

## Concluding Remarks

Eric H. Reiter

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[See table of contents](#)

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## Concluding Remarks

### ERIC H. REITER

I am grateful for the comments offered by these three expert and insightful readers, and for the opportunity to take part in this conversation about my book.<sup>1</sup> The scholar of early-modern rhetoric Walter J. Ong once wrote that “the writer’s audience is always a fiction,” as we imagine who might read our work and what they might get out of it.<sup>2</sup> I know that as I wrote, my imagined audience shifted back and forth between legal historians, lawyers, and historians full stop, and the finished book probably has some changes in tone and focus because of that. These readings by Jeffrey McNairn, Elsbeth Heaman, and James Muir — a real, rather than imagined, audience — are welcome precisely because they come from outside my own fields of Quebec civil law history and the history of emotions, and they take what I did and push it in new and rich directions.

I cannot do justice to all, or even most, of the insights they offer, so I will focus on three themes that arise from the discussion, which I think provoke important methodological and conceptual challenges to the (legal) history of emotions and allow me to make public some debates I had in my head while writing the book. If what follows do not fully answer those challenges, I hope at least that articulating these issues shows some of the ways that the history of emotions touches vital questions in Canadian historiography.

### Emotion and Reason

The first is the perennial issue of the relationship between emotion and reason, which has occupied historians of emotions from the beginning, but which is particularly relevant when law is in the picture.<sup>3</sup> As Heaman suggests, in the legal context the feelings/reason binary was never two fixed categories, and emotions could serve as a rhetorical position to neutralize the privileged position of reason and the “white, propertied men” who were its exemplars. And as McNairn points out, in the legal realm the supposed “objectivity” of reason and the rational powerfully reinforced judges’ and, more generally, the legal system’s restrictive definitions of what counted and what did not. This skewing of the field towards reason perhaps mattered little when two merchants were litigating a delayed shipment of timber,

though the world of commerce was never as entirely coldly materialist as liberal theory would have it.<sup>4</sup> For individuals complaining of emotional injuries, however, orienting the forum towards reason and its demands meant forcing those plaintiffs onto unfamiliar and often hostile terrain. This particularly affected women, who were more often dismissed as bringing forward “mere feelings,” but it also affected men who could see their masculinity questioned for litigating rather than living with emotional injuries.

Lawyers were important here, a point all three commentators rightly bring up. Lawyers worked right at the fluid emotion/reason interface, and their job was to figure out how to turn plaintiffs’ emotion-drenched narratives (which historians can usually see only by reading between the lines of the rationalized court file) into the available legal categories. To do this, they had to negotiate the formal requirements of rationality without sacrificing the visceral power of emotion. But emotion was more than a rhetorical intensifier: it could itself be the substance of a case, and part of the historian’s challenge in studying how emotions were litigated is to see how feelings were “translated” into legal objects.<sup>5</sup> This meant translating feelings into the rational categories of law, of course: into legally cognizable complaints or defences. But it also meant translating feelings into the *emotional* categories of law. By this I mean characterizing emotional responses in ways that would tap into the emotional pathways within the system: into that zone of self-evidence where the judge’s decision would be based on an emotional rather than a rational understanding of the situation. As Heaman suggests, we miss this emotional side of law if we buy into law’s self-fashioning as a zone of rationality only. We might say that in the courts, litigants had to (and must still) both reason emotionally and emote rationally.

### Labels, Legal and Historical

The second point is the question of labels, both historical and historians’, and especially the label “morality” that McNairn discusses. Morality is one of those present-day labels that would also have been understood by people at the time, though inevitably there is a gap between those two understandings. At the same time, morality and emotion related in complex ways with each other and with the law.

The labels we give to these different normative orders matter, since law and morality work on individuals and society differently, and

they play distinct roles in legal argument and adjudication. Morality defines a different normative order from law, but both law and morality operated within the courtroom, and both shaped how the objects of litigation — including wounded feelings — were interpreted and understood. I spent a lot of time in the book linking emotions and law, but McNairn is right that there is more to be said about emotions and morality. Emotions can themselves be normative and prescriptive, as historians of emotions have asserted in different ways,<sup>6</sup> and Rob Boddice links that normativity of emotions to morality in a way that is potentially productive for legal historians. Boddice has argued that the intersection of emotions and morality allows historians to see more clearly “how morality is experienced, and the ways in which moral economies are formed, entrenched, destabilized and changed.”<sup>7</sup> This idea of the experience of morality adds another layer to the cases in the book by defining a source of the feelings of outrage, mortification, shame, and the like expressed by so many of the litigants. As McNairn suggests, morality inflected law both in the assessment of the defendant’s fault (that is, the transgression that provoked the feelings) and in the evaluation of the plaintiff’s injury (that is, the wounded feelings themselves). At the same time, however, morality was just one evaluative standard at work in the cases; others included propriety, social class, gender roles, and racial prejudice, and all of them shaped emotional responses in different ways. But the shared experience of morality — inflected as it was by factors like social standing, gender, and race — was one element in building the empathy (or lack thereof) that made it possible to argue and especially judge those cases of emotional injury.

One final point about labels is more historiographical than substantive. The labels that historians (and other legal outsiders) see in the legal sources and that they apply to analyzing them can enrich legal history by bringing together topics that make sense historically but that may be foreign to lawyers’ categorizations (a point that Muir suggests). Today, the sorts of cases I looked at would be treated very differently from one another, with different lawyers handling them, and reaching for different legal manuals and searching different keywords to prepare for them. In the period of the book, lawyers were more generalists, but they too categorized their cases, and pulled out different arguments in a breach of promise case than they would in a case of denial of service or wrongful death. Historians, unlike lawyers, usually don’t wear the blinders that professional legal training creates

(blinders I am sure I wear at times, being trained in both history and law), and they often see linkages where lawyers would see distinctions. This is one reason why legal history done by historians is often refreshingly different from legal history done by lawyers — historians tend to say, “why can’t this go with that?” and move through the legal world and its categories in unanticipated but enlightening ways.

### Class and Power

The third issue is class and the effects of power in litigation, a point that all three commentators address. Power plays a gatekeeping and shaping role for how emotions operated within the legal system. It especially affects which emotions, and whose emotions, would be validated by the system. The civil archives are a rich (and still underused) resource for agency and its limits. Civil litigation shows all kinds of people (at least before the civil courts were priced out of the reach of people of modest means, and with the caveat that married women mostly acted only with men’s authorization) taking action of various kinds, but always within a system of rules and procedures to which they must conform.

While all kinds of people used the courts, their experiences differed in important ways, as Muir notes. The system had its insiders and its outsiders, and insiders came in various kinds. There were, of course, then (as now) the repeat players and those with ready access to legal advice, like the railroad companies.<sup>8</sup> But among the general public disparities are evident, and some walked through the courthouse door as social or cultural (if not legal) insiders, which advantaged them in various ways. Muir usefully characterizes these litigants as bourgeois and connects my stories of litigants to larger historical points of social structure and power. These bourgeois litigants, whether we define their status by social class or income or connections, all shared influence within the system, derived from being able to present themselves as sharing values with the judges who heard their cases. I focused on how shared emotions smoothed the way for certain litigants, but we could also focus on other factors relating to shared class identity, such as morality or education. The point is that shared identity like this allowed certain litigants to call upon and (sometimes) benefit from institutional power.

This potential for a power differential also factored into the law itself, because in the cases I looked at, emotions were felt, whereas

rights were proved, and in the courts proof (mostly) wins over feeling. Rights-based arguments always played a role in litigation, but in most of the years covered by the book, defendants were the ones arguing rights, setting up their property or contractual rights against plaintiffs' emotions. On the face of it, that should not have boded well for the plaintiffs. But what Heaman calls "the older protections for wounded feelings" actually held their own in many cases, which suggests that — for a time at least — the expected power dynamics of the courtroom could be neutralized if the case was right.<sup>9</sup> Cases of wounded feelings brought emotions within the courtroom, but in a way that treated them as common knowledge. Plaintiffs were almost never asked how they felt: talking about feelings would mire the court process in the quicksand of subjectivity, always problematic for civil litigation. The sort of quasi-judicial notice that comes out in so many of the cases in the book allowed emotions to be empathetically felt, and so adjudicated. But it did so in a way that institutionalized the classist, sexist, and often racist assumptions behind that common knowledge.

This is one reason why the cases of the Black men suing the theatres are so striking. Those plaintiffs brought their feelings (as well as their claims to equal citizenship and breached contracts) against the power of established property rights, and in the earliest cases they won. Those same cases, however, also show how the expected power dynamics quickly regrouped and reasserted themselves. The early victories, in which the (white) judges seem to have grasped the emotional injury of discrimination and said, "wait a minute here!" quickly gave way to the legal and social order closing ranks around the rights of (white) property owners, as Fred Christie famously found to his chagrin and cost in his infamous case from the 1930s.<sup>10</sup>

### Whither the (Legal) History of Emotions in Canada?

I would like to end, briefly and perhaps predictably, with some words on the place of the history of emotions — legal or otherwise — in Canadian historiography. The history of emotions is in full bloom and its literature is growing, from fine-grained case studies to methodological and theoretical proposals to synthetic overviews.<sup>11</sup> The legal history of emotions is a more select field, though it too has its classics, and recently major contributions have built on those foundations.<sup>12</sup> So far, however, Canadian and Quebec historians have been slow to embrace the field, at least in work that explicitly engages with the

history of emotions. There have been exceptions, like Cecilia Morgan's work on Indigenous travellers, Sophie Doucet's delineation of the emotional world of Marie-Louise Globensky, and Magda Fahrni's study of the aftermath of the 1927 Laurier Palace cinema fire.<sup>13</sup> But the emotional register has been underutilized in reading sources, and the emotional life of the Canadian past remains relatively unexplored.

One area of growth I might point to is broadening the palette of feelings, to bring an emotional dimension to areas of historical inquiry where that dimension might be less evident because it is hidden by other analytical categories like gender or family or religion. In a sense this is a labelling issue, and I had debates (with myself and others) while writing *Wounded Feelings* about whether certain things were or were not emotions. I adopted an inclusive approach that accepted individuals' perceptions that they were feeling something, whether or not they had a name for it or called it an emotion. Some, like feelings of honour and dishonour, I decided were profitably to be considered emotions, and they went into the book (indeed very prominently). Others, I was unsure about, like the half chapter on spiritual feelings that I ended up cutting.

But focusing on feelings is more than just labelling. Characterizing something as a feeling or emotion changes the orientation of historical analysis, broadening and enriching the questions we ask about relationships, situations, and people. The field of history of emotions was built on fairly basic emotions such as fear, anger, humiliation, and jealousy,<sup>14</sup> but more recently scholars have branched out to consider emotions such as anxiety, homesickness, and *schadenfreude*, using them to shed new light on aspects of modern culture and society.<sup>15</sup> Beyond studies of particular emotions, however, we are also seeing a flourishing of excellent work that gives an emotions-based reading of relationships, spaces, and time, turning the focus of the emotions lens away from the emotions themselves and onto ways that they shape society.<sup>16</sup> Like the historiographical changes brought by social and gender history decades ago, or cultural and transnational history more recently, the history of emotions reorients our perspective as historians, urging us to look at familiar things differently.

Here are two examples of rich fields of Canadian historiography in which emotions may provide a way to help us see familiar terrain in new ways. A first example is industrialization and labour history, and comes out of my current project on workplace accidents and the emotional politics of grief. Industrialization brought on economic,

legal, and political changes, but it also provoked profound emotions. Alongside the individual emotions of grieving spouses and parents, I have been struck by the collective dimension of emotions in the labour movement. Quebec's mutual aid societies of the nineteenth century, for example, brilliantly studied by Martin Petitclerc, were expressions of Marxist or Thompsonian class consciousness or of risk management.<sup>17</sup> But they were also sites of emotions, from the collective grief of funeral processions to the fraternal camaraderie of meetings and shop floors.

A second example relates to observations Alecia Simmonds and I made in a forthcoming piece on the legal history of emotions.<sup>18</sup> One of the items on our "to-do list" of the emerging field was the decolonization of views of both law and emotions. The complex emotions of colonialism are a potentially rich field of inquiry, adding an affective dimension to questions of cultural difference, loss, usurpation of voice, and suppression of memory.<sup>19</sup> What are the feelings — and what are the words to describe those feelings — raised by the loss of family ties through residential schooling? Or by the severing of connections to land and the past through relocation? Or by paternalistic and infantilizing treatment at the hands of governments, police, agents, and others? Or, in a more positive direction, what are the feelings of reconnecting with ancestral communities, lands, or languages?<sup>20</sup>

In my proselytizing zeal, I fear I have strayed from my own field of legal history. But in doing so, I have simply been caught up in the spirit of these three rich commentaries on my work and the new directions they suggest. Once again, I thank my readers, and I will continue to be challenged and inspired by their thoughts as I continue my research.

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**ERIC REITER** is a Professor of History at Concordia University; retired member of the Quebec Bar; member of the Centre interuniversitaire d'études québécoises.

**ERIC REITER** est professeur d'histoire à l'Université Concordia, membre retraité du Barreau du Québec et membre du Centre interuniversitaire d'études québécoises.



## Endnotes

- 1 I thank the three commentators for a fruitful and stimulating interchange, Barrington Walker and Benjamin Bryce for organizing the roundtable at which this exchange began, and the CHA prize committee for honouring my work.
- 2 Walter J. Ong, "The Writer's Audience Is Always a Fiction," *Publications of the Modern Language Association of America* 90, no. 1 (1975): 9–21.
- 3 Lucien Febvre's seminal article traced the rationality and irrationality of emotions: "La sensibilité et l'histoire : comment reconstituer la vie affective d'autrefois?" *Annales d'histoire sociale* 3 (1941): 5–20, translated as "Sensibility and History: How to Reconstitute the Emotional Life of the Past," in *A New Kind of History: From the Writings of Febvre*, ed. Peter Burke, trans. K. Folca (New York: Harper & Row, 1973), 12–26.
- 4 See, for example, John Corrigan, *Business of the Heart: Religion and Emotion in the Nineteenth Century* (Berkeley: University of California Press, 2002); Susan J. Matt, *Keeping Up With the Joneses: Envy in American Consumer Society, 1890–1930* (Philadelphia: University of Pennsylvania Press, 2003); Eva Illouz, *Cold Intimacies: The Making of Emotional Capitalism* (Cambridge, UK: Polity Press, 2007).
- 5 On the idea of translation, see especially James Boyd White, *Justice as Translation: An Essay in Cultural and Legal Criticism* (Chicago: University of Chicago Press, 1990); Clark D. Cunningham, "Lawyer as Translator, Representation as Text: Towards an Ethnography of Legal Discourse," *Cornell Law Review* 77, no. 6 (1992): 1298–387.
- 6 Especially the influential ideas of "emotionology," "emotional regimes," and "emotional communities" presented, respectively, in Peter N. Stearns and Carol Z. Stearns, "Emotionology: Clarifying the History of Emotions and Emotional Standards," *American Historical Review* 90, no. 4 (1985): 813–36; William M. Reddy, *The Navigation of Feeling: A Framework for the History of Emotions* (Cambridge, UK: Cambridge University Press, 2001); Barbara H. Rosenwein, *Emotional Communities in the Early Middle Ages* (Ithaca, NY: Cornell University Press, 2006).
- 7 Rob Boddice, *The History of Emotions* (Manchester, UK: Manchester University Press, 2018), 192.
- 8 This draws on Marc Galanter's classic distinction between "repeat players" and "one-shotters" (contemporary, but historically apropos also): "Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change," *Law and Society Review* 9 (1974): 95–160, at 97.
- 9 This might, of course, be an artefact of my source base. The cases in the book were likely the egregious tip of an emotional-injury iceberg, and many instances of wounded feelings never made it into court because of

- risk aversion, inadequate resources, discouragement by lawyers, settlement out of court, and the like.
- 10 See James W. St. G. Walker, "The Law's Confirmation of Racial Inferiority: *Christie v. York*" and Eric M. Adams, "Errors of Fact and Law: Race, Space, and Hockey in *Christie v. York*," both in *The African Canadian Legal Odyssey*, ed. Barrington Walker (Toronto: University of Toronto Press, 2012), 243–323, 324–60.
  - 11 Among recent critical overviews of the field, see Boddice, *History of Emotions*; Katie Barclay, Sharon Crozier-De Rosa, and Peter N. Stearns, eds., *Sources for the History of Emotions: A Guide* (Abingdon: Routledge, 2021).
  - 12 See the literature cited in Alecia Simmonds and Eric H. Reiter, "Legal History of Emotions," in *The Routledge History of Emotion in the Modern World*, ed. Katie Barclay and Peter Stearns (Abingdon: Routledge, forthcoming). Some excellent recent monographs illustrating varied approaches to the field include Katie Barclay, *Men on Trial: Performing Emotion, Embodiment and Identity in Ireland, 1800–45* (Manchester, UK: Manchester University Press, 2019); Mark Seymour, *Emotional Arenas: Life, Love, and Death in 1870s Italy* (Oxford: Oxford University Press, 2020); Julie Hardwick, *Sex in an Old Regime City: Young Workers and Intimacy in France, 1660–1789* (Oxford: Oxford University Press, 2020); Julia Laite, *The Disappearance of Lydia Harvey: A True Story of Sex, Crime and the Meaning of Justice* (London: Profile Books, 2021).
  - 13 Cecilia Morgan, *Travellers through Empire: Indigenous Voyages from Early Canada* (Montréal and Kingston: McGill-Queen's University Press, 2017); Sophie Doucet, "'Toujours je sens mon âme se balancer entre les joies et les peines': le paysage émotionnel de Marie-Louise Globensky (1849–1919) observé à travers ses écrits personnels" (PhD dissertation, Université du Québec à Montréal, 2019); Magda Fahrni, "Glimpsing Working-Class Childhood through the Laurier Palace Fire of 1927: The Ordinary, the Tragic, and the Historian's Gaze," *Journal of the History of Childhood and Youth* 8, no. 3 (2015): 426–50. Some others include contributors to Franca Iacovetta and Marlene Epp, eds., *Sisters or Strangers? Immigrant, Ethnic and Racialized Women in Canadian History*, 2d ed. (Toronto: University of Toronto Press, 2016) and Barbara Lorenzkowski, *Sounds of Ethnicity: Listening to German North America 1850–1914* (Winnipeg: University of Manitoba Press, 2010).
  - 14 Jean Delumeau, *La peur en occident (XIV<sup>e</sup>–XVIII<sup>e</sup> siècles) : une cité assiégée* (Paris: Fayard, 1978); Carol Z. Stearns and Peter N. Stearns, *Anger: The Struggle for Emotional Control in America's History* (Chicago: University of Chicago Press, 1986); Barbara H. Rosenwein, ed., *Anger's Past: The Social Uses of an Emotion in the Middle Ages* (Ithaca, NY: Cornell University Press, 1998); William Ian Miller, *Humiliation and Other Essays on Honor, Social Discomfort, and Violence* (Ithaca, NY: Cornell University

- Press, 1993); Peter N. Stearns, *Jealousy: The Evolution of an Emotion in American History* (New York: New York University Press, 1989).
- 15 Peter N. Stearns, *American Fear: The Causes and Consequences of High Anxiety* (New York: Routledge, 2006); Susan J. Matt, *Homesickness: An American History* (New York: Oxford University Press, 2011); Tiffany Watt Smith, *Schadenfreude: The Joy of Another's Misfortune* (London: Profile Books, 2018).
  - 16 Excellent examples include Seymour, *Emotional Arenas* on Risorgimento Italy, and Nicole Eustace's work on early America: *Passion Is the Gale: Emotion, Power, and the Coming of the American Revolution* (Chapel Hill: University of North Carolina Press, 2008); *1812: War and the Passions of Patriotism* (Philadelphia: University of Pennsylvania Press, 2012).
  - 17 Martin Petitclerc, "*Nous protégeons l'infortune*": les origines populaires de l'économie sociale au Québec (Montréal : VLB, 2007).
  - 18 Alecia Simmonds and Eric Reiter, "The Legal History of Emotions" in *The Routledge History of Emotions in the Modern World*, ed. Katie Barclay and Peter Stearns (London: Routledge, 2022), 423-439.
  - 19 For examples from elsewhere, see Matt Matsuda, *Empires of Love: Histories of France and the Pacific* (Oxford: Oxford University Press, 2005); Jane Lydon, *Imperial Emotions: The Politics of Empathy across the British Empire* (Cambridge, UK: Cambridge University Press, 2019); Alecia Simmonds, "Intimate Jurisdictions: Reflections upon the Relationship between Sentiment, Law and Empire," in *Transnationalism, Nationalism and Australian History*, ed. Anna Clark, Anne Rees and Alecia Simmonds (Singapore: Palgrave Macmillan, 2017), 179-90.
  - 20 See, from an autobiographical perspective, Leonarda Carranza, Eufemia Fantetti, and Ayelet Tsabari, eds., *Tongues: On Longing and Belonging Through Language* (Toronto: Book\*hug Press, 2021).