Reflections on Intersections: Some Post-Game Comments

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> Thinking is periodically nudged, frightened, inspired, or terrorized into action by strange *encounters*.
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> William E. Connolly, *Neuropolitics: Thinking, Culture, Speed* (2002)

> [T]he power exerted by a legal regime consists less in the force that it can bring to bear against violators of its rules than in its capacity to persuade people that the world described in its images and categories is the only attainable world in which a sane person would want to live.
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> Robert W. Gordon, "Critical Legal Histories," in *Stanford Law Review* (1984)

To have *Taxing Choices* be the subject of the *Canadian Tax Journal*'s policy forum is an honour. Seldom is an author offered the opportunity not only to listen in to a debate about her book, but also to participate in that discussion. It was difficult to respond to four such thoughtful engagements with the book.[1] All four reviews had

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1 Part of the problem was this: the reviews were so generous that I had no idea how I could possibly respond. Did I have anything to add, or should I say nothing, guided by the notion that discretion is the better part of valour? Neil Brooks applied no pressure, telling me that the choice to respond or not was mine. That was a twist. I had just spent the last 10 years of my life focusing on the hidden constraints on choice, and now "the choice was mine." The darker side of my sense of humour pushed me to a moment of extended self-analysis. The choice was mine, but what kind of choice was it really? Because the fact of the matter was that all four reviews were gifts. And that was the problem. Several years ago, I read Bill Miller's disturbingly delicious (albeit slightly pathological) book, *Humiliation: And Other Essays on Honor, Social Discomfort, and Violence* (Ithaca, NY: Cornell University Press, 1993). I have been nervous about gifts ever since. Gifts, he reminds us, have their dark side. They come with embedded obligations to reciprocate in some form. One who does not reciprocate runs the risk of appearing ungrateful, ill-mannered, or cheap. The choice to respond was mine? I was caught in a Hamlet-esque moment, paralyzed by choice, by the risks of both action and inaction, by both speech and silence.

left me feeling pulled not toward the safe arena of academic engagement, but toward a less comfortable (and less tidy) interior space of reflection—reflection on intersections, and on the role of "strange encounters" in the unfolding shape of our intellectual, political, and personal lives. I found myself thinking back to March 1993, to the shape of a strange encounter, the kind of encounter that could lead a neophyte deep into the entrails of tax law and keep her there for nearly 10 years.

But even this beginning leaves me exposed to risk, since, in the context of a specialized and pre-eminent tax journal, one should not lightly confess to anything less than full commitment to the world of tax. I hesitate to confess, to make the admission that lies like a hidden sin, locked in a dark closet. In her review, Pat Armstrong said, "Few of the people I know would find tax law fascinating, or see it as a particularly useful way to think about theory, evidence, class, race, gender, politics, parenthood, strategy, and contradictions." Before the strange encounter of 1993, I was such a person. I picked my courses at law school with the specific goal of avoiding "Tax." Thus, I see no small irony in having spent 10 years grappling with the very thing I had sought most to avoid.

In 1992, I left the law firm that had given me such an interesting exposure to the real world of law to spend 12 months as a law clerk at the Supreme Court. At the court, just as in the law firm, happiness was often to be found less in working on issues that interested me than in becoming interested in the issues I was working on. This generally wasn't very difficult: cases on appeal and supporting facta would arrive on the desk, and I would be drawn in. I was also able to spend time in the courtroom, listening to various arguments and interventions from the bench. Being a clerk at the Supreme Court was a bit like being offered a box of "Bertie Botts Every Flavour Beans":[2] the facta, the oral arguments, the comments from the bench—you never knew whether the next golden jellybean would be toffee or earwax. Each moment was fraught with the promise of possibility. There was a disconcerting tendency for things that interested (or baffled, amused, outraged, disgusted, or scared) me to surface in ways and places unexpected.

The *Symes* case was just such a moment—a moment of strange encounter between the world of tax and the discourse of choice. I was left troubled and unsettled during the oral hearing at the court by two related exchanges. First, in response to comments made by J.J. Camp (for the intervening Canadian Bar Association) about the economic burdens of caring for children, Justice Major posed the following question:

> MAJOR, J.: Let me ask you, to 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

2 J.K Rowling, *Harry Potter and the Philosopher's Stone* (London: Bloomsbury, 1997), 78: "'You want to be careful with those,' Ron warned Harry. 'When they say every flavour, they *mean* every flavour—you know, you get all the ordinary ones like chocolate and peppermint and marmalade, but then you can get spinach and liver and tripe. George reckons he had a bogey-flavoured one once.'"

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?

MR. CAMP: No. I don't think society encourages one way or another, but society should not disadvantage her from doing so.

MAJOR, J.: No, but who are they disadvantaging? Not all women. It is women who elect to have children.

MR. CAMP: Yes.

MAJOR, J.: Isn't that a matter of their choice, knowing that having a child is going to bear some costs in time and money?

MR. CAMP: Mr. Justice Major, I am tempted to say and I will say it is the future of our society at stake. We cannot enjoy a future unless we have children, we cannot enjoy it unless those children are properly cared for. They are us, they are our future.

MAJOR, J.: But surely there is an element of personal choice in a decision to have children. It serves two purposes: one may be the future that you describe, the other is whatever comfort may arise out of having children. My simple question is: To what extent does the element of choice play any part in your submission?

MR. CAMP: The element of choice as you have described it plays no part in my submission.[3]

Later in the hearing, Mary Eberts, Elizabeth Symes's lawyer, returned to Justice Major's question about choice:

The last point that I wish to make addresses the questions of my lord Mr. Justice Major and of my lord Mr. Justice Gonthier on this issue that having children is a matter of choice.

It is unfortunately true that if a couple chooses to have children the woman must bear them. There is no option. There is no choice there. Our social arrangements are such that women, by and large, also must rear them. In spite of the contention of counsel for the Attorney General of Quebec that men and women now, by statute, are equally responsible for the expenses of child care, I would ask that you not take the statutory prescription for the factual reality. There is ample documentation in this record that women still must bear the responsibilities for child care.

She has no choice, or at least a false choice, if she wants to participate in the labour market. If she puts her child care responsibilities first, she chooses either to stay out of the work force or to work part time, because it is simply not possible to stay in it, or she chooses to pay a higher proportion of her income for child care than a man would have to do.

On the issue of childlessness, it is not a choice for a woman to be childless in order to participate in the work force. Men do not have to choose to be childless in order to

3 Transcript of oral hearing in *Symes v. Canada* at 63-65, reproduced in Rebecca Johnson, *Taxing Choices: The Intersection of Class, Gender, Parenthood, and the Law* (Vancouver: UBC Press, 2002), 88-89.

> participate in the work force. It is a false and cruel choice to say that a woman voluntarily chooses to be childless. She is in fact responding to the structural inequities of the labour market that make it very difficult for women to participate in it while they have child care responsibilities.
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> This Honourable Court has recognized that in recognizing the ability of women to choose reproductive freedom, because often women are in a situation where they cannot afford to raise children, so they will seek abortions. Until we have a society where women are equal and can equally afford to raise their children in the same circumstances as men do, that "sombre choice"—and I put it in quotation marks—must all too unfortunately still be available to them.[4]

Something about the emergence of "choice" in this series of exchanges left me disconcerted, excited, and enraged. I will admit that Justice Major's comments left me so angry that I was speechless. Indeed, it was a long time before I could even begin to articulate what it was about his comments that so upset me. I didn't want to deny the importance of choice, but something about the use of "choice" in the context seemed inappropriate. It wasn't that I thought the question of choice couldn't be addressed. Nor did I disagree with Justice Major's comments that women might choose to have children and might derive some comfort from them. It was rather that he seemed to be raising choice as a trump card: if she chose, she can't complain. But the comments quoted above made me uneasy, as if I had been witness to some form of sacrilege, as if the notion of "choice" had been defiled.[5]

Eberts's response spoke directly to my anger over the earlier exchange about choice. Rather than diminishing the importance of "choice," rather than claiming that choice had no role to play, Eberts spoke of constraints that shaped women's and men's choices and that generally remained unacknowledged. I was also affected by the "leakage" of emotion in the intervention itself. In law, we are trained to speak in the language of neutrality and reason, to keep control of the flow of emotions and passions that drive our visions of justice.[6] But sometimes, as here, those currents surface.

In this moment of mixed anger and exhilaration, there was a further lingering discomfort. Even if the Eberts intervention was an important rejoinder to Justice Major's question, it too felt out of place in some sense. Yes, women's choices were constrained. That was a given. But how were those constraints to help us theorize tax deductions? How could the nested and interconnected webs of involvement in

4 Transcript of oral hearing in *Symes v. Canada* at 154-55, reproduced in *Taxing Choices*, ibid., at 89.

5 At this point, I will note that I did enjoy Nancy Staudt's comments about the failure to attend to the intentional deployments of this discourse in the *Symes* case. The anger that she sees as missing in the book, the sense of outrage with the discourse of choice, is an emotion that I felt strongly for some time, and part of me took a certain pleasure in seeing her articulate some of what I have felt at different times.

6 Susan Bandes, ed., *The Passions of Law* (New York: New York University Press, 1999).

the work/family/community/children confluence possibly be resolved through reference to choice, either its presence or its absence? Perhaps Camp had been right to argue that choice had no role to play here.

But why then did it seem necessary to Justice Major to ask about the role of choice? And if choice was simply beside the point, why was I so angry that he had asked the question? Why was I so moved by what I should have perceived as an unnecessary intervention by Eberts? In this strange encounter of tax law with the discourse of choice, I felt an unsettling of my assumptions about the conflicts and issues at the heart of this case. This was a tax case. It was about a deduction, about money. But it was also starting to feel, for me, as if the money was in some way very much beside the point. Perhaps, ironically enough, choice *was* very much at the centre of the case. This strange encounter was producing, for me, a "leaky moment": a moment in which things that I thought belonged in one arena had spilled over into another inappropriate one. The experience was disorienting, and it troubled my sense of the proper place of things and arguments.

Let me attempt to explain. Despite the constant reminders in law school that the law did not come packaged as "tort law" or "criminal law" but was one marvellous whole, the pedagogy and practice of law do in fact reward a certain amount of specialization and compartmentalization. My attempts to avoid the study of tax were a product of this tendency. Friends who intended to do corporate work would point out that they had no need of knowledge about criminal law or procedure (or indeed any of those fluffy "perspectives" courses). And I, likewise, focused on "perspectives" courses: human rights, law and society, Charter litigation. I understood that there were tax dimensions to many issues, but I was happy to leave those dimensions to the tax experts. I was into a different game. Or was I? *Symes* was the moment in which my sense of the boundaries became less rigid, and I was left wondering whether, after all, there were some other important games going on in the background that I had just failed to see. In particular, what was going on with "choice"?

If *Symes* was the breakthrough moment for me, it is also true that the ice had been melting throughout my year at the court. I found myself disconcerted by the frequency with which choice kept popping up in cases before the court. Sometimes, of course, the discourse of choice emerged exactly where I expected it. Talk of choice made perfect sense when the court addressed the doctrine of choice of forum.[7] So too the emphasis on choice and its absence in the criminal law context, where counsel and judges battled over the voluntariness of statements made to the

7 *Hunt v. T & N plc*, [1993] 4 SCR 289 (on the constitutionality of the Quebec statute prohibiting the removal from the province of documents of business concern); *Amchem Products Incorporated v. British Columbia (Workers' Compensation Board)*, [1993] 1 SCR 897 (in the context of a case in Texas involving nearly 200 people claiming asbestos-exposure related injury, dealing with remedies to control the parties' choice of forum).

police: had the accused truly chosen to speak?[8] In the context of the tort of battery, choice was foregrounded when the court concluded that consent would be legally ineffective if the disparity in the relative positions of the parties was so significant that the weaker party was not in a position to choose freely.[9] In the context of refugee claims, the discourse emerged in determining whether or not one's membership in a persecuted social group was based on "choice" or on an "immutable personal characteristic."[10] And in the context of immigration and refugee screenings, choice emerged when the court considered whether the state had assumed control over the movements of an individual such that the person believed that he had no choice but to obey.[11]

Certainly there were occasions on which the discourse of choice, if expected, was nonetheless occurring in contexts that were highly charged with politics and passion. Although it was a powerful and painful thing to see Sue Rodriguez sitting in the courtroom, watching those who would make decisions about the shape of her life and death, it was no surprise to hear the discourse of choice swirl around the body of a woman suffering from ALS: no surprise to hear the heated and passionate arguments about the value or risk of determining whether or not people could choose how and when to end their own lives.[12] Nor was it a surprise to hear passionate claims being made in *Mossop* in the language of choice for and against an understanding of "family status" that would be broad enough to include same-sex couples.[13]

I expected to hear the discourse of choice invoked in the context of child custody and access questions related to the right of one parent to educate the children in one religious tradition over the objections of the other parent (or indeed over the objections of the children themselves).[14] Such cases pressed logically on the boundaries

8 *R v. Brown*, [1993] 2 SCR 918 (whether the signed statements rendered the statement voluntary; dissent on whether or not this was a new issue on appeal).

9 *Norberg v. Wynrib*, [1992] 2 SCR 226 (fiduciary duty in the patient-doctor relationship vitiating "consent" where an addicted patient acquiesced to a doctor's suggestion of a sex-for-drugs arrangement).

10 *Canada (Attorney General) v. Ward*, [1993] 2 SCR 689 (finding an Irish terrorist organization not to be a "particular social group" for purposes of establishing a convention refugee claim).

11 *Dehghani v. Canada (Minister of Employment and Immigration)*, [1993] 1 SCR 1053 (finding that there is no detention, and thus no right to counsel in the context of examinations at Canadian ports of entry by immigration officers).

12 *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 SCR 519 (on the constitutionality of Criminal Code provisions prohibiting assisted suicide).

13 *Canada (Attorney General) v. Mossop*, [1993] 1 SCR 554 (whether heterosexually exclusive definition of "spouse" violates the right not to be discriminated against on the basis of family status).

14 *Young v. Young*, [1993] 4 SCR 3; and *P(D) v. S(C)*, [1993] 4 SCR 141 (scope of "best interests of the child" in the context of conflicts between custodial and access parents over the religious education of the children).

between choice and constraint. To what extent should the law interfere with a person's freedom to make choices about his or her own life? To what extent and for what reasons was the community entitled to place constraints on those choices? Which individual choices could be tolerated and which could not? What about the choice to sell or consume sexually explicit material,[15] or to provide or purchase a lap dance?[16]

It was, however, a bit of a surprise to note how the expected discussions about choice were sometimes deflected or repressed. For example, when Henry Morgentaler sat in the courtroom in 1993, there was a deafening silence on the question of women's reproductive choice: the choice under scrutiny was the choice of the provincial government to determine that, in order to be covered by provincial health insurance, certain medical procedures (including abortion, colonoscopy and liposuction) had to be done in hospitals rather than clinics.[17] But if the explicit discussion did not directly address the question of women's reproductive choice, it was also clear that this choice was very much the central issue, and that strong feeling about that choice had produced the legislation under scrutiny.

And I began to notice the discourse of choice emerging in ways that I had not anticipated. In particular, it emerged as an explanation for constraints on the court. In *Mossop*, for example, Chief Justice Lamer commented on Mossop's "choice" to decline the court's invitation to reframe his case as a Charter case.[18] The chief justice

15 *R v. Butler*, [1992] 1 SCR 452 (on the constitutionality of the Criminal Code obscenity provisions).

16 *R v. Tremblay*, [1993] 2 SCR 932 (whether lap dances are "indecent" in light of community standards of tolerance).

17 *R v. Morgentaler*, [1993] 3 SCR 463 (finding that the legislation was colourable and had been designed with the express purpose of preventing Dr. Morgentaler from setting up freestanding abortion clinics in Halifax).

18 See *Mossop*, supra note 15, at 579-80. Justice Lamer commented as follows:

> [T]he Court invited the parties to this appeal to submit new arguments. Relying on the reasons of the Ontario Court of Appeal in *Haig*, the appellant could then have challenged the constitutionality of s. 3 of the *CHRA* on the basis of the absence of sexual orientation from the list of prohibited grounds of discrimination. This would have enabled this Court to address the fundamental questions argued in the Ontario Court of Appeal in *Haig*. It would then have been possible to give a much more complete and lasting solution to the present problem.
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> The appellant chose not to take this approach, however, and insisted that this Court dispose of its action solely on the basis of the meaning of "family status." In these circumstances, as the Court did not have the benefit of any argument that would have enabled it to give an informed ruling on the questions decided by the Ontario Court of Appeal in *Haig*, and since on the present record it cannot do so, I can do no more than to dispose of this appeal on the basis of the law as it stood at the time of the events in question. Accordingly, the issue to be determined, on the facts of this case, is whether there was discrimination on the basis of Mr. Mossop's "family status" under the *CHRA* as it stood at the time the events occurred.

said that the court was constrained by Mossop's strategic choices, suggesting that a different resolution might have been possible had Mossop made better choices.[19] It became interesting to note the contexts in which the strategic choices of litigants and lawyers were or were not raised as a problem for the court. When would the court comment on these strategic choices? And if strategic choices did not produce the results counsel had hoped for, to what extent would the court choose to intervene or allow for a second chance?[20]

I began to note how frequently the language of choice and constraint was used by the court in speaking about its own responses to legislative choice—that is, in speaking about its jurisdiction and the boundary between appropriate judicial and legislative action. When would the court defer to legislative choices, and when would it not? Would it defer to the choice of the government to hold a referendum in 9 rather than 10 provinces?[21] If the legislature had chosen to exclude unmarried partners from the right to claim an interest in the matrimonial home, would the court use its own powers to craft a remedy in equity?[22] What about a government's choices in its capacity as employer? Where policing services had been contracted out, would the Court choose to accept the government's assertion that there had been a discontinuance of function, even if that would leave former employees without the compensation to which they would otherwise have been entitled?[23] And when would the court use the language of constraint to conclude that it was compelled to review a pre-trial severance order?[24] In places where I expected it and places where I didn't, "choice" kept surfacing.

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19 With hindsight, this suggestion appears somewhat disingenuous. Several years later, confronted with the section 15 argument he had asked for, Justice Lamer agreed with Justice La Forest that there was no violation of the Charter in the exclusion of same-sex couples from the definition of "spouse" in the Old Age Security Act.

20 So, for example, what should the court say about the choice of a lawyer *not* to object to evidence when the failure to object is part of an active tactical decision? For two cases in which the lawyers made such decisions and then sought to have them undone when they did not produce the desired outcome, see *R v. B (FF)*, [1993] 1 SCR 697, and *Brown*, supra note 8. In neither case was the accused brought to task by the majority for this strategic error.

21 *Haig v. Canada*, [1993] 2 SCR 995. With respect to Canada's decision to hold the referendum in all provinces except Quebec, Justice L'Heureux-Dubé focused on choice (at 1030): "It was a political choice, a choice open under the legislation, and a choice consistent with principles of federalism." Justice Iacobucci argued in dissent that the choice was not consistent with the government's Charter obligations.

22 *Peter v. Beblow*, [1993] 1 SCR 980 (dealing with unjust enrichment and constructive trusts in the context of long-term common law relationships).

23 *Flieger v. New Brunswick*, [1993] 2 SCR 651. The majority concluded that this was a "legitimate management decision" that resulted in a "discontinuance of function," such that the appellants could be summarily terminated without the compensation to which they would have ordinarily been entitled. The point is, again, the ways in which assumptions about the value of government (as opposed to other employer) choices shape the reasons produced by the court.

24 See *R v. Litchfield*, [1993] 4 SCR 333. The issue was a pre-trial severance order in a sexual assault case involving a doctor and a large number of women who had brought allegations. The

And it was at this moment, one in which I was attempting to figure out the appropriate forms of the discourse of choice, that I sat in the courtroom, listening to the arguments in the *Symes* case, and heard Justice Major say, "But doesn't it matter that the business woman has a choice?" With that question, I was drawn into a 10-year engagement with a tax case. And 10 years later, I am no longer angered by Justice Major's question. His question made me think in more complicated ways about the power of the discourse of choice, of its role both in enabling and in constraining change, and of its ability to function both as a tool of justice and as a tool of oppression.

I came to be persuaded that it is often worth slowing down when "choice" emerges; that more time should be spent in discussion and negotiation and in making explicit the normative assumptions and implications of our deployments of choice. I agree with Claire Young's assertion that tax rules are political tools used to direct social policy, and therefore I want to foreground the importance of attending to the discourse of choice, particularly in the context of tax rules. I think that it is important to spend at least some moments resisting the pull of the policy audience[25]—resisting the pressure to produce an answer to the question: What is the answer to the case? In saying this, I am not rejecting policy-directed commentary. There is a pressing need for policy-directed commentary that reflects a broad range of normative commitments. I am arguing rather that it is worth taking some time to articulate the contours of those normative commitments.

I am suggesting that tax expenditure theory, though undoubtedly valuable, cannot on its own solve the conflicts engaged by cases like *Symes*. I respect but do not share Tim Edgar's view that the problems raised by the case could have been better sorted out by tax expenditure theory.[26] Tax expenditure theory deploys fiscal language, and fiscal language inevitably has a dual character. As Daniel Shaviro puts it, it is "a weapon of political combat in addition to a tool of purportedly objective description, and proponents on both sides of fiscal language debates rarely sort out

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judge had severed the case into three different cases: sexual assaults involving genital contact; sexual assaults involving breasts; sexual assaults involving "other" activities. Justice Iacobucci said, at 355-56, "[T]he message that a division and severance order in a sexual assault case based on the complainant's body parts sends to women is that the complainant's physical attributes are more important than her experience as a whole person. The order severed the complainants as well as the counts."

25 Austin Sarat and Susan Silbey, "The Pull of the Policy Audience" (1988) vol. 10, nos. 2-3 *Law & Policy* 97-166. As Sarat and Silbey note, there is a strong (and understandable) desire for scholars to participate in debates about how to use law as an instrument of public policy. But focusing too closely on policy often makes it easy to underestimate law's more pervasive effectiveness and its hegemonic character. The hegemonic character of law, they argue, works to channel and shape both attitudes and behaviour. It is here that the law may be "least visible, hardest to see, and more importantly, hardest to differentiate from the social norms by which people go about their daily lives." Ibid., at 138.

26 Tim Edgar, review of *Taxing Choices: The Intersection of Class, Gender, Parenthood, and the Law*, Current Tax Reading feature (2003) vol. 51 no. 2 *Canadian Tax Journal* 1064-66.

the functions very scrupulously."[27] I am skeptical about the deployment of tax expenditure arguments in contexts where the normative assumptions about choice have not been made fully explicit. And while I have not quite solidified my own position in this regard, I may well agree with Lorna Turnbull that tax expenditure analysis should not apply to the reasonable costs associated with raising future generations. But to say "should not" is to draw a normative conclusion. What I seek is the use of tax expenditure analysis in ways that require us all to be clear about the normative conclusions upon which we rely; in ways that require us to identify who is made to bear the physical, emotional, and monetary costs of those conclusions. The current failure to make normative assumptions explicit enables tax rules to continue parading as neutral tools of decision making and distribution. Increased attention to the discourse of choice may be one way of making explicit the current normative grounding of our tax rules and policies.

And so I reflect back: "But doesn't it matter that the business woman has a choice?" In 2003, 10 years after the strange encounter, my answer is now, "Yes, it does matter that the business woman has a choice. Choice matters to us all, in a myriad of ways. And *how* it matters, and *why* it matters are questions of real importance." Of course, the answers we give to those questions will tell us less about the businesswoman's choices than they might tell us about the deeper normative structures of our larger social, political, and legal life.

Now, in thinking about the discourse of choice, I often find myself reflecting on Robert Gordon's epigraph at the beginning of this response: "[T]he power exerted by a legal regime consists less in the force that it can bring to bear against violators of its rules than in its capacity to persuade people that the world described in its images and categories is the only attainable world in which a sane person would want to live." The strange encounter of tax and choice pressed me to think about the ways in which "choice" is one of the tools of persuasion close to the centre of our social and legal regimes of ordering. Does choice matter? Yes . . . particularly to the extent that we are persuaded that it matters. Justice Major was persuaded that choice mattered. I too am persuaded. I doubt that he and I would agree about all the *ways* in which a woman's choice matters, but I also suspect that we occupy many places of common ground.

The strangeness of the encounter did not resolve the case for me. Like my reviewers, I remain ambivalent. But my ambivalence is rooted in the sense that there is value in an approach that both acts and remains open to rethinking the meaning of those actions, even after the fact. I remain hopeful that attention to the intersectional discourse of choice will help us project in sharp relief the different kinds of worlds described in our images and categories. And I am hopeful that perhaps, occasionally, those re-descriptions may play a part in making sense of those strange encounters that nudge, frighten, inspire, and terrorize us into new ways of thinking and acting.

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27 Daniel Shaviro, *Rethinking Tax Expenditures and Fiscal Language*, New York University School of Law, Public Law and Legal Theory Research Paper no. 72 (New York: New York University School of Law, September 2003), abstract (available online from the Social Science Research Network Electronic Paper Collection at http://papers.ssrn.com/abstract=444281).