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## Introduction: Comparative Law and Its Relevance to the Tax Field

That law both affects and is affected by the surrounding culture is a proposition so obvious as to hardly need mentioning. Yet the precise direction and nature of this relationship is among the most vexing problems in comparative (or any) law. Is law a reflection of the surrounding culture or one of its principal constitutive elements? Do countries have a legal culture, or subculture, that is distinct from their more general cultural tendencies or is this a contradiction in terms? What does culture consist of in the first place: is it primarily a question of attitudes, institutions, or some combination of the two, and which of these is likely to be more important in a legal context? Are countries becoming more similar in their legal and nonlegal cultures – the so-called globalization phenomenon – or is this merely a comforting myth? Is the term “culture” itself of any real value, or is it so prone to generalization and misstatement as to do more harm than good?

The question of law and culture is particularly beguiling in a tax context. Of all areas of law, tax has perhaps the strongest claim to universality. All governments impose taxes, and – rhetoric aside – there is no country in which people do not prefer to pay fewer rather than more of them. The basic kinds of taxation – income, excise, property, etc. – are the same in all countries, and the essential vocabulary of tax policy (equity, efficiency, simplicity) is the same in every language. Yet it is obvious to even a casual observer that tax outcomes vary enormously between countries, even when they are at a similar economic level and impose superficially similar taxes. More sophisticated observers frequently observe that the “tax culture” or (more colloquially) the “tax system” of these countries is different in various ways. But the precise meaning of this term is often indeterminate, and the relationship of a country’s tax culture to its broader legal (or general) attitudes and institutions is typically vague.

When tax law concerned primarily Western societies, it was possible to ignore or at least to finesse the cultural problem. As countries like China, India, and Brazil become major players it is increasingly difficult to do so. Even countries like France and Italy have a different understanding of the norms of tax administration or the

distinction between business and personal expenditures than do the United Kingdom and the United States. When we extend the discussion to Asia or Africa these differences are likely to be magnified many times over. It is possible to consider these differences on a case-by-case basis, or simply take them for granted without ever putting the issue into words. But the need for a more comprehensive approach to the problem seems increasingly obvious.

This book considers the question of tax culture and its implications in a systematic fashion, considering both the work of legal scholars and of experts in other fields – anthropology, sociology, political science, and history – that are relevant to the equation. The book addresses, or attempts to address, a series of closely related questions. What do we mean when we use the term tax culture? How do the tax cultures of various countries differ – is it primarily a matter of attitudes, institutions, or some combination of the two – and how do these differences express themselves in day-to-day tax outcomes? Is tax culture part of the underlying legal or general culture of each individual country or is it independent in nature, and does the answer to this question itself vary between different countries and different time periods? What happens when aspects of one country's tax culture are transferred (“transplanted”) to another country, either by force or by voluntary acceptance on the part of the receiving country? What role do international organizations, including more formal ones like the European Union or OECD and less formal ones like the international tax programs at major American universities, play in the development and diffusion of tax culture? Is culture more influential in some areas of tax law than others, and in some countries than others? How does the rise of non-Western countries like China and India affect the equation above? What are the implications of these questions for the so-called convergence or “harmonization” of tax systems and the overall globalization process?

The questions addressed in this book are at once theoretical and practical in nature. On a theoretical level the problem of tax culture is part of the more general question of legal culture – what is more ceremoniously called “law and anthropology” or “law and sociology” in the legal academy – and (specifically) the issue of legal transplants and legal adaptation that lies at the core of comparative law. The work of nontax legal scholars, including Schlesinger, Zweigert and Kötz<sup>1</sup>, and others, is thus relevant to the equation, together with that of cultural anthropologists like Margaret Mead, Ruth Benedict, Clifford Geertz, and other less famous but no less significant scholars.<sup>2</sup> Likewise, the work of many tax scholars, from recent authors like Omri Marian and Carlo Garbarino to other more traditional sources, makes an

<sup>1</sup> See Rudolf Schlesinger, Ugo Mattei, Teemu Ruskola, & Antonio Gidi, *Comparative Law: Cases, Texts, Materials* (7th ed.) (New York: Foundation Press, 2009); Konrad Zweigert & Hein Kötz, *An Introduction to Comparative Law* (3rd ed.) (Oxford University Press, 1998).

<sup>2</sup> See, e.g., Margaret Mead, *Coming of Age in Samoa* (New York: W. Morrow & Co., 1928); Ruth Benedict, *Patterns of Culture* (Boston: Houghton Mifflin, 1959); Clifford Geertz, *The Interpretation of Cultures: Selected Essays* (New York: Basic Books, 1973). On the often uneasy relationship between anthropology and law, see Leonard J. Pospisil, *Anthropology of Law*:

important contribution.<sup>3</sup> Yet many of these previous efforts remain incomplete and – perhaps because of the assumption that tax principles are universal in nature – the theoretical framework in the tax field frequently lags behind that in other disciplines. Much of the book will accordingly consist of the expansion or stitching together of ideas from various fields, applying them to areas that may not have been of particular interest to the original authors or of which they were largely unaware. Inevitably we will disagree with some previous scholars altogether. Still, the work of these scholars is invaluable, and this book should be seen as an effort to build upon their thinking rather than to ignore or refute it.

On a practical level, tax culture is simply a more systematic way of stating what we mean when we say that tax systems are different in different places or that tax actors approach their responsibilities in a different manner. Everyone has heard (or made) statements like “tax evasion is more common in Italy than Sweden” or “antitax sentiment is stronger in the United States than in Canada.” Somewhat more sophisticated observers may have heard, or made, assertions like “the Chinese tax system tends to favor administrative over judicial resolution of problems” or “Israeli tax administration reflects a mixture of British colonial influence and the country’s own Middle Eastern heritage.” Other than as clever cocktail-party chatter, what is the significance of these observations? Is it possible or desirable to combine them into a more comprehensive system, in which the components of tax culture could be identified and a series of questions (if not necessarily answers) relevant to all countries developed? Could (couldn’t) a more comprehensive framework be useful to those who observe and advise different countries in the design and functioning of their tax systems: those who sense intuitively that what works in one place may not work in another, but who lack a common language and methodology for explaining why? Is there something uniquely impenetrable about individual tax systems, or should (shouldn’t) they be subject to description in the same manner as other national characteristics?

### 1.1 TAX AND CULTURE: SOME POSSIBLE OBJECTIONS

Before starting out it may be useful to consider some possible objections to the study of tax and culture. One frequent objection is that tax culture – or the idea of culture in general – is too squishy and too indeterminate in nature: being essentially unquantifiable in character, it can be used to justify almost anything the speaker wants to. (Think of 1930s-era guidebooks that described Nazi uniforms as part of

*A Comparative Theory* (New Haven: HRAF Press, 1974); Sally F. Moore (ed.), *Law and Anthropology: A Reader* (New York: Wiley-Blackwell, 2004).

- <sup>3</sup> Carlo Garbarino, “An Evolutionary and Structural Approach to Comparative Taxation: Methods and Agenda for Research,” *American Journal of Comparative Law*, 57 (2009), 677; Omri Marian, “The Discursive Failure in Comparative Tax Law,” *American Journal of Comparative Law*, 58 (2010), 415. A full-length, up-to-date source on comparative tax law is Reuven Avi-Yonah, Nicola Sartori, & Omri Marian, *Global Perspectives on Income Taxation Law* (Oxford University Press, 2011).

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German culture, or the argument than racism or misogyny is a “cultural” trait of certain immigrant groups.) This argument is not easily dismissed. Culture may indeed serve to rationalize bad behavior, and has sometimes been used this way in the past. It must always be remembered that to describe a culture, including your own, is not necessarily to accept it.

Yet the alternative of ignoring cultural differences – of pretending that a universal (and typically an American or European model) applies in all times and places – is surely worse than studying them. Just because something is not reducible to numbers does not mean it is insignificant. If it were, we would not bother to teach history, literature, philosophy, or (for that matter) tax policy. The key here is to retain a detached and rational eye in describing what are at bottom irrational or at least nonrational phenomena, and to maintain a healthy humility in distinguishing that which is immutable from that which is subject to change. This is a challenge for scholars, but hardly an impossible one.

A somewhat more sophisticated version of this argument concerns the role of the tax scholar. Even if countries differ, the argument runs, the scholar’s role should be to reduce rather than exacerbate these differences, elaborating common themes in a way that will ultimately cause national tax systems to converge around the best common traits. This indeed is the role of many comparative scholars who – while surely aware of the differences between tax systems – focus on identifying the “correct” rules that they hope will eventually be reflected in all regional or national legislation. Indeed, identifying ideal norms and thus improving national legal systems is one of the classic goals of comparative law.<sup>4</sup>

The problem with this objection is twofold. First, it ignores the descriptive as opposed to normative aspect of legal (especially comparative law) scholarship. Before one can change something, one has to know what she is changing and what its place is in the broader legal framework of the country or region at issue. Culture being an inseparable part of tax law and administration, a complete description of taxation can hardly ignore the cultural element. The difference between stated and effective tax rates – that is, the tax rates once we take into account enforcement patterns and individual taxpayer behavior in the country at issue – is a classic example of this problem.

The second problem relates to the identification of the correct or “best” rule. It is an axiom of cultural studies that there is no single, privileged position from which to evaluate the attitudes, beliefs, or institutions of another society.<sup>5</sup> Neutral or universal tax rules frequently turn out, on examination, to reflect a particular, usually Anglo-American or northwest European viewpoint. Understanding the cultural and historical bases of different rules and practices – which of these are indeed universal in nature and which are dependent upon unique, even quirky cultural circumstances –

<sup>4</sup> A classic, if dated, statement of this purpose is Myres S. McDougal, “The Comparative Study of Law For Policy Purposes,” *American Journal of Comparative Law*, 1 (1952), 24.

<sup>5</sup> This issue is discussed further in Chapter 2.

is accordingly a prerequisite to serious reform. This is true of all areas of law, but no less so of tax provisions.

A cultural approach involves respect for human differences and (inevitably) a certain level of doubt regarding the standardization of law around a uniform set of values or practices. It will thus be no surprise that I retain a healthy skepticism regarding the convergence of legal and tax systems and – what is essentially the same thing – the “globalization” of tax on an essentially liberal, Western model. Yet celebrating difference is in the end as sterile and simplistic as hailing the end of history or the triumph of universal values. The key is to avoid preconceptions and to distinguish, as systematically as possible, between themes that are common to all societies and those that are not. As in any comparative study, the answers to these questions are likely to be elusive and incomplete. But asking them is half the battle.

## 1.2 LAW AND CULTURE: PREVIOUS SCHOLARLY EFFORTS

Culture has been defined as “the integrated pattern of human knowledge, belief, and behavior that depends upon the capacity for transmitting knowledge to succeeding generations.” An alternate definition is “the customary beliefs, social forms, and material traits of a racial, religious, or social group,” while still another is “the set of shared attitudes, values, goals, and practices that characterizes an institution or organization,” for which is provided the beguiling example of “a corporate culture focused on the bottom line.”

Still further definitions involve the acquisition of knowledge or discernment in science, art, and music – what is colloquially called “high culture” or “cultural sophistication.”<sup>6</sup> This is what we mean, for example, when we say that one individual is more cultured than another, or that one visits a museum or gallery in order to acquire more culture. These latter definitions are less relevant for our purposes, although they are not wholly without significance.

Cultural studies are most frequently identified with the anthropology field, although they show up in other disciplines as well. While cultural studies are frequently macroscopic in nature – think Margaret Mead in Samoa or Max Weber on the Protestant ethic – there is an equally active interest in the study of social, ethnic, and regional subcultures, including those limited to a specific industry, profession, or economic activity. This is what people mean when they speak of “the culture of the corporate law firm,” or make statements such as “the culture of American law schools tends to reward scholarship as opposed to teaching quality.” While these statements sometimes reflect an unscientific, pop sensibility, there is an impressive and growing body of academic studies regarding institutional or professional cultures in law and other fields. What these studies lack in breadth and grandeur they compensate for in depth and detail – the “thick description,” in the

<sup>6</sup> Webster’s Online Dictionary [www.merriam-webster.com/dictionary/culture](http://www.merriam-webster.com/dictionary/culture).

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memorable phrase of Clifford Geertz, that is easier to achieve in studying a small group or institution than an entire society.<sup>7</sup> If the dictionary definition of culture emphasizes values, attitudes, and beliefs, these microscopic studies focus attention on institutional structures, the subtle or not-so-subtle allocation of rewards, punishments, and responsibilities that makes (say) a Canadian law faculty different from an Italian one, or the process of resolving a tax dispute different in China and the United States. Anyone who has ever dressed for an interview is instinctively aware of these differences.

The problem of culture is of course not unknown to legal scholars, particularly in comparative law. The question is what, exactly, to do about it. The most common historical answer has been not so much to ignore cultural differences as to restrict their sphere of importance, and focus attention on that which is common to different legal systems rather than that which divides them. The operative phrase here is *praesumptio similitudinis*, Latin for “presumption of similarity,” which suggests that the many obvious differences between legal systems – democratic versus nondemocratic, civil versus common law, and so forth – mask equally and perhaps more fundamental similarities that will be revealed to the researcher upon further analysis. For example, while the British and American legal systems classify “torts” and “contracts” as common law subjects having essentially judge-made law, and the French and Italian treat both subjects as subdivisions of a legislated “civil code,” all four must eventually deal with similar real-world occurrences and – if analyzed according to their substance rather than their form – will reveal significant common themes that allow the (inevitably smaller) differences between them to be isolated and understood. The presumption of similarity lies at the core of the so-called functional method of comparative law, which emphasizes the common problems faced by different legal systems rather than their superficially different ways of approaching them, and which – notwithstanding various challenges – remains the premiere methodology in the field.<sup>8</sup>

Both the presumption of similarity and the functional method marked important advances in comparative legal studies, and the field as we know it would not have existed without them. The only problem with them is that, by and large, they don’t work. As Richard Hyland notes in his epic study of the law of gifts, the differences between cultures are by no means uniformly trivial in nature, and the fact that they all face common problems – food, clothing, shelter, or the legal rules pertaining to the gratuitous transfer of property – does not mean that they understand or approach the problems in anything like the same way.<sup>9</sup> The substantive nature of cultural

<sup>7</sup> The phrase is taken from the first chapter of Geertz, *Interpretation*, 2, although it has been developed further by several subsequent authors.

<sup>8</sup> The functional method is tied to functionalism as a social science (and specifically sociological) tool, which is in turn only one of many intellectual approaches. This issue is discussed further in Chapter 3.

<sup>9</sup> Richard Hyland, *Gifts: A Study in Comparative Law* (Oxford University Press, 2009). As the title suggests, the bulk of Hyland’s book concerns the treatment of gifts. However, the first chapter of the book contains a useful summary of comparative law doctrine and its limitations.

differences becomes especially significant when we move beyond the North Atlantic countries to embrace Asia, Africa, the Middle East, and other regions that are increasingly important in legal and economic affairs. I might with some difficulty be convinced that the United Kingdom and France share common historical roots and that the differences between them, however significant they appear at first glance, are ultimately less important than the prevailing similarities. It would be harder to convince me that this was true of the UK and Japan, or (for that matter) Israel and Egypt. Yet the latter are increasingly the comparisons that scholars are required to make, particularly in the comparative law field.

A somewhat more sophisticated definition of legal culture is offered by Lawrence Friedman in his book *The Legal System: A Social Science Foundation*.<sup>10</sup> Friedman notes that the term “legal culture” is used in different ways, at times to refer to popular attitudes and behaviors, and at times to describe the values and ideologies of legal professionals (lawyers, judges, etc.) who are most actively involved in the day-to-day administration of justice. The author notes further that, while there are clearly many superficial differences between legal systems, there is a debate as to how significant these differences are and (closely related) whether than to what extent legal systems are converging with the passage of time.<sup>11</sup> Finally, Friedman addresses the question of “modernism” in legal culture, although finding here again that there is no agreement as to what constitutes modernity and how best to achieve it<sup>12</sup>.

With so many contested notions, is the concept of legal culture beneficial at all? At least one critic (Roger Cotterrell) has suggested that it is not, to which Friedman responds that a concept may still be useful as a description of reality even though it is difficult to define and even more difficult to quantify.<sup>13</sup> (Think of “quality of life,” “love,” or for that matter, “God.”) This book proceeds, à la Friedman, from the assumption that culture is indeed worth studying, but with a recognition that it can be rather squishy in practice and that one must always be careful about how the word is being used. With this in mind, we will try not to get too far into semantics and to test the term repeatedly against real-world developments.

### 1.3 LAW AND CULTURE: APPLICATION TO THE TAX FIELD

Perhaps because of its relative youth, the tax field is relatively undeveloped in terms of legal theory. The income tax is at most two or three hundred years old; in many countries (including the United States) it has been around for barely a century. Tax law in all countries is primarily statutory in nature, so that the distinction between

<sup>10</sup> New York: The Russell Sage Foundation (1975). Friedman’s work is discussed here because of its relevance to the overall structure of the book. A more detailed discussion of law and anthropology is included in Chapter 2.

<sup>11</sup> Lawrence Friedman, *The Legal System*, 193–222.

<sup>12</sup> Ibid.

<sup>13</sup> See R. Cotterrell, “The Concept of Legal Culture,” and L. Friedman, A Reply, in David Nelken, *Comparing Legal Cultures* (Abingdon-on-Thames: Routledge Press, 2017).



common and civil law, and perhaps that between positivist and natural law theories, seems less pertinent than in other fields. These factors suggest that tax law would vary relatively little between different cultures, or that such differences as do exist could be analyzed with a common set of legal and economic tools. Yet simple observation tells us that tax systems vary enormously, not only in the taxes imposed but in the level of compliance and the sophistication (not to say enthusiasm) with which the rules are enforced. Observation likewise confirms that taxation is among the most politically contested, emotional areas of law: entire countries, again including the United States, have been born in tax revolts, and some are in danger of dying from them. It is likewise apparent that these differences are not merely economic, but political, historical, and (yes) cultural in nature: the United States and Italy are both advanced industrial or postindustrial countries, but only the most extreme globalist would suggest that their tax systems were substantively identical.

The contradictory features of the tax field have placed comparative tax scholars in an awkward position. By and large they have responded in three ways. The first – consistent with the functionalist tradition – is to emphasize similarities and to leave historical or cultural differences essentially at the margins. This is the approach taken by most textbooks on comparative tax law, which typically describe various countries' rules pertaining to income, deductions, and other matters while making only a relatively limited effort to describe the tax history of the country in question or the relationship of its tax and other laws.<sup>14</sup> Online sources, which have proliferated in recent years, take a similar approach. These works are useful for tax planning but somewhat less so for achieving a genuine understanding of tax systems.

A second, more sophisticated approach takes account of tax culture but tends to define it primarily in attitudinal terms, specifically regarding taxpayer attitudes toward compliance/tax evasion and considering the effect of such attitudes on the design and functioning of national tax systems. The work of Ann Mumford, who has written extensively on tax culture and gender issues, is especially identified with this approach.<sup>15</sup> This work has vastly increased our understanding of the compliance problem, but falls somewhat short of a systematic definition of tax culture.

In recent years there has been an effort to construct a more developed theoretical framework for comparative taxation, spearheaded by a group of Israeli, Italian, and (to a lesser degree) American scholars. The most comprehensive approach is found in the book *Global Perspectives on Income Taxation Law* (2011), coauthored by Reuven Avi-Yonah, Nicola Sartori, and Omri Marian.<sup>16</sup> While most of the book concerns practical issues, the first chapter provides an inventory of existing

<sup>14</sup> See, e.g., Brian J. Arnold & Hugh J. Ault, *Comparative Income Taxation* (3rd ed.) (New York: Aspen Publishers, 2010). Also in this general vein, albeit more detailed, is Victor Thuronyi, *Comparative Tax Law* (Dordrecht, Netherlands: Kluwer Law International, 2003).

<sup>15</sup> See Ann Mumford, *Taxing Cultures: Toward a Theory of Tax Collection Law* (London: Ashgate Publishers, 2002).

<sup>16</sup> Avi-Yonah, Sartori, & Marian, *Global Perspectives*.



theoretical approaches including functional, cultural, and critical methods, and a fourth method emphasizing economic analysis. Professor Marian has written a separate article critiquing functional and other approaches and attempts to connect them to broader developments in comparative law generally.<sup>17</sup> With characteristic bluntness, he suggests that previous scholars have “failed to produce even the faintest form of paradigmatic discourse,” arguably an overstatement of the problem but not very much so.

Also significant is the work of Carlo Garbarino, who has proposed a “functional evolutionary” approach emphasizing themes of institutional analysis, tax transplants, and an effort to identify a “common core” of tax principles across national boundaries.<sup>18</sup> Garbarino differs from Marian in having greater European emphasis and, perhaps, in being somewhat less skeptical about the functionalist method. But their work is to a large degree complementary, with each noting the limitation of current approaches and attempting to update tax law for developments in other areas.

The work of Garbarino, Marion, Avi-Yonah, and others suggests that a more systematic approach to comparative tax law, which moves beyond simple description to take account of developments in other fields, may at last be in the offing. But – as these authors would no doubt concede – much work remains to be done. In particular, three important questions remain unanswered.

First, at the risk of repetition, there remains a need for a more comprehensive and inclusive definition of tax culture. While the word culture is frequently used by tax scholars, in practice it refers primarily to taxpayer attitudes and surveys reflecting those attitudes. The institutional side of culture – how are tax laws made and enforced, what is the role and training of various professionals (lawyers, accountants, economists) in the lawmaking process, how did the country’s tax institutions develop, and what is the role of historical factors in understanding tax outcomes – tends to be much less developed, even in the Western countries themselves. Since institutional factors frequently dominate and often help to shape attitudinal differences, this is a significant omission.<sup>19</sup>

Second, and closely related, there is a need for a more robust and realistic approach to the convergence problem. It is a truism that the world is becoming smaller and that tax and other legal systems are becoming more like one another. Conventional wisdom likewise suggests that where convergence does not take place, it is because of deep-seated differences in values and attitudes that are not subject to the globalization process. Yet each of these assumptions is to a certain degree false: tax systems remain very different from one another, and these differences frequently result from institutional or historical factors rather than profound or deep-seated national values. Indeed, these latter factors may sometimes be more intractable than

<sup>17</sup> Marian, “The Discursive Failure.”

<sup>18</sup> Garbarino, “An Evolutionary and Structural Approach.”

<sup>19</sup> See Chapter 3.

popular attitudes, which are often quite malleable. What is the role of such factors in restraining or accelerating the legal convergence process and how should scholars respond to them?

Finally, a comprehensive approach must recognize the ongoing changes in the allocation of global influence. Even the more recent works on comparative taxation tend to have a European, or European-American, emphasis. The rise of China, India, and other non-European powers suggests that this approach is no longer viable. How does the Asian perspective on taxation differ from that of the traditional powers, and what effect will this have on the global tax system? Do these differences express themselves primarily through attitudes, institutions, or some combination of the two, and which if either of these differences are subject to the convergence process? How has the rise of transnational tax institutions – both formal ones like the OECD and informal ones like academic exchange programs – affected the behavior of non-Western tax systems, and how in turn have these institutions been affected by non-Western countries?

#### 1.4 COROLLARY ISSUES I: NATURAL LAW, POSITIVISM, AND THE TAX FIELD

The issue of legal culture is distinct from, but closely related to, several other issues in legal philosophy. One of the most important concerns the division between positivism and natural law, at one time the defining issue in legal philosophy. While not quite as prominent today, it still possesses significant influence.

Natural law, which has origins in religion and philosophy, suggests that there are certain immutable principles that will exist under any just legal system. For example, the prohibitions against murder and incest are often cited as universal rules that transcend the differences between legal systems. By contrast, positivism suggests that law consists of the rules promulgated by the sovereign – that is, the “positive law” – whatever an outsider might think of those rules. Put in simplest terms, natural law assumes a convergence between law and morality, while positive law does not. Most observers probably fall somewhere between these two extremes: even a positivist might accept that certain laws (e.g., those protecting slavery) had dubious legal status, while most natural law advocates would probably profess to at least some humility in defining universal principles. As a general rule, positivism is dominant in the legal academy, but with natural law making something of a comeback in recent years.<sup>20</sup>

Perhaps because of its statutory origins, tax law tends heavily toward the positivist side of the equation. No one has seriously claimed that the income tax was given on

<sup>20</sup> For a useful introduction to positivist legal theory, see Hans Kelsen, *Pure Theory of Law* (Berkeley: University of California Press, 1967) (original German edition published in 1934). For a recent example of a natural law approach, see Robert George, *In Defense of Natural Law* (Oxford: Clarendon Press, 1999).