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# Tax Talk

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**KEYWORDS:** CHILD CARE ■ DEDUCTIONS ■ FAMILY ■ WOMEN

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Rebecca Johnson's impressive new book, *Taxing Choices: The Intersection of Class, Gender, Parenthood, and the Law*,<sup>1</sup> is ambitious. In the book, Johnson explores the debate over child care in the context of *Symes v. Canada*,<sup>2</sup> and a brief outline of the book demonstrates the broad array of issues and topics that she tackles. In part I, Johnson investigates feminist theory, tax theory, and Michel Foucault's theory of power. She then details the history of the child-care debate, undertakes a comparative analysis of US and Canadian statutory and constitutional questions on the topic of child care, discusses the legal issues that litigants will face in seeking a deduction for child-care expenses, explores the possible strategies for addressing these issues, and explains the controversies that arose when Elizabeth Symes filed her lawsuit in court.<sup>3</sup> In part II, Johnson investigates the various discourses that emerged in the *Symes* litigation (including feminist, sociological, liberal, individualist, conservative, patriarchal, and economic-capitalist), argues that understanding language and words is important for understanding diverse communities, and then tracks the *Symes*

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1 Rebecca Johnson, *Taxing Choices: The Intersection of Class, Gender, Parenthood, and the Law* (Vancouver: UBC Press, 2002).

2 [1993] 4 SCR 695.

3 Johnson, *supra* note 1, at 3-53.

litigation through all three levels of the judicial hierarchy—reporting the courtroom drama in the form of a written play.<sup>4</sup> In part III, Johnson discusses the doctrinal and political constraints that inhibited the courts in the *Symes* case, explores the rhetoric that the courts adopted in deciding the case, analyzes the public response using five different intellectual frameworks, and finally explores the legal experts' response to the child-care debate using a "three-axis model of need."<sup>5</sup> *Taxing Choices*, in short, leads the reader down an astonishing number of intellectual roads.

At times, Johnson's diverse collection of ideas and perspectives generates exciting new insights on the child-care debate, but often the reader is left puzzled and bewildered—both by the material generally and, more specifically, with respect to how certain aspects of the discussion relate to various other topics explored in the book. But this confusion is temporary. By the end of the book, Johnson's intriguing underlying point becomes apparent: language is a powerful social tool that not only reflects individual viewpoints but also has the ability to shape our lives in tangible ways.<sup>6</sup> Discourse, according to Johnson, is not just one more activity in our day-to-day lives—it is the key to understanding speaker and audience. It is a central factor in social relations, reflecting disparate needs and interests, and capable of sparking strident opposition or inducing peaceful negotiation. As Johnson ingeniously shows, language is particularly potent because it often operates unconsciously; it can permeate perception, conception, and experience without speaker or audience ever stepping back to consider what has been said or heard.<sup>7</sup>

In *Taxing Choices*, Johnson investigates words and language in the context of the *Symes* litigation and the widespread debates it sparked; she brings to light much of the debate and controversy that played out in the courtroom dynamics, judicial opinions, the media, and academic circles, and among activists. In doing so, she demonstrates how language frames and steers debates, privileges certain actors, and undermines others. Focusing on language, Johnson argues, enables us to investigate the *Symes* case—not to determine whether the Supreme Court of Canada ultimately rendered a good decision, but to learn about people, power, culture, and institutions.<sup>8</sup> This knowledge, in turn, makes it possible to gain information about

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4 Ibid., at 57-106.

5 Ibid., at 109-95.

6 See, for example, Johnson, *ibid.*, at 57: "[L]aw is not simply a code of rules but is also an arena—an arena in which diverse communities struggle over the meaning to be given to words and over political distributions of social power. In these struggles, language functions both as capital deployed and as object of struggle."

7 See, for example, Johnson, *ibid.*, at 143-58, for a discussion of non-expert public response to the *Symes* litigation and the hidden meanings of the speakers' words and arguments.

8 I do not mean to suggest that Johnson does not have an opinion on the *Symes* litigation; she has. She readily acknowledges her view that the Supreme Court got it wrong when it denied *Symes* a deduction for her child-care expenses: "[A]lthough I believe it [the Supreme Court] could, and should, have reached a different result, I also believe that what it settled on can be defended on a number of political and pragmatic grounds" (*ibid.*, at 192). In *Taxing Choices*,

the world in which we live and arguably leads to greater levels of tolerance when we are faced with different perspectives on questions that mix class, gender, parenthood, and law.

Johnson does not focus exclusively on language. As noted above, she also addresses a range of other fascinating issues, but in each context, she reveals just how courts and commentators use the rhetoric of choice, responsibility, and selfishness when commenting on—and condemning—Symes's decision to seek a tax deduction for her child-care expenses. This rhetoric, Johnson argues, is seriously problematic because it works to cement the longstanding social norm that puts women in the home and men in the market, thereby undermining the feminist campaign to disrupt this system of gender oppression. Because Johnson highlights language and discourse throughout her book, I too will focus on this topic in my comments here.<sup>9</sup> Given that I cannot describe fully all the material found in *Taxing Choices*, I strongly encourage lawyers, feminists, linguists, political scientists, and virtually anyone interested in law, language, or politics to read the book. Johnson's prose is wonderfully lucid, and the range of material that she investigates virtually ensures that readers will find something of interest in the story that unfolds around child care and Symes's decision to go to court.

In this review, I first briefly summarize *Taxing Choices*—in particular, the legal issues involved in *Symes v. Canada* and Johnson's comments on and concerns about the discourse that emerged in the courtroom and in public debates. Johnson skilfully uncovers the expressive function of language and makes a strong case that words have real-world effects—in this context, negative effects. Although Symes's opponents labelled her as selfish and narcissistic, a con artist intent on redistributing public resources to privileged women, Johnson goes out of her way to make the case that the speakers did not want to harm working women or Symes; in fact, most of the speakers condemned Symes because they believed that her arguments were not feminist *enough*. In effect, Johnson implies that Symes's critics chose unfortunate words to make valid points on an important legal and social issue. Johnson articulates a number of insights in her book with which I agree, but I find this final point regarding speakers' intent problematic. Indeed, I reach just the opposite conclusion: Symes's critics adopted disapproving, condemning, and disparaging language for strategic purposes, and the consequences that Johnson finds alarming were most likely the very point of the rhetoric. *Taxing Choices* does not seek to explain *why* speakers adopt certain words in making their arguments, and

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however, Johnson hopes to move beyond the normative discussion of child-care expenses and into the realm of what we did, or can, learn from the controversy. See Johnson, *ibid.*, at 175.

- 9 My brief comments here will not adequately reflect the range of materials that Johnson marshalled in making her case that language matters. In order to develop her arguments, she obtained the entire record in the *Symes* case (including the briefs filed and the oral arguments made at every level of the judicial hierarchy), collected historical documents addressing child care in Canada and the United States, and gathered virtually every publication—in both the popular press and scholarly journals—that touched on the subject of gender, class, or child care.

Johnson should not be faulted for this failure. She addresses a wide-ranging collection of other ideas and made a good decision to set questions of strategy and motive aside. My comments, therefore, are an effort to pick up where Johnson left off rather than a criticism of what she chose not to discuss in her book.

## TAXING CHOICES

In this section, I briefly describe *Symes v. Canada* and the widespread view that Symes acted selfishly when she sought a tax subsidy for businesswomen who incur child-care expenses. I summarize Johnson's view on the rhetoric of self-interest and highlight her insights on how language and discourse cause unexpected harm. I then rely on this discussion to argue that the speakers most likely intended this harm as a means to achieve their own self-interested aims and goals.

### The National Controversy over Child-Care Subsidies

Symes was a full-time practising lawyer and a partner in a Toronto law firm when she and her husband decided to have children.<sup>10</sup> When the couple made this choice, they agreed that if one of them was to stay at home, it would be Symes who would give up her career to attend to the children while her husband would continue to work full-time. After having two daughters, Symes chose to continue with her law firm and to facilitate her legal practice she hired a nanny to care for her children.<sup>11</sup> Symes paid the nanny a salary and complied with the tax laws associated with this employment relationship by deducting tax withholdings from the salary paid and contributing to Canada's pension and unemployment insurance plans. With regard to her own taxes, Symes deducted the costs associated with child care as a business expense pursuant to sections 9 and 18 of the Canadian Income Tax Act,<sup>12</sup> an amount equal to roughly \$13,000.<sup>13</sup> This deduction, as Symes soon discovered, would become the centre of a national controversy.

The legal aspects of the controversy arose because section 63 of the Act clearly permitted taxpayer Symes to deduct a small portion of her child-care expenses—

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10 Supra note 2, at 705-6. As noted earlier, Johnson describes the *Symes* litigation in the form of a written play. I found this to be a clever way of conveying the details of the litigation, but at times I was confused as to what actually happened in court; accordingly, I rely on the judicial opinions for the details of the case.

11 Supra note 2, at 706.

12 RSC 1985, c. 1 (5th Supp.), as amended (herein referred to as "the Act"). Unless otherwise stated, statutory references in this review are to the Act.

13 Supra note 2, at 706. Subsection 9(1) of the Act defines a taxpayer's income for taxation purposes from a business or property as equal to profit from the year. Subsection 18(1) provides as follows:

In computing the income of a taxpayer from a business or property, no deduction shall be made in respect of

(a) an outlay or expense except to the extent that it was made or incurred for the purpose of gaining or producing income from the business or property.

approximately \$4,000—but Symes hoped to deduct the entire expense under sections 9 and 18 of the Act.<sup>14</sup> She argued that she was entitled to do so because the cost of child care was a business expense, and sections 9 and 18 explicitly addressed deductions associated with the cost of doing business. The Canada Customs and Revenue Agency (CCRA), however, determined otherwise; it argued that Symes’s business deduction was not warranted because “the wages paid [to her nanny] . . . were not outlays or expenses incurred for the purpose of gaining or producing income from business, but were personal or living expenses.”<sup>15</sup> Symes did not give up. Aware that data unambiguously showed that women were primarily responsible for child care and knowing that child care was necessary for parents to undertake professional activities, she thought that the CCRA’s cramped interpretation of the Act violated, without justification, the guarantee of equality set out in the Canadian Charter of Rights and Freedoms.<sup>16</sup> To prove her point, Symes went to court.

Because the Act contained specific provisions that addressed (and limited) the deductions that wage earners could take, Symes restricted her argument to the child-care costs that self-employed businesswomen incurred.<sup>17</sup> Unlike wage earners, Symes argued, businesswomen were not prevented by the Act from taking the large deduction she sought for child care. To many observers, this strategy indicated a serious class bias on Symes’s part, a bias that led commentators to disparage and scorn both Symes and her lawyer, Mary Eberts, for their decision to go to court. Indeed, the class aspects of the controversy and the fact that the case went all the way to the Supreme Court set off a cultural war; after reading *Taxing Choices*, I wondered whether there was a single Canadian resident who did *not* have an opinion on the *Symes* case, and for the most part, a negative opinion.

Feminist activists, for example, argued that if Symes won her case, only the wealthiest women—business owners and not wage earners—would be able to deduct the cost of child care, an expense that the vast majority of low-income women also incurred.<sup>18</sup> The activists also argued that Symes’s pursuit of a tax deduction was a

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14 *Supra* note 2, at 706. Section 63 sets out the amount of child-care expenses that taxpayers may deduct from earned income. The largest deduction that Symes could take under subsection 63(1) was \$4,000; she sought to take as much as \$13,359 under section 9 and subsection 18(1).

15 *Symes v. Canada*, [1989] 3 FC 59, at 63 (TD).

16 Section 1 of the Charter provides, “The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.” Canadian Charter of Rights and Freedoms, part I of the Constitution Act, 1982, being schedule B of the Canada Act 1982 (UK), 1982, c. 11.

17 Subsection 8(2) of the Act prohibits employees from taking deductions from employment income, while section 9 allows business owners to make such a deduction. See *supra* note 2, at 766 (noting that subsection 8(2) and section 9 together most likely led Symes to focus on businesswomen to the exclusion of wage-earning women).

18 Johnson, *supra* note 1, at 52 and 164 (quoting Martha Friendly, chair of the Childcare Committee of the National Action Committee on the Status of Women).

flawed approach for winning economic benefits for women. The best tactic, it was argued, would be for Symes to forgo the tax argument altogether and to work for a public child-care system that would pay the child-care costs of all women, or at least the poorest women.<sup>19</sup> A second group of activists argued that Symes and her lawyer advocated a redistribution of public resources to working women, which would, in turn, devalue traditional families with stay-at-home mothers.<sup>20</sup> The national and local presses published various other viewpoints and opinions in newspapers around the country. After conducting a survey on the *Symes* litigation, the *Montreal Gazette* printed responses that included arguments like the following: “As a working mother who has raised children on her own without any help from anyone except my salary, I don’t see why this lawyer lady should get any help or special privileges.”<sup>21</sup> A second survey respondent argued, “If they can afford to be self-employed and pay a nanny they can afford to pay taxes.”<sup>22</sup> Even scholarly commentators picked up on the theme of selfishness; in one commentator’s view, Symes was engaged in a “scam against women” to get special privileges for herself and other business owners at the expense of all other women.<sup>23</sup>

The harsh critique along class lines continued into the courtroom. During trial, the Crown’s lawyer argued that Symes did not need to work given her husband’s high salary. She chose to work for personal reasons and now, the lawyer argued, Symes hoped that the government would subsidize the costs associated with her selfish choice.<sup>24</sup> The government’s critique did not persuade the trial court judge, but the argument did have an impact on the case as it made its way through the appellate courts. The trial judge found that Symes had used “good business and commercial judgment” in dedicating a portion of her resources from her law practice to the provision of child care and thus could take a business deduction pursuant to sections 9 and 18 of the Act.<sup>25</sup> Symes’s legal victory was only temporary, however. The Federal Court of Appeal reversed the lower court’s finding and commented on Symes’s “selfish behaviour.” The appellate court first held that Parliament explicitly permitted parents carrying on business activities to deduct the costs of child care under section 63 and thus it did not permit a business deduction under sections 9

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19 *Ibid.*, at 52 (quoting members of the National Action Committee on the Status of Women).

20 *Ibid.*, at 164 (quoting Cynthia Forsyth, the national president of REAL Women, a group sometimes seen as “anti-feminist”).

21 *Ibid.*, at 149.

22 *Ibid.*, at 148.

23 *Ibid.*, at 178-79 (quoting Michael Mandel, professor of law).

24 *Ibid.*, at 180 (quoting the government’s lawyer, John Power).

25 *Supra* note 15, at 73. As to the Charter argument, Trial Judge Cullen stated, “I am of the opinion that if in our society we are to promote the equality of women, as clearly intended by section 15, then an interpretation of the *Income Tax Act* which allows women entrepreneurs (in proper circumstances) to deduct their child care expenses to permit them to pursue a business, is clearly in order.” *Ibid.*, at 83.

and 18.<sup>26</sup> Second, the court held that this interpretation of the statute did not violate the equality provision found in the Charter. As appellate Justice Décaré observed, professional women were not a disadvantaged group suffering discrimination in violation of the Charter; rather, Symes and her lawyer were seeking privileged treatment that was entirely unwarranted.<sup>27</sup>

A majority of the Supreme Court justices also believed that sections 9 and 18 did not authorize a child-care business expense in light of the language found in section 63, which already allowed a deduction, albeit a less generous one than Symes had hoped to obtain. The court took judicial recognition of the fact that women do take more responsibility for child care and do incur certain costs for this household labour;<sup>28</sup> but there was no evidence, the majority argued, that women actually pay a greater share of the child-care expenses.<sup>29</sup> Thus, while the justices acknowledged that women incur the social costs of child care, because no evidence existed that women actually incurred a disproportionate amount of the *monetary* costs associated with the activity, the court could not redress the harm. In the court's words, it could redress only "legal harms" and not sociological harms associated with the unequal distribution of family burdens along gender lines.<sup>30</sup> In short, because the Act limited child-care deductions to married men and women in precisely the same fashion, the court found that there was no gender discrimination and no violation of the Charter.<sup>31</sup> The court, however, did not stop here.

It picked up on the point of contention regarding class and noted that Symes as a businesswoman seemed to "distance herself" from wage earners as a legal strategy; this legal strategy, in the court's view, appeared flawed because it led Symes to ignore the fact that the goal of the Charter is to redress discrimination against all women, salaried or self-employed, and thus the focus on businesswomen was "curious" indeed.<sup>32</sup> Moreover, and more problematic, the court suggested that if a subgroup of women were to bring a cause of action, a different subgroup of women, perhaps single mothers, might have been better able to prove the adverse effects of the limited deduction for child-care expenses. Symes could prove no such adverse

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26 *Canada v. Symes*, [1991] 3 FC 507, at 523-24.

27 *Ibid.*, at 531: "I also note that in the case at bar the respondent, who is in some measure claiming privileged treatment for professional women and parents, does not argue that the *Income Tax Act* would create unlawful discrimination between professional and salaried workers if her argument was allowed . . . [Under Symes's argument] 'the richer the taxpayer, the more her child care expenses will be subsidized by other Canadian taxpayers. The poorer the taxpayer, the less she will receive. The poorest will receive nothing.'"

28 *Supra* note 2, at 763 (taking judicial notice of the fact that women disproportionately incur the social costs of child care).

29 *Ibid.*

30 *Ibid.*

31 *Ibid.*, at 763-75.

32 *Ibid.*, at 766.

effects, given her privileged position as a married businesswoman who shared the financial burden of child care with her husband.<sup>33</sup> In short, the court suggested that Symes's self-interested strategy cost her the case. Or, as Johnson puts it, the court's language draws on the feminist criticisms regarding class bias as well as the language of "choice" to shame and discipline Symes for her selfish behaviour.<sup>34</sup>

### The Rhetoric of the Selfish Litigant

I have offered only a small collection of anecdotes from *Taxing Choices* regarding the controversies that grew out of the *Symes* litigation, as well as the critiques along class lines that surfaced in briefs, courtroom arguments, public debate, and court rulings. Johnson delves more deeply into every context in which the discourse arose and provides much more detail on the various issues and ideas that preoccupied the speakers. Johnson, however, argues that in each venue the portrayal of Symes is the same: she is self-interested, narcissistic, a con artist, and driven to take advantage of her gender for her own economic gain. This language, according to Johnson, is not altogether surprising given that allegations of maternal selfishness have surfaced throughout the history of child-care debates.<sup>35</sup> In the 1950s, courts and commentators critiqued women's decision to work as a self-centred abdication of maternal responsibilities—responsibilities that many argued a virtuous woman would gladly undertake without monetary compensation.<sup>36</sup> And when the government closed day-care nurseries after the Second World War, it encouraged mothers to stay out of the workplace and avoid shirking their responsibilities at the home front.<sup>37</sup> As Johnson details in the book, in certain eras widespread support for working women existed, but for the most part throughout history, society has harshly criticized women who work outside the home.<sup>38</sup> There is, in short, an entrenched social norm that calls for women to sacrifice their own careers for their husbands and children. When Symes filed a lawsuit seeking a subsidy to enable her to work as a lawyer, she challenged a longstanding tradition that many hoped to preserve.

As Johnson rightly argues, the view that women's role is in the home and the conclusion that women who reject the role are selfish depends on a number of unarticulated presumptions about gender, class, autonomy, and morality. Society has often encouraged poor women to provide market labour, but the opposite is true of wealthy white women.<sup>39</sup> Unless a privileged white woman is busy caring for

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33 Ibid., at 766-68 (discussing the possible Charter claim of single mothers but taking no position as to its viability).

34 Johnson, *supra* note 1, at 136 (investigating the manner in which the lawyers and judiciary shamed Symes for bringing her lawsuit).

35 Ibid., at 180.

36 Ibid.

37 Ibid.

38 Ibid., at 16-32 (providing a history of child-care politics in Canada between 1865 and 1990).

39 Ibid., at 181.

the poor, the orphaned, the errant, and her own children, she is often considered self-absorbed and perhaps even “nasty” or “brutish.”<sup>40</sup> As Johnson suggests, while we may be tempted to consider this view outdated and obsolete, many individuals continue to subscribe to the viewpoint, as can be seen in the harsh response to the Symes lawsuit. Symes, a privileged and successful white woman, sought economic benefits for herself and not for the less privileged women in society; for doing so, she incurred the wrath and the disdain of opposing counsel, colleagues, judges, and the media. Few viewed Symes as a feminist leader undertaking a strategy that would ultimately benefit all women. Rather, popular opinion reflected in the documents that Johnson amassed suggested that she was a virtual pariah in society for seeking a legal precedent that would award a tax deduction for businesswomen.

Upon demonstrating that society, the courts, and scholars responded to Symes in a manner that reflected the arguments made in the past regarding privileged women who sought to undertake professional work, Johnson goes on to argue that the rhetoric of virtue and selflessness is seriously problematic for its tendency to foster and perpetuate a system of gender oppression.<sup>41</sup> It cultivates a gendered distribution of social and family burdens and promotes the vilification of women who fail to carry their burdens without complaint. Johnson does not argue against virtue or for selfish behaviour; instead, she argues that we should “pay attention to contexts where the discourse of selfishness surfaces. . . . The discourse of selfishness can provide an opportunity to discuss social failures of care but it may also serve to reinscribe the imperative of oppressive selflessness and sacrifice.”<sup>42</sup> Continuing with her argument that language and word choice have real-world effects, Johnson notes that by focusing on the self-centred aspects of Symes’s approach to the child-care debate, we ignore the courageous aspects of her decision-making process—Symes becomes a villain rather than a brave litigant working for the public good. We should recognize that Symes, as a lawyer, understood that the press, opposing counsel, and even friends would scrutinize her decision to bring the lawsuit and to serve as the named plaintiff on a controversial legal topic.<sup>43</sup> And yet

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40 *Ibid.*, at 182.

41 Johnson notes that this problem emerges in many contexts. For example, during oral argument in the Supreme Court, Justice Major inquired about women’s choice; specifically, he asked, “[T]o what extent does it matter that the question of having children is a matter of choice? The woman in the work force has a choice. Does it make the society have an obligation to encourage her to make the choice to have children, compared to her counterpart who wants a career without children?” Johnson, *ibid.*, at 129. Justice Major’s question participates in the practice of gendering social responsibilities: men are not assumed to have child-care duties, and women, who do have such duties, have undertaken them for personal reasons—reasons with which the state should not interfere. This mode of thinking, according to Johnson, appears to rely on neutral and universal principles but in fact relegates women to the home in a subordinate position. Johnson, *ibid.*, at 129-32.

42 *Ibid.*, at 182-83.

43 *Ibid.*, at 183.

her long-term commitment to women's issues led her to suffer and endure the public scrutiny at great personal cost.<sup>44</sup> Although Symes could never adequately represent the interests of all women—as Johnson notes, no one woman could—we should applaud Symes for her tenacious focus on women's rights, limited though it was.

Johnson, in short, does not argue that we should view Symes as a purely selfless actor—Symes clearly stood to gain from her lawsuit. If the Supreme Court had upheld her claim, she would have gained a rather large tax deduction as well as the symbolic benefits associated with a court ruling that implied that her choice to work as a lawyer should be recognized and even encouraged through a government subsidy. Symes did have a personal interest in the outcome. But as Johnson notes, by focusing only on her privileged status and the drawbacks of her legal argument with respect to class dynamics, we ignore various important features of the litigation. The single-minded focus on Symes's drawbacks as a plaintiff leads commentators to ignore the link between child-care needs and gender oppression. It misses the fact that had Symes prevailed, we might have been one step closer to winning a reclassification of child care—a move from the world view that the work is a private family endeavour to one that sees child care as having important public dimensions—a public good that should be publicly funded.<sup>45</sup>

Finally, after extensively summarizing the *Symes* litigation, describing the range of responses to Symes as a litigant, and critiquing the language of selfishness for perpetuating gender biases in society, Johnson provides an intriguing assessment of each actor's role in the child-care controversy. In the last chapter of *Taxing Choices*, she offers a sympathetic explanation for why so many people adopted accusatory and harmful language when debating the complex social issues associated with gender, parenthood, and the law. Johnson assesses the language adopted by the government in the courtroom proceedings,<sup>46</sup> by the courts in their judicial opinions,<sup>47</sup> and by academic observers.<sup>48</sup> In each case, she notes that the speakers at one time or another acknowledged women's economic interests and considered the costs associated with the gendered nature of child care, but for a variety of reasons—including concerns about public resources, institutional constraints, and valid concerns about the poor—all supported the status quo in lieu of the legal reform that would have won Symes a deduction. Notably, Johnson indicates that the actors did not act in bad faith and did not seem unwilling to support women's goal of "getting ahead"; instead, each acted and spoke in good faith and appeared to act for the public good in opposing Symes.

I agree with Johnson's analysis and her conclusions about language and discourse and their ability to shape debate and affect lives, as well as with her argument that

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44 Ibid., at 49-51 (providing a brief summary of the work of Elizabeth Symes and her lawyer, Mary Eberts, with feminist groups over the course of years).

45 Ibid., at 187-90.

46 Ibid., at 190-91.

47 Ibid., at 191-92.

48 Ibid., at 193-95.

each of the players in the *Symes* controversy acted in good faith, notwithstanding the potentially harmful effects of the words they chose in making their points. After reading the book, however, I was struck by Johnson's failure to discuss, in any systematic fashion, *why* the feminists, judges, scholars, and survey respondents so vehemently opposed Symes. Put differently, why did the courts feel it necessary to decide the technical tax issues that arose and then append to their decisions language that seemed to reflect their personal views on Symes's privileged position and her apparently selfish reasons for bringing the lawsuit?<sup>49</sup> Why did the scholars not only critique Symes's class bias but also disparage her decision to bring the lawsuit as a "scam"?<sup>50</sup> Why did the wage-earning women argue not only that Symes's strategy harmed their changes of getting more effective legal reform in the future but also that her decision to litigate was an obstacle to "any serious [discussion] of sex discrimination"?<sup>51</sup> And why did the survey respondents argue not only that the deduction Symes sought was costly but also that Symes already seemed to have too much wealth and too much privilege, given that she could afford a nanny? In the next section, I pick up where Johnson left off. While she examined the consequences of the discourse that arose, I investigate *why* the speakers adopted the particular language they did and what goals they hoped to achieve.

### THE STRATEGIC USE OF LANGUAGE

Johnson does not give sustained attention to the manner in which speakers use language in the effort to achieve political, social, and legal goals. Politics and law often raise complex distributional and behavioural issues associated with how we should allocate public resources and what types of activities we should undertake, and the manner in which society resolves these issues speaks volumes about who we are and how well we understand one another's needs and desires. But the resolution of these issues also suggests just how effective speakers are at making arguments and winning entitlements and rights for themselves. Johnson systematically shows how the courts' and commentators' language informs us of the former but not the latter; she ignores how the actors in the *Symes* controversy used language to advance their own self-interested goals and aims.

I do not mean to suggest that we can easily separate the expressive and instrumental features of language or that Johnson completely ignores how courts and commentators adopted certain arguments or manners of speech to advance individual aims and goals. Indeed, she is very much aware of this possibility.<sup>52</sup> But in

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49 *Supra* notes 28 to 34 and accompanying text.

50 *Supra* note 23 and accompanying text.

51 Johnson, *supra* note 1, at 165 (quoting Professor Dianne Pothier). Compare note 19, *supra*, and accompanying text.

52 Johnson, *supra* note 1, at 136-40 (noting, at 140, that the courts and government lawyers adopted language that shamed Symes for neglecting "to police the gendered codes for female selflessness. Symes failed the codes. She should be made to feel her shame").

the end she goes to great lengths to show her readers that if we view language and discourse as strategic and not authentic, then we view the speaker as an “enemy.”<sup>53</sup> According to Johnson, the best way to understand the public debate over the child-care subsidy is to avoid viewing the speakers (even if we dislike their argument) as strategic actors or “enemies.” Instead, we should view them as “friends” seeking to make valid and authentic contributions to the debate.<sup>54</sup> This sympathetic approach arguably enables observers to pay attention to what has been said and to better understand the speakers, their arguments, and the constraints under which they operate. Johnson does not avoid critiquing various individuals’ choices and behaviours, but she does so with the caveat that she believes that all were acting in the public good and without intent to harm. They were, in short, not strategic. I find the friend/enemy dichotomy seriously flawed—a dichotomy that ultimately leads Johnson to limit her analysis to how she thinks “friends” would like to be understood.

At least since the time of Aristotle, the strategic and persuasive features of discourse have been acknowledged and applauded.<sup>55</sup> To use language in a strategic fashion is not necessarily to cloak selfish aims and unjust purposes in the rhetoric of the common good; rhetoric and persuasion are often the means to convey knowledge and promote justice, notwithstanding the reality that speakers often choose (and exploit) language with selfish goals in mind. As Aristotle argued, the strategic speaker who passionately advocates a particular position on an important topic may win not because he is a con artist or because he intends to deceive or harm, but because he has the best idea for the times, even though the idea coincides with his personal interests.<sup>56</sup> Contrary to the argument that Johnson sets out in *Taxing Choices*, many believe that the strategic use of language is not only friendly and authentic, but high art.<sup>57</sup> In this section, I hope to identify the strategic use of language and to demonstrate that Symes was not the only individual who made arguments that reflected her personal preferences; the courts and commentators also acted with their own interests in mind.

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53 Ibid., at 178 (arguing that “there is a tendency to treat various parties as either friends or enemies, and to extend accordingly more or less trust to the language that each uses and to the purposes being pursued”).

54 Ibid., at 178-95 (analyzing commentators’ language in a “friendly manner”).

55 See, for example, Mary P. Nichols, “Aristotle’s Defense of Rhetoric” (1987) vol. 49, no. 3 *The Journal of Politics* 657-77 (investigating Aristotle’s response to critics of rhetoric and arguing that a rhetorician must persuade the audience that he acts for noble and just purposes, and not only for revenge or for private interests.).

56 Ibid., at 661-71.

57 Triadafilos Triadafilopoulos, “Politics, Speech, and the Art of Persuasion: Toward an Aristotelian Conception of the Public Sphere” (1999) vol. 61, no. 3 *The Journal of Politics* 741-57; and Nichols, *supra* note 55, at 661-71. For additional views on rhetoric and its uses in political and legal debate, see Jeffrey E. Cohen, “Presidential Rhetoric and the Public Agenda” (1995) vol. 39, no. 1 *American Journal of Political Science* 87-107; and Richard A. Brisbin Jr., “Antonin Scalia, William Brennan, and the Politics of Expression: A Study of Legal Violence and Repression” (1993) vol. 87, no. 4 *American Political Science Review* 912-27.

## Understanding the Stakes

Before I turn to the strategic use of language, I first discuss what was at stake when Symes brought her claim into court. That is to say, who would benefit if Symes had prevailed and, alternatively, who stood to gain when the Supreme Court maintained the status quo? Johnson does not explicitly discuss the stakes associated with these two options. Nevertheless, if we are to appreciate how speakers can (and do) use language and rhetoric to effectuate their aims and goals, the consequences of the different possible outcomes must be understood.

### *The Winners*

If Symes had prevailed in her lawsuit, the most obvious impact of the decision would be a new tax deduction for self-employed women under sections 9 and 18 of the Act, a far more advantageous deduction than that allowed under section 63. This redistribution of public resources to self-employed women with child-care expenses would not only put money into their pockets; it would also provide economic incentives that would, in turn, lead other women to seek the deduction. More professional women would continue to work in the business sector and hire nannies to perform child-care services in their homes, and more women would seek professional careers because of the higher pay awarded to the work (through a larger deduction). The deduction, then, would have facilitated greater competition in the traditionally male-dominated business environment.<sup>58</sup>

Not only would a victory for Symes have awarded economic benefits to self-employed women and sparked incentives for women to compete in the business world, it also would have had an important symbolic impact—it would have suggested that society (or at least the justices) believed that businesswomen with children should be encouraged to work in the marketplace and to compete with men on equal footing. The Supreme Court, in effect, would have suggested that professional women need not sacrifice their careers for their families and, at the same time, that it is not always the most virtuous and moral route to put husband and children above all else. In short, if Symes had prevailed, the court would have seriously challenged the longstanding social norm associated with gender roles and the division of labour within the household. Understanding these symbolic and material consequences helps to explain the widespread and strong public response to the lawsuit. If Symes had won her tax deduction, it is possible that women's role in society (along with men's control over the business world) would have been somewhat more threatened than it already is—a threat that the Canadian government would have endorsed and in fact encouraged. Professional women, then, would obviously stand to benefit from a Supreme Court decision that awarded a tax deduction to Symes.

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58 See Nancy C. Staudt, "Taxing Housework" (1996) vol. 84, no. 5 *The Georgetown Law Journal* 1571-1647, at 1585-96 (noting that women are systematically materially disadvantaged and men are advantaged by the gendered division of labour).

When *Taxing Choices* is viewed within a framework that accounts for the consequences just outlined, the strategic use of language becomes transparent. The book contains quotes from a number of women law professors and business owners, for example, who hoped that the court would grant Symes a deduction; they argued that if it left the current system unchallenged, it would sanction “the historically disadvantaged status of women in the economy.”<sup>59</sup> Lynette de Batt, publisher of the monthly *Alberta Women in Business Newsletter*, wrote that the majority opinion in the *Symes* case gives one the distinct impression that “men just don’t want to see women getting ahead.”<sup>60</sup> Moreover, it is entirely predictable that the two female justices on the Supreme Court of Canada, who had firsthand experience with the problems of trying to work and care for children,<sup>61</sup> supported Symes in her request for a tax deduction. Justices L’Heureux-Dubé’s and McLachlin’s dissent from the majority opinion argued:

The real costs incurred by businesswomen with children are no less real, no less worthy of consideration and no less incurred in order to gain or produce income from business. . . .

What, in my view, has traditionally been recognized as a “commercial need” has everything to do with those persons who have traditionally held positions in the commercial sphere—primarily men. . . .

The definition of a business expense under the *Act* has evolved in a manner that has failed to recognize the reality of businesswomen.<sup>62</sup>

I do not mean to suggest that all professional women did or would support Symes. It is easy to imagine businesswomen without children objecting to a redistribution of public money to women with children, regardless of class or gender.<sup>63</sup> Moreover, various other groups in addition to professional women may also have supported the deduction that Symes sought, including men married to the women who sought to gain financially from a subsidy. My point in this section is to juxtapose the groups of women that Johnson documented as supporting Symes with those

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59 Johnson, *supra* note 1, at 163 (citing Margarit Cassin and Professors Donna Eansor and Christopher Wydrzynski).

60 *Ibid.*

61 *Ibid.*, at xi.

62 *Supra* note 2, at 699, 789, and 819.

63 I should acknowledge here that I tend to be one of these people. For an illuminating discussion of why some professional women object to child-care subsidies in certain contexts, see Mary Ann Case, “Commentary: How High the Apple Pie? A Few Troubling Questions About Where, Why, and How the Burden of Care for Children Should Be Shifted” (2001) vol. 76, no. 3 *Chicago-Kent Law Review* 1753-86 (questioning subsidies for families with children as unwise and unfair); and Katherine M. Franke, “Theorizing Yes: An Essay on Feminism, Law, and Desire” (2001) vol. 101, no. 1 *Columbia Law Review* 181-208 (discussing feminists’ focus on children, parental responsibility, and child-care subsidies as harmful to the development of women’s sexual desire and fantasy).

who opposed her cause and to suggest that all were acting reasonably—and in their self-interest.

### *The Losers*

Many individuals and groups had a strong interest in preserving the status quo—or, put differently, in seeing Symes lose her lawsuit. For the purposes of analysis, I will discuss three distinct groups (and their advocates). The groups (and advocates) that I identify for discussion were presented in *Taxing Choices* as some of the most vocal commentators when it came to the child-care controversy: they include professional men, wage-earning women, and stay-at-home mothers. In this discussion, I will show that each of these groups acted in a rational manner when commenting on the Symes litigation; in other words, they too acted in accord with their preferences and stood to gain when they advocated the status quo. Identifying self-interest does not suggest that a person acts without any concerns for justice or fairness; often just the opposite is true. Perceptions of the good may coincide with individual self-interest, and it is this self-interest that tends to motivate people to act or to take a strong position on public issues.<sup>64</sup> Thus, just as Johnson ably demonstrated that Symes could act for her own well-being and still have gender equality in mind, the same is true for every one of the actors I discuss below.

#### STAY-AT-HOME MOTHERS

Although many feminists critique the gendered division of labour, many other women prefer to stay home and subscribe to this division of labour, perhaps because they believe that a woman's role is naturally and properly in the home, or because they genuinely enjoy staying home with their children, or because they believe that it is easier to accept what many perceive to be a lower-status position in society than to fight an entrenched social norm.<sup>65</sup> Whatever the reason, this group of women unambiguously gets utility from the accolades and esteem showered upon them by society when they comply with the gendered social norms. Thus, they would rationally object to Symes's argument. They would oppose a law that paid women to reject their choice regarding family and work: the government, at the minimum, should be neutral as to these preferences and should not privilege working women's choices. Stay-at-home mothers might also oppose the deduction Symes sought because it would suggest that their decision to undertake caretaking responsibilities at significant personal cost was not particularly virtuous and deserving of applause, but just one option among a range of ethical choices for the modern woman. When Johnson reported in *Taxing Choices* that Cynthia Forsyth and Kathy Harvey, two activists who supported women's work in the home, were opposed to Symes's argument because the deduction would have devalued "the care parents give at home,"<sup>66</sup>

64 See Nichols, *supra* note 55, at 661-71.

65 Staudt, *supra* note 58, at 1579-88 (discussing women's diverse views on household labour).

66 Johnson, *supra* note 1, at 164.

readers should not have been surprised. The symbolic impact of the deduction that Symes hoped to win and that would benefit Symes and other lawyers and professionals was exactly what stay-at-home mothers feared; existing social norms and the gendered division of labour advantages them, and thus they would rationally support and seek to maintain it as a way of life, or at least object to rules that did not seem neutral as to this choice.

#### WAGE-EARNING WOMEN

Johnson suggests that when the *Symes* litigation led conservative feminists who supported traditional roles for women to align themselves with progressive feminists who advocated the interests of wage-earning women, we saw proof of the “adage that politics makes strange bedfellows.”<sup>67</sup> But a framework that accounts for the strategic use of words would predict just such a coalition. Progressive feminist activists, as Johnson shows, believed that a child-care deduction for businesswomen would not benefit low-income women and that this inability to benefit would lead wage earners and their advocates to prefer the status quo, thereby aligning themselves with conservatives who advocate women’s role as in the home. Wage-earning women would support the status quo over Symes’s argument for at least three reasons.

First, low-income working women might simply object to a law that awards a small subset of (privileged) women an economic benefit and at that same time denies them such a right. Psychologists hypothesize that a central component of people’s angry feelings when it comes to deprivation is that those who are denied resources or things tend to compare themselves to others who have obtained the desired thing.<sup>68</sup> Moreover, numerous empirical studies have lent support to the idea that people who experience relative deprivation are often angry and motivated to object or to engage in social protest—the very response observed among wage earners and their advocates.<sup>69</sup> Second, many wage earners may enjoy marketwork, but a victory for Symes would have the symbolic effect of sanctioning high-income, successful women’s labour while suggesting that lower-income, salaried workers’ rightful place is in the home.<sup>70</sup> By allocating social status to professional women in the market, the wage earners might fear that courts would devalue their own work; once again, this relative deprivation would spark anger and protest. Finally, and

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67 Ibid.

68 Richard H. McAdams, “Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination” (1995) vol. 108, no. 5 *Harvard Law Review* 1003-84, at 1021.

69 Ibid.

70 The fact that this is the approach to statutory interpretation that the Supreme Court adopted in *Symes* confirms that this is how we tend to view these types of questions and issues. In *Symes*, the court held that by addressing child-care expenses under section 63, Parliament must have intended to exclude the expenses from the purview of sections 9 and 18. *Symes*, supra note 2, at 763.

very much related to the last two points, if the wage earners and their advocates believed that a win for Symes would bar the future reforms necessary to ensure that low-income women would be able to obtain economic support for child care (through a national child care program, for example) given limited public resources and parliamentarians' general resistance to expanding women's influence in the market, then this group would object to Symes's deduction. Their objection would be grounded in the hope of winning the preferred reform in the future and the belief that high- and low-income women were caught in a zero-sum game. In other words, the wage earners believed that if Symes won her lawsuit, it would necessarily bar satisfaction of their own needs and preferences; thus, they were willing to invest significant time and energy to preserve the status quo,<sup>71</sup> an environment that, while not altogether ideal, was better than the reform that Symes advocated.

Johnson cites two activists who are very much concerned with class and gender as strongly opposed to the deduction that Symes advocated. Martha Friendly, who works with the National Committee on the Status of Women, said, "It would have been very unfortunate if the existing tax breaks had been extended and made available to a very select and privileged group of people."<sup>72</sup> And Sue Wolstenholme of the Child Care Advocacy Association of Canada said, "This is only a very minimal kind of benefit to a very few people who have lots of other options. . . . So it's not really any kind of a solution to the child-care problem in this country."<sup>73</sup> These positions are perfectly defensible and predictable within a framework that considers individual preferences when seeking to explain arguments on social issues.

### PROFESSIONAL MEN

Professional men would also have strong reasons to object to the tax deduction that Symes sought in court. Their preference for the status quo would be grounded in the advantages associated with the social norm that puts women in the home and men in the market. Under this gendered regime, there is never a question about who will perform child-care services in the home and who will work for a wage in the market. Many men (as well as women) believe that this is the natural and right order of things. But at the same time, as countless commentators have noted, the gendered division of labour significantly benefits and empowers men in society. If the court had granted a deduction for Symes, men who prefer a gendered division of labour would rightly fear that it would lead women to seek help with child care, thereby causing them to abdicate their maternal responsibilities and freeing them

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71 Notably, the wage-earning activists opposed Symes because they believed that they were in a zero-sum game when it came to public resources. But McAdams, *supra* note 68, argues that people tend to cite material reasons in making arguments, while in fact they worry most about the symbolic features of the law.

72 Johnson, *supra* note 1, at 164.

73 *Ibid.*

to work in the market.<sup>74</sup> Professional and self-employed men, in particular, would object to the child-care subsidy for businesswomen because it could spawn an army of new competitors—competitors who very well may be better lawyers, doctors, and managers and thus could appropriate both business and clients. I found it notable that *Taxing Choices* reported lengthy comments and strong objections made by two prominent lawyers, Justice Iacobucci of the Supreme Court and Michael Mandel, two individuals in a group of professional men that would be particularly threatened by Symes's success as a lawyer.<sup>75</sup>

Justice Iacobucci, wrote the majority opinion, which every other male justice joined; each was married with children but had never been solely responsible for the care of his children.<sup>76</sup> As Johnson reports in her book, Justice Iacobucci wrote the majority opinion that expressed some sympathy for working women, but he ultimately sided with the status quo. His opinion reflected an awareness of the fact that women are primarily responsible for child care and that this responsibility, along with various aspects of the law, seems to interfere with women's professional activities—encouraging housework over marketwork.<sup>77</sup> The court, however, was arguably constrained from redressing this harm because it had power to remedy only legal harms, and the harm to which Symes pointed was more sociological in nature.<sup>78</sup> Justice Iacobucci noted that perhaps single mothers experienced the legal harm necessary for the court to act; but given that no single woman was a named plaintiff, the court was left in the position of denying Symes the recovery she sought and maintaining the status quo in the process.<sup>79</sup>

Michael Mandel, a well-known law professor, also expressed concerns about class dynamics and was particularly harsh in commenting on the child-care controversy and Symes's claim for a deduction. He said, "There is nothing in the record to indicate that the failure to speak up for employees was merely strategic on Symes's and Eberts's parts, in other words that they were after anything but the goal of equal rights for businesswomen like themselves. . . . [T]here was no avoiding the fact that this was not just any scam, but a scam against women too."<sup>80</sup> Mandel, in effect, argued that Symes used her status as a woman to get economic

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74 This fear, of course, is just the opposite of that of low-income women and their advocates. While the latter group worries that a deduction for Symes will lead courts to deny other women a tax benefit (or some other subsidy), the former fears that if Symes prevails, the courts will inevitably expand the subsidy. Either way, both groups strongly prefer the status quo.

75 I agree with Johnson's suggestion that the fact that the justices aligned themselves along gendered lines indicates the importance of putting women on the bench if legal change is to take place, but I would add that *who* the women are is an important detail to consider. As shown in the text, not all women supported Symes; in fact, the majority seemed to oppose her.

76 Johnson, *supra* note 1, at xi.

77 *Supra* note 2, at 762-63.

78 *Ibid.*, at 763.

79 *Ibid.*, at 766-67.

80 Johnson, *supra* note 1, at 178-79.

benefits that no other women would obtain, but for which all women would, through higher taxes, pay. This, in Mandel's view, was akin to the activities of con artists—people who use other (more vulnerable) people to get ahead, all the while claiming that they are acting on behalf of the person they exploit.

Readers might be tempted to think that if Justice Iacobucci and Mandel objected on self-interested grounds, they would have levelled criticisms of Symes that suggested as much. Instead, these men spoke in the rhetoric of institutional constraints, class, and fairness. Indeed, the professional men quoted in *Taxing Choices* arguably found Symes's lawsuit problematic not because it would disrupt gender norms but because it did not go far enough—only wealthy privileged women would benefit, and this unfairly denied wage-earning women the chance to get tax subsidies and to be supported by society in their life choices.<sup>81</sup> I find it odd that to take the position that wage-earning women are deserving members of society, one must argue that Symes should lose her deduction. But even if this was the case—say, because the speakers had in mind limited public resources—the argument still reeks of strategy and self-interest. As most rhetoricians (and good lawyers) understand, persuasive speakers avoid making arguments that unabashedly promote their own self-interest; or, as Aristotle instructed, persuasive rhetoric must appeal to broad common goals and must not obviously accord with the preferences of the individual speaker.<sup>82</sup> Thus, when the Supreme Court spoke of institutional limitations and constraints, it hoped to persuade the parties (and the world) that the decision it arrived at was good and fair, that it had weighed the evidence and had justly applied the rules of law; it saw the social realities and the drawbacks of the decision, but it was compelled to decide as it did.<sup>83</sup> In short, Justice Iacobucci suggested that the court followed the law and not the justices' own "personal preferences," which is precisely what the courtroom setting mandates. And yet the court's decision very well may have reflected the male justices' own predilections, for, as the two dissenting justices noted, the court could have legitimately interpreted the law to reach just the opposite conclusion—that nothing in the Act barred self-employed women from taking a business deduction for child-care expenses.

Moreover, the objection set forth by the wage-earning women and their advocates opened the perfect avenue for professional men like Justice Iacobucci and Mandel to object loudly and vehemently to Symes's argument. They could ingeniously adopt the language of class and fairness, as the feminists themselves had, and

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81 The Supreme Court, for example, specifically commented on the "changing social structure" and the unfortunate demands it placed on women who worked in and out of the home. *Symes*, supra note 2, at 744.

82 Nichols, supra note 55, at 665; see also McAdams, supra note 68, at 1048 (noting that, to be effective, an insult must not accord with the insulter's self-interest).

83 Robert M. Cover, *Justice Accused: Antislavery and the Judicial Process* (New Haven, CT: Yale University Press, 1975), 119-39 (investigating judicial rhetoric, noting that judges often take the position that legal principles disallow certain outcomes, and arguing that this is a means to avoid responsibility for bad outcomes).

simultaneously appear justice-oriented when in fact selfish goals were most likely the very motivation for their campaign against Symes. As I discuss in the next section, not only did their objection reflect professional men's interests, but the specific words they used to describe Symes—selfish, a scam artist, a narcissist—strongly suggest that this group of speakers had more in mind than simply spending resources on women in the most fair and just fashion.

Before turning to the language of selfishness and offering an explanation for why speakers adopted this language in making their arguments opposing Symes's deduction, I would like to note that my point here is not to argue that each of the commentators on the *Symes* case actually held the viewpoints that I ascribe to them; I merely suggest that it would have been rational to hold such views. It is easy to imagine individuals in each group rationally supporting Symes (just as professional women could have rationally objected to her argument). For example, some wage-earning women might have supported Symes's case: they could have aligned themselves with professional women like Symes because they calculated the costs and benefits of a Symes victory differently from those whom Johnson cites in *Taxing Choices*. Wage-earning working women could plausibly believe that if Symes won her case, they would be far more likely to win a larger child-care deduction for themselves in the future. In the United States, just such a train of events transpired recently: Congress adopted a tax benefit that would advantage only middle- to high-income families, and the public outrage that followed led the legislators to work to extend the credit to low-income families rather than eliminate the benefit altogether.<sup>84</sup> It is easy to imagine some professional men supporting Symes—men who do not fear competition from women and who believe that they would gain more with an unlimited deduction for child-care expenses than they currently gain in a society that seeks to maintain a gendered division of labour. Moreover, to point out the advantages gained from supporting the status quo is not to suggest that there were not costs in doing so—many speakers were criticized for criticizing Symes. My point is this: Symes was unlikely to be the only self-interested actor in the drama that unfolded. The courts, the survey respondents, and the commentators—virtually every one of them—supported or objected to Symes's legal reform for reasons that could have reflected, and indeed most likely did reflect, their own personal goals and preferences. Ultimately, the decision to support or oppose Symes rested on the advantages and disadvantages of taking a position, and apparently most commentators believed that the benefits of opposing Symes outweighed the costs.

### The Language of Punishment and Deterrence

The discussion of rationality, self-interest, and motive does not explain the repeated and harsh critique of Symes, a litigant whom many perceived to be a con artist

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84 Edward Walsh and Jim VandeHei, "President Talks Up Tax Policy for Boosting Economy: Bush Calls for Expanding Child Credit, but GOP Is Wary," *Washington Post*, July 25, 2003 (President Bush proposes to extend the family tax credit to lowest-income families).

intent on harming women for her own personal advancement. To understand why commentators used unforgiving language when speaking about the *Symes* case, I look to the vast literature on social norms and the importance of punishment.<sup>85</sup> Students of social norms argue that cooperation is essential for maintaining the status quo.<sup>86</sup> When cooperation breaks down and individuals or groups begin to violate socially mandated roles and behaviours, norms begin to dissolve, and the potential is created for a new norm to emerge—a new social order that may work to advantage some but not others.<sup>87</sup> A new gender hierarchy, of course, is precisely what Symes and her lawyer sought to achieve when they filed their lawsuit in court; Symes and Eberts were, in effect, norm entrepreneurs, two individuals who sought to change the age-old convention that prescribed a gendered division of labour and worked as a barrier for women seeking to compete in professional circles.

Johnson's argument that the commentators used unfortunate language to make their valid points about a difficult social issue is true enough, but I do not agree that the language was not meant to harm; more likely, this was precisely the objective. The individuals who supported the status quo—Cynthia Forsyth, Kathy Harvey, Martha Friendly, Sue Wolstenholme, Justice Iacobucci, and Michael Mandel—not only pursued a strategy that made their views on the tax subsidy for professional women clear, but they used language that sanctioned Symes for her boldness in making the argument in the first place. When they characterized Symes—a well-known feminist who had a long history of working for the advancement of women—as a selfish egomaniac intent on harming women, they used language that would harm her and work to ostracize her from the feminist circles she had worked throughout her life to maintain and build. The objectors, in short, sought to scorn and isolate Symes, to retaliate against her for the decision to go to court in order to challenge the gendered hierarchy.

Scholars who study social norms note that groups and individuals elicit solidarity by rewarding those who cooperate and by sanctioning those who fail to do so through disparagement and ridicule (or least through the failure to praise).<sup>88</sup> Maintaining cooperation with social norms depends on the success of the mechanisms

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85 For three particularly interesting articles, see Eric A. Posner, "The Regulation of Groups: The Influence of Legal and Nonlegal Sanctions on Collective Action" (1996) vol. 63, no. 1 *University of Chicago Law Review* 133-97 (general investigation of the importance of sanctions and punishment for maintaining norms); Lawrence Lessig, "The Regulation of Social Meaning" (1995) vol. 62, no. 3 *University of Chicago Law Review* 943-1045; and McAdams, *supra* note 68 (investigating group behaviour in the context of race discrimination norms). For a discussion of rhetoric and norms in wealth tax policy, see William Blatt, "The American Dream in Legislation: The Role of Popular Symbols in Wealth Tax Policy" (1996) vol. 51, no. 2 *Tax Law Review* 287-354.

86 Posner, *supra* note 85, at 142.

87 For a more formal discussion of social norms and the importance of widespread cooperation, see Eric A. Posner, "Symbols, Signals, and Social Norms in Politics and the Law" (1998) vol. 27, no. 2, part 2 *The Journal of Legal Studies* 765-98; and Jennifer Roback, "Racism as Rent Seeking" (1989) vol. 27, no. 4 *Economic Inquiry* 661-81.

88 Posner, *supra* note 85, at 142.

used to punish. After all, the point of the sanction is not only to punish the bad actor, but also to deter individuals from undertaking similar activities in the future. Just as formal rules harshly sanction individuals who intentionally violate codified norms, groups can protect informal rules of behaviour by imposing extralegal sanctions that entail disrespect, contempt, and isolation.

Moreover, to maximize the cost of being punished, groups tend to assign sanctioning responsibilities to the most effective agents, those in positions of power who use rhetoric and language in a persuasive manner. The individuals cited in *Taxing Choices*—leaders in women's groups, Supreme Court justices, and a prominent law professor—all fit this description and in fact did effectively use language to punish and deter. Through the use of fierce language in legal opinions, newspapers, and other public documents, the commentators were certain to publicly embarrass and humiliate Symes. This would, in turn, deter not only Symes and Eberts but other professional women from arguing for a tax deduction in the future. Johnson points out that the commentators used language to criticize Symes that may have unintentionally entrenched the gendered division of labour. I argue that these consequences were the very goal of the discourse.

## CONCLUSION

*Taxing Choices* is an impressive investigation of the controversies that arose in the *Symes* litigation. One important feature of the book is Johnson's focus on language, its hidden meanings, and its unintended consequences. In this review, I have noted that language is not only expressive; it can also be used instrumentally to secure the speakers' own self-interested goals and aims. *Taxing Choices* documents the widespread belief that Symes and Eberts used language and legal arguments to win selfish goals. I have argued here that virtually every commentator—those who supported Symes and those who opposed her—used language and rhetoric to achieve their own personal preferences, notwithstanding that they often cloaked their preferences in the language of the common good.