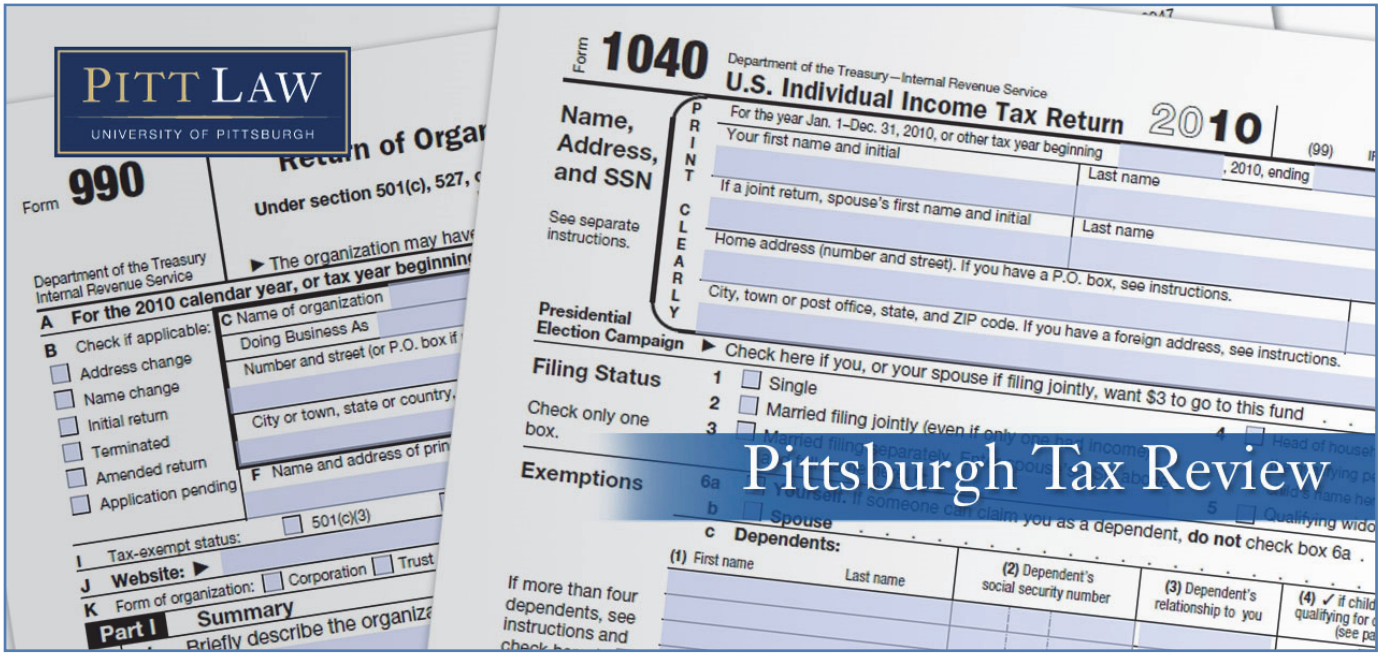

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"LIFE IN ALL ITS FULLNESS": CARDOZO, FELLOWS, AND THE CRITICAL CONTEXT OF *WELCH v. HELVERING*

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I. INTRODUCTION

United States Supreme Court Justice Benjamin Cardozo's opinion in *Welch v. Helvering* has long been recognized as a significant,[1] if somewhat disappointing, federal tax law decision. Its significance rests with the author's historical stature, and with the opinion's doctrinal holding that payments to a former company's creditors are capital expenditures rather than deductible "ordinary and necessary" business expenses.[2] The disappointment comes from Cardozo's rather murky logic. Indeed, tax law scholars have frequently ridiculed *Welch* for containing "so much soggy philosophy that its main thesis is difficult to locate."[3] The decision, moreover, has been identified as "[p]ompous and needlessly [d]elphic," with "showy, relentless phrasemaking,"[4] that provides little in the way of guidance for analyzing subsequent cases. Perhaps one of the showiest and most well-known phrases from the decision is Cardozo's conclusion that a final judicial determination of difficult cases rests not with clear and easily understood

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[*] Executive Director and Research Professor, American Bar Foundation; Professor of Law & History, Northwestern University Pritzker School of Law. I am grateful to Bridget Crawford and Anthony Infanti for giving me this opportunity to comment on Mary Louise Fellows's creative contribution to the outstanding edited volume. Many thanks also to Jonathan Byron for his research assistance, and to the editors of the *Pittsburgh Tax Review* for their editorial guidance and revisions.

[1] Nicole Appleberry, *Commentary on* Welch v. Helvering, *in* FEMINIST JUDGEMENTS: REWRITTEN TAX OPINIONS 95 (Bridget J. Crawford & Anthony C. Infanti eds., 2017).

[2] *Id.* at 96.

[3] MARVIN A. CHIRELSTEIN & LAWRENCE ZELENAK, FEDERAL INCOME TAXATION: A LAW STUDENT'S GUIDE TO THE LEADING CASES AND CONCEPTS 153 (12th ed. 2012).

[4] JOSEPH BANKMAN ET AL., FEDERAL INCOME TAXATION 547 (17th ed. 2017).

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factors or tests, but with a nearly impossible assessment of the whole of human existence: "The standard set up by the statute is not a rule of law; it is rather a way of life," Cardozo (in)famously wrote toward the end of *Welch*. "Life in all its fullness must supply the answer to the riddle."[5]

In her brilliant feminist reevaluation of *Welch*, Mary Lou Fellows takes seriously Cardozo's famed phrase and uses it to craft a creative and insightful judicial opinion—one that shows how "all the fullness of life" in early twentieth century America might have led to a dramatically different opinion than the one penned by Cardozo.[6] Fellows's central contribution to our understanding of *Welch*—and to the excellent collection of essays in *Feminist Judgments: Rewritten Tax Opinions*—is her innovative mix of methodologies; her combination, that is, of sociolegal historical analysis and a humanistic law and literature approach. Like a good historian, Fellows uses the broader social, political, and economic conditions of the times, especially the dramatic changes in traditional gender roles, to demonstrate that Cardozo's vision of the conventional "way of life" was slowly changing all around him. Similarly, like a good literary scholar, Fellows uses Mary Shelley's *Frankenstein*[7] to shed light on alternative visions of economic relations. Thus, Fellows uses history and literature not only to undermine the logic of *Welch*, but to demonstrate an alternative path that the Court could have taken.

Ultimately, though, her decision to remand the case to the lower courts, rather than answer the riddle of whether loan payments to a former creditor are "ordinary and necessary" business expenses, leaves one (or at least this reader) disappointed and unsatisfied. Justice Fellows persuasively shows how tax law is imbricated with American values and cultural norms. But by remanding the case she appears to believe that a lower court—or for that matter any court—can simply overcome centuries of western patriarchy and

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[5] Welch v. Helvering, 290 U.S. 111, 115 (1933).

[6] Mary Louise Fellows, Welch v. Helvering, *in* FEMINIST JUDGMENTS, *supra* note 1, at 103. Fellows has long been an intellectual leader and pioneer in the area of critical tax theory, particularly in the application of feminist theory to tax law and policy. *See generally* TAXING AMERICA (Karen B. Brown & Mary Louise Fellows eds., 1996); Mary Louise Fellows, *Wills and Trusts: "The Kingdom of the Fathers*," 10 LAW & INEQ. J. 137 (1992).

[7] *See generally* MARY WOLLSTONECRAFT SHELLEY, FRANKENSTEIN OR, THE MODERN PROMETHEUS (1818).

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gender discrimination to fashion the type of decision that she and other feminists would support. The common law, as we know, often changes slowly and incrementally, reflecting existing social norms and broader conditions.[8] A more radical feminist shift in thinking about tax law requires a bolder and more ambitious decision—one that acknowledges how and why tax law has not kept up with changing times. In short, Fellows does not go far enough in her feminist judgment. She does not go far enough in her historical analysis and her humanistic sensibilities to acknowledge that values and culture emerge and change very slowly over long periods of time, and that a simple deferral to the existing times and legal institutions with a mere judicial rebuke may do little to change the fundamentals of American gender relations.

II. *CARDOZO V. FELLOWS*

The *Welch* case turned on the fundamental question of whether past debts of a bankrupt company paid by an individual taxpayer, who was once a company officer, could be deducted by the individual taxpayer as an "ordinary and necessary" business expense.[9] The U.S. Supreme Court, in an opinion written by Cardozo, upheld the denial of the deduction on the grounds that the expenditures were not "necessary" under the definition of the Internal Revenue Code.[10]

Throughout his opinion, Cardozo appears to make implicit references to the importance of context. In his curt analysis of whether the payments were "necessary," he defers to the judgment of the taxpayer, suggesting that a former corporate officer should have sufficient information about general industry conditions to know which types of business expenses are "necessary," and that therefore the Court should be "slow to override his judgment." The taxpayer, in Cardozo's estimation, seems to have the local

[8] *See generally* OLIVER W. HOLMES, JR., THE COMMON LAW (Dover Publications 1991) (1881); *see also* Robert W. Gordon, *Holmes' Common Law as Legal and Social Science*, 10 HOFSTRA L. REV. 719, 721 (1982).

[9] *Welch*, 290 U.S. 111.

[10] I.R.C. § 162(a).

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commercial knowledge to know what ought to be a "necessary" business expense.[11]

Similarly, when Cardozo turns his attention to the meaning of "ordinary" he acknowledges the importance of surrounding circumstances. He states that an "ordinary" business expense is "a variable affected by time and place and circumstance."[12] Indeed, he elaborates on the significance of "time, place and circumstance" when he writes—in yet another example of cryptic phrasemaking—about how context can help anchor the meaning of "ordinary."[13] He writes: "The situation is unique in the life of the individual affected, but not in the life of the group, the community, of which he is a part. At such times, there are norms of conduct that help to stabilize our judgment and make it certain and objective."[14] What exactly the norms might be, or where they come from, are surprisingly left unaddressed.

In the end, however, the "norms of conduct" that Cardozo believes should "stabilize" the Court's definition of "ordinary" business expenses are those espoused not by a broad industry or community, but by the Commissioner of Internal Revenue. The holding of the case, thus, turns not on any type of empirical analysis of prevailing social norms or industry conventions, but simply on the Commissioner's ruling that "the payments in controversy came closer to capital outlays than to ordinary and necessary expenses in the operation of a business."[15] Eventually, Cardozo's limited view of the broader context does little to assist the individual taxpayer or, for that matter, to help future courts, lawyers, and taxpayers with subsequent fact patterns.

Mary Louise Fellows, initially, appears to agree with Cardozo's view of the relationship between law and society. She makes a persuasive argument for how law in general, and the specific case before the Court, can both reflect and shape the country's values and cultural norms. "The facts of this case have heightened our appreciation of how much the federal income tax has

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[11] *Welch*, 290 U.S. at 113.

[12] *Id.* at 113–14.

[13] *Id.* at 114.

[14] *Id.*

[15] *Id.* at 115.

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and will continue to reflect this nation's values," writes Fellows.[16] "The imperative to shape a fair and just federal income tax system rests on this Court's ability to recognize the multitude of ways the income tax influences cultural norms and institutions."[17]

Yet, rather than defer to the IRS's perspective or any general industry standard, Fellows contends that the Court has an "obligation to situate the federal income tax historically and culturally as we consider the specific facts of the case before us."[18] To do so, Fellows uses one of the fundamental aspects of historical analysis: placing events into their broader context. She begins by analyzing holistically the context in which the payments were made. By bringing the tax treatment of the company's initial debt into the calculus, Fellows shows how tax logic and fairness may determine the tax treatment of the payments. Because the initial business corporation, as a taxpayer, would not have received tax benefits from repaying the principal on its original loan, she reasons, the individual taxpayer in the case (Welch) should not receive a tax benefit for repaying the loan on behalf of the company.[19] "A fair and just federal income tax system," she writes, "requires this Court to place a taxpayer's reporting positions into context and take account of a taxpayer's familial, professional, and financial relationships."[20]Eventually, Fellows remands the case to the lower courts to do just that—to scrutinize "E.L. Welch Company's tax treatment of its debt."[21]

III. A FEMINIST RESPONSE

Although Justice Fellows's analysis of the taxpayer's relationship to the original company/debtor is fruitful, it is difficult to see how this is a feminist judgment. One could contend that greater focus on familial bonds and tax fairness are "a feminist concern," as Nicole Appleberry has noted in her

[16] Fellows, *supra* note 6, at 107.

[17] *Id.*

[18] *Id.*

[19] *See id.* at 109.

[20] *Id.*

[21] *Id.*

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insightful commentary on Fellows's opinion.[22] But Fellows seems to reserve her truly feminist critique of *Welch* for the Court's strict and rigid distinction between the private and public spheres. This is where her historical analysis and her feminist judgments are at their finest. Citing to the changing role of women in early twentieth-century American society, Fellows argues that the traditional division between the private home and the public market has been dissolving.[23] "The political activism of the suffragist movement and the enactment of the Nineteenth Amendment in 1920, giving women the right to vote, have diminished the boundaries between the private and public spheres and undermined social stratifications," writes Fellows.[24] As a result, she concludes, the commercial and business realms have been changing.[25] Because more women are participating in economic life, Fellows maintains, business may no longer be viewed simply as a "blood sport."[26] The notions of fairness and collective sacrifice usually associated with women and the domestic sphere, she suggests, may begin to penetrate and improve the norms of the marketplace.

An empirical analysis of changing historical conditions is not the only way that Fellows infuses her opinion with a sociolegal and humanistic perspective. She also turns to literature to illustrate how one can imagine a different perspective on the realm of economic relations—a perspective attuned to the importance of ethical and moral considerations. More specifically, Fellows uses Shelley's *Frankenstein* to demonstrate both the perils of an unfettered search for profits absent social context, and the promise of using a humanistic perspective to infuse tax law with a sense of prudence, fairness, and ethical conduct.[27] She does this once again by suggesting that *Frankenstein* has its roots in the broader context of changing gender relations.[28]

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[22] Appleberry, *supra* note 1, at 98.

[23] *See* Fellows, Welch v. Helvering, *supra* note 6, at 115.

[24] *Id.*

[25] *Id.*

[26] *Id.* at 116.

[27] *See id.*

[28] *Id.* at 118.

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First, Fellows draws a direct analog between Dr. Frankenstein's hubris and the taxpayer's claim to expertise. Dr. Frankenstein's "prideful ambition to create life unrestrained by ethical considerations or a web of social and familial relationships," Fellows writes, "clarifies the dangers of the taxpayer's claim for exclusive expertise in the business arena."[29] For Fellows, Dr. Frankenstein's workshop embodies the quintessential conception of the economic market: it is a place where masculinity, pride, greed, and individual self-interest are dominant.[30] By relying solely on the expertise of the (male) market, Fellows seems to warn us that courts are deferring to conventional, market action that may appear at first blush as "necessary," but could have adverse effects on social norms and the public sphere. *Frankenstein*, thus, provides Fellows with a cautionary tale about the risks of overly relying on market expertise.

Second, Fellows uses Shelley's depiction of the monster's evolving ethical behavior to help the Court envision a kinder and gentler marketplace—one that examines factors beyond the taxpayer's business knowledge. "By allowing the creature to study and mimic fruitful domestic harmony, Shelley allows us to imagine the potential of a marketplace that embraces an ethos of caring,"[31] Fellows observes. "[Shelley's] moving tale underscores this Court's responsibility to promote a marketplace, and, in turn, an income tax, that esteems prudence, fairness, and ethical conduct."[32] Just as Frankenstein the monster is able to learn from the private (feminist) sphere about moral and ethical behavior, so too can law learn from, and reflect, the "powerful and productive" private sphere, which looms large in the broader social context of the 1920s.[33] Fellows, thus, uses the novel's humanistic message to remind us of the promise and potential of envisioning a feminist-driven, ethically-infused marketplace.

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[29] *Id.* at 111.

[30] *See id.*

[31] *Id.*

[32] *Id.*

[33] *Id.*

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IV. CONCLUSION: FEMINISM RESTRAINED

Yet, if the primary goal of Fellows's opinion is to remind her readers that the Court and the legal system, as a whole, have a responsibility to promote an economy, society, and tax law that "esteems prudence, fairness, and ethical conduct,"[34] her decision to remand the case to the lower courts is ultimately perplexing. Why would Fellows believe that a trial court could take the lead in overcoming centuries of patriarchy and gender discrimination to provide a feminist-infused tax law ruling about "ordinary and necessary" business expenses? If the U.S. Supreme Court refrains from taking the lead in promoting gender equality, why should we be confident that lower courts can provide such leadership? Indeed, there are several times in her brilliant opinion where Fellows seems eager to overturn the Commissioner's judgement on what constitutes an "ordinary and necessary" business expense.[35] Yet, in the end, she refrains from taking a radical feminist stand on the case.

A more thoroughgoing historicism and humanism would acknowledge that dramatic legal and social changes require bold and ambitious actions by prominent institutions and the people who lead them. Studying the past and great works of literature can certainly widen our legal imagination, as Fellows persuasively demonstrates. History and literature teach us that there is nothing "neutral, natural, or necessary"[36] about our existing gender relations and legal institutions. Yet, history and literature also teach us that we are a product of our times and our broader social conditions. We are, after all, invariably prisoners of our own generation. Simply remanding the case to the lower courts with a judicial rebuke, however poignant, seems to leave little promise for long-term legal and social change. Even after reading Fellows's persuasive critique of Cardozo's *Welch* opinion, one is left to wonder: How could one reach a decision in *Welch* with a more radical

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[34] *Id.*

[35] *Id.* at 113–14. For example, she examines the percentage of the taxpayer's income spent on the repayments, and notes that "[the ratio of income to payments] should lead the lower court to look warily at the taxpayer's stated commitment to do right by [Welch's] creditors." *Id.* at 113.

[36] MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOXY 169 (1992).

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feminist view? How, indeed, could "[l]ife in all its fullness . . . supply the answer to [that] riddle?"[37]

[37] Welch v. Helvering, 290 U.S. 111, 115 (1933).

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