

## *Faces of Judicial Anger : Answering the Call\**

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*“Anger is an impediment to reason, as it is to justice.” (J. FERRON, *Cotnoir*)*

*“One is tempted to define man as a rational animal who always loses his temper when he is called upon to act in accordance with the dictates of reason.” (O. WILDE, *The Critic as Artist*)*

### Introduction

Accounts of the mythical foundations of law, in written or spoken form, are Manichaeic stories in which emotion plays the role of the viper and reason that of the saviour. Law is not the only discipline to adopt this way of thinking: the tendency to mark the dichotomy between reason and emotion and to favour the first over the second runs deep in western thought. Whether in Freud’s primal horde<sup>1</sup> or Rousseau’s social contract,<sup>2</sup> emotion is linked to decadence, is figured as a seductive femme fatale obscuring man’s ability to deploy reason. Overtaken by passion, man is no better than beast: fiery, reckless, relying on base instincts, constrained only through law, with its cold voice of reason. Justice, level-headed, witnessing the torments of human passion, dampens the fire through objective and disciplined thought. In delivering judgement, the judge does not love, hate, weep or laugh. Justice does not founder. It assesses, reflects, decides and imposes, not to the beat of its own heart, but to the demands of reason untainted by emotion.

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<sup>1</sup> S. FREUD and A. A. BRILL, *Totem and Taboo; Resemblances between the Psychic Lives of Savages and Neurotics*, New York, Moffat Yard, 1918. See discussion in P. FITZPATRICK, *Modernism and the Grounds of Law*, Cambridge, Cambridge University Press, 2001.

<sup>2</sup> J.-J. ROUSSEAU, *Du contrat social ou principes du droit politique*, Paris, Messidor, 1987.

This dominant story of reason and passion has, of course, been contested all along.<sup>3</sup> As Bandes notes, “emotion pervades law, and always has. It’s just that sometimes it’s more visible than others”.<sup>4</sup> In fact, justice requires passion.<sup>5</sup> The evacuation of passion creates a distance from persons and emotions that precludes the dialogue required by justice itself.<sup>6</sup> Emotions like anger, despair, disgust, fear and compassion play a fundamental role in the art of persuasion,<sup>7</sup> an art central to justice, law and decision making. Furthermore, justice, that which states that something “is *unjust*”, is itself a feeling. Georges Gurvitch notes that “law is fundamentally expressed as a spontaneous and intuitive *feeling* that justice has been served” [our translation].<sup>8</sup>

In this article, we consider the presence in law of one particular emotion: anger.<sup>9</sup> We do so in the context of the judicial treatment of a criminal incest case, a location in which one might expect anger to be present and be taken seriously. Admittedly, criminal law is often the site of pain-wracked, sometimes veiled, anger; law functioning as a bastion against the dangerous consequences of wrath. Criminal courts are popularly understood a sites of sin and anger. But wrath does not attend to the reasoned boundary said to separate public from private law. The face of wrath is often highly visible in the exchanges between disputants embroiled in any number of private law struggles: divorce actions, custody battles, labour disputes,

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<sup>3</sup> Certainly, scholars have drawn attention to the exclusionary racialised and gendered implications of the understanding of reason and passion at the heart of the dominant story. See, for example, **G. CHAKRAVORTY SPIVAK**, *A Critique of Postcolonial Reason: Toward a History of the Vanishing Present*, Cambridge, Harvard University Press, 1999; **C. PATEMAN**, *The Disorder of Women: Democracy, Feminism and Political Theory*, Cambridge, Polity, 1989.

<sup>4</sup> **S. BANDES**, *The Passions of Law*, New York, New York University Press, 2001, p. 14. The field of moral judgment is another example of similar questioning of the reason/passion dichotomy in moral philosophy, involving the process of rendering a decision. See **C. TAPPOLET**, “Crimes passionnels et émotions appropriées”, *Le Magazine littéraire*, 1998, pp. 82-83.

<sup>5</sup> See, for example, **R. MANGABEIRA UNGER**, *Passion: An Essay on Personality*, New York, The Free Press, 1984; **W.J. BRENNAN**, “Reason, Passion, and ‘The Progress of the Law’”, *Cardozo Law Review*, 1988, pp. 3-23.

<sup>6</sup> For attempts to transform the primacy of “reason” by bringing matters of passion closer to the core of individual, social and legal orders, see **P. GOODRICH**, *Law in the Courts of Love: Literature and Other Minor Jurisprudences*, London, Routledge, 1996, p. vii.

<sup>7</sup> **D. DESTENO et al.**, “Discrete Emotions and Persuasion: The Role of Emotion Induced Expectancies”, *Journal of Personality and Social Psychology*, 2004, pp. 43-56, at p. 43.

<sup>8</sup> **D. ALLAND and S. RIALS**, *Dictionnaire de la culture juridique*, Paris, Lamy-PUF, 2003, s.v. “pluralisme juridique”.

<sup>9</sup> To understand anger as an emotion, we borrow the description by Robert Augustus Masters: “As an emotion, anger is an aroused, often heated state which combines a compellingly felt sense of being wronged or frustrated (hence the moral quality of anger) with a counteracting, potentially energising feeling of power, both of which are interconnected biologically, psychologically, and culturally [...]. Rather than being a single entity with a clear perimeter, anger appears to be a complex process, a shifting, fluxing interplay of many states of mind and feeling. Desire, frustration, aggression, self-pity, righteousness, confusion, hurt, pride, calculation, blame, feelings of abandonment – all these and more may arise and pass or overlap in a very short time, during which we conceive of ourselves as ‘being angry’”; **R.A. MASTERS**, “Compassionate Wrath: Transpersonal Approaches to Anger”, *The Journal of Transpersonal Psychology*, 2000, pp. 31-51, at p. 33.

environmental protests, tort claims, and struggles between shareholders in closely held corporations. In all these contexts, law acknowledges and even anticipates individual and collective anger: the anger of those who do harm, of those who *are* harmed, of those who witness the harm, of those who seek a (sometimes bloody) re-settling of accounts.

Certainly, whether this particular emotion bubbles up in the context of ‘public law’ or ‘private law’ disputes, wrath is understood as a significant danger that must be managed. Law, with its focus on reason, steps in to buffer the edges of people’s unruly and sinful anger. The judge -charged with the singular obligation to do justice, an obligation that cuts across the many divisions and categories of law- is to safeguard society from the disruptive and deadly consequences of wrath, must channel wrath’s excesses away from vengeance, vigilantism and blood feud.<sup>10</sup> Through law, the courts channel excess and ennoble the fight for justice.

Here, we are interested less in the anger of disputants before the law, than in the anger of judges themselves. We are challenging the claim that emotion, particularly anger, is contrary to the process of rendering judgement. To do so, we focus on the faces of judicial anger, using a Canadian Supreme Court<sup>11</sup> criminal law case, *R v. F.F.B.*,<sup>12</sup>. The issue to be resolved in *F.F.B.* was fact specific. Had the jury in a childhood sexual abuse case been properly instructed about their ability to use some highly prejudicial testimony? If not, what was the appropriate remedy? Should the court affirm the jury’s decision to convict, order a new trial or simply confirm the conviction by applying ‘remedial provision’ 686(1)(b)(iii) of the *Criminal Code*?<sup>13</sup>

Settling the matter required the judges to individually decide whether the specific case before them involved a ‘miscarriage of justice’. This case involved no policy conflicts, addressed no emergent legal concept, and produced no precedent setting principle of law. And yet, the case

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<sup>10</sup> **W.I. MILLER**, *Bloodtaking and Peacemaking: Feud, Law, and Society in Saga Iceland*, Chicago, University of Chicago Press, 1990.

<sup>11</sup> The Supreme Court of Canada, created in 1875, is the highest court in the country. Each year, it hears a hundred or so appeals. As a general court of appeal, it is authorised to determine, in last instance, appeals from all lower courts on all matters, even constitutional. Cases can arrive at the Supreme Court through different channels. The most traditional way is for the Supreme Court to grant leave. For the Court to grant leave, it first makes a determination that the case involves an issue of national importance. The second way applies only in criminal law. In criminal law cases where there is a dissent at the court of appeal, there is an automatic right of appeal; the case will be heard by the Supreme Court even if it is widely agreed that there is no issue of national importance raised by the case.

<sup>12</sup> **Supreme Court of Canada**, [1993] 1 S.C.R. 697 [following cited: *F.F.B.*].

<sup>13</sup> *Infra*, note 53.

was highly divisive, leading the 5 judges hearing the case<sup>14</sup> to generate four different opinions.<sup>15</sup> Our focus is on how the judges occupied that moment of decision, and how wrath is there manifested. Judicial wrath can appear in many faces. It can involve personal angers between judges, anger about the actions of the Court as an institution, anger towards parties before the Court, anger at competing visions of justice and injustice. The rulings in *F.F.B.* invite us to consider this double-edged relationship of anger to justice, and to ask, in effect, whether the doing of justice might not sometimes *require* anger.

We interrogate the practices of judgement that reveal (and fail to reveal) judicial anger. In Part I, we lay the foundation of our exploration of judicial anger. We introduce the complex edges of anger (part I.A), then analyse the tools available to reveal the presence of judicial emotion: the conventions of judicial language (part I.B). Our goal is to begin elaborating a method for rendering anger visible. In Part II, we put this method to work in an analysis of the four opinions generated by the Supreme Court of Canada judges who heard case *F.F.B.* We begin with a brief overview of the facts (part II.A), consider the production and publication of judicial opinions (part II.B), continuing with a search for hints of anger in the four opinions (part II.C). To conclude, we offer some observations about judicial calls to anger and the ways in which readers might respond.

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<sup>14</sup> There are 9 judges on the Supreme Court of Canada, sitting most frequently in benches of 9 or 7, but sometimes also of 5. That there were only 5 judges hearing this case rather than the more usual 9 or 7 is related to the status of the case as an 'as of right appeal': it was not thought to be of national importance.

<sup>15</sup> At the Supreme Court of Canada, all opinions, whether majority or dissenting, are published. "Majority opinions are those written and signed by the majority (minimum 3 judges out of 5, 4 out of 7 or 5 out of 9). It is this opinion that determines law as it applies in Canada at a precise moment in time. The other opinions are dissenting, divided into two main types. Dissenting opinions based on reasons are those written by a judge who, although in complete agreement with the results of the majority opinion, does not share the arguments behind it. Dissenting opinions based on the result are those written by a judge who is not in agreement with the majority, nor the reasons for the decision, nor the result or conclusion of the decision. Dissenting opinions can sometimes involve the two types, both reasons and result, at once [...]. Finally, dissenting opinions do not make up the law. They do have a certain power of persuasion, however. Furthermore, these opinions can become law if subsequent majority decisions consider the arguments they present" [our translation]; **M.-C. BELLEAU and R. JOHNSON**, "Les opinions dissidentes au Canada", conference presented at the *Cour de cassation de France*, October 18, 2005, [http://www.courdecassation.fr/IMG/File/18\\_10\\_2005\\_intervention\\_belleau\\_johnson.pdf](http://www.courdecassation.fr/IMG/File/18_10_2005_intervention_belleau_johnson.pdf) [date accessed, 29 September 2007]. In the 1990s, at the time the ruling we are interested in was passed down, 35.5% of the Supreme Court's decisions involved dissent, 17.1% based on reasons and 18.4% based on results; **M.-C. BELLEAU and R. JOHNSON**, "La dissidence judiciaire: Réflexions préliminaires sur les émotions, la raison et les passions du droit / Judicial Dissent: Early Reflections on Emotion, Reason, and Passion in Law", in **M.-C. BELLEAU and F. LACASSE**, *Claire L'Heureux-Dubé à la Cour suprême du Canada, 1987-2002*, Montréal, Wilson & Lafleur, 2004, pp. 699-719, at p. 711.

## I. Searching for traces of judicial anger

In common language, anger is defined as a “passing violent state, stemming from a feeling of having been attacked or offended”.<sup>16</sup> This emotion is a layered phenomenon. As Masters points out, anger can be an affect, a feeling, or an emotion: “*Affect* is a given; *feeling* involves our conscious experience of that given; and *emotion* is how we frame and what we do with that given”.<sup>17</sup> It is the presence of anger as an emotion within the legal system that is of interest to us.

### A. Unjustified anger and righteous anger against injustice

Despite the heated situations that give rise to legal proceedings, and perhaps because of these, the law often presents itself as a world in which such emotions, creators of disorder, are set to the side in the interests of well thought-out, objective rulings. In fact, in *R. v. C.A.M.*,<sup>18</sup> the Canadian Supreme Court asserts that it is the presence of ‘emotion and anger’ that distinguishes ‘vengeance’ (unacceptable) from its (legitimate) cousin, ‘retribution’.<sup>19</sup> Retribution is a legitimate ground of legal punishment.<sup>20</sup> Retribution, unlike vengeance, is readily accepted by law, which can find in it a foothold for reason in truth. But anger, the Court argues, interferes with the “objective, reasoned, measured determination of an appropriate punishment”.<sup>21</sup>

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<sup>16</sup> *Le petit Larousse illustré*, 1999, s.v. “colère” and “strong, stern, or fierce anger; deeply resentful indignation; ire”, in *Random House Webster’s Unabridged Electronic Dictionary*, 2nd ed., s.v. “wrath”, as a “vehement irritation against an offender. Anger, loss of temper, fury”; [our translation] by *Le nouveau petit Robert*, 1993, s.v. “courroux”. Moreover, *Le dictionnaire culturel en langue française* notes that there is a historical difference between *colère* in French, anger in English and *ira* in Latin. The first refers to the medical spectrum, a physiological state. The second refers to a feeling of anguish and the last to a “strong activity”. However, in each case “anger, at least in the Western world, is seen as a disruption, an influx of uncontrolled energy (an ‘emotion’, a ‘movement of the spirit’), a violent, but subdued state (‘a passion’) that manifests itself in many ways and leads to the desire to cause harm” [our translation]; **A. REY**, *Le dictionnaire culturel en langue française*, Paris, Dictionnaires Le Robert, 2005, s.v. “colère”.

<sup>17</sup> **R.A. MASTERS**, *supra* note 9.

<sup>18</sup> **Supreme Court of Canada**, [1996] 1 S.C.R. 500.

<sup>19</sup> *Ibid.*, § 80.

<sup>20</sup> Michel Foucault agrees, giving retribution a political aspect. In fact, it is where truth resides in justice, in the moment where the convicted person admits his or her guilt before all by submitting to the punishment and, via his or her tortured body, confessing; **M. FOUCAULT**, *Surveiller et punir*, Paris, Gallimard, 1975, pp. 28 and 47.

<sup>21</sup> *Ibid.* Léon Husson relates Bergson’s experience serving on a jury hearing a criminal case and the philosopher’s reflections on the laxity of the punishment imposed by the jury. He explains that there are several reasons for this. “The last reason is institutional. It is found in the law, which sets out that juries must base their decision on their deep inner conviction. This influence is reinforced by a sign in the deliberation room that announces in large letters, “The jury may deliberate before making a verdict”. “May deliberate” basically means that it is not bound to do so. The jury, believing that it is acting in good conscience, abandons itself to feeling, to thoughtless impulse. *There is nothing as harmful to justice as emotion*” [our emphasis; our translation]; **L. HUSSON**, “Les trois dimensions de la motivation judiciaire”, in **C. PERELMAN and P. FORIERS**, *La motivation des décisions de justice*, Bruxelles, Bruylant, 1978, pp. 69-109, at p. 70.

Consequently, although the individuals appearing before the law are likely to experience strong emotion, including blinding anger, it seems that wrath is not an appropriate legal or judicial emotion. Wrath may make frequent appearances in the courts of law, but wrath remains something for the judge to *tame*, not something for the judge to *feel*. After all, law is a sphere in which steady logic intervenes to dull the sharp edges of turbulent and uncontrolled anger and to ensure that justice, while possibly altered by emotion, is nonetheless tempered by reason. Moreover, temperance and justice are two of the four cardinal virtues.<sup>22</sup> Temperance dampens desire and primal instincts, and justice is a reasoned quest for fairness. These two virtues are often represented by balanced images: water flowing from one receptacle to another, water in the wine of temperance<sup>23</sup> and the scales of justice.<sup>24</sup>

However, anger can have constructive value.<sup>25</sup> Anger is not exclusively sin.<sup>26</sup> It can emerge not only out of experiences of jealousy, betrayal, hatred, or loss, but also out of

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<sup>22</sup> The two others are prudence and fortitude. See *Catechism of the Catholic Church*, <http://www.vatican.va/archive/ENG0015/INDEX.HTM> [date accessed, June 26, 2007]. See also **J. PIEPER**, *The Four Cardinal Virtues*, Notre Dame, University of Notre Dame Press, 1996. It appears that these cardinal virtues originated from the *Symposium* of Plato in the dialogue questioning Eros' divinity. "He who strives for the greater good with moderation and justice, here as among the gods, possesses the greatest strength, and it is to him that we owe all of our happiness, as he makes life and friendship with our fellow men possible as well as with those who are stronger than us – the gods" (speech by Eryximaque); "It is of the highest importance to note that among gods and men, Eros commits no injustice, nor is he its victim [...] On this we can agree. The Laws, queens of the city, proclaim it to be just. Besides justice, Eros embodies the greatest temperance. None would disagree that temperance is dominion over pleasures and desires" (speech by Agathon) [our translation]; **PLATON**, *Le Banquet*, trad. [M. RENOARD, Paris, Payot & Rivages, 2005], pp. 70 and 85.

<sup>23</sup> See namely the work of Piero del Pollaiuolo, *Temperance*, 1470, which the *Corporation des Marchands de Florence* ordered to adorn the hearing room.

<sup>24</sup> See namely the work by Raphaël, *Justice*, 1509-1511, Vatican. The character of justice dominates those representing the other virtues.

<sup>25</sup> See **R.A. MASTERS**, "Compassionate Wrath: Transpersonal Approaches to Anger", *supra* note 9, p. 39: "It is also worth nothing that some feminist writings on anger emphasise the value of anger -as opposed to aggression- as a resource in restoring integrity and intimacy, both personally and socially (e.g., McAllister, 1982; Miller & Surrey, 1997). Though such wrtings do not overtly speak of heart-anger, their aligning of openly expressed anger and compassion as a twin force of great benefit is in the spirit of heart-anger. That spirit may also sometimes be found in rage at injustice, as when such rage moves 'beyond fruitless scapegoating of any group, [being linked] instead to a passion for freedom and justice that illuminates, heals, and makes redemptive struggle possible' (hooks, 1995, p. 20)".

<sup>26</sup> See **R.A.F. THURMAN**, *Anger*, New York, Oxford University Press, 2005, pp. 4 and 17: "We need anger to right wrongs, overturn social evils, revolt against oppression. Anger is only deadly, sinful, or bad when it is unfair, excessive, or self-destructive"; "Then there is righteous anger, against criminality and injustice, slackers and busybodies, luxury and destitution, which ranges from individuals to be punished to communities against whom there are crusades to be waged". See also **S. LAPAQUE**, *Les sept péchés capitaux: 7 anthologies*, Vol. 5, Paris, Libro, 2000, p. 6 "Thomas d'Aquin [...] questions the deceptive prestige of anger in *Somme théologique* (IIa, IIae, qu. 158): anger, the appetite for vengeance, is reinforced by our thirst for justice and honesty and thus takes on a dangerous majesty. 'Succumb to irritation, but do not fish', says the Book of Psalms. After which, the incensed man dreamt of an anger that does not oppose love and justice" [our translation]. See also **A.A. SAPPINGTON**, "Wrath: Relationships Between Sinful Anger, Blaming Cognitions and Altruism", *Journal of Psychology and Christianity*, 1998, pp. 25-32.

experiences of injustice.<sup>27</sup> In fact, one of the facets of wrath is ‘righteous anger’, a type of anger that can prompt people to defend the cause of justice. Righteous anger can be a powerful resource that makes possible the restoration of integrity or intimacy. Author bell hooks maintains that anger, properly channelled, can illuminate, heal, and make redemptive struggle possible. Under the banner of ‘righteous anger’, it may operate as the fuel that pushes people to action in the cause of justice itself. As the Reverend Kenneth Lyons notes, “when we read biographies of people who have been leaders in the struggle for justice and reform, we find that often they have been motivated by righteous anger, shame, and indignation”.<sup>28</sup> If anger is tied to both injustice and justice, it is crucial that we understand how it is interwoven.<sup>29</sup>

Biblical texts capture this dual face of anger. Some passages position anger as sin:<sup>30</sup> “Ye have heard that it was said to them of old time, Thou shalt not kill; and whosoever shall kill shall be in danger of the judgment: but I say unto you, that every one who is angry with his brother shall be liable to judgement”<sup>31</sup> (Matt. 5:21-22). However, wrath can be justified if expressed by God, the absolute judge:<sup>32</sup> “For the wrath of God is revealed from heaven against all ungodliness

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<sup>27</sup> *Le Petit Larousse illustré*, 1999, s.v. “colère”: “Violent, passing state stemming from a feeling of having been attacked or offended” [our translation]. Psychology also links anger with justice: “Anger: Reaction of tension and hostility aroused by a wide variety of real or imagined frustrations, hurt, slights, threats, or injustices [...]. Anger is ordinarily directed outward”. Paradoxically, however, “anger gives rise to injustice (Pr 14, 17; 29, 22; cf Jc I, 19s)” [our translation]; **X. LÉON-DUFOUR et al.**, *Vocabulaire de théologie biblique*, 2nd ed., Paris, Éditions du Cerf, 1970, p. 180.

<sup>28</sup> **K. LYONS**, “The Seven Deadly Sins Today, III: Anger”, *Expository Times*, 1986, pp. 302-304, at p. 302. And at p. 303: “At one extreme is the man too easily roused, touchy, aggressive. At the other is the meanspirited man who never feels anger because he is never aroused by injustice”.

<sup>29</sup> In fact, anger is not always a sin. See **A.A. SAPPINGTON**, “Wrath: Relationships Between Sinful Anger, Blaming Cognitions and Altruism”, *supra* note 26, p. 26: “Nevertheless, there is a body of work within the literature on the integration of psychology and theology, summarised by Bassett and his colleagues (Bassett, Hill, Hart, Mathewson, & Perry, 1993), which argues that anger is not always sinful and that it is indeed possible to distinguish between righteous and sinful anger. Bassett et al. (1989) surveyed Christian therapists and found a consensus that righteous anger was characterised as: (a) a response to somebody else being mistreated; (b) attempting to be guided by Godly principles while angry; (c) constructively confronting the person who stimulated the anger; and (d) getting angry slowly. Sinful anger was characterised as: (a) a reflex-like response; (b) a justification as the best response; (c) a form of retaliation; (d) producing initial and long term bad results; and (e) an overreaction. The deadly sin of wrath should thus be identified not in anger in general, but with sinful anger”.

<sup>30</sup> In Christianity, wrath is one of the seven deadly sins (the others are pride, gluttony, greed, lust, sloth and envy). According to the *Compendium of the Catechism of the Catholic Church* published in 1992, sin “creates a proclivity to sin; it engenders vice by repetition of the same acts”. And “Vices are the opposite of virtues. They are perverse habits which darken the conscience and incline one to evil”. *Compendium of the Catechism of the Catholic Church*, [http://www.vatican.va/archive/compendium\\_ccc/documents/archive\\_2005\\_compendium-ccc\\_en.html](http://www.vatican.va/archive/compendium_ccc/documents/archive_2005_compendium-ccc_en.html) [date accessed, June 26, 2007].

<sup>31</sup> *Book of Matthew*, c. 5, v. 21-22.

<sup>32</sup> See **X. LÉON-DUFOUR**, *Vocabulaire de théologie biblique*, *supra* note 27, pp. 180-181: “Do not do justice onto yourself, allow anger to act, as it is written: I will be the one to mete out justice, I will be the one to make retribution, said the Lord” [our translation]. And pp. 185-186: “Finally, Jesus expressed the wrath of a judge, as the host of the feast (Lc 14, 21), the master of the ruthless servant (Mt 18, 34), he brings his wrath down on

and unrighteousness of men who suppress the truth in unrighteousness”<sup>33</sup> (Romans 1:18). In this case, wrath is seen as an appropriate emotion (and action) in response to injustice, malice or an attempt to hide or deny the truth. These two passages draw a distinction between those who may and those who may not rightfully feel or express anger, denying the articulation of wrath to humankind. God says to Job, who, poor and unhappy, laments being the victim of an unfair divine judgement: “Where were you when I created the earth? Speak now if you are all-knowing” [our translation].<sup>34</sup> From a religious point of view, God is the only one who can make a fair judgment that distinguishes good from evil. Indeed, it is His duty as a just and all-knowing being. And yet, the distinction between anger as virtue or vice doesn’t necessarily turn on the divide between the sacred and the profane. In Western law, impregnated with religious concepts of judgement, the expression of anger is linked to questions of authority, particularly the authority to stand in judgement. Authority is manifest in the figure of the impartial judge, and also in the figure of the jury, who, in taking an oath, throw off the cloak of human frailty and robe themselves in the authority conferring garb of judgement.<sup>35</sup>

Here, it is also noteworthy that the virtuous wrath (of God) is *revealed*: it is not simply a thing *felt*, it is a thing performed;<sup>36</sup> it involves action. ‘Righteous’ judgment seems to require the public *display* of the powerful anger demanded by grave injustice. In fact, the act of rendering of judgement is deeply relational and thoroughly ‘public’, an act designed to be *witnessed*: justice

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unrepentant cities (Mt II, 20s), chasses the money lenders from the temple (Mt 21, 12s) and curses the barren fig tree (Mc II,21)” [our translation]. Moreover, the duty of rendering a decision grants judges a great deal of power: “The judges deal pain and death. That is not all they do. Perhaps that is not what they usually do. But they *do* deal death, and pain [...]. In this they are different from poets, from critics, from artists”; **R. COVER**, “Violence and the Word”, *Yale Law Journal*, 1986, pp. 1601-1629, at p. 1609.

<sup>33</sup> *Letter to the Romans*, c. 1, v. 18.

<sup>34</sup> *Book of Job* quoted by **R. JACOB**, “Le jugement de Dieu et la formation de la fonction de juger dans l’histoire européenne”, *Archives de philosophie du droit*, 1995, pp. 87-104, at p. 88.

<sup>35</sup> “How did the falling away of divine justice and the reinforcement of traditional regulations modify the practice of law? First, by the invention of the jury. During the XIIth century, calling upon oath-taking juries grew more popular [...]. The appointment of ad hoc judges, sanctioned by their oath, appeared as a substitute for ordeals, used in turn with the latter before replacing it entirely. The word of truth, the verdict, spoken by the 12 members of the jury, directly replaces God’s judgment” [our translation]; *Ibid.*, p. 100.

<sup>36</sup> “In Roman times, when a case involved state business, only the sentence (the death sentence) was made public. However, most of the time, the trial was a spectacle, like circus act or a theatre production. A canvas was stretched laterally between the court, the accused and the defence, on which the incriminating facts were painted as they were revealed. On the other hand, from the Middle Ages up until the Revolution, ‘the secret, written form of the procedure, says Michel Foucault, goes back to the principle that in criminal law, establishing truth was the absolute right and exclusive power of the sovereign and his judges’. During the Revolution, the oral nature of the debates guaranteed their transparency: ‘With testimony, the reinstated speech and debate granted the population newly acquired sovereignty. Everyone could, at least ideally, stand before a judge – or take the judge’s place –with full awareness as a free man to state the reality of a fact or deed’”; **D. SALAS**, *Du procès pénal: Éléments pour une théorie interdisciplinaire du procès*, Paris, P.U.F., 1992, p. 86, cited by **C. DELAGE**, *La vérité par l’image: De Nuremberg au procès Milosevic*, Paris, Denoël, 2006, pp. 121-122.



must not only be done, and it must also be *seen* to be done. The restoration of balance would seem, at least on some occasions, to require that injustice be met with the visible expression of wrath.

In short, law and justice clearly have a complicated and paradoxical relationship to anger. On the one hand, law seeks to suppress anger, and on the other hand, tries to channel it. Judicial anger may reveal itself as improper excess. And yet, the evacuation of anger from judgement - the failure to give voice to wrath- may deprive law's witnesses of adequate markers of justice, may prevent justice from being seen to be done. But this leaves us with a puzzle. What *is* the relationship between wrath and the judge? When is anger not justified? When does anger serve justice?

### **B. Retracing anger in judicial texts**

Judges are not simply neutral tools of justice. Their subjectivity and lives have an impact on the decisions they make. Although biographical studies could shed light on certain manifestations of anger by judges, that is not our focus. There are important limits to using someone's personal history as a core vehicle for reflection on anger. Traces of personally felt angers are often minimally present in judgements or are difficult to detect. As such, biographies are a useful resource when considered in parallel to the judgements, but also serve as a reminder that personal anger that arises in the context of judicial work does not always visibly alter judicial texts. There are both pragmatic and theoretical limits to an approach focusing on such stories about anger. First, in the absence of rich biographical accounts (generally done long after the judge in question has stepped down from the bench), knowledge about actual anger is simply not easy to find. This is not to say that stories don't exist. They do. Within the legal community, there are always some with insider knowledge and insider stories. But although they may provide context or colour, these 'insider observations' travel in selective ways, and are not easily verifiable. For the most part, such stories help us flesh out angers felt rather than angers performed. They provide very little in the way of theoretical frameworks for thinking about judicial anger.

The stability and authority of law is in large measure a product of the replicability of legal texts. Though almost all texts are available for interpretation and re-interpretation, interpreters in various locations are required to grapple with '*the same*' texts. This is a point

both obvious, and yet of great significance. As Dorothy Smith reminds us, in our text-mediated societies, texts are far more than simple ‘ideas’. They enter into the construction of social and physical environments by coordinating activity: they are “key devices in hooking people’s activities in particular local settings and at particular times into the transcending organisation of the ruling relations”.<sup>37</sup> Legal texts are key documents in the construction and maintenance of justice. Though it is interesting to explore the stories behind the scenes, these stories do not generally travel with the text. Whether or not those stories are ‘true’, or have explanatory power, there are nonetheless good reasons to restrict one’s consideration of judicial anger to those angers visible in judicial texts – to those traces of anger that are textually inscribed and thus constantly replicable in the moment of judgement performed each time a reading of the text links together judge and witness/reader. So it is to judicial texts that we look, and to the language in which those texts are crafted.

Conventions of judicial writing establish the terrain against which one should search for evidence of anger. These conventions tend, in general, towards a writing style that aspires towards objectivity, rationality, logic, and which makes minimal use of language explicitly carrying a weight of passion or anger. The pressure towards ‘dispassionate’ decision-making encourages judges to articulate their angers in the language of judicial rhetoric, a language highly inflected with the discourse of abstract rationality. This impartiality, says Léon Husson, “does not only assume that the judge’s personal interests do not come into play in this instance and that he or she strives to remain impartial before the parties involved. It also assumes that the judge works to keep his or her feelings under control and his or her prejudices in check” [our translation].<sup>38</sup> In reading judicial opinions for anger, one must be attuned to what might otherwise appear as subtle variations from the norm.<sup>39</sup>

Furthermore, it is useful to ask a number of questions about how anger emerges in judicial language, and particularly about differences in: 1) the nature of the concern; 2) the target of anger; and, 3) the form of the anger. On the first of these, one can ask if the anger

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<sup>37</sup> **D. E. SMITH**, “Texts and the Ontology of Organisations and Institutions”, *Studies in Cultures, Organisations and Societies*, 2001, No 7, pp. 159-198, at p. 164.

<sup>38</sup> **L. HUSSON**, “Les trois dimensions de la motivation judiciaire”, in **C. PERELMAN et P. FORIERS**, *La motivation des décisions de justice*, *supra* note 21, pp. 69-109, at pp. 75-76.

<sup>39</sup> On the Canadian legal horizon, it is very rare to see judges expressing anger about other judges within the text of a legal opinion. And even where judges are in serious disagreement with each other, disagreements that may well involve intense feelings of anger, those disagreements are generally expressed in language where the judges continue to refer to the other as “my learned colleague”, and to express dissent using neutral sounding phrases like “I must respectfully disagree”.

seems to be about context or concept. That is, does the anger seem to emerge in response to people and what they do? Is the anger linked with commitments to ideas and principles?<sup>40</sup> Second, who (or what) is the target of judicial anger? The target is frequently an identifiable individual, such as an adulterous husband or wife in a divorce action, the executor of a will, the accused in a criminal case, or a corporate officer in a tort litigation case. But judicial anger can also spill out against a number of other individuals indirectly implicated in a case: at parents who failed to put a stop to abuse taking place right under their nose, at loans officers or social workers or doctors who failed to do their jobs; at the strategy adopted by a lawyer; at another judge who admitted or failed to admit certain evidence.<sup>41</sup> Third, what form does the anger take? Some forms of expression of anger are seen as more common or more acceptable than others. Anger can be red hot and explosive, but it can also be white hot and channelled. That is, anger can also be expressed coldly or even in a passive-aggressive manner. Indeed, one might argue that the techniques of legal rhetoric make this latter form of anger particularly prevalent in legal writing. The point is simply that variations in the form do not necessarily deprive various language moves of their grounding in anger.

Judicial texts, particularly majority opinions, have legal force, exercise legal judgement and inscribe the law.<sup>42</sup> But, as Robert Gordon so aptly put it, the true power of a legal regime lies less in the relations of force it inscribes and brings to bear, than in “its capacity to persuade people that the world described in its images and categories is the only attainable world in which a sane person would want to live”.<sup>43</sup> The judge not only inscribes the law, but also seeks to persuade the reader/witness to see things as does the authoring judge. For Perelman, “[law], which presents itself as democratic, a work of persuasion and reason, must attempt to attract

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<sup>40</sup> In his comparison of Harlan and Holmes, Pillsbury rejects, for example, the notion that Holmes was dispassionate, arguing rather that Holmes’ passions were deeply engaged but generally over principles than over the reality experienced by the parties before him. He argues that the reverse is true of Harlan, for whom the situation of the parties drove his reasons much more than his commitment to any particular principles of law. See **S. H. PILLSBURY**, “Harlan, Holmes, and the Passions of Justice”, in **S. BANDES**, *The Passions of Law*, *supra* note 4, pp. 330-362, at p. 330.

<sup>41</sup> There is an extensive literature about the anger felt by those who are made to be witnesses to the trauma suffered by another. The target of a witness’s anger can sometimes end up being the original victim who has -by telling their story- made the witness a sort of party to the trauma itself. On the anger felt by those called upon to witness trauma (that is, those who must hear the stories told by victims of abuse). See **O. KAMIR**, “Cinematic Judgment and Jurisprudence: A Woman’s Memory, Recovery and Justice in a Post-Traumatic Society; A Study of Polanski’s *Death and the Maiden*”, in **A. SARAT, L. DOUGLAS and M. UMPHREY**, *Law on the Screen*, Princeton, Princeton University Press, 2005, pp. 27-81, at p. 28.

<sup>42</sup> See **R. COVER**, “Violence and the Word”, *supra* note 32.

<sup>43</sup> **R. W. GORDON**, “Critical Legal Histories”, *Stanford Law Review*, 1984, pp. 57-125, at p. 109.

reasoned support through motivation” [our translation].<sup>44</sup> It is thus different from “authoritarian law, which imposes itself through respect and majesty” [our translation].<sup>45</sup> Readers of a judicial text are thus called to position themselves with or against the authoring judge. The latter, to retain the power granted by his or her role, must reach and persuade the largest number of people. “To give reasons for a judgement is to justify it, not base it on something impersonal and demonstrative, as it were. It is persuading an audience one must get to know to ensure that the decision meets their expectations” [our translation].<sup>46</sup> Consequently, there is also an interest in examining the relationship between the judicial text and its implied readers, as well as the different ways in which anger can emerge in this relationship. Anger is a tool of persuasion. When used by a judge, it can become a judicial invitation to share this anger. Readers either welcome or resist it. They may also reject it because they, in turn, are angry at the judge for not addressing apparently obvious injustices.

Appreciating the degree of support for judicial anger is still more complex in non-unanimous judgments. The collection of opinions does not necessarily tell a coherent story through linear narration. This is the difficulty that emerges in *F.F.B.*: a judgement comprised of four opinions,<sup>47</sup> which do not flow in a chronological and continuous order. Quite the contrary. In the *Supreme Court Reports*, one first encounters the reasons of Chief Justice Lamer. But in those reasons, he responds to the (as of yet unread by the reader) reasons of Justice L’Heureux-Dubé. In order to understand the reasons of Justice L’Heureux-Dubé, one needs to read the reasons of Justice Iacobucci (to which she is responding). But even here, one would need to know what was written by Chief Justice Lamer, since the last several paragraphs of Justice L’Heureux-Dubé’s judgement are a response to Chief Justice Lamer’s response to her response to Justice Iacobucci. All this to say, full judgement is possible only when one has not only read the various component pieces, but has also picked back and forth between them to get the fullest possible account of what is captured by the whole.

This of course creates additional complexities for anyone attempting to retrace anger through the judgment. Because the case itself is composed of multiple opinions, a reader does

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<sup>44</sup> C. PERELMAN, “La motivation des décisions de justice, essai de synthèse”, in C. PERELMAN and P. FORIERS, *La motivation des décisions de justice*, supra note 21, pp. 415-426, at p. 425.

<sup>45</sup> *Ibid.*

<sup>46</sup> *Ibid.*

<sup>47</sup> The majority reasons given by Justice Frank Iacobucci and Chief Justice Antonio Lamer and the dissenting reasons given by Justice Claire L’Heureux-Dubé and Justice Charles Doherty Gonthier.

not have the full picture until all the pieces are in front of him or her. The reader is positioned very much as a judge: the reader takes in all the opinions, considers their persuasive impact, and then is forced to a moment of judgement. Does the reader then agree with the majority, the dissenting opinion or neither? Legal readers will be familiar with the experience of reading one opinion in a case and being persuaded by it, followed by the reading another opinion in the same case, and having one's view completely change. It is often difficult to suspend judgement until the end of the process, and experience of reading is filled with moments of seduction and betrayal. In the context of teaching first year law, our own experience has been one of seeing many expressions of outrage as students move from one judgement (feeling persuaded) to another (feeling newly persuaded in the opposite direction) with a sense of shame at having held the first position which they now feel cannot be maintained, a feeling of anger and a sense that they have been manipulated or betrayed by one author or the other, but also at seeing that there appear to be multiple truths and that the law does not give a final, objective, certain answer. The reader's reaction therefore needs to be considered. And, with Barthes having killed the author, we are reminded that the reader must be located in the text's written space.<sup>48</sup>

In brief, when interrogating judicial texts for the presence of anger, one of course must pay close attention to language. But it is also important to consider the structure of the reasons as published, to see if the order of production of the judges' reasons and the conventions of publication can give further information about the operation of anger. It also remains important to ask about the emergence of anger in the relationships constructed between the text and its implied readers. With these issues foregrounded, let us turn to *R. v. F.F.B.* to see what it might make visible about the faces of judicial wrath.

## **II. Performance of the method: Discovering the faces of anger**

In judicial decisions, the facts are recounted first and are presented as an objective given, a sure foundation upon which the legal analysis can be built. We follow the same narrative structure (separating fact from opinion) to facilitate an understanding of the discussion that will follow. That being said, as will be evident in the upcoming sections, it is clear that fact and opinion are related; accounts of the facts, far from being neutral, are themselves the bearers of opinion.

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<sup>48</sup> R. BARTHES, "La mort de l'auteur", in R. BARTHES, *Le Bruissement de la langue: Essais critiques IV*, Paris, Seuil, 1984, pp. 63-69.

## **A. The facts**

Let us begin with the account of the case provided in the head note of the *Supreme Court Reports*:

“Appellant [F.F.B.] was alleged to have sexually assaulted his niece [P.A.L.] from when she was six to eight years old through to age sixteen. The complainant had been in his care as a child during the fifties and sixties and only left her parents’ household in 1964 after being discovered in the act of intercourse with her. The alleged assaults were reported to the police in 1990 and appellant was charged with rape, assault and procuring an abortion.”

“During the course of the trial, the judge decided on a *voir dire* not to admit the evidence of the complainant’s sister that she too had been sexually assaulted by the appellant, on the ground that it fell within the similar fact evidence rule and its prejudicial effect was not outweighed by its probative value. However, testimony of the complainant’s brothers and sisters was admitted with respect to the violent control that the appellant exerted within the household. Appellant was convicted of rape and assault and was unsuccessful in his appeal to the Nova Scotia Court of Appeal. He had sought to have declared inadmissible those parts of her brothers’ testimony relating to assaults by the appellant on the complainant’s siblings. Given a dissenting opinion, an appeal as of right arose on this point”.

Evidence heard and admitted at trial<sup>49</sup> included the testimony of P.A.L.,<sup>50</sup> F.F.B., P.A.L.’s mother, and several of the brothers and sisters in the family. There were also hospital records documenting internal injuries suffered by P.A.L. as a child, and social services documents concerning the two children P.A.L. gave birth to before the age of 16.

Through his lawyer, F.F.B. issued a blanket denial that any of the incidents described had occurred. The jury acquitted F.F.B. of the charge of having procured an abortion, but found him guilty on all of the other counts. He was sentenced to thirteen years in prison.

F.F.B. appealed the guilty verdict on a number of grounds. He maintained that a testimony given by one of the victim’s brothers was prejudicial and should have been excluded from evidence. Two of the three judges from the Nova Scotia Court of Appeal<sup>51</sup> rejected this

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<sup>49</sup> Of first instance.

<sup>50</sup> In Canada, when the case involves a minor, only the initials are used to preserve anonymity.

<sup>51</sup> Nova Scotia is one of Canada’s ten provinces. Each province has courts of first instance as well as a court of appeal. The Supreme Court of Canada, the highest court in the land, is common to all provinces.

request as unfounded. However, the third stated that the trial judge should have instructed the jury as to the limited use of the testimony given by the victim's brother.<sup>52</sup> This dissent allowed F.F.B. to appear before the Supreme Court of Canada.

At the Supreme Court, there were three questions:

- Should the evidence of the brother L.L have been excluded because its prejudicial value outweighed its probative value?<sup>53</sup>
- If that evidence was admissible, did the judge err in failing to give the jury special instructions to warn them about how they should use that evidence?
- If the judge erred, could the error be 'cured' by s. 686(1)(b)(iii)<sup>54</sup>, or was a new trial necessary?

The five judges of the court split into two camps. The majority (Justices Lamer, Sopinka and Iacobucci) concluded that:

The evidence of the brother *was* admissible, but...;

The judge *should* have given better instructions to the jury about how to use the evidence;

The failure to give better instructions was an error that could be cured only by ordering a new trial: s. 686(1)(b)(iii) did not apply.

The dissenters (Justices L'Heureux-Dubé and Gonthier) concluded that:

The evidence of the brother *was* admissible, and...;

The judge *did* give adequate instructions to the jury;

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<sup>52</sup> **Nova Scotia Court of Appeal**, *R. c. B. (F.F.)*, 107 N.S.R. (2ème) 231, 69 C.C.C. (3d) 193.

<sup>53</sup> "The basic rule of evidence in Canada is that all relevant evidence is admissible unless it is barred by a specific exclusionary rule. One such exclusionary rule is that character evidence which shows *only* that the accused is the type of person likely to have committed the offence in question is inadmissible". *F.F.B.*, *supra* note 12, § 71.

<sup>54</sup> **Criminal Code**, R. S. C. 1985, c. C-46. Section 686(1)(b)(iii) allows a court to affirm a conviction in the face of a legal error where it is of the view that the conviction (even with the error) involves "no substantial wrong of miscarriage of justice". This provision requires the Court to consider the meaning of a 'fair trial', the importance of giving an accused every benefit of the law, technical errors, and 'the costs' of justice. This section allows a court to acknowledge the presence of an error of law without forcing the state to incur the economic costs of retrial where the final result would be the same.

Any error was technical at best: s. 686(1)(b)(iii) should apply and the original conviction should be affirmed.

And so, in accordance with the decision of the majority, a new trial was ordered. As an aside, when a court sends a case back for a new trial, it is not inevitable that a new trial will be held. A number of issues are in play, including the deployment of resources, and the availability witnesses (who may move, die, or simply refuse to participate a second time). A trial is sometimes forestalled where an accused chooses that moment to enter into a negotiated agreement with the Crown to enter a guilty plea in exchange for a joint submission on sentence. And that is exactly what happened in this case. The day the second trial was scheduled to start, F.F.B. pled guilty to one count of rape and one count of indecent assault in exchange for a sentence resolution that was better than the original: 7 years instead of the original 13. One might also add, for the sake of factual closure, that F.F.B., long an alcoholic, had suffered deteriorating health for some time; he died in jail within a few months of the new sentence resolution.

On the surface, the case seems to involve a fairly straightforward form of factual disagreement between the judges - disagreement about the ‘fact’ of the specific address to the jury; about the ‘fact’ that a second jury would come to the same conclusions as the first. But though one might divide the judges into two camps on the facts, the reasons make visible a court that is far more fragmented: four judges authored reasons in this case (Justices Gonthier, Iacobucci, Lamer, L’Heureux-Dubé). We will look in more detail at the language used by each of these judges. As Perelman emphasises, “more often than not, a judge is less likely to exercise power through an explicit reinterpretation of the law than through his or her manner of qualifying the facts” [our translation].<sup>55</sup> But first let us consider what can be seen by attending to some larger structural matters related to the order of production and publication of those reasons.

### **B. The order of the reasons: Publication and production**

It is sometimes possible to read something about judicial anger by attending to the conventions around the production of judicial reasons, and to variations from what one might expect in light of those conventions. This is one way to make visible the kinds of exchanges

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<sup>55</sup> C. PERELMAN, “La motivation des décisions de justice, essai de synthèse”, *supra* note 44, p. 421.



and emotions which may be operating around judicial deliberations. Indeed, in this case, some of the dialogues between the judges are made visible in the order of production and publication of their different sets of reasons.

First, one needs to distinguish ‘order of publication’ from the ‘order of production’. Before 2005 and following the British tradition, written reasons in the Supreme Court of Canada Reports were published by order of seniority: from the most to the least senior of the (authoring and signing on to the judgement) judges. Thus, where a more senior judge has written (or signed on to) a dissent, or concurrence, those reasons would appear ahead of majority reasons written by a less senior judge.

So, in our case, the five judges on the court had seniority as follows: Justices Lamer, L’Heureux-Dubé, Sopinka,<sup>56</sup> Gonthier, and Iacobucci. Following the general conventions, the reasons appeared in this order: Justices Lamer (Sopinka); L’Heureux-Dubé; (Sopinka) Iacobucci; Gonthier.<sup>57</sup> The order of publication marks out patterns of seniority, rather than anything about order of production, or indeed, the status of an opinion as part of the majority or the dissent.

This rule of seniority did not apply to the head note. The head note, a summary of the reasons in the case, begins with the majority holdings, then summarises the dissenting ones.<sup>58</sup> In this case, the head note gives the order of reasons as follows: Iacobucci (Sopinka); Lamer (Sopinka); L’Heureux-Dubé; Gonthier. Note that in the head note, the reasons of Justice Iacobucci come ahead of the reasons of Chief Justice Lamer. The head note suggests that there are two sets of ‘majority’ reasons, but it marks out the ‘central’ majority reasons as those of Justice Iacobucci. Again, this does not tell us anything about the order of production, but it does give some indication about the status of an opinion as closer to or further from the

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<sup>56</sup> Justice Sopinka did not write any reasons and signed on to both the reasons given by Justice Iacobucci and Chief Justice Lamer.

<sup>57</sup> In his reasons, Lamer mentions that he agrees that the “appeal must be allowed and a new trial ordered for the reasons given by Justice Iacobucci”. However, Lamer did not sign the opinion of Iacobucci because he wrote his own reasons. Therefore, the order of seniority was respected in the publication of the judgment in the Supreme Court Reports.

<sup>58</sup> In 2005, in order to allow for a better reading of their decisions, the Supreme Court adopted a new convention for their judgments. Now the majority holding appears first, the concurring opinions second and the dissenting reasons last. According to the conventions of British publication, the length of the Supreme Court’s opinions sometimes resulted in the majority decision by a junior judge being placed last after a number of pages written by a senior judge. The Supreme Court judges made the transition to the conventions of American publication in order to make it easier to read their decisions.

‘ratio’, or ‘holding’ of the case. What is of interest here is that the head note directs us towards the Justice Iacobucci text.

To learn more about the possible order of production, we can move to the texts themselves. We begin with the caveat that it is not always possible to make inferences about the order of production simply from reading a text. There are a number of considerations that can lead judges to craft their texts in specific ways, and it is not always the case that the structure of the judgement can tell you about the dialogues behind the scene. However, sometimes, the texts give us express information allowing us to track additional dimensions of judicial anger. *F.F.B.* is just such a case.

We know the order of production in part due to the interaction between the texts. Chief Justice Lamer begins his reasons by stating that he has already read the reasons of Justices Iacobucci and L’Heureux-Dubé. Justice L’Heureux-Dubé begins her reasons by saying that she has read the reasons of Justice Iacobucci. In an addendum to her reasons, she tells us that, since finishing her reasons, she has had a chance to read the reasons of Chief Justice Lamer. Justice Iacobucci’s reasons engage directly with the case, making no reference to any other reasons. In a final addendum, he tells us that, since writing his reasons, he has read the reasons of Lamer, and agrees with them. He does not mention the reasons of Justice L’Heureux-Dubé, but presumably has read them, since he agrees with the reasons of Chief Justice Lamer (which are in large measure a discussion of the reasons of Justice L’Heureux-Dubé). Justice Gonthier tells us that he has read the reasons of both Justices L’Heureux-Dubé and Iacobucci. He does not mention the reasons of Chief Justice Lamer.

In brief, the texts themselves tell us that the order of production was something like this:

- draft majority reasons of Justice Iacobucci circulate<sup>59</sup>;
- draft dissenting reasons of Justice L’Heureux-Dubé circulate (responding to Justice Iacobucci’s reasons);
- draft reasons of Chief Justice Lamer circulate (responding to L’Heureux-Dubé’s dissent);

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<sup>59</sup> The expression ‘circulate’ refers to the process in a common law system in which majority and dissenting opinions coexist. Basically, the judges write their reasons and send them to the other judges’ chambers for comment and to seek agreement with their opinion.

- second draft reasons of Justice Iacobucci circulate (responding to Chief Justice Lamer's reasons);
- second draft dissenting reasons of Justice L'Heureux-Dubé circulate (responding to Chief Justice Lamer's reasons);
- dissenting reasons of Justice Gonthier (mentioning reasons of Justices Iacobucci and L'Heureux-Dubé).

Our inclination was to place Justice Gonthier's reasons as number 6, but his text may have been produced at one of several possible moments between numbers 3 and 6. Because he refers to the reasons of both Justices Iacobucci and L'Heureux-Dubé, and *not* to the reasons of the Chief Justice, his reasons could have been circulated as early as position number 3. However, the failure to mention the reasons of the Chief Justice needn't lead us to conclude that Justice Gonthier had not read those reasons. Justice Gonthier's text could also have been produced *after* the Chief Justice circulated his reasons, or after either of the second draft reasons of Justices Iacobucci or L'Heureux-Dubé. We will return later to the implications that can be drawn from this uncertainty about order of production. At this point, it is sufficient to note that the order provides us with some useful information.

The texts suggest that, before the reasons of Justice L'Heureux-Dubé circulated, the judges had anticipated two set of reasons, a majority of three, and a dissent of two. But it appears that the Justice L'Heureux-Dubé reasons then generated a response by Lamer. In 1993, Lamer was both the Chief Justice and the most senior judge. Some would say that one of the roles of a Chief Justice is to foster agreement between judges in the interest of the authority and of the legitimacy of the court. In this particular case, it is surprising to note that not only does he fail to achieve this kind of agreement, but in fact, his reasons seem to have provoked an even greater division among the judges. Instead of what would have been one majority opinion signed by three judges, the decision of Chief Justice Lamer to write creates a situation where Justice Sopinka signs on with two different 'reasons', each of which express agreement with the other. Further, had Lamer simply signed on to the Justice Iacobucci reasons, they would have appeared first in the published record, followed by the L'Heureux-Dubé dissent. Chief Justice Lamer's decision to write means that Justice L'Heureux-Dubé's dissent appears before the Iacobucci reasons. What is more, this specific situation shows us that the manifested anger is directed toward the dramatic case as well as the positions held by the other judges.

### C. The language of the individual texts

We are interested in displays of emotion in judicial texts, especially the emergence of anger. As such, we feel it is best to begin by studying Justice Claire L'Heureux-Dubé's dissenting opinion. According to Pillsbury, it is in dissent that emotion is most apparent<sup>60</sup> because dissent expresses a difference in opinion.<sup>61</sup>

#### 1. Dissenting reasons of Justice L'Heureux-Dubé<sup>62</sup>

Justice L'Heureux-Dubé's dissenting opinion begins in language that 'feels' quite consistent with what a legal reader would expect; the text is fairly dry or detached and analytical in traditional ways. She seems to avoid using strong or passionate language, preferring to make a predictable comment about the first and second matter at issue (the admissibility of the testimony and the instructions given to the jury) by referring to relevant cases and assessing the relative value of the matters at issue in a language that bears the customary markings of law. However, the fact that she reproduced a long passage from the opinion written by Justice Hallet of the Nova Scotia court of appeal<sup>63</sup> (relating to the *F.F.B.* case), presenting the judge's reasons in their

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<sup>60</sup> S. H. PILLSBURY, "Harlan, Holmes, and the Passions of Justice", *supra* note 40.

<sup>61</sup> M.-C. BELLEAU and R. JOHNSON, "La dissidence judiciaire: réflexions préliminaires sur les émotions, la raison et les passions du droit / Judicial Dissent: Early Reflections on Emotion, Reason, and Passion in Law", in M.-C. BELLEAU and F. LACASSE, *Claire L'Heureux-Dubé à la Cour suprême du Canada, 1987-2002*, *supra* note 15, pp. 699-719, at p. 700.

<sup>62</sup> Born in 1927, Justice Claire L'Heureux-Dubé studied civil law and practiced law for 21 years in different firms and on different boards and commissions. Her career as a judge began in 1973, when she was appointed to the *Cour supérieure du Québec*. In 1979, she was appointed to the *Cour d'appel du Québec* and finally, the Supreme Court of Canada on April 15, 1987, where she served before stepping down on July 1, 2002. Justice L'Heureux-Dubé is the first woman in Quebec, a French-speaking Canadian province, to sit on the Supreme Court of Canada and the first woman to sit on the *Cour d'appel du Québec*.

<sup>63</sup> The quoted passage reads as follows: "In this regard, I agree with Hallett J.A. of the Nova Scotia Court of Appeal who said (1991), 107 N.S.R. (2d) 231, at pp. 255-56:

In my opinion, (L.L.'s) evidence, which was set out in some considerable detail in the decisions of Justices Jones and Chipman, was admissible not as similar fact evidence but simply because it was relevant and highly probative to explain to the jury how these assaults on (P.A.L.) could have occurred and continued over so many years in this crowded household and nothing was ever said. The evidence disclosed that Mr. (L.) was rarely home and Mrs. (L.) was generally at work which left the appellant in charge of these young children. Without the evidence of his cruelty to these captive children and the total domination of them as a result of their fear of him, there is no explanation of why none of the children, including (P.A.L.), ever spoke of what was taking place. It is relevant and probative because without it this horror story, cloaked in secrecy for some 25 years, would not seem credible.

(L.L.'s) evidence was admissible to show the circumstances that existed in the household during the years these assaults on (P.A.L.) took place. I would prefer not to cloak the evidence with the questionable mantle and trappings of "similar fact" evidence to support its admissibility. (L.L.'s) evidence of the appellant's cruelty, although it certainly proves the appellant's disposition

near entirety, is not insignificant and must be included in the analysis. All texts are made up of pieces of text. Julia Kristeva wrote, “A text is therefore a “productivity”, meaning [...] a permutation of text, intertextuality. In the space of a text, several statements, taken from other texts, cross and cancel each other out” [our translation].<sup>64</sup> Barthes agrees. “The concept of intertextuality is what brings the volume of sociality to the text theory. Not on a path to a traceable relationship, a voluntary imitation, but a path to dissemination” [our translation].<sup>65</sup> Quotations are but a more obvious form of this intertextuality. They cannot be isolated, separated from the text because of their ‘foreignness’. They are not more foreign than any other phrase. As such, the quoted passage in the judge’s text, which did not need to be reproduced as a whole for coherence of the reasons and could have been shortened, even summarised, reveals a choice. It shows the judge’s intent to legitimise her opinion and her anger through outside support. In fact, Justice L’Heureux-Dubé steps into a genealogy of anger. She calls upon the anger expressed by Justice Hallett, who herself refers to the reasons given by her two colleagues in the Court of Appeal: the dissenting opinion that the accused did not receive a fair trial<sup>66</sup> and the majority opinion that supports the sentence passed down in the court of first instance.<sup>67</sup> Three judges from the Nova Scotia Court of Appeal who nevertheless agree on the judicial grounds for appeal<sup>68</sup> and who entrench the emotion stirred up by the case in the presentation of facts in the court of first instance. It is in this jumble of anger that Justice L’Heureux-Dubé reiterates her own. Anger that she holds in check, but which is already mounting.

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to violence and is prejudicial, was, in the peculiar circumstances of this case, admissible for the reason I have stated.

The appellant was certainly entitled to a fair trial and to have excluded evidence adduced solely to show bad disposition. However, (L.L.’s) evidence was not introduced for that sole purpose. The law does not immunise the appellant from having relevant evidence adduced by the Crown to show the circumstances and setting in which the assaults on (P.A.L.) were alleged to have taken place”; *F.F.B.*, *supra* note 12, § 21.

<sup>64</sup> J. KRISTEVA, *Semeiotiké: recherches pour une sémanalyse*, Paris, Seuil, 1969, p. 113, cited by *Dictionnaire international des termes littéraires*, <http://www.ditl.info/arttest/art14881.php> [date accessed, 8 August 2007].

<sup>65</sup> *Ibid.*

<sup>66</sup> “Having regard to the highly prejudicial nature of L.L.’s evidence I am forced to the conclusion that a new trial must be ordered. It is impossible to say that this evidence did not have an effect on the minds of the jury. Indeed it could only have had an inflammatory effect. The appellant did not have a fair trial”; *R. c. B. (F.F.)*, *supra* note 52, p. 15, Justice Jones, dissenting.

<sup>67</sup> “I agree that P.M. has been deprived of a normal childhood and her life has been ruined. The Crown did not cross-appeal the sentence and it is not the practice of this court to increase a sentence where the accused alone appeals seeking a reduction. I have considered the relevant principles which govern this court on an appeal from sentence and I am satisfied that incarceration for 13 years on these five counts could not be said to be excessive having regard to the damage done, and all the other relevant considerations”; *Ibid.*, pp. 28-29, Justice Chipman.

<sup>68</sup> “The two grounds put forth by the appellant in support of the conviction appeal should be rejected for the reasons given by Jones, J.A.”; *Ibid.*, p. 16, Justice Chipman; “I have had the opportunity to read the opinions of Mr. Justice Jones and Mr. Justice Chipman. I agree with Mr. Justice Jones’s disposition of the two grounds of appeal raised by the appellant”; *Ibid.*, p. 29, Justice Hallett.

Justice L’Heureux-Dubé then turns, however, to the question of defence counsel tactics. She discusses the defence counsel’s strategic decision *not* to object to this evidence at the time of trial. She includes a large segment from the Court of Appeal transcript, where the defence lawyer was explaining his failure to object.<sup>69</sup> The transcript section makes it clear that this was not a slip, a mistake, or a problem of inadvertence. On the contrary, counsel was of the opinion that the introduction of the most heinous evidence might open up the possibility in the minds of the jury that the witnesses were fabricating or inventing.

In this context, she asks why the failure to address, in a context where counsel may well have opposed a limiting instruction, should be seen as an error of law. Here, you can see some anger beginning to emerge, anger at a practice of strategic lawyering. Certainly, her use of transcripts, including sections where counsel himself was of the view that his client was likely to be convicted even without the evidence, tends towards a more explicit articulation of anger as an emotion.

However, having expressed this irritation (if not quite full blown anger) with the conduct of counsel, she goes on to say that, even if she were wrong, she would apply the curative provision “without hesitation”.<sup>70</sup> However, she does not truly believe that she is wrong and

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<sup>69</sup> “The failure to object was neither accidental or inadvertent. Counsel was not simply caught off guard, but had a specific strategy. This is clear in comments made by defence counsel to the Justices of the Nova Scotia Court of Appeal, as cited in the reasons for judgment of Chipman J.A., at p. 250:

[Mr. Coady]:But, you know, it’s one of those things when you’re doing the trial, sometimes the more absurd it sounds, I mean, we were in a difficult situation. We had --

Justice Jones: No question about that.

Mr. Coady: -- a complainant and we had corroboration.

Justice Hallett: Yes, (T.), (D.).

Mr. Coady: (T.). In my mind, the evidence of (T.B.), was, it carried the day. I think his evidence was very very important. He was one of the best witnesses that the Crown could ever hope to have and that . . . so it became a situation where, to some degree, the more bizarre, the more heinous and the more absurd that the allegations in totality were, probably the greater it fed any possible hope that we had for reasonable doubt and they were given great rein by not objecting and they were cross-examined at length about it and it was focused on.

Now, that obviously it wasn’t sufficient to erode the conclusion of the Jury, but I just leave it with you. It’s one of those things, it’s a judgment call you make during the trial when you’re in a tough situation.

Justice Hallett: At that point in time, you felt that (F.F.B.) was in great jeopardy of being found guilty, even before (L.L.) was called.

Mr. Coady: No question about that”. *F.F.B.*, *supra* note 12, § 32.

<sup>70</sup> “However, even if I were wrong in my conclusion as to the adequacy of the instructions, I would without hesitation apply s. 686(1)(b)(iii) of the *Criminal Code* to remedy any defect”; *F.F.B.*, *supra* note 12, § 34.

marks her growing anger, about to shift targets, by beginning the next phrase with a “quite frankly” that looks down on the other opinion.<sup>71</sup>

After stating that there is no dispute about the test, she moves to consider the totality of the evidence before the court, directly related to the facts. This is the move one expects at this point because the central question here is whether or not an affirmation of the jury’s conviction would cause a miscarriage of justice. This question can only be answered through a review of the facts before the court.

In the language used to describe the facts, we see rhetorical formulations which mark out anger in inescapable ways. The first thing to note is her use of words which carry emotive weight, words which are sometimes difficult for a reader to read, and which serve to keep broken and damaged bodies firmly in the view of witnesses encountering the text.<sup>72</sup> Indeed, it is arguable that the passage performs some of the violence of the facts, making the reader an actual witness to a traumatic encounter.<sup>73</sup>

“It is thus critical to consider all the evidence that was available to the jury. There was, of course, the evidence of P.A.L. She told a *nightmarish story* of physical and sexual abuse. She spoke of *sexual molestation* as a child, of *forcible rape* at 10 years of age, and of being *rushed to the hospital* because of the resulting *haemorrhaging*. She told of the appellant *grinding her face into the ground* with his foot, *holding her head under the water* in a bathtub and *threatening to bury her* with her dead brother, *cutting her legs* with knives, *burning her* with cigarettes and cigarette lighters. She told of having a

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<sup>71</sup> “Quite frankly, if the curative provision cannot be applied here, I do not know where it can be applied”; *F.F.B.*, *supra* note 12, § 45.

<sup>72</sup> Christian Delage stresses the importance of seeing the injuries and staging the crimes in the quest for justice. He uses the Nuremberg Trials as an example. In a memorandum instructing the military personnel called to collect evidence that could be used in the trial: “The first paragraph specifically targets ‘atrocities’, that is, ‘crimes against humanity’. The recommendations, quite specific, concern visual evidence as to the manner in which to photograph or film a dead body. The evidence of brutality that the person has suffered must be shown (hands tied behind the back with electrical wire, evidence of torture, kicks, bayonet, sabre and knife wounds, etc.). If the body is in an advanced state of decomposition and approaching it causes discomfort or poses a threat to health, wearing a gas mask or any other protection is recommended. What is important is to obtain close-ups, regardless of the circumstances. Though it might be best to take a picture or film the body lying on the ground from several angles to emphasise how this person was ill-treated, it is also a good idea to show the entire body, keeping in mind how perspective may be distorted. If there are several bodies (a hypothesis that never materialised), you must show the number of people (wide view), but also capture especially representative shots of the brutality of the methods used” [our translation]; C. DELAGE, *La vérité par l’image: De Nuremberg au procès Milosevic*, *supra* note 36, p. 125.

<sup>73</sup> From the point of view of ethical practice, we struggled long and hard with the question of how to discuss the facts in this case, feeling that the replication of the words was a move very fraught with risk. Here, conscious of the burden this places on the reader, we proceed on the basis that there is no other way to grapple with angers produced in the case.

*broken bottle stabbed into her leg, and silence and compliance obtained through threats to burn down the house and kill her family, of giving birth twice before the age of 16” [our emphasis].<sup>74</sup>*

Justice L’Heureux-Dubé uses evocative and explicit terms when referring to the victim’s body and the emotions felt. She refers to a “nightmarish story” of abuse, “sexual molestation as a child”, “forcible rape at 10 years of age, and of being rushed to the hospital because of the resulting haemorrhaging.” She is not simply using highly emotive words, but is also making use of verbs in an active form: rushed, grinding, holding, threatening, cutting, burning. These words tend to focus our attention on the events as having a solid reality, rather than on the act of testifying about those events. In the paragraph which follows, Justice L’Heureux-Dubé goes further in her account, directing the reader towards corroboration coming from the mother, from siblings, from hospital records verifying internal injuries, and from remaining scars on adult bodies providing additional evidence of abuse. She therefore chooses rhetorical formulations that suggest solidity, stability, reliability and credibility:

*“This disturbing evidence was supported by other witnesses. T.B. saw the accused have intercourse with P.A.L. when she was 16. D.M.L. confirmed seeing the accused smash P.A.L.’s face into the side of a car. She also was a witness to years of sexual abuse. There was the evidence from Mrs. L. which corroborated elements of both P.A.L.’s and T.B.’s testimony. Mrs. L. also told of breaking the lock on a cabinet belonging to the accused, and finding items which belonged to P.A.L. but which had gone missing. There was evidence of P.A.L.’s two pregnancies, and hospital records verifying the internal injuries sustained by P.A.L. when she, according to the accused, fell on a stick. There were remaining scars on her body which provided additional evidence of physical abuse” [our emphasis].<sup>75</sup>*

The verbs in this passage are also active and direct: supported, saw, confirmed, witness, corroborated, told, finding, verifying. The only place where the verb use suggests any ambiguity is, significantly, in the phrase we have put in italics: “according to the accused”. Indeed, the only words that suggest any level of epistemic uncertainty are attached to the passage in which the accused story is recounted.

It is only after putting all this evidence in front of the reader, that Justice L’Heureux-Dubé turns to the ‘problematic’ evidence of one of the brothers, evidence that addressed not the specific assaults against his sister, but which spoke rather to the climate of fear that had

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<sup>74</sup> *F.F.B.*, *supra* note 12, § 38.

<sup>75</sup> *F.F.B.*, *supra* note 12, §§ 39-40.



been created by the uncle, a climate that kept the children silent. This testimony, “outrageous and unbelievable as it seems” -in her words- was supported by the evidence of other witnesses. She then goes on to say:

“The totality of evidence in this case produces a strong sense of moral revulsion, and it would not be surprising if the jury were to conclude that the appellant was in fact a bad person. Such a conclusion does not, in itself, create a problem. The problem arises where a jury uses this conclusion to make the further conclusion *in the absence of evidence of guilt*, that the accused is guilty because he is the type to do such atrocious acts” [our emphasis].<sup>76</sup>

This passage is interesting for its drawing of a distinction between ‘deciding that a person is a bad person’, and ‘deciding that there is sufficient proof of guilt’. Here, Justice L’Heureux-Dubé claims that juries are able to make the distinction between moral and legal judgement, and that the fact that moral judgement may also be operating needn’t lead us to conclude that juries are unable to distinguish between moral judgements and their obligation to satisfy themselves that legal judgement is also appropriate.

Incidentally, she continues by expressing her own opinion that even had the evidence in question been completely excluded, the remaining evidence was so compelling as to necessitate a finding of guilt. Up to this point, the language has been strong, made so through the addition of emotion marking words: ‘nightmarish’, ‘disturbing’, ‘grinding’, ‘smash’, ‘rushed’, ‘threatening’, ‘violent’, ‘revulsion’, ‘atrocious’.<sup>77</sup> But much of the emotional weight of the reasons<sup>78</sup> is carried in the words of the witnesses themselves: she reproduces large portions of the transcript which produce their own effects in a reader. For example, she includes the testimony of a younger sister who tells of seeing the abuse, but saying nothing and pretending she was asleep to avert the possibility that she herself would be victimised.<sup>79</sup>

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<sup>76</sup> *Ibid.*, § 42.

<sup>77</sup> *Ibid.*, §§ 38-42.

<sup>78</sup> It is interesting to note that in French, the words *émotion* or *émotif* and *motif* share the same Latin root. In fact, *émotion* originates from the Latin *movere*, tied to the idea of movement: “a moral movement that troubles and agitates the soul” [our translation]; L. LEBRUN et J. TOISOUL, *Dictionnaire étymologique de la langue française*, Paris, Librairie Fernand Nathan, 1937, s.v. “émotion”. Similarly, the word *motif* “originates from an old adjective that means ‘puts into movement’, borrowed from the epic Latin *motivus* ‘mobile’ (from *movere*, ‘mouvoir’)” [our translation]; O. BLOCH and W. VON WARTBURG, *Dictionnaire étymologique de la langue française*, Paris, Quadriga/PUF, 2002, s.v. “motif”.

<sup>79</sup> Some of the extracts of the transcript reproduced by Justice L’Heureux-Dubé read as follows:

“A. . . I remember seeing on occasions, [F.F.B.] come in our bedroom and have intercourse with [P.A.L.]. I remember [P.A.L.] saying no, no. He never said an awful lot. He just did as he felt like. I did pretend I was asleep at the time. I didn’t . . . I was only young too. I never told [P.A.L.] until later on in the years that I did

If anger is spilling out in Justice L’Heureux-Dubé’s reasons, it is focused on the horror of the abuse. It is an anger that makes visible the hidden and terrible experiences of P.A.L. and her siblings.

Justice L’Heureux-Dubé’s dissenting opinion is, until this moment in her reasons, focussed on the facts of the case and on its actors, in particular, on telling the story on the complainant through her own voice, through the testimonies of those who had witnessed the crimes committed by the accused and on the material evidence. The judge’s anger is made visible in the text through the narrative she reproduces and the way she chooses to reproduce it (using the voices of the victims), as well as through the choice of words carrying her own emotions.

But at this point in the judgement, Justice L’Heureux-Dubé begins to engage with Justice Iacobucci’s reasons. Here, the emotional tone of her response is made explicit, but the target of anger begins to shift. We reproduce here two paragraphs in their totality:

“For these reasons, *I find myself startled* that, after remarking, at p. 737, that ‘the evidence was not so overwhelming that the jury would have inevitably convicted the appellant’; my colleague concludes, at p. 737, that ‘this is not an appropriate case to invoke the curative provision’. *Quite frankly*, if the curative provision cannot be applied here, I do not know where it can be applied. *The weight of evidence in this case is staggering*. To refuse to apply the provision in these circumstances is to *render the curative provision impotent and enfeeble the meaning of the word ‘justice’*. This Court must give substance to the term ‘*miscarriage of justice*’. *Justice* requires that all fairness be accorded an accused, but where, as in this case, the accused has in fact been treated with fairness, *justice* also requires a consideration of the public interest.”

“The Court *cannot be blind* to the ramifications of sending this matter back for re-trial. Apart from the time and expense to the public purse in terms of courts, prosecutors and defence lawyers, the

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know this, because I felt . . . I couldn’t say anything to my mother about it, in fear and I felt too, that I was . . . I felt bad because I couldn’t say anything. I felt that I was doing [P.A.L.] an injustice at the time, because I didn’t want it happening to me. So, I pretended I was snoring and not seeing anything, it wouldn’t happen to me.

Q.You mentioned you were young. How old were you when you . . . When you remember this, how old do you feel you were?

A.I was around ten, eleven.

Q.Can you remember how often it happened?

A.It happened, well it happened quite often, but I wasn’t always awake either, I wouldn’t think, but it happened quite often. I mentally in my head, tried to block it out, but I found it hard sleeping at night, knowing what was going on.

Q.Do you know how long it continued?

A.It continued right up until he left”; *F.F.B., supra* note 12, § 39.

complainant and her family have already lived through an experience of *unspeakable violence* as well as *the trauma* of a trial. A new trial will require them to once again re-live experiences that should not be experienced even once. Given that there was no *miscarriage of justice* in the first trial, this would be more than ‘regrettable’. In the circumstances of this case, a new trial would itself, in my view, be a *miscarriage of justice*, the very type of *miscarriage* that the curative provision of the Code was meant to prevent” [our emphasis].<sup>80</sup>

The tone of these two paragraphs is significantly different from the tone of the initial paragraphs, and the language here is explicit in invoking the emotional registers of shock, dismay, and outrage. Consider the phrases we have emphasised above: “I find myself startled”, “quite frankly,” “the weight of the evidence in this case is staggering”, “render the curative provision impotent”, “enfeeble the meaning of the word justice”, “the court cannot be blind to the ramifications”, “experience of unspeakable violence”, “trauma”. She deploys the language of s. 686(1)(b)(iii) of the *Criminal Code*, language of a “miscarriage of justice”, but in a way that focuses attention less on ‘the case’ than on ‘the Court’.

As such, in paragraphs 45 and 46, the target of Justice L’Heureux-Dubé’s anger shifts. Her anger is now directed not at the accused, but at the Court itself, and at its unwillingness (in her language) to see the complainant and her family. Her anger serves as a photographic developer (*révélateur*), revealing and denouncing P.A.L.’s invisibility in Justice Iacobucci’s reasons. She implies that they have been erased in a way that makes the Court responsible. The purpose and fundamental role of the courts is to render ‘justice’.

Note also the number of times that she expresses anger by invoking the concept of ‘justice’. Here, blind justice is invoked, but in combination with violence and trauma. This is not ‘Justicia’, blindfolded and holding the scales in balance. Justice L’Heureux-Dubé is evoking a quite different picture, asserting that the majority is unwilling or even refusing to see the carnage before them. By referring six times to the word “justice” and four times to the expression “miscarriage” or “miscarriage of justice” in these two paragraphs, Justice L’Heureux-Dubé’s expression of anger directly targets her colleagues, suggesting that they are culpable in perpetuating the environment of silence and erasure. Her decision to put scare-quotes (placing the meaning of the term in issue) about the word “regrettable” and the word “justice”, indicate further levels of anger. She therefore adopts a Kantian view of justice

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<sup>80</sup> *Ibid.*, §§ 45-46.

based on human dignity. Justice “becomes a duty that, in order to be fulfilled, involves referring to a court of one’s conscience or: [...] acting in such a way as to treat humanity as well within oneself as toward others, always as an end and not a means” [our translation].<sup>81</sup> Justice is the end result of law, not its means.

The law can also be seen as a target of Justice L’Heureux-Dubé’s anger. When she discusses the jury’s use of the testimony, she uses logical reasoning stemming from a “quasi-syllogism”, which prevents all interpretation to the contrary without seeming illogical.<sup>82</sup> She writes: “If the jury had found the accused guilty on all charges, I would not necessarily conclude that the jury had used the evidence of L.L. improperly. However, the fact that the jury did not convict on all grounds supports the conclusion that the jury understood the principles of law, that they properly followed the instructions of the trial judge, and that they found the accused guilty of specific charges based solely on the evidence before them”.<sup>83</sup> This reasoning contains a third proposal, one that is silent, but carries serious portent. The logical sequence of the judge’s affirmations can therefore be inferred:

If the jury finds the accused guilty of all charges, it does not make improper use of the testimony.

If the jury finds the accused guilty of some of the charges, it makes proper use of the testimony.

If the jury does not find the accused guilty, it makes incorrect use of the testimony (?).

Shining through this self-contained, well thought-out justification of her reasons is the judge’s insistence on the lack of doubt concerning the alleged events as well as the jury’s abilities and the soundness of the instructions they received. Furthermore, she lays before the readership her certainty of the accused’s guilt after having discussed the case’s moral aspect, which is not mandatory in the judgement. Consequently, the structure on which her reasoning is built seems to express a refusal to believe that the law can counter morals, that is, that the

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<sup>81</sup> A.-J. ARNAUD, *Dictionnaire encyclopédique de théorie et de sociologie du droit*, Paris, LGDJ, 1988, s.v. “justice”.

<sup>82</sup> On syllogism, see V. THIBAudeau, *Principes de logique*, Québec, PUL, 2006, pp. 731-ff.

<sup>83</sup> F.F.B., *supra* note 12, § 27.

instructions given to the jury do not respect judicial standards while the accused is nonetheless guilty. The majority opinion is not without a judicial basis, but it is perhaps less sensitive to the rules of morality, as attached as these rules are to those of law. L'Heureux-Dubé's refusal to entertain doubt therefore reveals anger against this judicial possibility, perhaps substantiated, which leads to a result that is contrary to moral standards. The conflict between morality and the law is also clear in her description of the jury's role, in which she repeats an affirmation made by Chief Justice Dickson,<sup>84</sup> "The very strength of the jury is that the ultimate issue of guilt or innocence is determined by a group of ordinary citizens who are not legal specialists and who bring to the legal process a healthy measure of common sense".<sup>85</sup> In a word, she believes the shortcomings of the legal system can be balanced by common sense. And so must they be. Justice is the end result of the law and truth is the end result of justice.<sup>86</sup>

In the paragraphs that follow this, she comments on reasons of the Chief Justice Lamer. But before looking at those comments, let us turn first to the reasons of Justice Iacobucci (to which she is responding). We will then turn to the reasons of Chief Justice Lamer, which are in large measure themselves a response to the two paragraphs above.

## **2. Majority reasons of Justice Iacobucci**<sup>87</sup>

The classical structure of Justice Iacobucci's reasons give further support to the textual indicators that his draft was the first to circulate, and that it was expected to be a majority. He first sets out the facts of the case and the relevant legislation. He then summarises the judgements of the lower courts and sorts out the issues involved before turning to his legal analysis. What can we see in his account of the facts, given our knowledge that he will conclude the evidence of guilt before the jury was not overwhelming?

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<sup>84</sup> Chief Justice Dickson is Chief Justice Lamer's predecessor.

<sup>85</sup> **Supreme Court of Canada**, *R. c. Corbett*, [1988] 1 S.C.R. 670, p. 692, cited by *F.F.B.*, *supra* note 12, § 25.

<sup>86</sup> According to the Attorney General's prosecutor, Éric Marcoux, "Justice L'Heureux-Dubé used the quest for truth principle in a striking way to support her decisions in criminal law, making her a true standard-raiser for this principle among the members of the Court" [our translation]; **E. MARCOUX**, "La recherche de la vérité dans les procès criminels: Une question de principe", in **M.-C. BELLEAU and F. LACASSE**, *Claire L'Heureux-Dubé à la Cour suprême du Canada, 1987-2002*, *supra* note 15, pp. 103-117, at p. 104.

<sup>87</sup> Born in 1937, Justice Frank Iacobucci, of Italian descent, first had a private practice, namely in the United States. In 1965, he joined the University of Toronto's Faculty of Law, serving as the dean from 1979 to 1983. He taught at the university until 1985, the year he left academia to become Deputy Minister of Justice. He was appointed Chief Justice of the Federal Court of Canada in 1988 and judge of the Court Martial Appeal Court in 1989. He was appointed to the Supreme Court of Canada on January 7, 1991, where he sat until his retirement on June 30, 2004.

Here, we can note that Justice Iacobucci's language (like Justice L'Heureux-Dubé's) shows a certain rhetorical force. But the words chosen here do a different sort of work. Consider the language he uses in his account of 'the facts' of the case:

"P.A.L. testified that the appellant began abusing her";<sup>88</sup> "P.A.L. testified that the sexual abuse began";<sup>89</sup> "The first incident of sexual intercourse *allegedly* resulted in P.A.L.'s hospitalisation";<sup>90</sup> "P.A.L. gave birth to two sons at ages fifteen and sixteen, *allegedly* as a result of the sexual abuse by the appellant. Stories were *apparently* fabricated as to how these pregnancies occurred";<sup>91</sup> "she testified that the appellant used constant threats";<sup>92</sup> "she testified that the appellant used constant threats"<sup>93</sup> [our emphasis].

Terms like "allegedly", "testified", "apparently" -neutral from one perspective- are verbs which qualify, which introduce elements of uncertainty. They thus do a certain kind of semiotic work, and serve as reminders to legal readers that tales told are not always full descriptions of reality, therefore making credibility a larger issue than it had been initially. Such language serves to de-emphasise the importance of any given account of the facts, drawing allegiances away from individual parties, and towards (more abstract) legal principles, which are presented as being more reliable. Though the effect is subtle, such formulations insert distance between the parties/facts and the reader. While one might argue that Justice Iacobucci's language is more 'neutral' than L'Heureux-Dubé's, it can also be noted that his language performs a non-neutral task: it turns credibility into an issue, and serves to call the evidence of the complainant and her family (and the hospital and its record keeping practices) into question.

Iacobucci concludes that the evidence was not overwhelming. His use of language tends to draw the reader in a similar direction. Justice Iacobucci points out that "the appellant denied that any of the incidents described by P.A.L. occurred".<sup>94</sup> If credibility was at issue here, it was at issue in the following sense. Against F.F.B.'s blanket denial, the complainant testified to the assaults; her sister testified to seeing an assault, a brother testified to seeing an

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<sup>88</sup> *F.F.B.*, *supra* note 12, § 52.

<sup>89</sup> *Ibid.*

<sup>90</sup> *Ibid.*, § 53.

<sup>91</sup> *Ibid.*

<sup>92</sup> *Ibid.*

<sup>93</sup> *Ibid.*, § 55.

<sup>94</sup> *Ibid.*

assault, a mother testified to finding physical objects in possession of F.F.B. Then there was corroboration in the form of hospital records and bodies. This is the way in which credibility was in issue: for F.F.B.'s denial to be credible, all the other witnesses must be lying.

But, again, in the context of the appeal to the Supreme Court, the only evidence 'at issue' was the evidence of the brother on the specific question of the climate of fear produced in the children by F.F.B.. All the judges agreed that there had been no problems with all the other evidence that had been given about the sexual and physical assaults against the complainant herself. The evidence being challenged here, evidence which did not make F.F.B. look particularly good, was evidence called in response to F.F.B.'s assertion that none of these events could have happened without notice.

However, in the language used and problems foregrounded, attention is taken off the relevance of the evidence, and is instead placed on the credibility of P.A.L. Justice Iacobucci notes that P.A.L.'s credibility and her long delay in coming forward were put in issue by the appellant. While he does not himself suggest that P.A.L. was not credible, his many references to credibility do serve to pull the question to the forefront of a reader's mind:

"The same question may be asked in the context of whether the jury in the instant case could have had a reasonable doubt as to the appellant's guilt *had they been properly charged* with respect to how they might use the testimony of L.L. and T.B. In my opinion, the evidence was *not so overwhelming* that the jury would have inevitably convicted the appellant *if the judge had properly instructed them* as to the use they could make of that testimony. *Credibility was a large issue at trial*, and it is impossible to know what was in the minds of the jurors and *how they were affected by the unrestricted admission* of the evidence in question" [our emphasis].<sup>95</sup>

This formulation suggests that, properly instructed, the jury *should* have seen the witnesses as less credible. But in making this move, Justice Iacobucci does not slip over into showing any sympathy for F.F.B. as an individual. On the contrary, he makes a quite strong statement about F.F.B.'s character: "It is indisputable that the evidence of L.L. and T.B. tends to show that the appellant is a person of bad character, with a propensity for violence".<sup>96</sup> It is unclear, however, whether this assertion functions simply as an acknowledgement that bad stuff may have happened, or to again raise questions of credibility (ie. it is indisputable that

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<sup>95</sup> *Ibid.*, § 89.

<sup>96</sup> *Ibid.*, § 73. This assertion is very similar to the one made by L'Heureux-Dubé and which Lamer countered.

the evidence tends to show bad character, but the evidence might not be credible?). As such, when he presents the facts at the beginning of his reasons, he writes: “She testified that she decided then to report the alleged assaults to the police”. The use of “She testified” and “alleged” emphasise the related character of the events and raises doubt that the crimes took place.

One should also note that, at the end of his reasons, Justice Iacobucci does show a moment of sympathy for P.A.L, deploying language carrying some markers of emotion:

“It should be stated that it is highly *regrettable* that P.A.L. and her family, as well as the appellant, will be forced to undergo a new trial. However, we must be *inexorably vigilant* to *ensure that courts properly follow the rules which provide fair trials* to all those charged and tried under the Criminal Code” [our emphasis].<sup>97</sup>

Justice Iacobucci acknowledges a level of regret at the outcome. This is the “regrettable” that L’Heureux-Dubé puts in scarequotes in her own reasons.<sup>98</sup> But the centre of focus in Justice Iacobucci’s moment of sympathy is with the fairness of the trial. He foregrounds the demand for the court to be “inexorably vigilant” to follow the rules to provide fair trials. The primary commitment here is to ‘justice’ and ‘a fair trial’. Said differently, the commitment to ‘justice’ is to ‘a fair trial’. While (writing for a majority) it is not necessary for Justice Iacobucci to use strong language, we do have the sense that he believes it would be an outrage for the conviction to stand. The trial judge was in error and must be corrected in the interests of justice. Justice Iacobucci seems to be demonstrating that a true passion for justice must not run the risk of being tainted by emotional responses to the ‘alleged’ horrific facts of the case. His passion for justice rests on a belief that the jury cannot be trusted to make good legal judgements without a more specific form of warning from the judge about how they can use the evidence that has been found to be relevant and admitted. The language here -the neutral sounding language of law-creates a distance from the evidence, portraying it as only one set of ‘stories’ amongst many possible ones.

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<sup>97</sup> *Ibid.*, § 93.

<sup>98</sup> *Ibid.*, § 46.



### 3. The concurring reasons of Chief Justice Lamer<sup>99</sup>

One might think that Justice Iacobucci would amend his reasons to respond to the concerns articulated in Justice L'Heureux-Dubé's dissent. But he does not do so. The job of addressing her anger appears to have fallen to - or to have been voluntarily chosen by - the Chief Justice. The only comment we get from Justice Iacobucci is a line at the end indicating that he has read the reasons of the Chief, and agrees with them. Presumably, this means he has also read the reasons of Justice L'Heureux-Dubé's since, as we shall see below, Lamer's reasons are a direct engagement with her reasons. In adopting the reasons of Chief Justice Lamer, Justice Iacobucci implicitly adopts the Chief Justice Lamer's critique of Justice L'Heureux-Dubé.

Lamer begins with the assertion that the appeal must be allowed and a new trial ordered for the reasons given by Justice Iacobucci. He wishes, however, to further develop his analysis of the law surrounding s. 686(1)(b)(iii). This law, he tells the reader "is clear".<sup>100</sup> One might note that this was not a contested issue. All three judges are in agreement about the meaning of the section, thus, in large measure, the next several paragraphs of Chief Justice Lamer's opinion canvas ground over which there is no dispute. Lamer wishes, however, to foreground a cautionary note: appellate courts should not too quickly resort to the section. Otherwise they run the risk that the verdicts of judges will be substituted for the verdicts of juries. The central question, he asserts, is whether, with the appropriate instructions, "the verdict of guilty would necessarily have been the same".<sup>101</sup>

At this point, Chief Justice Lamer (like Justice Iacobucci in the reasons above) directs his attention to the case before him, stating "in the final analysis, the case turned on questions

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<sup>99</sup> Born in 1933, Chief Justice Antonio Lamer studied civil law before working in a private practice for several years. He was appointed to the *Cour supérieure du Québec* in 1969, then the *Cour d'appel du Québec* in 1978. He was appointed to the Supreme Court of Canada on March 28, 1980 and became Chief Justice in 1991, serving until his retirement on 6 January 2000. He passed away on the 24th of November 2007.

<sup>100</sup> This means reference to a case, "cited with approval by Lamer J (as he then was) for the court": "*Colpitts v. the Queen*, [1965] S.C.R. 739 at p. 744, cited with approval by Lamer J. (as he then was) for the Court in *Wildman v. the Queen* [1984] 2 S.C.R. 311, at p. 328"; *F.F.B.*, *supra* note 12, § 4. It is interesting to note that the Chief Justice refers to himself in the third person.

<sup>101</sup> He writes: "I therefore approach the question of whether this is a case in which the proviso of s. 686(1)(b)(iii) should be applied by asking whether, if the jury had been properly instructed, the verdict of guilty would necessarily have been the same in the sense that any other verdict would have been unreasonable or not supported by the evidence"; *Ibid.*, § 8.

of credibility”.<sup>102</sup> He agrees that there was ample evidence upon which a jury could have convicted, but, like Justice Iacobucci, would not have found it unreasonable had the jury acquitted: since he finds it undesirable to ask why the jury might or might not have accepted various pieces of testimony, he would not find it unreasonable were the jury to have accepted the accused’s wholesale denial of any wrongdoing over the evidence proffered against him.<sup>103</sup> Here, by suggesting that this is a case about ‘credibility’, Chief Justice Lamer subtly calls into question not only the evidence of the brother L.L., but *all* the other evidence that had been before the jury. One may wonder if such a conclusion suggests that the witnesses had not been truthful and that documents had been doctored. It does imply that the Crown, the judge and jury were duped by conspiring witnesses or even a conspiracy to falsely convict an innocent man.

And yet, while nodding in a direction that distances the readers from the parties, Chief Justice Lamer nonetheless refrains from taking a position as to the believability of any particular witnesses. His focus is not on the parties, but on the jury instructions. His passion is reserved for issues of trial fairness. We see this over the next few paragraphs. The language of justified anger begins to surface in Chief Justice Lamer’s comments about the decision of the trial judge. He says:

“The theory of the Crown as put to the jury by the trial judge was *an invitation to the jury to infer F.F.B.’s guilt* of the counts in the indictment on the basis that he was a person with the propensity for cruelty and violence to children. In short, it was *an invitation to the jury to do exactly what the law prohibits*. Not only was there no instruction that this should not be done, as in my view the law requires; there was, in fact, *an invitation to do exactly what the jury ought to have been told, in the clearest possible terms, not to do.*”

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<sup>102</sup> *Ibid.*, § 9.

<sup>103</sup> He writes: “However, verdicts of acquittal on all counts on the trial record as it stands would, in my respectful view, not be susceptible to be set aside as being unreasonable.

It is generally undesirable to speculate as to the basis upon which a jury might or might not have accepted certain evidence and rejected other evidence. This is all the more true when there is to be a new trial. Without in any way suggesting that a jury failed, or in fact should have failed, to accept any or all of the Crown evidence in this case, their decision to do so would not have been unreasonable in the circumstances of this case. The allegations were very old because there had been a long delay in bringing the allegations to the attention of the police. The accused testified in answer to the charges and denied everything. The deliberations of the jury were not short. The jury retired just after 12:00 noon, and returned just after 5:00 p.m. that afternoon with a request to re-hear certain parts of the evidence. A verdict was not returned until 10:40 a.m. the following morning. The jury acquitted on the charge of procuring a miscarriage, although there was evidence from the complainant relating to that charge. None of these considerations, of course, is in any way conclusive, but they underline the dangers inherent in speculating as to what may have been in the jury’s mind as it reached its verdicts. Everything depends on what evidence was accepted and what evidence was not accepted in the face of a sworn denial of all charges from the accused in the witness box”; *Ibid.*, §§ 9-10.

“In these circumstances, it can scarcely be concluded that the verdict of the jury would have been the same had the trial been conducted in accordance with the law. Upon the evidence adduced, a verdict of guilty was justified, but not inevitable. A verdict of acquittal would not have been unreasonable. The absence of the required instruction, in the circumstances of this case and in light of the way the theory of the Crown was put to the jury was *a serious error cutting to the heart* of the manner in which the jury should approach the evidence. *A clearer case for a new trial is difficult to imagine*. The application of s. 686(1)(b)(iii) *is completely inappropriate*”[our emphasis].<sup>104</sup>

In this passage, the language is getting stronger: “serious error cutting to the heart”, “clearer case for a new trial is difficult to imagine”, the application of the curative provision “is completely inappropriate”. We begin to approach something more passionate – a sense of outrage at actions that are characterised as cutting to the heart of justice. Foregrounding the need to safeguard justice, Lamer finally replies directly to the dissenting reasons of Justice L’Heureux-Dubé. He does so in ways that, on the one hand, use the code words of respect, but on the other hand, do not simply express disagreement, but suggest judicial incompetence. For our purposes, let us focus on this passage:

“L’Heureux-Dubé J.’s reasons, *in my respectful opinion, fall into error* with respect to the dangers of prejudice created by the sort of evidence here in issue. She says at p. 719:

‘The totality of evidence in this case produces a strong sense of moral revulsion, and it would not be surprising if the jury were to conclude that the appellant was in fact a bad person. Such a conclusion does not, in itself, create a problem. The problem arises where a jury uses this conclusion to make the further conclusion, in the absence of evidence of guilt, that the accused is guilty because he is the type to do such atrocious acts.’

‘*With respect, this is not the law. It is precisely the very chain of reasoning against which the jury is to be cautioned*; they are not to be told to go ahead and use evidence of propensity as evidence of guilt provided there is other evidence, as my colleague implies in the quoted passage. They should be told, but were not here, to put that chain of reasoning out of their minds’” [our emphasis].<sup>105</sup>

This passage is interesting in several respects. First, the quote reveals the disjuncture between the language of “in my respectful opinion” and the content of that opinion. Chief Justice Lamer’s wording goes quite a bit beyond disagreement on legal grounds, and quite a

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<sup>104</sup> *Ibid.*, §§ 14-15.

<sup>105</sup> *Ibid.*, §§ 17-18.

bit closer to an assertion of judicial incompetence. He writes, “in my respectful opinion”, and “with respect”, but the tone of the language reveals a gap between respect felt and respect expressed. Consider, for example: “With respect, this is not the law.” In this sentence, the words “with respect” function rather as a sign of deep disrespect. This is not, “With respect, I cannot agree” or “With respect, I take a different view”. Rather, Chief Justice Lamer claims the right to assert what the law ‘is’ in a way that suggest it has a visible and objectively clear presence. This also allows him to assert that Justice L’Heureux-Dubé’s seeming ‘inability to get the law right’ is a function of incompetence rather than a disagreement about the content of the law.

Having already expressed the view that juries tend towards excessive reliance on emotion over reason, and are unable to make decisions without very clear directions from a competent judge, Chief Justice Lamer now suggests that Justice L’Heureux-Dubé has shown herself to be even less able to reason than the average jury member: “it is precisely the chain of reasoning against which the jury is to be cautioned”. Justice L’Heureux-Dubé, he suggests, is even less able than the (inherently instable) jury to discipline her chains of reasoning. Further, and with an increasing tone of outrage, he asserts that she is implying that the jury *should* use evidence of propensity as evidence of guilt. Anger is emerging in this judgment, and it has two targets: first, the trial judge who did not stand up for the principles of neutral justice; and secondly (and much more strongly) against Justice L’Heureux-Dubé, who is swayed by passion rather than reason.

The next paragraph reveals another deployment of rhetoric. Chief Justice Lamer adopts the scare quote method (used also by Justice L’Heureux-Dubé in discussing the Justice Iacobucci reasons) to place in question some of the language of anger that had emerged in the Justice L’Heureux-Dubé reasons, in a manner which bleeds the words of some of their force:

“In order to reach the conclusion that the evidence of the Crown is *“compelling”* and its weight *‘staggering’* my colleague must assume that Crown witnesses are credible and that the evidence of the defence is not. This conclusion appears to be premised on the fact that *‘the complainant and her family have already lived through an experience of unspeakable violence’* (at p. 720, emphasis added). These are matters which the law, justice and the public interest require to be entrusted to a properly instructed jury” [our emphasis].<sup>106</sup>

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<sup>106</sup> *Ibid.*, § 19.

One might note at this juncture that the jury *did* arrive at just this conclusion. But Chief Justice Lamer's comments here assert that their conclusion could well have been undercut had the jury received 'proper' instruction. This chain of logic suggests that the jury's determinations about credibility were in error. The effect is to enhance the credibility of the accused (who had done nothing more than issue a blanket denial through his lawyer), and to undercut the credibility of the many other witnesses who gave evidence. Note also that Chief Justice Lamer has placed his scare quotes not only around words dealing with the weight of evidence, but also around words describing the pain of the violations experienced. In placing these two issues together, Chief Justice Lamer is undercutting not only the weight to be given to the evidence and the credibility of the witnesses, but is also calling into question the notion that there was any experience of violence at all. His anger at L'Heureux-Dubé flows out not only in the form of an attack on his fellow judge, but also in the form of a minimisation of the violence documented in the court, and dismissal of those who testified about the abuse they suffered.

#### **4. Back to the final paragraphs in the reasons of L'Heureux-Dubé**

Let us return to the final paragraphs in the dissenting reasons of Justice L'Heureux-Dubé.<sup>107</sup> These last paragraphs are clearly marked as an addition to the judgment. She explicitly begins by telling us that, since writing her reasons, she had had the opportunity to

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<sup>107</sup> These final paragraphs read as follow: "Since writing these reasons, I have had occasion to read those of the Chief Justice. *I agree* with his observation that the key issue before the Court is to determine whether or not the curative provision should apply, and that the exercise (at p. 706) must be conducted with respect for the function of the jury, whose role it is to determine what evidence of which witnesses they accept, the weight it should be accorded and, in the final analysis, whether there exists a reasonable doubt about the guilt of the accused.

The law is well settled, as the Chief Justice notes, at p. 710, that determinations as to credibility of witnesses, and the weight to be given to the evidence 'are matters which the law, justice and the public interest require to be entrusted to a properly instructed jury'. My reasons do not depart from these principles.

*I totally disagree* with the Chief Justice that the case essentially turns on credibility. In most if not all cases, a jury must make determinations on credibility, but there is nothing here to suggest that credibility was more or less of an issue than in any other case. The issue before us is not one of credibility, but is rather of weighing the evidence in its totality.

*With respect, I believe that the Chief Justice misinterprets my comments* concerning the morally repugnant nature of the evidence in this case. The law is clear that a jury should be instructed not to use evidence of propensity as evidence of guilt. However, my comments do not concern the instructions to be given by a trial judge to a jury, but rather, the task facing an appellate court. This task is not to consider what the jury may or may not have thought, but to examine whether the entire body of evidence before the jury was such that the court can be satisfied that a properly instructed and reasonably acting jury would reach the same conclusion. The presence of such evidence is thus crucial to a determination that the curative provision can be properly applied. In my view, the evidence before the Court in the present [page722] case is such that the curative provision should apply" [our emphasis]; *Ibid.*, §§ 47-49.

read the reasons of Chief Justice Lamer, and that the subsequent paragraphs are a response to those reasons. It is of some interest that, in this portion of her reasons, she moves back from language resonant with anger or wrath, to language that is articulated in the more traditional of law's ways. She is responding to a strong attack, but answers with language that is sounds measured, cold and detached.

Her responses involve a direct engagement with the reasons of the Chief Justice. She begins by saying that she agrees with his articulation of the relevant principles, adding that her reasons do not depart from those principles. She then goes on to express her disagreement (“I *totally* disagree with the Chief Justice”) with the idea that the case turned on credibility. She also, using the formulaic phrase, “with respect”, adds that she believes him to have misinterpreted her comments concerning the repugnant nature of the evidence in the case. She goes on to point out that her comments concern not the task of a jury, but the task facing an appellate court. The evidence is reviewed in order to determine whether or not a reasonable and properly instructed jury *would* reach the same conclusion (rather than to figure out what *this* particular jury may or may not have thought). Here, though the language is much less explicitly emotional, one can see again that she is keeping her attention on the role of the appellate court, making a claim about the justice (or injustice) being performed by those asked to assess the application of s. 686. The closest we get to emotion is her use of the phrase “I totally disagree with the Chief Justice that the case essentially turns on credibility”.<sup>108</sup>

### **5. The reasons of Justice Gonthier**<sup>109</sup>

Finally, we turn to the very brief reasons of Justice Gonthier. Gonthier states that he has read the reasons of Justice L'Heureux-Dubé and those of Justice Iacobucci. He writes that he agrees with both of them that the testimony of the brother L.L. was admissible. However, he prefers the reasoning of Justice L'Heureux-Dubé concerning the adequacy of the trial judge's instructions to the jury. He also agrees with Justice L'Heureux-Dubé that the weight

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<sup>108</sup> *Ibid.*, § 47.

<sup>109</sup> Born in 1928, Justice Charles Doherty Gonthier worked in a private practice for several years before being appointed to the *Cour supérieure du Québec* in 1974 and then the *Cour d'appel du Québec* in 1988. He did not remain there for long as he was appointed to the Supreme Court of Canada on 1st February 1989, where he served until his retirement on 31 July 2003.

of the evidence supporting the guilt of the accused was overwhelming and that this was a proper case for the application of s. 686(1)(b)(iii).

On the surface, there is nothing in the opinion which carries any suggestion of anger. However, as mentioned earlier, anger can take many different forms; silence is one. When reading judicial decisions for traces of anger, one must attend not only to words, but also to gaps and omissions.<sup>110</sup> Is there a silence in a space where words would have seemed in order? In his text, Gonthier explicitly mentions the opinions of both Justice Iacobucci and Justice L'Heureux-Dubé, but says nothing about the opinion of Chief Justice Lamer. What are we to make of this absence? Is Justice Gonthier's silence an eloquent one?

Here, the textual silence forces one into speculation, and a consideration of various possibilities. How should the silence be understood? Does the silence imply merely that he was unaware of or failed to read the reasons of Lamer? This seems unlikely given the work ethic of the Supreme Court judges. But what then, does the silence suggest? Does it imply that Gonthier disagreed with the Lamer reasons? That Gonthier saw the Lamer's reasons as an irrelevant commentary on the law? Is this a silence of propriety? Or is it a more active response to the visibility of anger directed against L'Heureux-Dubé? Is this an example of one judge giving another judge 'the silent treatment'? Or does the silence mean nothing at all?

The brief reasons of Gonthier may or may not reflect traces of anger in the form of an absence. However, the text, omitting words when words seem to be called for, requires the reader to pose a set of questions which foreground the ways in which anger may be operating in the background. At the same time, that very absence prevents the reader from coming to any kind of authoritative answer.

### **Conclusion**

We have explored the faces of judicial wrath to shed light on some of the many ways anger is linked to notions of justice. We have argued that wrath is a persistent judicial emotion, and that it emerges in fashions both appropriate and inappropriate. We also suggest that an interrogation of judicial texts can help make these operations visible in ways that

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<sup>110</sup> See M. CONSTABLE, "The Silence of the Law: Justice in Robert Cover's *Field of Pain and Death*", in A. SARAT, *Law, Violence and the Possibilities of Justice*, Princeton, Princeton University Press, 2001, pp. 85-100.

allow us to ask better questions about the linkages of anger and justice. Clues can be found: in the words used by judges; in conventions concerning the publication and production of reasons; in the reading of majority and dissenting reasons against each other; in a consideration of gaps, omissions, and silences; in attention to the ways in which witnesses to judgment interact with the texts of judgment.

Acknowledging our subject position as readers, our voyage through *F.F.B.* leads us to foreground some of these faces and linkages as follows. In the Justice Iacobucci reasons, we see a text and a vision of justice which seems far removed from the language of anger and wrath. The tools of persuasion here are those of detached, objective, and principled justice. In the moment of exercising judgment, the judge acknowledges (and grieves) the additional suffering which may flow to P.A.L., but implies that this suffering is part of the cost of the demand for justice. Because of these commitments to justice, the text declines to use the language of wrath against the accused. The ‘rationality’ of Justice Iacobucci’s reasons and the language used to describe the harms and the evidence tends to foreground the need to protect the accused while pressing the harmed body offstage. His reasons invite the reader to be complicit in the erasure of the victim’s bodies and to embrace a vision of justice that excludes them.

The Justice L’Heureux-Dubé reasons, on the other hand, presume a much different implied reader, and are redolent with the language of anger. Wrath is made visible, and the reader is invited to share it. Through language which foregrounds bodies and violations, she directs her anger at a violent pedophilic abuser, and a lawyer attempting to strategically exploit the law. Furthermore, she directs anger at her colleagues, whom she accuses of perpetuating a grave injustice as well as at the law they use to support their reasons.

As for Lamer’s reasons, we maintain that they add nothing of substance to the Justice Iacobucci judgment, and read them primarily through the language of wrath. We see in them a return volley of anger, loaded with projection and displacement, directed back at Justice L’Heureux-Dubé in her capacity as judge. Just as did Justice L’Heureux-Dubé, Chief Justice Lamer calls the audience to experience anger. Chief Justice Lamer indicts Justice L’Heureux-Dubé with failing to properly exercise the office of judge. He posits an objective boundary between ‘law’ and ‘not-law’, and invites the reader to share his outrage at her transgression.



Again, anger is made visible against injustice, but here, at a judge who has failed to respect the boundaries of judicial propriety and authority.

Under any circumstances, anger is a powerful and universal response to injustice, atrocity and incomprehension. On April 26, 1937, with General Franco's approval, the Condor Legion of the Luftwaffe bombed the small Basque city of Guernica y Luno.<sup>111</sup> A total of 1 654 civilians were killed and the city was almost completely destroyed.<sup>112</sup> The attack weighed heavily on Picasso. In one of his greatest works, entitled *Guernica*,<sup>113</sup> he cries out in anger and pain at the strategic, political, experimental, gratuitous and inhuman attack on innocents. This work of art enters Guernica y Luno's story into "humanity's collective memory".<sup>114</sup> Reproduced on a wall at the United Nations, it reminds everyone who gazes upon it of the barbarism of war. The artist's anger emanates from the mother holding her dead child in her arms, baying at the sky, from the horse pierced by a lance, with open mouth and flank and the chaos of the cries and anguish. The image is such a strong call to remember this bloody injustice that on February 5, 2003, the mural was covered<sup>115</sup> before Colin Powell's call to arms<sup>116</sup> against Iraq. His speech could not be made before a bitter and persuasive anger such as this,<sup>117</sup> one that demands peace and the righting of wrongs.

Judicial texts, as human creations, are also calls to anger. They are addressed to an audience, they speak from one subjective conscience to another. This understanding is indispensable to giving them meaning. Anger does the work of persuasion. Judgements call to an audience that needs to be won over, and anger can be a cry that pierces the heart. Some judicial texts use this tool explicitly, and those calls matter, aiming at the relationship between the text and the reader. This relationship involves both the call and our response -acceptance or resistance- to the cry. The call can be heard, answered or welcomed, but can also be hidden, scorned or rejected.

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<sup>111</sup> For the history of links between the Franco and Hitler regimes, see: **L. RICHARD**, "Guernica, un crime franquiste", *Le Monde diplomatique*, April 2007, <http://www.monde-diplomatique.fr/2007/04/RICHARD/14600> [date accessed, 9 August 2007].

<sup>112</sup> **V. BROWNE**, "Picasso's Shriek against Horrors of War", *Sunday Business Post*, 27 April 2003, <http://archives.tcm.ie/businesspost/2003/04/27/story640995853.asp> [date accessed, 9 August 2007].

<sup>113</sup> **P. PICASSO**, 1937, kept at the Centro de Arte Reina Sofia, Madrid.

<sup>114</sup> **V. BROWNE**, "Picasso's Shriek against Horrors of War", *supra* note 112.

<sup>115</sup> **W. WALKER**, "The Lessons of Guernica", *The Toronto Star*, 9 February 2003, <http://www.commondreams.org/views03/0209-04.htm> [date accessed, 9 August 2007].

<sup>116</sup> United States Secretary of State under the presidency of Georges W. Bush.

<sup>117</sup> For the controversy as to the reasons for covering the mural, see: **V. BROWNE**, "Picasso's Shriek against Horrors of War", *supra* note 112.