Taxing Choices: A Conversation About the Demands of Motherwork on Tax Policy

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Rebecca Johnson's new book[1] provides a close, contextual analysis of *Symes v. Canada*.[2] Elizabeth Symes is the lawyer whose claim to deduct the cost of her nanny as a business expense was rejected by the Supreme Court in 1993. Johnson tells the story, beginning with Symes's original income tax filing in 1982 through the three levels of court hearings to the voluminous public and academic commentary that followed the judicial pronouncements. Through this carefully documented and broadly researched examination of the case, Johnson concludes that what is important about the case is the process of engagement itself, not merely the particular outcome. What many have criticized as the pivotal weakness of the case—that is, the complex and overlapping issues it reveals—Johnson identifies as its ultimate strength. She uses intersectional theory to demonstrate how easily complex issues involving conflicted actors are flattened and oversimplified in the legal process, and she invites readers to welcome complex cases as sites where this simplifying influence can be resisted and more nuanced and realistic understandings can gain currency.

Intersectional theory has traditionally theorized sites where multiple disadvantages shape an individual's experiences of inequality.[3] Johnson applies the insights of intersectional theory to the situation of Symes, a woman who finds herself at the intersection not of multiple disadvantages but of privilege and disadvantage, of "power and wound." Symes's power lies in her position as a white, economically privileged lawyer. Her wound is being a woman and a mother in a society still

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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; aff'g. [1991] FC 507 (CA); rev'g. [1989] 3 FC 59 (TD).

3 Kimberle Crenshaw, "Race, Gender, and Sexual Harassment" (1992) vol. 65, no. 3 *Southern California Law Review* 1467-76.

permeated with systemic gender inequality. The theme of "power and wound" is established in the epigraph to the introduction—a poem by Adrienne Rich about Madame Curie and the healing and destructive powers of radium.[4] Johnson cleverly echoes the theme throughout the nine chapters of the book, noting repeatedly that disadvantage and power may emanate from the same place. She uses this metaphor of "power and wound" to examine the potentials and pitfalls revealed by complex legal problems such as the one presented by the *Symes* case.

As Johnson rightly observes, the majority and dissenting opinions in the Supreme Court judgment reflect more than different opinions about particular rules of tax law.[5] Tax law is ultimately about politics, and it is an important vehicle of social and fiscal policy. "[T]he technical design of the tax system is built on socially contested visions about the appropriate structure of fiscal and political life."[6] The divergent judicial opinions are founded on differing understandings of the position of women in contemporary society, of the connection between child care and participation in the labour market, of the realities of economic marginalization, of the competing demands of "power and wound." Johnson shows the reader that neither of the judgments is completely monologic, but rather more dialogic: each is affected by the competition of diverse discourses for the power to define the issues and characterize the import of the facts.[7] This is an important insight for Johnson, who sees hope rather than "a dispiriting impasse"[8] in the intrusions (however slight) of radical discourses into the Supreme Court's articulation of the law.

The first three chapters of the book provide the historical, political, and theoretical background for Johnson's analysis of the *Symes* case. Chapter 1 outlines intersectional theory, tax expenditure theory, and the theoretical concept of the public/private divide. Chapter 2 reviews the history of the occasional implementation of child-care policy in Canada and the debates that were provoked. Chapter 3 recounts the attempts of women in other jurisdictions to have child care recognized within the tax system. In these three chapters, Johnson extracts the themes that she then traces through the unfolding of Symes's drama in chapter 4. Using the narrative device of a play, Johnson focuses on the importance of language in shaping the contours of the questions before the courts. For example, is Symes's claim about her own personal "troubles," or is it about broader, socially significant "issues"? The Crown argued that it was the former; for Symes, evidently, it was the latter. In this chapter, Johnson shows how, as the battle over "troubles" and "issues" unfolded, Symes's equality claim was met by the discourses of public/private, responsibility, choice, selfishness, and privilege at each stage of the way.

4 Johnson, supra note 1, at ix.

5 Ibid., at xi.

6 Ibid., at 13.

7 Ibid., at 58-59.

8 Ibid., at 166.

In chapters 5 and 6, still looking through the lens of "power and wound," Johnson considers the powers of and constraints on the Supreme Court as it was deciding the *Symes* case. The court had the power to define the questions before it, to use the rhetoric of choice to draw boundaries around its authority, and to justify deferral to the legislative branch of government. But the court was also constrained, Johnson suggests, in two significant ways. First, the court was limited by the Crown's failure to develop any meaningful evidence or analysis on section 1 of the Charter question; second, the equality question before the court was tremendously complicated by the coexistence of power and wound, making it both theoretically and politically difficult to decide.

In chapters 7 and 8, Johnson uses the public response, both popular and academic, to explore the competing discourses the case has drawn out. On the basis of a poll of *Montreal Gazette* readers conducted shortly after the Supreme Court's decision was released, Johnson concludes that the public was not fooled by the court's oversimplification of the questions the case presented:

> [T]he discourses filtered out by the Supreme Court majority were not thereby filtered out of the public discussion. Though the Court may have chosen to discuss the case as involving essentially an absence of sufficient evidence, the nonexpert responses suggest a public that continued to see the problems in the case as the broader ones reflected in the discourses of equality, childcare need, public/private divides, and notions of choice and responsibility.[9]

In chapter 8, Johnson analyzes "expert" responses through the politics of need and finds that feminists were not as divided as they were portrayed in the media during and following the case. Rather, they had much common ground and differed mainly over appropriate strategies for advancing agreed-upon claims.

Finally, in the concluding chapter, Johnson ties together the common threads from the legal, popular, and academic readings of Symes's challenge to the Income Tax Act[10] to reanimate the case as one that feminists and other social activists can use to theorize "the potential present in the intersection of privilege and disadvantage."[11]

Johnson's contributions in *Taxing Choices* are significant for three reasons. First, she provides a thoroughgoing analysis of a case that represents a watershed in Canadian feminist litigation. Second, she uses a methodology that opens the windows of legal analysis to allow consideration of the whole context of a case from long before the action was instituted through to popular and academic post mortems. Third, she inspires hope and purpose in social activists who may despair about the utility of law as a tool for social change. Any of these contributions on its own would be exciting. Three in one book give reason to celebrate.

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9 Ibid., at 157.

10 RSC 1985, c. 1 (5th Supp.), as amended (herein referred to as "the Act").

11 Johnson, supra note 1, at xiv.

In these brief comments I wish to focus on Johnson's key themes of the public/private divide and the rhetoric of choice and to highlight the regulatory effect these discourses have on women. These two contested areas have shaped tax rules as they apply to mothers and others with responsibility for dependents, much as they continue to regulate and control the position of women in contemporary Canadian society. Johnson's work in *Taxing Choices* is another chapter in an extensive literature on the subject,[12] but with its pointed focus on the tax law dimension it accomplishes the important task of destabilizing an area of law that might be considered above such debates. One purpose of my comments here is to contribute to a dialogue aimed at moving toward a model of fiscal policy that recognizes and explicitly provides for the caregiving work that is required for social reproduction.

As Johnson notes, the line between business and personal expenses that the courts were invited to consider in the *Symes* case resonates, if not perfectly then at least very closely, with the line between the public and private spheres of activity and concern. The drawing of the line is a political exercise, and Symes's claim may be viewed as a claim to participate in the drawing, not merely to dispute the assignment of any given issue to one side of the line or the other.[13] Although the trend in cases dealing with the business expense deduction has been liberalizing in recent years, expanding to cover expenses that include some personal element, this trend was not enough to push the courts to allow Symes to participate in the redrawing of the boundary. Symes's concerns were kept firmly in the private sphere because her situation was characterized in the arguments and decisions as her own personal "trouble" resulting from a decision made within her own family. The Supreme Court also enforced the line between public and private by limiting its own authority to legal, but not social, issues. The majority acknowledged the social costs of caring for children, which are disproportionately borne by women, but held them to be outside the scope of the Act. The court maintained that the Act deals only with the legal costs, which do not have a detrimental impact upon women.

In her review of the trial and appeals in chapter 4, Johnson shows how the Crown employed a strategy in the cross-examination of the expert witness and of Symes herself of narrowing the focus of the issue to Symes's situation as an individual. The Crown attempted to direct the court's attention away from the sociological evidence that showed the situation of women with children in the modern workplace. Both the Crown and the majority in the Supreme Court also focused on the fact that Symes found herself in her particular predicament as a result of a "family decision" made within the private sphere. This characterization completely obscures

12 Susan Boyd, ed., *Challenging the Public/Private Divide: Feminism, Law, and Public Policy* (Toronto: University of Toronto Press, 1997); Martha Albertson Fineman, *The Neutered Mother, the Sexual Family, and Other Twentieth Century Tragedies* (New York: Routledge, 1995); and Sandra Fredman, *Women and the Law* (Oxford: Clarendon Press, 1997).

13 Johnson, supra note 1, at 15 and 187.

the power dynamics within families that lead to such decisions.[14] Perhaps even more significantly, it obscures the fact that the costs of such family decisions made within the context of our current tax regime fall principally upon the primary caregiver. It is still women whose wage-earning capacity and economic security are significantly reduced if they have children, whether the "family decision" is that both parents remain in the workforce or that one parent, usually the mother, cares for the children at home. Much of the wage gap between men and women may be explained by women's motherwork, and some studies suggest that a mother may lose as much as 57 percent of her lifetime earnings compared with a woman who has no children.[15]

The Crown's and the courts' focus on the private and individual nature of Symes's troubles is aided directly by their use of the rhetoric of choice. In focusing on the "family decision," the discourse shifts responsibility to Symes for the choices she made. The law properly requires that parents share responsibility for their children equally, but Symes chose to carry the full responsibility for the care of her children. Her problem is thus characterized as being of her own making, not created by any defect in the law of which she may complain.

Notions of choice have strong symbolic power as part of a discourse of liberation, freedom, and autonomy.[16] Choice also implies accountability, and attributions of choice allow the assigning of responsibility and blame. In this way, choice is a double-edged sword for women who need to be recognized as autonomous in a liberal society such as ours and yet who lack the ability to make true choices in a gendered world where heavy burdens are still borne as a result of those supposed "choices." As Johnson illustrates in her analysis, the rhetoric of choice also masks the complexity of many issues, characterizing choices as being "all or nothing," either completely free or completely coerced. The Crown capitalized on this simplification in suggesting to Symes when she was on the stand that if she had not chosen to bear all the costs of child care, she must have done so only because her husband had forced her. Such an approach fails to take account of the "complex web of power and constraint woven into the gendered experiences of child-rearing and work."[17] Johnson argues that the Crown's and the courts' use of the rhetoric of choice obscures the courts' power in constructing and reinforcing the range of choices available. The assumption that choice is a neutral arbiter of responsibility allows the court to avoid inquiry into the differentially gendered, raced, and classed dimensions that shape women's choices; by doing so, the court causes the social divisions of labour to vanish.[18] Many areas of law that mothers encounter have a similarly magical effect,

14 See, for example, Susan Moller Okin, *Justice, Gender, and the Family* (New York: Basic Books, 1989), and Lorna A. Turnbull, *Double Jeopardy: Motherwork and the Law* (Toronto: Sumach Press, 2001).

15 Turnbull, supra note 14, at 15.

16 Johnson, supra note 1, at 125.

17 Ibid., at 126.

18 Ibid., at 128.

causing hours, days, and years of motherwork to disappear with the wave of a judicial or legislative wand.[19]

When the rhetoric of choice is used, the focus is placed on a woman's choice to have children (or, among more conservative commentators, on a mother's choice to be employed). Justice Major's questions to counsel during the hearing at the Supreme Court of Canada indicate that he accepted the notions of responsibility in the rhetoric of choice. He seemed to believe that Symes had voluntarily accepted the costs associated with her decision to have children and that she thus deserved no recourse to the courts. Fortunately, this logic was explicitly rejected by the majority and dissenting opinions, although the majority did not go far enough in shifting the focus to the larger systemic context within which such "choices" are made.[20] Furthermore, the rhetoric of choice did lead the majority to blame Symes for her selfishness. The majority suggested that Symes's failure to make the case on behalf of the many women less fortunate than herself, as well as the fact that she bore the child-care costs as a result of a "family decision," may have contributed to her lack of success before the Supreme Court.

Finally, the majority also employed the rhetoric of choice on its own behalf, noting that its analysis "ineluctably" led to the conclusion that child-care expenses cannot be deducted as business expenses because section 63 of the Act provides a complete code for child-care expenses.[21] The court suggested that it had no choice and that it bore no responsibility because the legislature had clearly spoken on the question of child-care expenses, and the legislature held the ultimate power. By the mechanism of judicial deference to the legislature, the court managed to completely avoid the key issue in the case and to legitimize the existing definitions of public and private, business and personal.[22]

The rhetoric of choice, responsibility, and blame, and the definition of the boundaries between business and personal, between public and private, all work in the service of regulating women and mothers. The messages conveyed through these discourses tell mothers, even in the 21st century, that they should bear the costs of raising children without complaint and with no expectation that society will share those costs. Mothers should continue to provide the public good of bearing and raising future taxpayers but without making demands on the rest of Canadian taxpayers.

Johnson's work is important because she makes explicit the various discourses operating in the *Symes* case that contribute to the inequality that women with children continue to experience. She helps to remind us that debates that focus on women and choice are fruitless. The issue is not whether women choose to have children; the issue is that the costs are borne almost entirely by the women who have children. Where is it written that if a woman has children she should be prepared to forgo

19 See Turnbull, supra note 14.

20 Johnson, supra note 1, at 88 and 91.

21 Ibid., at 133.

22 Ibid.

potentially half of her lifetime earnings? Given that social benefits as well as costs are associated with caring for dependants, the pressing question is: how should those costs be shared?

With regard to families, our current tax system affirms the traditional answer to this question: mothers shall bear the costs of children. There is no explicit recognition in the tax rules of expenses associated with the raising of children or the reduced ability to pay of taxpayers with children. The child tax benefit may be considered to provide some recognition, but clawbacks, small benefit amounts, and the lack of universality undermine its effectiveness. Other provisions, such as the spousal amount and the child-care deduction, also suffer from significant flaws.[23] The lack of meaningful recognition of taxpayers with dependent children suggests that the Act attributes a low value to motherwork and to children, leaving the impression that mothering is merely a consumer choice.

It might be suggested that Johnson's book suffers from its failure to engage in a fully developed tax expenditure analysis. Johnson acknowledges that a factor in the *Symes* case was the question of whether the child-care expense provision should be categorized as a tax expenditure or as a part of the normative tax system. Not all provisions lend themselves to being neatly classified. Tax expenditures, according to Stanley Surrey, who developed the concept, are tax incentives or subsidies that depart from the normative tax structure "and are designed to favor a particular industry, activity, or class of persons."[24] Tax expenditures are considered to represent government spending rather than revenue raising. Provisions that are characterized as tax expenditures must be analyzed using budgetary considerations such as government objectives and the ability of the provision to meet them, and whether any other policy instrument might better meet the objective. Johnson notes that those who see "the childcare deduction as part of the tax expenditure system . . . might focus on the need for courts to defer to governmental decisions as to the appropriate amounts of money to divert (or not divert) to social programs such as childcare spending."[25] By contrast, if the child-care provisions were considered part of the normative tax system, they would be evaluated according to the criteria of equity, neutrality, and simplicity. Johnson states that in such an analysis the focus would be upon the "unfairness of applying the deduction in ways that ignored the centrality of childcare to the ability of the businesswoman to conduct her business."[26] Perhaps Johnson intended to imply what I propose to state explicitly: that tax expenditure analysis should not apply to the reasonable costs associated with the raising of future generations. I would argue that such reasonable costs, including the cost of substitute care when a parent is occupied in market labour, directly

23 Turnbull, supra note 14, at 121-41.

24 Stanley S. Surrey and Paul R. McDaniel, *Tax Expenditures* (Cambridge, MA: Harvard University Press, 1985), 3.

25 Johnson, supra note 1, at 11-12.

26 Ibid., at 11.

affect the resources upon which a taxpayer may draw to pay taxes. Recognition of these costs should not be seen as a "subsidy to favour a particular class of persons." By such logic, women with children are excluded from full equality. While it is true that our taxation unit is the individual, many workers have dependent children, and it is time to recognize that not all individuals are autonomous: many are encumbered by their child-raising responsibilities. Our understanding of "individual" should recognize this reality.

Effective tax reform in this area will address the broader situation of mothers within the income tax regime as a whole. It will be necessary to look at the child tax benefit, the spousal deduction, and the child-care deduction. It is important to remember that even according to the government itself the major obstacles to women's equality in paid labour are the lack of adequate child-care options and recognition of caregiving work.[27] Johnson invites us to consider these questions in all of their complexity, to embrace the places of "power and wound," and to imagine and work toward a system that makes mothers' choices less taxing. Johnson inspires in us the ability to trust the power of the "failures," of small changes, of the occasional intrusions of competing discourses into dominant ones. Johnson argues that Symes's claim that child care is a public rather than a private matter was a radical claim for recognition. The power in *Symes*, she maintains, is in the retelling:

> If recognition is about the renegotiation of codes, we participate in the renegotiations each time we tell the story of the *Symes* case. Whether or not she "won," the case is a success each time it can be used to illustrate or tease out the complexity of a claim, each time it can be used to tell a story of the need to collectively continue to negotiate the codes used to socially recognize the work people do.[28]

That is what Johnson has empowered me to do here, by pushing her readers to examine the complex questions and negotiate the codes used to socially (and, I would add, legally) recognize the work that people do. Income tax law is one area that cries out for such revisioning.

27 Canada, *Report of the Commission on Equality in Employment* (Ottawa: Supply and Services, 1984).

28 Johnson, supra note 1, at 194.