does little to help us understand the relation of liberalism to the law. The discussion of *Chiniquy v. Bégin* — with the tension between the concept of family honour and the law's insistence that only the individual had standing even if their injury arose from their membership in the group — does, however, point to the value of probing that relationship. Certainly, other legal scholars indebted to intellectual history have done so (100-11).[21] In turn, intellectual historians of liberalism will find much of value in the legal history of *Wounded Feelings*. After all, the form of moral reasoning so prominently on display in the book is often associated with the Scottish Enlightenment, whose leading figures did not think reason was the sole or even the primary motive for action. Liberal thinkers also thought long and hard about the responsible use of such individual agency; about propriety, in other words.[22] *Wounded Feelings* suggests the need to explore the "complex and sometimes contradictory" liberalisms in Canadian contract and property law in relation to the areas of law it considers.[23] Such liberalisms navigated — rather than denied — tensions between the individual and social, the material and moral, and freedom and duty.

Gratitude

Wounded Feelings is a powerful combination of historical scholarship and storytelling. It is fitting that a book about legal subjectivity puts the narratives of litigants at its core. The book poses big questions about how law worked, how it changed, and how it related to social relations and public meaning without losing sight of those individuals and their contributions to law and public meaning. It brings together a variety of forms of legal history, especially the history of doctrine and legal archeology, that parallel various forms of intellectual history. As a result, and despite saying little about methodology, it answers recent criticisms of legal history. At a certain degree of

purity, these approaches rest on different, even incompatible, suppositions about ideas, law, and history. Even the prodigious research of such a work as *Wounded Feelings* cannot settle the theoretical questions such approaches raise. The book does, however, testify to the value of a principled pragmatism in such matters. What works? The value of a method ought to be its demonstrable ability to answer historical questions. The multiple methodologies in this book work. The result is not analytic incoherence, but compelling *mixité*.[24] Written with grace, *Wounded Feelings* is a gift to Canadian history, richly deserving of the recognition it has received. I hope appropriating it for conversations not of the author's choosing is not mistaken for ingratitude. After all, "This idea of 'ingratitude' was a rare instance in which the CCLC required a particular emotional state in order to trigger legal effects," the revocation of the gift (212).

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JEFFREY L. MCNAIRN is a member of the History Department at Queen's University, Kingston.

JEFFREY L. MCNAIRN est membre du département d'histoire de l'Université Queen's, à Kingston.

Endnotes

1 Sarah E. Hamill, "Review of Legal History," *Social & Legal Studies*, 28, no. 4 (2019): 538–59 surveys these doubts and Canadian scholarship. The synthesis is Philip Girard, Jim Phillips, and R. Blake Brown, *A History of Law in Canada; Volume One: Beginnings to 1866* (Toronto: University of Toronto Press, 2018).

2 See especially John E. Toews, "Intellectual History after the Linguistic Turn: The Autonomy of Meaning and the Irreducibility of Experience," *American Historical Review* 92, no. 4 (1987): 879–904; William W. Fisher III, "Texts and Contexts: The Application to American Legal History of Intellectual History," *Stanford Law Review* 49, no. 5 (1997): 1065-110; and, most recently, Assaf Likhovski, "The Intellectual History of Law," in *The Oxford Handbook of Legal History*, ed. Markus D. Dubber and Christopher Tomlins (Oxford: Oxford University Press, 2018), 151–69.

3 Compare Lynn Hunt, *Inventing Human Rights: A History* (New York: W. W. Norton and Company, 2007) with Samuel Moyn, *The Last Utopia: Human Rights in History* (Cambridge: Harvard University Press, 2010).

4 Reiter's "Nuisance and Neighbourhood in Late Nineteenth-Century Montreal: *Drysdale v Dugas* in its Contexts," in *Property on Trial: Canadian Cases in Context*, ed. Eric Tucker, James Muir, and Bruce Ziff (Toronto: Irwin Law, 2012), 35–69 exemplifies the approach. It owes much to A. W. Brian Simpson, *Leading Cases in the Common Law* (Oxford: Oxford University Press, 1995). Hamill, "Review"; Jim Phillips, review of *Is Eating People Wrong: Great Legal Cases and How They Shaped the World*, by Allan C. Hutchinson, *University of Toronto Law Journal*, 63, no. 2 (Spring 2013): 342–6; and William Twining, "What Is the Point of Legal Archaeology," *Transnational Legal Theory*, 3, no. 2 (2012): 166–72; are especially helpful.

5 Phillips, review, 345–6.

6 Justin Desautels-Stein and Samuel Moyn, "On the Domestication of Critical Legal History," *History and Theory* 60, no. 2 (2021): 296–310; Justin Desautels-Stein, "A Context for Legal History, or, This is not your Father's Contextualism," *American Journal of Legal History* 56, no. 1 (2016), 31; and Christopher Tomlins, "After Critical Legal History: Scope, Scale, Structure," *Annual Review of Law and Social Science* 8 (December 2012): 31–68. Pushback has come especially from John Fabian Witt, including in "Garland's Million; or, the Tragedy and Triumph of Legal History: American Society for Legal History Plenary Lecture, New Orleans, 2021," *Law and History Review* 40, issue 1 (February 2022): 123–47.

7 Joshua Getzler, "Brian Simpson's Empiricism," *Transnational Legal Theory* 3, no. 2 (2012): 133–4.

8 Hamill, "Review," 540 and Justin Desautels-Stein, "Structuralist Legal Histories," *Law and Contemporary Problems* 78, no. 1 (2015): 47–50. For Canadian examples, see Bradley Miller, "Confederation in Court: The BNA Act as Legal History," *Canadian Historical Review* 98, no. 4 (2017), 713–4.

9 Eric H. Reiter, "Imported Books, Imported Ideas: Reading European Jurisprudence in Mid-Nineteenth-Century Quebec," *Law and History Review* 22, no. 3 (2004): 445–92.

10 On the lexicographical and conceptual, see Keith Tribe, *The Economy of the Word: Language, History, and Economics* (Oxford: Oxford University Press, 2015) and Jan-Werner Müller, "On Conceptual History," in *Rethinking Modern European Intellectual History*, ed. Darrin M. MacMahon and Samuel Moyn, (Oxford: Oxford University Press, 2014), 74–93 respectively.

11 Desautels-Stein, "A Context," 29–40 and *The Jurisprudence of Style: A Structuralist History of American Pragmatism and Liberal Legal Thought* (Cambridge UK: Cambridge University Press, 2018).
12 See Duncan Kennedy, *The Rise & Fall of Classical Legal Thought* (Cambridge UK: AFAR, 1975) and "The Structure of Blackstone's Commentaries," *Buffalo Law Review* 28, (1979): 209–382.
13 For a study that brings Foucault into conversation with the themes of this section, see Christopher Tomlins, "The Presence and Absence of Legal Mind: A Comment on Duncan Kennedy's Three Globalizations," *Law and Contemporary Problems* 78, no. 1/2 (2015): 1–17.
14 Andre Morel and Yvan Lamonde, "Bibaud, François-Maximilien," in *Dictionary of Canadian Biography*, vol. 11, accessed 15 June 2022, http://www.biographi.ca/en/bio/bibaud_francois_maximilien_11E.html. See Samuel Moyn and Andrew Sartori, eds., *Global Intellectual History* (New York: Columbia University Press, 2013).
15 For this criticism, see Desautels-Stein, "Structuralist Legal Histories" and esp. Desautels-Stein and Moyn, "Domestication."
16 Appeals to "lived experience" as an unsullied, natural authority to bypass and trump intersubjective meaning require that the concept of experience escape interrogation. In addition to Toews, "Intellectual Histories," see esp. William H. Sewell, Jr., "How Classes Are Made: Critical Reflections on E.P. Thompson's Theory of Working-Class Formation," in *E.P. Thompson: Critical Perspectives*, ed. H. J. Kaye and Keith McClelland (Philadelphia: Temple University Press, 1990), 50–77; and Martin Jay, *Songs of Experience: Modern American and European Variations on a Universal Theme* (Berkeley: University of California Press, 2005).
17 We see the potential for a history of morality and the elision with emotions at the bottom of page 161 where "feelings-based injury" becomes "moral injury" on the next line.
18 Daniel Wickberg, "What Is the History of Sensibilities? On Cultural Histories, Old and New," *American Historical Review* 112, no. 3, (2007): 661–84.
19 In the Canadian context, see Bruce Curtis, *The Politics of Population: State Formation, Statistics, and the Census of Canada, 1840–1875* (Toronto: University of Toronto Press, 2001) and E. A. Heaman, *Tax, Order, and Good Government: A New Political History of Canada, 1867–1917* (Montreal and Kingston: McGill-Queen's University Press, 2017).
20 Jean-François Constant and Michel Ducharme, eds., *Liberalism and Hegemony: Debating the Canadian Liberal Revolution* (Toronto: University of Toronto Press, 2009).
21 For an example of liberalism as a cluster of economic ideas, see Herbert Hovenkamp, *Enterprise and American Law, 1836–1937* (Cambridge:

Harvard University Press, 1991) and, for liberalism as related structural contradictions, Desautels-Stein, *Jurisprudence of Style*.

22 See Stephen Holmes, "The Secret History of Self-Interest," *Passions and Constraint: On the Theory of Liberal Democracy* (Chicago: University of Chicago Press, 1995), 40–66 and Duncan Kelly, *The Propriety of Liberty: Persons, Passions & Judgement in Modern Political Thought* (Princeton: Princeton University Press, 2011).

23 Philip Girard, "Land Law, Liberalism, and the Agrarian Ideal: British North America, 1750–1920," in *Despotic Dominion: Property Rights in British Settler Societies*, ed. John McLaren, A. R. Buck, and Nancy E. Wright (Vancouver: UBC Press, 2005), 120–43 is an excellent start.

24 Compare Fisher, "Texts and Contexts," 1088 with Samuel Moyn and Andrew Sartori, "Approaches to Global Intellectual History," in *Global Intellectual History*, 25–6.