

Chasing Ghosts: On Writing Cultural Histories of Tax Law

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This Article discusses the use of arguments about “culture” in two debates about the imposition, application and abolition of income tax law: A debate about the transplantation of British income taxation to British-ruled Palestine in the early twentieth century, and a debate about tax privacy in late eighteenth-century and early nineteenth-century Britain. In both cases, “culture,” or some specific aspect of it (notions of privacy) appeared in arguments made by opponents of the tax. However, it is difficult to decide whether the use of cultural arguments in these debates simply reflected some “reality” that existed prior to these debates, whether “culture” was actively constituted in these debates to further the specific interests of the participants, or whether the cultural arguments that appeared in the debates combined reflection and constitution in some determinable way. Using legal debates to learn something about culture, the Article concludes, is sometimes problematic. The Article therefore suggests an additional approach to the study of law and culture, one which focuses on the rhetorical level, seeking to map the ways in which arguments about “culture” (and related terms referring to the traditional and particular), appeared in tax law debates.

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Introduction	844
1. <i>A Dybbuk</i>	844
2. Tax, Law, Culture.....	848
3. Two Case Studies.....	850
I. Cultural Histories of Tax Law	853
II. A Colonial Tax Transplant: Mandatory Palestine 1917–1948.....	857
1. 1917–1939: Rejecting Transplantation	858
2. 1939–1941: Enactment	863
3. 1941–1948: Application	866
4. Tax Transplants and Culture.....	869
III. Tax Privacy: England 1799–1816.....	870
1. The History of Tax Privacy as a History of Culture	870
2. The Early British Income Tax and the Notion of Privacy	875
3. The Novelty of Income Taxation	877
4. The Inquisition Argument.....	880
5. Tax Privacy and English Culture.....	887
Conclusion: “The Thunder of World History”?.....	888

INTRODUCTION

1. *A Dybbuk*

In Jewish folklore, a *dybbuk* is a wandering spirit possessing a living body. I encountered my *dybbuk* in 2004 in an Israeli Supreme Court case in which my wife, a public interest lawyer, was involved.¹

Elazar Abu-Hatsera, also known as Baba Elazar, came from a family of Jewish saints, kabbalists, and miracle workers. Baba Elazar was merely one of a group of kabbalists and miracle workers that appeared in recent decades in Israel, people such as Yaakov Ifergan, known as “the X-ray” (because of his diagnostic powers), his brother Haim, known as “the ultrasound” (he specializes in fertility-related blessings), and even the country bumpkin “Baba Tractor,” a farmer from a small village in the south of Israel who his followers claim is the messiah because he foresaw 9/11 and also because he had a keen ability to predict the location of underground water pipes in the fields he used to plow with his tractor before moving to his more recent career as a kabbalist.²

1. HCJ 3516/04 Israel Religious Action Ctr. v. Ministry of Fin. [2004] (unreported case) (on file with author).

2. See Yanir Yagna, *Maatsamat Rentgen: Ha-Rav CT, Ha-Rav Ultrasound va-Ha-Boreret* [*A Roentgen Empire: Rabbi CT, Rabbi Ultrasound and the Arbitrator*], HAARETZ, July 31, 2009 (discussing the Ifergan family); Avishay ben Haim, *Masbiach al Traktor Lavan* [*A Messiah on a White Tractor*], MAARIV, Oct. 3, 2005 (discussing “Baba Tractor”); see generally YORAM BILU, *THE SAINTS’ IMPRESARIOS: DREAMERS, HEALERS, AND HOLY MEN IN ISRAEL’S URBAN PERIPHERY* (2010) (a study of healers and saint worship in contemporary Israel).

My interest in this story is strictly tax-related. Abu-Hatsera was a very successful kabbalist. Allegedly, he amassed a fortune of about \$150 million by doling out blessings and advice to diamond merchants, bankers, and real estate developers. In the late 1990s, the Israeli tax authorities decided that the time had come to tax rabbis and other types of holy men involved in the “blessings industry.” The money that they were receiving, the government argued, was ordinary income, similar to the income received by psychologists or business consultants. At first Abu-Hatsera was asked to pay the tax authority an amount equivalent to \$25 million, but then he and the tax authority settled. The rabbi was asked to pay a mere \$5 million, part of which would be donated to charities of his own choosing. The settlement was the subject of a petition to the Israeli Supreme Court submitted by the Israel Religious Action Center (IRAC), an NGO affiliated with Reform Judaism, where my wife works as a lawyer.³

In his response to the Supreme Court petition by IRAC, Abu-Hatsera’s lawyer, David Gliksberg, a tax professor at the Hebrew University of Jerusalem, used what may be called a tax law “cultural defense.”⁴ Abu-Hatsera’s money, said the lawyer, came from nontaxable gifts. These gifts were given to the rabbi so he would use them for charitable purposes. The characterization of the money as a gift was rooted in a long Jewish tradition which would be misconstrued if the money was to be viewed as income.⁵ Abu-Hatsera, said the lawyer,

3. See Petition by the Israel Religious Action Center and Yossi Bar Moha, HCJ 3516/04 *Israel Religious Action Center v. Ministry of Finance* [2004] (unreported case) (on file with author). The petition was rejected by the Israeli Supreme Court; HCJ 3516/04 *Israel Religious Action Center*; see also Zvi Alush, *Ha-Mekubal Elazar Abu-Hatsera: Yeshalem Mas Kamekubal* [*The Kabbalist Elazar Abu-Hatsera: Will Pay Tax*], YEDIOT AHRONOT, Sept. 23, 2003. According to a newspaper report, Abu-Hatsera got paid not merely for his blessings but also by people who feared his curses. See Ruling of the Court of the Sephardi Rabbis Committee of Greater New York, June 12, 2004 [Hebrew] (on file with author); Natasha Mozgovaya, N.Y. *Jews Accuse Be'er Sheva Kabbalist of Massive Fraud*, HAARETZ (Feb. 26, 2010), <http://www.haaretz.com/hasen/spages/1152485.html>. He was recently killed by one of his followers. Yanir Yagna, *Popular Kabbalah Rabbi Elazar Abuhatzzeira Stabbed to Death in Be'er Sheva*, HAARETZ (July 29, 2011), <http://www.haaretz.com/news/national/popular-kabbalah-rabbi-elazar-abuhatzzeira-stabbed-to-death-in-be-er-sheva-1.375855>. For a discussion of a somewhat similar tax controversy in Romania, see Chloe Schama, *Voodoo Economics: Why Has Romania Slapped an Income Tax on Witches?*, THE NEW REPUBLIC (Jan. 22, 2011), <http://www.tnr.com/article/world/81989/Romania-witch-income-tax>. For an example of an explicit tax exemption for clergymen, see Phil Bednar, Comment, *After Warren: Revisiting Taxpayer Standing and the Constitutionality of Parsonage Allowances*, 87 MINN. L. REV. 2107 (2003); Jacob Lewin, *Orthodox Jewish Women and Eligibility for the Parsonage Exemption*, 17 CARDOZO J.L. & GENDER 139 (2010).

4. See generally ALISON DUNDES RENTELN, THE CULTURAL DEFENSE (2004); see also Yoram Shachar, *Ha-Adam ba-Savir ba-Mishpat ha-Plili* [*The Reasonable Person in Criminal Law*], 39 *Ha-Praklit* 78 (1989); Menachem Mautner, *Al Sekhel Yashar, Legitimatsya, Kfiya: Al Sboftim ke-Mesapre Sipurim* [*Common Sense, Legitimacy, Coercion: Judges as Narrators*], 7 *PLILIM* 11 (1997); GAD BARZILAI, COMMUNITIES AND LAW: POLITICS AND CULTURES OF LEGAL IDENTITIES (2003) (discussions of the cultural defense and, more generally, law and culture, in Israel).

5. On the nontaxation of gifts in Israeli tax law (following English law) see AMNON RAFAEL WITH SHLOMI LAZAR, MAS HACHNESA [INCOME TAX] 64–65 (4th ed. 2009) (Hebrew).

gives his blessing to his followers without asking for anything in return. Yet some of his followers are interested, out of their own generosity, in giving a gift to [Abu-Hatsera]. The gift is given out of spiritual and religious belief, with no relations to the blessing, which is rooted in a Jewish tradition that is more than a thousand (!) [emphasis in original] years old and which concerns the roots of the commandment of charity, and the essence of the relations of the rabbi and his followers [T]hese followers give their gifts to [Abu-Hatsera] because they rely on him, as their rabbi and teacher, to transfer the money to destinations and goals at his own discretion. As noted before, this behavior is in accordance with an old Jewish tradition [Abu-Hatsera] does not personally use the gifts received, and he leads an ascetic life, learning *Torah* and leading his followers.⁶

Here was my *dybbuk*, the question that has haunted me ever since I encountered this argument: How should we view Abu-Hatsera's cultural defense argument, and more generally, what exactly is the relationship of tax law and culture?

Raymond Williams famously said that culture is "one of the two or three most complicated words in the English language."⁷ The term has many meanings, and many academic disciplines have been using it in a variety of contradictory ways.⁸ In this Article I will use the term to designate a set of ideas, beliefs, symbols, values, social norms, and practices which are often unconscious, are relatively stable and static, and are widely shared by most members of a given social group.⁹ This social group may be large (a given society) or it may be small (elite lawyers). Culture, in my use of the term, is a category that is distinct from power.¹⁰

6. Response of Respondent number 3, at 2, HCJ 3516/04 *Israel Religious Action Center* (on file with author). Note the ambiguity in the argument about whether Abu-Hatsera received the money as a gift or as an agent (his followers expecting him to give the money to charity rather than retain it). An additional ambiguity in the argument is between its descriptive and normative natures. The impact of this cultural argument on the Court is unclear, since the petition was rejected on other grounds.

7. See RAYMOND WILLIAMS, *KEYWORDS: A VOCABULARY OF CULTURE AND SOCIETY* 87 (rev. ed. 1983).

8. See, e.g., A.L. KROEBER & CLYDE KLUCKHOHN, *CULTURE: A CRITICAL REVIEW OF CONCEPTS AND DEFINITIONS* (1952) (cataloguing hundreds of definitions of the term); William H. Sewell, Jr., *The Concept(s) of Culture*, in *BEYOND THE CULTURAL TURN: NEW DIRECTIONS IN THE STUDY OF SOCIETY AND CULTURE* 35 (Victoria E. Bonnell & Lynn Hunt eds., 1999) (on the variety of modern academic uses of the term); PETER BURKE, *WHAT IS CULTURAL HISTORY* 27–29, 103–04 (2d ed. 2008) (on the boundaries between elite and mass culture in the writing of the history of culture).

9. See generally ADAM KUPER, *CULTURE: THE ANTHROPOLOGISTS' ACCOUNT* 227 (1999) (defining culture as a "collective cast of mind"). On the problem of identifying culture with a collective unconscious, see JEAN & JOHN COMAROFF, *OF REVELATION AND REVOLUTION: CHRISTIANITY, COLONIALISM, AND CONSCIOUSNESS IN SOUTH AFRICA* 27–30 (1991).

10. On the difficulty of separating culture and power, see, for example, CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURES* 30 (1973) (on the relationship of culture and "the hard surfaces of life"); COMAROFF, *supra* note 9, at 22–23 (discussing the relationship between culture,

The *Abu-Hatsera* case raises interesting normative and descriptive questions about the relationship between law and culture. One of these questions has to do with the relationship of legal arguments and some cultural “reality.” What exactly was Abu-Hatsera’s lawyer doing? Some might see him a sincere *informant*, accurately describing contemporary and past reality—the authentic beliefs and practices of Abu-Hatsera and his followers (and of previous generations of observant Jews) regarding the nature of the money that was to be taxed (as a “gift” rather than as “income”). Others would say that the lawyer was a cynical *inventor* of “culture” (or, the term actually used in this case, “tradition”), constructing fictitious cultural differences that did not exist in reality just to serve the interests of his client. Finally, some might point to the fact that the categories the lawyer was using were not invented by him. Abu-Hatsera’s lawyer represented the rabbi and his followers as belonging to a traditional group which used non-Western distinctions between “market” transactions and the private sphere, between “income” and “gift.” The images used by the lawyer were part of a discursive formation about the non-Western/nonmodern other (Orientalism).¹¹ This discursive formation was not created in the legal sphere but outside the law, in elite culture. The lawyer himself was, in a sense, trapped in this discourse. However, this discursive formation was not all powerful. In fact, it was creatively applied in ways that contradicted its supposed logic. In our case, rather than being used to legitimize the power of the modern secular state, the images were used to support the rabbi, Abu-Hatsera, in his quest to escape taxation.

It is unclear which of these interpretations is the right one. Did the arguments made by the lawyer transparently reflect an actual reality? Was “reality” constructed by these arguments? Were legal discourse and “reality” inseparably enmeshed in each other, for example one type of culture (the discursive formation shared by the lawyer and the court) providing the lawyer with images about another type of culture (the beliefs and practices of Abu-Hatsera and his followers), and the legal debate in which these images appeared reshaping the meaning of the images by creatively using them in a way which empowered the “traditional” individual rather than the (supposedly oppressive) state?

The nature of the arguments made by the lawyer is the concern of the judges who heard the case, but asking how exactly should we view such arguments is also a question that can be raised by anthropologists, and, when dealing with past

hegemony and ideology). See also Ronald Grigor Suny, Review Essay, *Back and Beyond: Reversing the Cultural Turn?*, AM. HIST. REV. 1476, 1485 (2002) (on the autonomy of culture); BURKE, *supra* note 8, at 23, 77–101, 115–16 (on Marxist critiques of older types of cultural history that saw culture as autonomous as well as a discussion of more modern, social-construction approaches to culture). For an important discussion historicizing the way the category “culture” emerged in the nineteenth century in western discourse as distinct from other spheres of human activity, see, for example, RITU BIRLA, *STAGES OF CAPITAL: LAW, CULTURE, AND MARKET GOVERNANCE IN LATE COLONIAL INDIA* (2009).

11. See generally A.L. MACFIE, *ORIENTALISM* (2002).

societies, by cultural historians.¹²

2. Tax, Law, Culture

Historians of taxation (and tax law) also face similar questions. The dilemmas they face are already implied in a famous passage by Austrian economist, Joseph Schumpeter, who said in 1918,

The spirit of a people, its cultural level, its social structure, the deeds its policy may prepare—all this and more is written in its fiscal history, stripped of all phrases. He who knows how to listen to its message here discerns the thunder of world history more clearly than anywhere else.¹³

Fiscal matters, including taxation, are described in Schumpeter's passage as a microcosm mirroring the bigger cultural, political, and economic macrocosm. However, Schumpeter's approach was actually more ambivalent. Schumpeter did not view taxation as merely being a passive reflection of society and culture. Taxation, he added, in another passage of his article, was also a "formative influence" or "cause" which actively shaped society (and culture).¹⁴

Tax historians have understandably been keen to quote Schumpeter's words.¹⁵ Who would not want to hear "the thunder of world history"? What about historians of tax law? Schumpeter warned his readers against using the history of law as a way of studying past societies. The conservative nature of legal forms, he said, meant that similar legal and constitutional terms can be used by completely different societies and that therefore it is "not to jurisprudence but to sociology that the historian . . . must turn when concerned with the interpretation . . . of social . . . conditions."¹⁶ However, it seems that historians of tax law can overcome this problem if they study the moments immediately preceding and following the birth of tax laws when, presumably, there is a better fit between law and outside "culture."

Schumpeter's view of taxation as both a "symptom" and a "cause" seems to relate to a major debate in modern law and society, legal history, and law and

12. See, e.g., WRITING CULTURE: THE POETICS AND POLITICS OF ETHNOGRAPHY (James Clifford & George E. Marcus eds., 1986); PETER BURKE, VARIETIES OF CULTURAL HISTORY 197–98 (1997); NATALIE ZEMON DAVIS, FICTION IN THE ARCHIVES: PARDON TALES AND THEIR TELLERS IN SIXTEENTH-CENTURY FRANCE (1987) (on the possibility of using ethnographic and historical sources to gain an unmediated understanding of society). On the relationship of cultural history and anthropology see generally ROBERT DARNTON, THE GREAT CAT MASSACRE AND OTHER EPISODES IN FRENCH CULTURAL HISTORY 3 (1999) (cultural history as "history in the ethnographic grain").

13. JOSEPH SCHUMPETER, THE CRISIS OF THE TAX STATE (1918), reprinted in THE ECONOMICS AND SOCIOLOGY OF CAPITALISM 99, 101 (Richard Swedberg ed., 1991).

14. *Id.* at 100–01.

15. See Isaac William Martin et al., *The Thunder of History: The Origins and Development of the New Fiscal Sociology*, in NEW FISCAL SOCIOLOGY 1, 2 (2009) (discussing the meaning of this "well-known" quote).

16. See Schumpeter, *supra* note 13, at 132.

culture scholarship: the debate about the reflective versus the constitutive nature of law. Is law a mirror whose categories, doctrines, norms, and institutions passively reflect “outside” culture? Or is law a workshop in which cultural notions (“husband” and “wife” or “employer” and “employee”) are made by hegemonic actors, sometimes consciously and explicitly, sometimes not, and later trickle down and shape the collective consciousness of the rest of society?¹⁷

One possible way to answer this question is to argue that the dichotomy is false. Law and society, or law and culture, are *mutually constitutive* or, to put it another way, law both *reflects* and *constitutes* culture. Law and culture, according to this approach, are both part of a single feedback loop, one which is based, according to Naomi Mezey, on “continuous recycling and rearticulation of legal and cultural meaning.”¹⁸ Sometimes the commitment to this formulation is still based on causation and a unidirectional vector of influence (which changes direction over time).¹⁹ However, sometimes the use of this formulation is meant to signify that it is impossible to clearly separate the two.

In a recent article Pierre Schlag has criticized the “mutually constitutive” approach. The argument that law and culture are inextricably intertwined, he says, means that we are no longer able to say anything about the causal relationship between them. Dedifferentiation—collapsing the boundary between law and culture—entails the abandonment of any hope of explaining law using conventional arguments about causation.²⁰

People committed to a mutually constitutive approach might respond to Schlag’s critique by saying that this is not really a problem. They are no longer interested in conventional causal explanations. An alternative answer to the dedifferentiation problem, notes Schlag, is to “find refuge in the particular, the concrete, the local.” Legal historians, says Schlag, because of their professional commitment to particularism, accept the theoretical problem of dedifferentiation but assume that by looking at concrete examples the problem might go away.²¹

17. See Christopher Tomlins, *How Autonomous Is Law?* 3 ANN. REV. L. & SOC. SCI. 45, 68 (2007) (discussing these two formulations); Christopher Tomlins, *A Mirror Crack’d? The Rule of Law in American History*, 32 WM. & MARY L. REV. 353 (1990) (discussing the “mirror” metaphor); Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 121 (1984) (discussing the trickle-down effect); see also BURKE, *supra* note 8, at 77–101 (discussing a similar dilemma in cultural history).

18. See Naomi Mezey, *Law as Culture*, 13 YALE J.L. & HUMAN. 35, 37 (2001), for a discussion on the “mutually constitutive nature of the relationship” between law and culture; see also Tomlins, *How Autonomous Is Law?*, *supra* note 17, at 47 (“Law and society simultaneously contextualize, absorb, and are absorbed into each other.”). For additional discussions of the relationship of law and culture see Austin Sarat & Thomas R. Kearns, *The Cultural Lives of Law*, in LAW IN THE DOMAINS OF CULTURE 1–20 (Austin Sarat & Thomas R. Kearns eds., 2001).

19. See Mezey, *supra* note 18, at 55–57 (using the *Miranda* rule as an example of such a cycle of influence).

20. See Pierre Schlag, *The Dedifferentiation Problem*, 42 CONTINENTAL PHIL. REV. 35, 36, 39–40, 55–56 (2009).

21. *Id.* note 20, at 58–59; see also COMAROFF, *supra* note 9, at 14 (mentioning the turn to the particular as one solution to the doubts about the ability of the social sciences to describe “reality”).

3. Two Case Studies

It is at this point that I would like to intervene in the debate by discussing two concrete examples taken from my most recent research projects. The first example is taken from twentieth-century colonial tax history. The second example is taken from nineteenth-century Britain. Despite the time and space difference, the two examples have a common denominator. Both examples deal with the historical relationship of tax “law” (understood broadly to encompass administrative and political debates about the enactment and application of income tax legislation) and “culture.” As I will show in this Article, the problem of determining the causal relationship between law and culture does not go away even when we focus on concrete historical examples.

Both projects discussed here analyze debates about the enactment of income tax legislation. In both debates participants suggested that income tax legislation should not be enacted (or should be altered or abolished) because there was a misfit between law and the society it was supposed to govern—a problem of “cultural” difference in the first example, or a problem of novelty which undermined “constitutional” traditions in the second example

In both projects I ultimately encountered the same questions that were raised by the *Abu-Hatsera* case: Did the images and arguments that I found in the debates about legislation passively reflect some actual reality that existed “outside” law? Were the participants in the legal debates actively constructing false images about reality in order to serve their own material ends? Were they taking a set of images that existed outside law, but reshaping these images in new and creative ways that changed the meaning and impact of these images? As I will show, determining the exact causal relationship between law and culture is sometimes quite difficult.

My first example is taken from early twentieth-century British-ruled (mandatory) Palestine. This example deals with the history of a colonial tax transplant—the imposition of income taxation in Palestine in the 1930s and 1940s.²² The question that I sought to answer in this case was whether tax law is culturally specific. Tax law is often seen as a technical area of law. It is therefore conceived of as easily transferable between different societies and cultures. However, like any other area of law, tax law also relies on specific cultural notions: unconscious, widely shared ideas that change from one society to the next (such as the distinction between the market and the private sphere, notions about the nature of the family, or indeed definitions of terms like “gift”).

In this case, I attempted to find out whether the transplantation of British income taxation to Palestine was influenced by perceptions of cultural difference. I discovered that participants in the debates about the imposition and application of income taxation in Palestine sometimes referred to local “culture.” This term

22. See Assaf Likhovski, *Is Tax Law Culturally Specific? Lessons from the History of Mandatory Palestine*, 11 THEORETICAL INQUIRIES L. 725 (2010).

was used to designate things such as attitudes toward consumption, but it also referred to two law-related categories: tax morale (willingness to comply with tax law), and attitudes toward bribery. Cultural attributes thus relied on “legal” notions.

Law and culture were not merely enmeshed in the definitions used. It is hard to say whether the images used by the participants in the debates reflected some “reality” (the actual attitudes of the local population toward consumption, tax compliance, and bribery) or whether the local “culture” that was described in my sources was a conscious construct, invented by the participants in the debates to further their political or administrative interests. Indeed, just like the *Abu-Hatsera* case, the participants may have relied on an existing set of (elite) cultural images (Orientalism) to describe another set of (nonelite) beliefs and practices, but the very process of the application of these images to a specific legal debate was changing the meaning and the actual effect of these images.

While it is difficult to determine the exact causal relationship between law and culture, I discovered that other aspects of the use of cultural arguments in tax debates were easier to pin down. The use of cultural arguments, it turns out, was not uniform. Officials, politicians, and businessmen involved in the initial debates about the imposition of income taxation in Palestine in the 1930s and tax administrators involved in the application of income taxation in the 1940s argued that tax law had to take into account cultural differences between Palestine and Britain. However, other actors ignored or rejected these arguments. The lawyers involved in the enactment of the Palestine Income Tax Ordinance, both in Palestine and the Colonial Office, and the judges who interpreted the provisions of the Ordinance once it was enacted, assumed that income taxation was not culturally specific (or that there were no relevant cultural differences between Palestine and Britain). Thus, they did not see any problem with imposing English (or British-colonial) tax law on Palestine. Whatever the causal relationship between law and culture was, it was clear that different actors at different stages in the life of the law had different attitudes toward the use of cultural arguments.

The second example discussed in this article analyzes arguments about one specific aspect of culture—privacy. This example is based on an ongoing research project of mine which deals with income tax privacy in Britain in the first two decades after income taxation was introduced (1799–1816).

There is now an impressive body of social and cultural history of privacy that shows the gradual creation of the modern sense of privacy in the last few centuries. However, not everyone agrees that modernity is characterized by a growth in the scope of privacy. Critical histories of modernity have often argued that the modern era is characterized by the growing penetration of the private sphere by the state and by various nonstate institutions. My project asks whether the debates about tax privacy can tell us something about the more general history of modernity (as one based on a growth in the scope of privacy or conversely on a

decline).

Arguments about privacy played a major role in the debates about income tax legislation in early nineteenth-century Britain. However, as in my first project, it is difficult to separate reflection from construction. Notions of privacy found in these debates may have simply reflected widely shared unconscious notions of privacy, the income tax debates being in this sense derivative of more general culture. Privacy may also have been a construct created in the specific context of tax debates to further the political and economic interests of specific actors. Another alternative may have been that the participants in the debates were using notions of privacy that did indeed exist in some “outside” culture, but the debates (and their impact on the creation of actual tax privacy norms in income tax legislation) changed these notions. The debates may have effected this change by giving privacy formal legal protection that did not exist before—specifically, a protection that shielded information about the taxpayer’s income from the community but not from the state, thus creating a distinction within the notion of privacy between relations of individuals to each other and relations between individuals and the state.

Again, while it is difficult to determine the exact causal relationship between law and culture in the early nineteenth-century English income tax debates, other aspects of the debate are easier to pin down. In this case, an interesting aspect of the debate was the use of “constitutional” (in the English sense) arguments by the opponents of the income tax in support of the contention that the tax should be repealed as a novel innovation.

Because the causal relation between law and “outside” culture is sometimes difficult to determine, I suggest in this article that, in addition to trying to decide whether cultural notions are merely reflected in debates about law, legal debates constitute cultural notions, or law and culture are mutually constitutive in some definable way, we can also ask an additional set of questions. These additional questions have to do with mapping the rhetorical use of “cultural” arguments in law-related debates—the way references to the traditional, the local, and the particular appeared in debates about tax law in different historical contexts. Some possible questions would be: When and where did references to “culture” first appear in such debates? What other terms (for example “constitution” or “custom”) were previously used in similar ways in such debates and when did “culture” replace them? Which actors (politicians? lawyers? administrators?) employed the rhetorical move of relying on “culture” to prevent taxation or to mitigate its effects? What sources were used to prove these types of arguments? At what stages in the life of the law (preenactment, enactment, postenactment) did such arguments appear?

Such questions are not meant to discover the way law somehow “constructed” the category “culture” and how this category later trickled down to law’s outside. Categories such as “culture” were probably first created outside law

and only later appeared in legal debates, but I am agnostic about the primacy of either law or culture in creating these categories, and about the trickle-down process from law to its outside. Instead, I think such an inquiry might yield interesting jurisprudential insights about the nature of law at given historical moments: for example, about the way lawyers and nonlawyers viewed similarity and difference in various societies at various points in times, and about law as one of several alternative sites for discussing the nature of society (and “culture”).

The Article has three parts. Part I discusses some approaches to the writing of cultural histories of tax law. Parts II and III describe my two case studies: Mandatory Palestine and nineteenth-century Britain. The conclusion summarizes the lessons that can be learned from the two specific case studies.

I. CULTURAL HISTORIES OF TAX LAW

The roots of cultural history can be traced back to the work of Herodotus. In the last two centuries, as historiography became an academic discipline and historical studies proliferated, many varieties of cultural history have appeared. Indeed, as Donald Kelley has shown, every several decades in the nineteenth and twentieth centuries, a “new cultural history” school has appeared in academic historiography.²³

The latest “new cultural history” school appeared in the 1970s. It was inspired by developments in anthropology, linguistics, literary theory, and cultural studies, and its appearance was part of a wider trend in the humanities and the social sciences—“the cultural turn.” Within this approach there are many varieties: *histoire des mentalités*, microhistory, history of the everyday, New Historicism, and approaches inspired by cultural Marxism and the work of Michel Foucault.²⁴ One major difference between all these varieties and previous phases of cultural history is that contemporary views of culture often define it in a more fragmented and contested way, see culture and politics as intertwined (culture being implicated in relations of power), and view cultural categories as socially constructed.²⁵

23. See Donald R. Kelley, *Cultural Turns in Historical Scholarship*, 8 INTELL. NEWS: REV. INT’L SOC’Y FOR INTELL. HIST. 91–97 (2000) [hereinafter Kelley, *Cultural Turns*]. See generally DONALD R. KELLEY, *FACES OF HISTORY: HISTORICAL INQUIRY FROM HERODOTUS TO HERDER* (1998) [hereinafter KELLEY, *FACES OF HISTORY*] (discussing the history of cultural history and its relationship to other varieties of historiography); Carl E. Schorske, *History and the Study of Culture*, 21 NEW LIT. HIST. 407–20 (1990).

24. See, e.g., *THE NEW CULTURAL HISTORY* (Lynn Hunt ed., 1989); *HISTORIES: FRENCH CONSTRUCTIONS OF THE PAST* (Jacques Revel & Lynn Hunt eds., 1995); *BEYOND THE CULTURAL TURN* (Victoria E. Bonnell & Lynn Hunt eds., 1999); MICHAEL BENTLEY, *MODERN HISTORIOGRAPHY* 145–7 (1999); Miri Rubin, *What is Cultural History Now?*, in *WHAT IS HISTORY NOW?* 80–95 (David Cannadine ed., 2004); GEORG G. IGGERS, *HISTORIOGRAPHY IN THE TWENTIETH CENTURY: FROM SCIENTIFIC OBJECTIVITY TO THE POSTMODERN CHALLENGE* 97–133 (2005); BURKE, *supra* note 8, at 74–76.

25. KUPER, *supra* note 9, at 19, 23–24, 245–47; see also Suny, *supra* note 10; BURKE, *supra* note 12, at 183–212; BURKE, *supra* note 8, at 22–23, 31–33; Sewell, *supra* note 8; Mezey, *supra* note 18, at

What are the topics of the new cultural history? As historian Peter Burke once said, modern cultural historians are interested in topics such as “longevity, the penis, barbed wire and masturbation.”²⁶ They focus on the daily, automatic, seemingly “natural” aspects of human existence, studying meanings, values, practices, manners, and representations that many individuals in a given social group share with other members of their group. This includes distinctions between the public and private, childhood and adulthood, proper male and female behavior, attitudes to the body, health and illness, madness, and death. The study of the unconscious and nonrational is an important aspect of many of these works, and cultural historians often study emotions and sensations, imagination, dreams, and collective memory.²⁷

The impact of the cultural turn on specific subfields of historiography has been uneven. For example, it has been argued that while diplomatic history was heavily influenced by the cultural turn, political history was not.²⁸ What about legal history? One important influence of the cultural turn on legal history can be found in works written by critical legal historians in the 1980s and 1990s. Critical historians sought to study the collective “consciousness” of elite American lawyers, emphasizing the constitutive nature of law—the way in which categories created by legal discourse influenced society rather than reflected outside political, economic, or cultural forces.²⁹

Moving to specific subfields of legal history, one can ask what was the impact of cultural history on the history of tax law. Interest in the history of tax law has grown in the last few years.³⁰ However, most of the recent works written about the history of tax law have focused on political and economic factors rather than on cultural ones. Fewer works have attempted to study tax law using a cultural rather than a political approach.³¹

38–45 (discussing contemporary approach to the definition of culture in anthropology and cultural studies and the blurring of the boundary between culture and politics).

26. BURKE, *supra* note 8, at 3.

27. See, e.g., Kelley, *Cultural Turns*, *supra* note 23, at 94–97.

28. On international history see David Reynolds, *International History, the Cultural Turn and the Diplomatic Twitch*, 3 CULTURAL & SOC. HIST. 75 (2006); see also *Debate Forum*, 3 CULTURAL & SOC. HIST. 472–95 (2006) (responding to Reynolds’ arguments); Peter Jackson, *Pierre Bourdieu, the ‘Cultural Turn’ and the Practice of International History*, 34 REV. INT’L STUD. 155, 160–61 (2008); Sewell, *supra* note 8, at 48. On the impact of the cultural turn on political history see Suny, *supra* note 10, at 1489 (arguing that it did not influence political history). *But see* Burke, *supra* note 8, at 105–08 (arguing that it did).

29. Gordon, *supra* note 17, at 109. See generally William W. Fisher, *Texts and Contexts: The Application to American Legal History of the Methodologies of Intellectual History*, 49 STAN. L. REV. 1065 (1997) (for a discussion of some examples of the influence of varieties of cultural history, such as new historicism, on legal history). For a more recent discussion see Mitra Sharafi, *New History of Colonial Lawyering: Likbowski and Legal Identities in the British Empire*, 32 LAW & SOC. INQUIRY 1059, 1061 (2007).

30. See *The Thunder of History*, *supra* note 15, at 1–27.

31. On the study of tax law and culture see generally Michael A. Livingston, *Law, Culture and Anthropology: On the Hopes and Limits of Comparative Tax*, 18 CAN. J. L. & JURISPRUDENCE 119, 121

How can the history of tax law be connected to cultural history? There are many possible varieties of cultural histories of tax law. I will mention here four (these are ideal types and they may blend in actual works): Histories of the way in which tax law was *perceived* by lay persons; the way tax law *constituted* culture; the way tax law *reflected* culture; and, finally, the way cultural arguments were rhetorically used in tax law debates.

Histories of how tax law was perceived by culture examine the ways in which notions of tax law appeared in the thoughts and practices of nonlawyers. There is a vast sociological literature on legal consciousness which analyzes how official law is perceived and is experienced by ordinary people in their everyday lives.³² The tax equivalent of this literature is the social science scholarship measuring and explaining tax morale—popular attitudes to taxation and tax law.³³ Studies of how tax law was understood and viewed by lay persons in the past would be the historical counterpart of the literature on contemporary tax morale. Carolyn Jones's work on American tax morale during the Second World War, my own work on Israel of the 1950s, and Nicholas Parrillo's recent work on nineteenth-century American property tax administration are possible examples of works belonging to this category.³⁴

The second type of study examines the way taxation (and tax law) *constituted* culture. For example, we can study the way in which taxes and the legal requirements associated with them (for example, bookkeeping) created a rational approach to economic behavior (to use Schumpeter's words, brought the "calculating spirit into corners in which [it] did not dwell as yet"³⁵). The historical emergence of a rational, "calculating spirit" was mostly studied by critical

(2005) (discussing works dealing with tax culture, defining the term as "the body of beliefs and practices that are shared by tax-practitioners and policy-makers in a given society and that provide the background or context in which tax decisions are made."); see also Michael Livingston, *From Mumbai to Shanghai, with a Side Trip to Washington: China, India, and the Future of Progressive Taxation in an Asian-Led World*, 11 THEORETICAL INQUIRIES L. 539 (2010). An important discussion of the way local "culture" was constructed in colonial income tax legislation (embedded within a wider discussion of the way law constructs both "culture" and "the economy") is found in BIRLA, *supra* note 10, at 53–60, 96–99.

32. For a summary of the literature see, for example, Marc Hertogh, *A 'European' Conception of Legal Consciousness: Rediscovering Eugen Ehrlich*, 31 J.L. & SOC. 457 (2004).

33. For recent surveys of the social science literature see, for example, BENNO TORGLER, TAX COMPLIANCE AND TAX MORALE: A THEORETICAL AND EMPIRICAL ANALYSIS 64–78 (2007); Marjorie E. Kornhauser, *A Tax Morale Approach to Compliance: Recommendations to the IRS*, 8 FLA. TAX REV. 599, 606–40 (2007); see also Birger Nerré, *The Concept of Tax Culture*, in NATIONAL TAX ASSOCIATION PROCEEDINGS 228 (Sally Wallace ed., 2001) (defining "tax culture").

34. See Carolyn C. Jones, *Mass-Based Income Taxation: Creating a Taxpaying Culture, 1940–1952, in FUNDING THE MODERN AMERICAN STATE, 1941–1995: THE RISE AND FALL OF THE ERA OF EASY FINANCE* 107 (W. Elliot Brownlee ed., 1996); Assaf Likhovski, *Tax Compliance and Modernity*, 32 LAW & SOC. INQUIRY 665 (2007); Nicolas Parrillo, *Tax Administration for Profit: Its Rise and Fall in American States and Localities, c. 1860–1940* (unpublished manuscript) (on file with author); see also Marjorie E. Kornhauser, *The Rhetoric of the Anti-Progressive Income Tax Movement: A Typical Male Reaction*, 86 MICH. L. REV. 465 (1987).

35. Schumpeter, *supra* note 13, at 108.

accounting historians who have been heavily influenced by the Foucauldian notions of power-knowledge and of governmentality.³⁶ Another topic examined by histories of tax and social constitution is, in Schumpeter's words, the way taxation "determines the social structure," for example, how general categories of tax law such as "taxpayers," and more specific categories such as the distinction between passive and active income, came to define the political identities of social groups subject to taxation, spurring them to political organization and leading them to resist (or acquiesce to) taxation.³⁷ In both cases, there is a strong assumption of a trickle-down process of the legal notions to law's outside.

The third type of history of tax law and culture is focused on the way tax law *reflects* culture. This approach assumes that the legal categories used by tax law reflect deep unconscious notions which originate outside the law. According to this approach, embedded within the technical details of tax law we can find unconscious notions about the proper relationship between individual and state, about the scope of rights and duties of taxpayers, and about the purposes of social institutions such as the family, corporations, or the market. Tax law is a palimpsest: the explicit black-letter rules hide cultural notions which originated elsewhere. One example of such an approach is Marjorie Kornhauser's pioneering work on the impact on tax law of two general (and contradictory) images of wealth found in American culture, a negative and positive view. These contradictory images, argued Kornhauser, ultimately produced contradictory tax treatment of things such as interest income.³⁸

As I noted before, I believe that it is sometimes difficult to clearly decide whether tax law is a passive reflection of "culture" or actively constitutes it. Culture and law are not separate categories. Each is enmeshed within the other. While the second and third types of history are interested in the *causal* relationship between law and its outside, I suggest in this article a fourth category which is agnostic about the causal relationship between law and its outside. Just as the first category is focused on the way "tax law" is present in culture, the fourth category is focused on how "culture" (and related terms which refer to deep, widely shared, relatively static norms and practices) appeared in tax law. The interest is not in the link to an actual "reality." Instead, the interest is in culture as a rhetorical move.

36. See Peter Armstrong, *The Influence of Michel Foucault on Accounting Research*, 5 CRITICAL PERSP. ON ACCT. 25 (1994) (offering a summary and critique of Foucauldian-inspired accounting histories).

37. See Schumpeter, *supra* note 13, at 108; see also DROR WAHRMAN, *IMAGINING THE MIDDLE CLASS: THE POLITICAL REPRESENTATION OF CLASS IN BRITAIN, C.1780–1840*, at 108–40 (1995).

38. Marjorie E. Kornhauser, *The Morality of Money: American Attitudes Toward Wealth and the Income Tax*, 70 IND. L.J. 119 (1994); see also Carolyn C. Jones, *Split Income and Separate Spheres: Tax Law and Gender Roles in the 1940s*, 6 LAW & HIST. REV. 259 (1988); Assaf Likhovski, *A Map of Society: Defining Income in British, British-Colonial and American Tax Legislation*, 2005 BRIT. TAX REV. 158 (providing some other examples of attempts to describe tax law doctrines as a reflection of broader cultural images).

Possible questions of tax law history done in this mode would be: In what periods did arguments about the gap between taxation and the “culture” of the society appear? What similar terms were previously used to support such arguments? In what stages in the life of the law (preenactment, enactment, application) did these arguments appear? Who was raising such arguments (lawyers, judges, tax administrators, politicians)?

Why pursue such an approach? While such an approach cannot fulfill the Schumpeterian goal of using taxation (or tax law) to “hear the thunder of world history”—that is, to use tax law to learn something about broader society (or culture), either as a “reality” reflected in law or as a set of categories and notions constructed by law and later used by society, this approach may still yield interesting jurisprudential insights, allowing us to ask new questions about the way in which law (understood as a rhetorical practice) and actors involved in this practice (whether lawyers or not) viewed social similarity and difference in a given place or period. I will return to this point in more detail in the Conclusion. Let me now move to the first of my two specific case studies.

II. A COLONIAL TAX TRANSPLANT: MANDATORY PALESTINE 1917–1948

In the early 1930s, British officials in Palestine and the Colonial Office in London began to contemplate the introduction of income taxation in British-ruled Palestine. In 1934 the Colonial Office sent a tax expert, J.F. Huntington, to the country. Following his visit, Huntington came to the conclusion that Palestine was not ready for such a tax. One of the reasons he gave had to do with a cultural difference between Britain and Palestine regarding outward manifestations of wealth: “In Palestine,” Huntington observed,

the style of life of quite wealthy persons bears, to Western ideas, little relation to their income . . . I was told on good authority that the richest Arab in Haifa lives in a style of penury and that a Jew of the same city, reputed to be a millionaire, lives in a third-rate hotel.

Huntington then quoted a novel by the German émigré author, Arnold Zweig, who was living in Palestine at the time, in which it was said that

Men who own whole districts of Jerusalem live unobtrusively among ancient gardens, whose existence behind high walls is more surmised than seen. And sheikhs, who may be observed buying costly carpets . . . look as though they did not possess five pounds . . . but in the end they produce thick bundles of notes from their pockets or from their broad girdles.³⁹

The wealthy beggars of Palestine, and the challenges that they posed to the British officials who were supposed to tax them, thus raise the question of the

39. J.F. HUNTINGTON, REPORT ON THE INTRODUCTION OF INCOME TAX IN BRITISH-RULED PALESTINE 12 (May 1934) (CO 733/261, TNA: PRO) [hereinafter HUNTINGTON REPORT].

relationship between British tax law and local Jewish and Arab culture (culture in the sense that Huntington's "style of life" was not the result of economic differences between locals and British taxpayers but the result of local attitudes to conspicuous consumption). To what extent was British colonial income tax law adapted to "local conditions" in the process of the transplantation of income tax law to Palestine?⁴⁰

1. 1917–1939: Rejecting Transplantation

The tax system of Palestine during the late Ottoman period was mainly based on direct taxation of the rural population of the country. It included a "tithe" (called *usher*) that was levied on gross farm output, an animal tax (*aghnam*), and a land and building tax (*werko*). In addition to these taxes, the system included excise taxes, customs, and various registration and license fees. The British occupied the southern part of Palestine in 1917 and its northern part in 1918. During the first years of their rule in Palestine the British modified only small parts of the Ottoman tax system, turning customs, a favorite colonial revenue-raising tool, into a major source of revenue.⁴¹

The British had relatively little leeway in changing the tax system, not merely because they were foreign rulers to whom the local population owed weaker allegiance, but also because they ruled a society that was composed of two distinct communities, Arabs and Jews, whose social structures, economic interests, and political aspirations diverged widely. Any new fiscal measure would automatically have been seen as serving the interests of one community to the detriment of the other.⁴²

In 1923 the first British High Commissioner of Palestine, Herbert Samuel, appointed a commission to consider the desirability of reintroducing a Turkish

40. For a summary of the theoretical literature on legal transplants, see Likhovski, *supra* note 22, at 148–50.

41. On the late Ottoman and early Mandatory tax system see ABRAHAM GRANOVSKY, *THE FISCAL SYSTEM OF PALESTINE* (1935); ARYE LAPIDOTH, *EVASION AND AVOIDANCE OF INCOME TAX: A COMPARATIVE STUDY OF ENGLISH LAW AND ISRAELI LAW* 16–25 (1966); Arye Lapidoth, *Trends in the Income Tax Legislation of Israel*, in *SCRIPTA HIEROSOLYMITANA: VOL. 26—STUDIES IN ISRAEL LEGISLATIVE PROBLEMS* 325 (1966); AMOTZ MORAG, *MIMUN HA-MEMSHALA BE-YISRAEL: HITPATHUT U-VEAYOT [PUBLIC FINANCE IN ISRAEL: DEVELOPMENT AND PROBLEMS]* 1–28 (1967) (Hebrew); *HITPATHUT HA-MISIM BE-ERETZ YISRAEL: SKIRA HISTORIT [THE HISTORY OF TAXATION IN PALESTINE AND ISRAEL]* (A. Mandel ed., 1968) (Hebrew); HAROLD C. WILKENFELD, *TAXES AND PEOPLE IN ISRAEL* 16–42 (1973); BARBARA J. SMITH, *THE ROOTS OF SEPARATISM IN PALESTINE: BRITISH ECONOMIC POLICY 1920–1929*, at 40–46 (1993); JACOB METZER, *THE DIVIDED ECONOMY OF MANDATORY PALESTINE* (1998); Aharon Yoran, *Forty Years of Tax Law*, 24 *ISR. L. REV.* 738 (1990); MARTIN BUNTON, *COLONIAL LAND POLICIES IN PALESTINE 1917–1936*, at 132–70 (2007).

42. MORAG, *supra* note 41, at 2–3; see also Livingston, *From Mumbai to Shanghai*, *supra* note 31, at 570–76 (discussing the way ethnic fissures are reflected in attitudes to progressivity in contemporary Israel).

vocational tax on merchants and artisans (*temettu*).⁴³ This tax had been abolished in 1920 following the British conquest of the country, and its reimposition in 1923 was contemplated because the British believed that the rural population was paying more than its fair share of taxes while urban merchants and professionals were lightly taxed. The High Commissioner consulted the Colonial Office in London, seeking information about similar taxes in the British Empire. In response, the Colonial Office informed Samuel of the existence of a 1922 report by the Imperial Inter-Departmental Committee on Income Taxation. The Committee created a Model Income Tax Ordinance for British colonies, a copy of which, apparently, was never sent to Palestine. The Colonial Office added a word of caution about income taxation. Because of difficulties of assessment, said the Colonial Office, income tax in colonies “tends to resolve itself into little more than a tax on Government officials, as being the only class whose income is readily ascertainable.”⁴⁴ Following this advice, the whole matter was dropped.

While sporadic mention of the income tax can be found in documents from the late 1920s, the idea of introducing income taxation in Palestine was only revived following the Arab riots of 1929.⁴⁵ The riots led to the establishment of a committee composed of William Johnson, the Deputy Treasurer of Palestine, and Robert Crosbie, the Assistant Southern District Commissioner. They suggested that an income tax be introduced in Palestine, again as a way of alleviating the relatively high tax burden that had apparently been placed on Arab peasants.⁴⁶

In June 1932 the Government’s Standing Committee on Trade and Industry was instructed to examine the problem of introducing income taxation to Palestine.⁴⁷ The renewed interest was again motivated by the desire to redistribute the tax burden more equitably between the rural and urban sectors, and implicitly between Arabs (most of whom were peasants) and Jews (most of whom were urban). It was also motivated by the concern, raised perhaps by the economic crisis of the early 1930s, that custom revenues might decrease in the future and that a machinery for taxing income should therefore be put in place while

43. Taxation Inquiry Appointees (June 15, 1923) (CO 765/1, TNA); see also *Mas Hachmasa be-Eretz Yisrael [Income Tax in Palestine]*, DAVAR, Nov. 6, 1939, at 2 (Isr.).

44. Letter from Thomas to Herbert Samuel, (Jan. 28, 1924) (CO 733/51, TNA: PRO); Minutes (July 21, 1932) (CO 733/225, TNA: PRO); *Income Tax*, PALESTINE POST, Apr. 3, 1941, at 4; see also GRANOVSKY, *supra* note 41, at 119, 209, 302–03; REPORT OF THE INTER-DEPARTMENTAL COMMITTEE ON INCOME TAX IN COLONIES NOT POSSESSING RESPONSIBLE GOVERNMENT (1922) [hereinafter 1922 REPORT].

45. See, e.g., Minutes of the Executive Council of the Government of Palestine, 183rd Meeting (June 27, 1927) (CO 814/23, TNA).

46. GOV’T OF PALESTINE, REPORT OF A COMMITTEE ON THE ECONOMIC CONDITIONS OF AGRICULTURALISTS IN PALESTINE AND THE FISCAL MEASURES OF GOVERNMENT IN RELATION THERETO 49, 56 (1930); GRANOVSKY, *supra* note 41, at 305.

47. *Income Tax*, PALESTINE POST, Apr. 3, 1941, at 4; *Sir Arthur Wauchope’s Policy*, PALESTINE POST, Dec. 14, 1932, at 5; Extract from Daily News Bulletin No. 36 (Feb. 10, 1934) (CO 733/260, TNA: PRO); *Income Tax Scheme: No Change in Jewish Attitude*, PALESTINE POST, Feb. 16, 1934, at 8.

Palestine enjoyed a period of relative prosperity, so that it could be used in the future to replace other sources of revenue.⁴⁸

Palestine was not the first British territory in the Middle East to have an income tax. Income taxation was introduced in Iraq in 1927. However, in Iraq most taxpayers were British officials and firms.⁴⁹ Income taxation was also introduced in Trans-Jordan in 1933.⁵⁰ There too the tax was actually imposed only on a small group of salaried employees, with exemptions provided for many occupations (including workers in religious and charitable organizations, servants, agricultural workers, and midwives).⁵¹

Unlike Iraq and Trans-Jordan, where the tax encountered little opposition from the local population, in Palestine the introduction of income taxation met with fierce resistance among some sectors of the population. While initially there was some Arab opposition to the tax, most Arab politicians and businessmen ultimately came to support it, provided it would be used to replace other taxes such as the tithe and customs, which were seen as pro-Jewish.⁵²

Initial Jewish reaction, at least in the politically dominant Jewish labor movement, was quite favorable despite the perceived adverse impact income taxation would have on the Jewish sector.⁵³ However, middle-class Jews opposed

48. Letter from Wauchope to Colonial Office (Dec. 22, 1932) (CO 733/225, TNA: PRO); Letter from Wauchope to Cunliffe-Lister (June 14, 1934) (CO 733/261, TNA: PRO).

49. One Colonial Office official who served in Iraq before moving to London noted that the general Iraqi view was that the income tax "should be a tax payable by British officials and British firms and companies, and as far as possible by no one else." Minutes, Vernon (Apr. 30, 1934) (CO 733/260, TNA: PRO).

50. *Income Tax in Trans-Jordan*, PALESTINE POST, Mar. 21, 1933, at 2; GRANOVSKY, *supra* note 41, at 324.

51. *Old Story Across the Jordan: Income Tax in Force Since 1933*, PALESTINE POST, Apr. 29, 1941, at 3.

52. The tithe was seen as pro-Jewish because it was mainly paid by Arab peasants. High customs rates were also seen as pro-Jewish because they were seen as a way of protecting young Jewish industries from foreign competition. On Arab support for the income tax, see, for example, *Hajfa Arabs Favour Low Income Tax*, PALESTINE POST, Feb. 25, 1934, at 5. On the argument that income tax should replace customs, see *Syrian Transport to Palestine Growing*, PALESTINE POST, June 12, 1938, at 12. On Arab opponents of the income tax, see, for example, *More About Income Tax: View of Arab Opponents*, PALESTINE POST, Dec. 5, 1932, at 5; *Merchants and Proposed Income Tax*, PALESTINE POST, Feb. 15, 1934, at 5; *Proposed Election Boycott: Depreciated by Gaza Mayor*, PALESTINE POST, Feb. 16, 1934, at 8.

53. See, e.g., Haim Arlosoroff, *mi-Reshimot ha-Hodesh* [Notes of the Month], 1 AHDUT HA-'AVODA 461, 471 (1930); *Ha-Vicub al Mas Hachnasa ba-Vaad ha-Leumi* [The Argument Regarding Income Tax in the National Council], DAVAR, Nov. 16, 1932; *Lediyun be-Inyan Mas Hachnasa* [Discussion Regarding Income Tax], DAVAR, Nov. 18, 1932, at 2 (speech by Berl Katznelson). For an earlier declaration of support for progressive income taxation by the Jewish labor movement, see *Hablatot ha-Veida ha-Shlisit shel Histadrut ha-Ovdim ha-Clalit be-Eretz Yisrael* [Decisions of the Third Conference of the National Workers Alliance in Israel], DAVAR, Aug. 26, 1927, at 9. On the Jewish labor movement, socialist policies, and taxation see also ZEEV STERNHELL, *THE FOUNDING MYTHS OF ISRAEL: NATIONALISM, SOCIALISM, AND THE MAKING OF THE JEWISH STATE* 6 (1999).

income taxation vehemently.⁵⁴ An article by Arthur Ruppin, a leading Zionist sociologist and economist, summarized the main arguments of the Jewish opponents of the tax.

One of the major arguments that Ruppin used was based on cultural difference between Britain and Palestine. According to Ruppin, the tax morale and “economic maturity” of the native (i.e., Arab) inhabitants of Palestine would not allow the introduction of the income tax. Indeed, “the income tax, a product of long evolutionary process in Western countries, if mechanically transplanted into the backward conditions of Palestine, can do little good to state finance but may inflict serious harm on the country’s economic fabric.”⁵⁵ Ruppin’s arguments were espoused by the National Council of Palestinian Jews (*Vaad Leumi*), one of the major political organizations of the Jewish community in Palestine, which, in December 1932, adopted an official resolution opposing taxation of income, arguing that

The cultural level and economic situation of large sections of the country’s inhabitants prevent a fair registration of their income, giving rise to the danger that instead of a fair distribution of taxes, an income

54. On settler resistance to income taxation in other parts of the British Empire, see Barbara Bush & Josephine Maltby, *Taxation in West Africa: Transforming the Colonial Subject into the “Governable Person,”* 15 CRITICAL PERSP. ON ACCT. 5, 12 (2004); Michael Littlewood, *Taxation Without Representation: The History of Hong Kong’s Troublingly Successful Tax System*, 2002 BRIT. TAX REV. 212 (discussing the history of income taxation in Hong Kong). According to a *Palestine Post* article, the opposition to the tax in the Jewish community was universal. *Income Tax Opposed: Unanimous Jewish Opinion*, PALESTINE POST, Feb. 14, 1934, at 4; *Income Tax: Impractical, Unjust, Harmful*, PALESTINE POST, Mar. 5, 1934, at 4.

55. Arthur Ruppin, *Income Tax in Palestine: A Premature and Ill-Advised Project—Serious Menace to Development*, 18–19 PALESTINE NEAR E. ECON. MAG. 443, 443–46 (1932). Similar arguments were made by other Jewish opponents of the plan. See, e.g., Letter from Dizengoff to Chancellor (Nov. 20, 1932) (CO 733/225, TNA: PRO); Note on Discussion on the Introduction of Income Tax in Palestine Between the Acting Treasurer and the Jewish Agency (July 4, 1932) (CO 733/255, TNA: PRO); GRANOVSKY, *supra* note 41, at 283–300, 305–16. It should be noted that the ethnic incidence of taxation was hotly disputed. In a memorandum submitted to the Palestine Royal Commission in 1937, the Government of Palestine argued that it was impossible to give an accurate figure of the relative incidence of taxation along ethnic lines. See *Memorandum No. 4C: Relative Contributions of Arabs and Jews to Revenue and Benefits Derived by Each Race from Expenditure*, in 2 MEMORANDA PREPARED BY THE GOVERNMENT OF PALESTINE FOR THE USE OF THE PALESTINE ROYAL COMMISSION 20–24 (1937); see also MICHEL FRED ABCARIUS, PALESTINE THROUGH THE FOG OF PROPAGANDA 173–85 (1946); SMITH, *supra* note 41, at 57; Mahmoud Yazbak, *From Poverty to Revolt: Economic Factors in the Outbreak of the 1936 Rebellion in Palestine*, 36 MIDDLE E. STUD. 93, 97–100 (2000). An additional argument made by other Jewish speakers was that the tax would subject capital flowing to Palestine from foreign countries to double taxation. See Note of Discussion with Dr. Brodetsky (Nov. 30, 1932) (CO 733/225, TNA: PRO). The issue of double taxation was often a cause of concern in the colonial context. For previous examples, see *The Colonies and the Income-Tax*, TIMES, June 6, 1896, at 18; *Association to Protest Against the Duplication of Income-Tax Within the Empire*, TIMES, Feb. 10, 1917, at 12; *Double Income Tax Within the Empire: Strong Protest Against the Grave Injustice of the Present System*, TIMES, Apr. 10, 1919, at 17. Some opponents of income taxation in Palestine also noted that Egypt and Syria, which neighbored Palestine to the south and the north, respectively, did not have an income tax at the time. Arie L. Shenkar, *Why Income Tax in Palestine*, PALESTINE POST, Apr. 4, 1934, at 2.

tax will lead to an additional burden on those sections which either do not desire or are unable to conceal their income.⁵⁶

While the debate on the taxation of income raged, the lawyers of the Colonial Office and the Government of Palestine created a draft Income Tax Ordinance for Palestine. This draft was based on the Model Colonial Income Tax Ordinance of 1922. Little attempt was made, either in London or Jerusalem, to adapt the Model Ordinance to local conditions.⁵⁷

If in the initial stage of drafting the Ordinance little attention was devoted to local conditions, it seems that the opposite was true of the second stage—when an expert was sent to Palestine to examine local attitudes, interests, and circumstances. The official who was sent to Palestine was the previously mentioned Board of Inland Revenue expert, J.F. Huntington. Huntington arrived in Palestine in February 1934 to head a committee that also included two local officials, the Treasurer and the Director of Customs, Excise, and Trade. Huntington's committee heard evidence in March and April of 1934. Witnesses included members of local chambers of commerce, as well as representatives of major industries and the professions. Perhaps unsurprisingly, workers and peasants, who were an indirect although important interest group, were not invited to give evidence.⁵⁸

Huntington submitted his report in May 1934. His general conclusion was that income taxation should not be imposed in Palestine. Huntington's rejection of income taxation was based on two major arguments: one having to do with the nonhomogeneous nature of society in Mandatory Palestine, the other with local social norms.

Taxation of income, Huntington said, should target the taxpayer's "ability" by reference to the taxpayer's monetary income. Palestine, said Huntington, was a country of "strangely assorted standards of life," and monetary income could not "furnish a fair test of 'real' ability in a country in which the most widely different cultures and standards of life are found side by side." In Palestine, an income of £500 per annum provided a high standard of living for Arabs, but "for a European . . . and for many Jews" such an income meant "bare livelihood," both because much of the income would be spent on rent and because "many of the more numerous things which [the European's and Jew's] culture and standard of living have made necessary to him are heavily taxed already." Living costs,

56. Extract from Daily News Bulletin No. 36, *supra* note 47.

57. This obliviousness to local conditions was perhaps a result of the recommendation of the committee that prepared the 1922 draft, which said in its report that the "uniformity of legislation should be aimed at as far as possible." See 1922 REPORT, *supra* note 44, at 5; see also G. EICHELGRÜN, PALESTINE INCOME TAX GUIDE 2 (1945).

58. *A Low Income Tax: Considered: Visiting Expert to Hear Local Evidence*, PALESTINE POST, Feb. 11, 1934, at 1. In total, the committee heard eighty-one witnesses, thirty-one of whom were Jews, and the rest coming from the local Muslim, Christian Arab, and Christian European communities in roughly equal numbers. See HUNTINGTON REPORT, *supra* note 39, at 35.

Huntington concluded, “vary according to race and creed, of necessity and not of choice, in a way inconceivable in occidental countries.”⁵⁹ Huntington also added,

There were such vast differences in the standard of living and morality of various sections of the community, that an identical rate of tax on a given income would be burdensome on some classes and comparatively light for other sections assessed at that rate e.g. a Government official earning £1000 a year is a comparatively poor man and a merchant in the Souk earning £1000 a year is definitely a rich man.⁶⁰

Another set of arguments used in the report had to do with local social norms. Huntington noted that there would be widespread evasion of the income tax because of “Arab standards . . . both of truthfulness and of bookkeeping.” He also noted that in Palestine accountants were of poor standing and low quality, unregulated by any professional body, and that they therefore lacked a spirit of independence toward their clients. Finally, he mentioned the “engrained habits of bribery in an oriental country.”⁶¹ These images were echoed in a note written on Huntington’s report by one of the officials in the Colonial Office (who previously served in Iraq). This official commented that

the Baghdadi Jew is the greatest living expert in the production of fictitious accounts and . . . he has a high reputation for this in Manchester. No doubt the Palestine Jew will have some similar qualifications and I should be surprised if the Palestine Arabs and Christians are behind him in this respect.⁶²

Based on Huntington’s report, the High Commissioner for Palestine reached the conclusion that introducing an income tax in Palestine would be impractical.⁶³

2. 1939–1941: Enactment

As a result of the Arab revolt of 1936–1939 and the beginning of the Second World War in 1939, the revenues of the Government of Palestine declined sharply. The British attempted to deal with declining revenues by increasing import and excise duties, stamp duties, and rates on postage, telephone, and transportation.⁶⁴ However, the decline in revenue also served as an excellent excuse for introducing income taxation.⁶⁵ Several developments created a more

59. HUNTINGTON REPORT, *supra* note 39, at 18, 23.

60. *Id.* at 40.

61. *Id.* at 8, 14, 20, 42.

62. R. V. Vernon, Minutes (July 17, 1934) (CO 733/261, TNA: PRO). This official then added that such considerations should not hinder the imposition of the tax because “if you are ever going to introduce income tax in Palestine you will have to face this difficulty,” and the sooner it was done the better.

63. Letter from Wauchope to Cunliffe-Lister (June 14, 1934) (CO 733/261, TNA: PRO).

64. *Increased Taxation in Palestine: Attempt to Make Country Self-Supporting*, TIMES, May 2, 1940, at 5.

65. Minutes of the 854th Meeting of the Executive Council of the Government of Palestine 1 (Mar. 8, 1941) (CO 814/37, TNA).

favorable climate for the introduction of taxation of income in Palestine. Income tax had been introduced in Egypt in 1938,⁶⁶ and in a number of other British colonies such as Hong Kong and Cyprus at the beginning of the Second World War.⁶⁷ Palestine thus became one of the last British possessions in the Middle East—and, indeed, around the world—where an income tax had not yet been introduced by 1940, at a time when the explicit policy of the Colonial Office was to introduce it in all parts of the Empire.⁶⁸

In addition, the Jewish community in Palestine was already in the process of introducing such a tax internally. In early October 1940, the Jewish National Council, the governing body of the Jewish community in Palestine, decided to impose a voluntary progressive Jewish income tax whose revenues were to be used for relief work.⁶⁹ The revenues collected were substantial.⁷⁰

Six days after the decision of the Jewish National Council to create a voluntary Jewish income tax system, the Government of Palestine announced that it was reconsidering the imposition of income taxation due to the expected decline in revenues from customs, the increase in income tax rates in Britain, and the fact that the burden of taxation in Palestine fell heaviest on the poor and middle

66. *New Tax Law in Egypt*, PALESTINE POST, July 26, 1938, at 5; *Egypt's Double Peace-War Programme: King Farouk Officially at State Opening of Parliament*, PALESTINE POST, Nov. 20, 1938, at 1. Syria and Lebanon introduced income taxation only after it was introduced in Palestine. See *Income Tax Announced in Syria*, PALESTINE POST, June 18, 1942, at 3; *Income Tax in Lebanon*, PALESTINE POST, Nov. 24, 1944, at 3; G. Eichelgruen, *Income Tax in Lebanon: Provisions May Affect Palestinians*, PALESTINE POST, Mar. 14, 1945, at 2.

67. *News in Brief*, PALESTINE POST, Oct. 13, 1939, at 7; *Economic Position of Cyprus*, PALESTINE POST, Jan. 24, 1941, at 5; *Cyprus Income Tax and Commerce: A Possible Model for Palestine*, PALESTINE POST, Apr. 19, 1941, at 5. On the introduction of income taxation in Hong Kong (in Apr. 1940) see generally Littlewood, *supra* note 54; Michael Littlewood, *The Legacy of UK Tax Law in Hong Kong*, 2008 BRIT. TAX REV. 253. See also, BIRLA, *supra* note 10, at 53–60 (discussing India).

68. *Income Tax Levy for Palestine: 50 Mils in the Pound and Up*, PALESTINE POST, May 26, 1941, at 1; *H.M. Government's Colonial Policy During and After the War*, PALESTINE POST, Aug. 20, 1941, at 4.

69. *Income Tax*, PALESTINE POST, Oct. 3, 1939, at 6; *Jewish "Income Tax" Announced*, PALESTINE POST, Oct. 3, 1939, at 1; *The Week in Comment*, 4 PALESTINE REV. 341, 342 (Oct. 1939). The rates ranged between one percent on a monthly income of 10LP to more than twenty percent on monthly incomes of more than 100LP. Even before the introduction of Jewish income tax on a national level, there were repeated attempts to introduce a municipal income tax in Tel Aviv. For example, in 1938 Labor councilors in Tel Aviv were joined by some homeowners who suggested that such a tax be imposed because they felt that they were shouldering too much of the municipal tax burden and because foreign companies with huge profits paid only an insignificant amount of the municipal rates. See *Councillors in Conference*, PALESTINE POST, Mar. 13, 1938, at 8. But see *Councillors in Conference: Tel Aviv's Budget*, PALESTINE POST, Mar. 20, 1938 (suggesting that such taxation should wait for the establishment of a Jewish state, since taxation of income could not be successfully introduced in a single city); see also *Municipal Budget Debate Concluded*, PALESTINE POST, Feb. 12, 1941, at 3. These demands were not met, and no municipal income tax was created. See *T[el] A[viv] Adopts LP704,500 Revenue Budget*, PALESTINE POST, Mar. 14, 1944, at 3; *Municipal Elections Demanded*, PALESTINE POST, Dec. 20, 1944, at 3.

70. From 1942 to 1943 the government collected about LP1,000,000 in income tax, while the three main voluntary Jewish funds collected about LP1,200,000. See *Public Works for Tel Aviv Progress: Town's Debt Is Only LP390,000*, PALESTINE POST, Apr. 23, 1945, at 3.

classes.⁷¹ An Income Tax Ordinance was enacted in August 1941 and came into force in September 1941.⁷²

This time around, the idea of a tax on income was received far more favorably than in the mid-1930s. Jewish chambers of commerce in major towns and Jewish homeowners were still opposed to the tax, but the general tone in the Jewish press now shifted in a more favorable direction, most likely because the Jews and the British were now on the same side of a world conflict that threatened the very existence of the Jewish community in Palestine.⁷³ The tax, said a *Palestine Post* article, “cannot be regarded as an unjustifiable burden on the population since it is modest in its demands and apparently equitable in incidence.”⁷⁴ Another newspaper, *Ha-Boker*, said that the new income tax commissioner was not to be seen as an enemy of the people, and noted enthusiastically that the new income tax ordinance was in “the latest European fashion.”⁷⁵

A few changes were made in the Ordinance to adapt it to local conditions. For example, a section dealing with “family deductions,” which originally allowed a deduction only for the maintenance of old or infirm family members, was redrafted to allow a deduction in any case in which the taxpayer proved that they maintained a “person incapable of maintaining himself.” The alteration, it was explained, was made to meet a request from Muslims who claimed that “they are bound by custom to maintain relatives whether or not they are old or infirm.”⁷⁶

71. *Income Tax Again Being Considered: Government Measure to Reach All Classes in Palestine*, PALESTINE POST, Oct. 8, 1939, at 1. The decision to introduce the tax as an experimental measure was actually made by the Executive Council of the Government of Palestine in early 1940. See Minutes of the 723rd Meeting of the Executive Council of the Government of Palestine 2 (Feb. 2, 1940) (CO 814/36, TNA); see also Minutes of the 746th Meeting of the Executive Council of the Government of Palestine 3 (Sept. 14, 1940) (CO 814/36, TNA).

72. *Income Tax Law Published: In Force from September 1*, PALESTINE POST, Aug. 24, 1941, at 1.

73. *Notes of the Week*, PALESTINE POST, Oct. 13, 1939, at 6; *Me-Inyanei ha-Shaa* [Current Events], DAVAR, Feb. 13, 1940, at 8; *Readers' Letters: The Urban Property Tax*, PALESTINE POST, Mar. 26, 1941, at 4; *Income Tax as Substitute*, PALESTINE POST, Apr. 2, 1941, at 2; *Arab Chambers Consider Income Tax*, PALESTINE POST, Apr. 7, 1941, at 2; *Our Treasury*, PALESTINE POST, Apr. 22, 1941, at 4; *Income Tax Favoured*, PALESTINE POST, Apr. 22, 1941, at 3; *Reflections*, PALESTINE POST, Apr. 26, 1941, at 4 (supporting the tax). But see *Mas Hachnasa be-Eretz Yisrael*, *supra* note 43; *Opposition to Income Tax in Palestine*, PALESTINE POST, Jan. 26, 1940, at 5; *Objections to Income Tax*, PALESTINE POST, Apr. 21, 1940, at 2; *Hebrew Daily Says Move Is Premature*, PALESTINE POST, Mar. 17, 1941, at 3; *Home-Owners Protest Against Income Tax*, PALESTINE POST, Apr. 2, 1941, at 2; *Jewish Merchants in Conference*, PALESTINE POST, Apr. 16, 1941, at 3.

74. *The New Income Tax*, PALESTINE POST, June 2, 1941, at 4.

75. *Mutzag ba-Muzgon le-Misim: 50 Shana le-Hanbagato shel Mas Hachnasa be-Eretz Yisrael 1941–1991* [Tax Museum Exhibit: 50 Years to the Enactment of Income Tax in Israel 1941–1991], 19 RIV'ON YISRA'ELI LE-MISIM 292 (1991).

76. Untitled Table, at 38 (CO 733/444, TNA: PRO) (Section 16 of the Ordinance); Income Tax Adviser Memo (May 15, 1941) (M 724/15, (3.0.1.643), ISA). For a similar argument in the case of Hong Kong, see Littlewood, *supra* note 54, at 256. See also *Government Adviser's Broadcast*, PALESTINE POST, May 26, 1941, at 4 (comparing the use of allowances in European countries and Palestine); *In Force*, *supra* note 72; *Income Tax*, PALESTINE POST, Aug. 27, 1941, at 4 (providing summaries of alterations in the Ordinance following comments received from the public after the publication of the

However, as a general statement it is fair to say that the Ordinance was drafted based on the assumption of universality of income tax law.

Evidence that these assumptions were not shared by all British officials can be found in a letter written by D.N. Strathie, the first Income Tax Commissioner in Palestine, who previously served in Madras. In a 1941 letter, Strathie suggested that the draft Palestine Income Tax Bill should be amended in line with a provision of Indian income tax law which did not grant a right of appeal to taxpayers who either did not file a return or failed to produce accounts and whose tax assessments were made independently by a tax officer. This, said Strathie, was “our chief weapon in forcing the production of accounts.” Such a provision “may appear retrograde,” but “Orientals will certainly avoid giving returns and producing accounts (I am sure they all have them).” In addition, said Strathie, the Palestinian Ordinance was faulty because it was based “too much on English practice.” For example, he thought that the deductions for a wife and children were ill-advised “in an Eastern Country.”⁷⁷

3. 1941–1948: Application

Collection of the new income tax proved to be easier than expected, and initial revenues exceeded expectations.⁷⁸ Not surprisingly, one prominent characteristic of the tax debates in Palestine was that many tax issues were viewed through an ethnic prism. Jewish opposition to the tax, as well as Arab support for it, were based on the fact that taxation of income was seen as an anti-Jewish measure.⁷⁹ It was only when wealthy (and perhaps less nationalist) Arabs realized in early 1943 that taxation of income did not necessarily ease the burden of other taxes that they joined forces with the Jews to oppose it. In January 1943, when the Government announced its intention to raise income tax rates and introduce a new rural property tax, Jewish and Arab landlords joined ranks in opposition to the plan, discussing the formation of a joint conference of Arab and Jewish property owners.⁸⁰

Wealthy Arabs also voiced opposition to taxation when the British attempted to introduce an estate duty in early 1943.⁸¹ When this became known, a

bill and also a list of major requests for changes in the Income Tax Ordinance which were not accepted); ABRAHAM FELLMAN, *THE PALESTINE INCOME TAX LAW AND PRACTICE* 27 (1946).

77. Letter from Strathie to Downie (Jan. 5, 1941) (CO 733/444, TNA: PRO).

78. Annual Progress Reports 1942–1945: Supplement to Annual Report (Apr. 15, 1942) (Record Group 16, M-1379/24, ISA) [hereinafter Supplement to Reports 1942–45]. The actual number of taxpayers, however, was lower than expected (5000 instead of 7000). Cf. *6000 out of 7000 Taxpayers in Towns*, PALESTINE POST, June 5, 1941, at 3; *Income Tax Receipts Satisfactory*, PALESTINE POST, Apr. 26, 1942, at 3.

79. HUNTINGTON REPORT, *supra* note 39, at 8 (citing a PALESTINE POST editorial published in Mar. 1934).

80. *Landlords Meet*, PALESTINE POST, Jan. 25, 1943, at 3.

81. *Palestine Pays Its Way*, PALESTINE POST, Feb. 18, 1943, at 4; *New Taxes on Incomes and Profits*, PALESTINE POST, Feb. 18, 1943, at 1.

conference of Arab landlords and delegates attacked the tax as “contrary to the laws of Islam.”⁸² The opposition proved successful and the idea was abandoned, although there was another, equally unsuccessful, attempt to introduce an inheritance tax in 1945.⁸³

By 1945–46 there were 62,000 income taxpayers in Palestine, and revenues from the tax comprised about twenty percent of total government revenues.⁸⁴ However, government officials, while reporting an impressive increase in the number of taxpayers, also reported that certain social groups generally evaded taxation, especially Arabs and “Old Yishuv” (i.e., non-Zionist, often ultra-orthodox) Jews.⁸⁵ At least in the case of Arab taxpayers, the disappointing revenues may also have been the result of social structures. The Income Tax Commissioner observed in 1942 that “in early discussions the District Commissioners had anticipated large sums from rich Arab property owners. There has been no such case. Certain Arab families do own large extents of agricultural land but the income is divided up between various members of the family and has rarely proved taxable.”⁸⁶

In the process of adapting the Ordinance to local conditions, British officials made use of various mechanisms. One was to give discretion to local experts.⁸⁷ For example, one popular method of tax avoidance in Palestine was the formation of companies and the retention of profits by the companies (the maximum initial tax rate on individuals was thirty percent, while the rate of taxation on companies was initially set at ten percent).⁸⁸ One way to fight the use of companies as a tax avoidance device was by taxing undistributed profits. Section 22(1) of the Income Tax Ordinance, which contained a general anti-avoidance provision, was expanded in April 1943 to include specific provisions taxing undistributed profits. A committee was created, which had a majority of nonofficial members (two

82. *All-Palestine Arab Conference Rejects Tax Proposals*, PALESTINE POST, Mar. 12, 1943, at 3.

83. *New Income Tax in Force Tomorrow*, PALESTINE POST, Mar. 31, 1943; *Landlords' Opposition*, PALESTINE POST, Mar. 11, 1945, at 2; *War Tax on Companies Enacted*, PALESTINE POST, July 29, 1945, at 3.

84. *How Jewish Taxpayers Outnumber Arab*, PALESTINE POST, Mar. 23, 1948, at 3; MORAG, *supra* note 41, at 10.

85. Annual Progress Reports 1942–1945: Income Tax—General Report for 1942–43, at 2 (Record Group 16, M-1379/24, ISA) [hereinafter Income Tax General Report 1942–43].

86. Supplement to Reports 1942–45, *supra* note 78, at 2.

87. The use of lay experts to assess and collect income, thus reducing friction between the state and taxpayers, was a well-known device used, for example, in the determination of the profits of unincorporated businesses in England. See MARTIN DAUNTON, *TRUSTING LEVIATHAN: THE POLITICS OF TAXATION IN BRITAIN, 1799–1914*, at 186, 188, 190 (2001); see also Margaret Lamb, ‘Horrid Appealing’: *Accounting for Taxable Profits in Mid-Nineteenth Century England*, 26 ACCT. ORGS. & SOC. 271, 288 (2001); BUNTON, *supra* note 41, at 162–69.

88. Annual Progress Reports 1942–1945, Jerusalem District: Revenue Report for the Financial Year Ending March 31, 1942, at 7 (Record Group 16, M-1379/24, ISA); Annual Progress Reports 1942–1945: Annual Report 1943–1944, at 3 (Record Group 16, M-1379/24, ISA); *800 New Firms in Six Months*, PALESTINE POST, July 1, 1942, at 2; see also MORAG, *supra* note 41, at 97.

officials and three members of the public with special commercial experience) to advise the Income Tax Commissioner on the exercise of his power under the section. This attempt to “introduce responsible members of the public as advisers,” noted the commissioner, has proved “a conspicuous success.”⁸⁹

A different way of adapting the Ordinance to local conditions was simply to ignore the letter of the law in its application.⁹⁰ For example, requests for relief in respect of income taxation paid in other parts of the empire were dealt with, despite the fact that there was no formal reciprocal mechanism of the kind envisioned by the Ordinance. In his 1942 Report the Commissioner noted that “I gave relief in some cases in which it was not strictly speaking due, as reciprocating arrangements have not yet been made with the colonies,” explaining that “in war conditions I considered it undesirable to delay relief till reciprocating arrangements were completed.”⁹¹

Another example of the discretion used was in the treatment of evasion. In the report for 1942–43, the Commissioner noted that evasion was fairly widespread, but “having regard to the fact that income tax has been but recently introduced in Palestine, it was decided, as a matter of policy, not to take any action under sections 66 and 67 of the Ordinance which provide for penalties for the making of incorrect returns and fraudulent acts.”⁹²

While the officials administering the Income Tax Ordinance tried in various ways to adapt the Ordinance to local conditions, legal actors, both lawyers and judges, were working in the opposite direction, seeking to eliminate the differences between Palestinian and English (and British-colonial) income tax laws. Legal textbooks and case law were both used to achieve this goal. The Income Tax Ordinance spawned an impressive number of textbooks and commentaries during the final seven years of British rule in Palestine.⁹³ Many of these books contained

89. Annual Report 1943–44, *supra* note 88, at 3; *see also* *Income Tax Panel*, PALESTINE POST, 28, 1944, at 2; S. MOSES, THE INCOME TAX (AMENDMENT) ORDINANCE 1943, at 31 (1943); S. MOSES, THE INCOME TAX ORDINANCE OF PALESTINE 77 (1944). In February 1944, the High Commissioner issued a notice naming twelve nonofficials to the panel. These included three English, four Jewish, and five Arab “members of the public.”

90. The use of extensive discretion also characterized tax administration in England in the nineteenth century. *See* Margaret Lamb, *Defining “Profits” for British Income Tax Purposes: A Contextual Study of the Depreciation Cases, 1875–1897*, 29 ACCT. HIST. J. 105, 121, 123 (2002).

91. Supplement to Reports 1942–45, *supra* note 78, at 2.

92. Annual Progress Reports 1942–1945: Income Tax—General Report for 1942–43, at 2 (Record Group 16, M-1379/24, ISA). Deviations from the letter of the law were not always in favor of the taxpayer. For example, it seems that while the Income Tax Ordinance required assessing officers to refund any amount that was deducted at the source in excess of the amount of tax due, the actual practice instead was not to refund these amounts, but to carry them over to future years, in direct contravention of section 61 of the Ordinance. Letter from Berinson to Comm’r of Income Tax (July 21, 1946) (Record Group 16, M-151/38, ISA).

93. *See* A.M. APELBOM & B. BRAUDE, PALESTINE INCOME TAX CASES (1945); EICHELGRÜN, *supra* note 57; FELLMAN, *supra* note 76; E.W. KLIMOWSKY, MAS HACHNESA BEREZT YISRAEL [INCOME TAX IN PALESTINE] (1941) (Isr.); S. MOSES, THE 1947 INCOME TAX

systematic discussions of the Ordinance.⁹⁴ Lawyers were also busy comparing the law of Palestine to English and colonial income tax law in newspaper articles.⁹⁵ Typically lawyers called for greater similarity between Palestinian and English law.⁹⁶ Case law was another method of convergence of laws. Unlike other Mandatory ordinances, the Palestine Income Tax Ordinance did not contain a specific provision requiring judges to interpret it on the basis of English law. British judges in Palestine at first declared that they would not use English tax law in their decisions, but they soon turned to English decisions, even if they were not formally obliged to do so, because lawyers arguing the cases before them used English precedents, and the judges felt the need to address these precedents.⁹⁷

4. Tax Transplants and Culture

Arguments about cultural difference appeared in debates about taxation in Palestine. In these debates, “culture” and some related terms (“morality,” “habits,” “custom”) were used to refer to literacy, bookkeeping practices, attitudes toward conspicuous consumption and standards of living, social norms about family obligations, tax morale, and attitudes toward telling the truth and bribery.

Cultural arguments were used by Jewish opponents of income taxation in the 1930s in their attempt to prevent the imposition of income taxation, but the use of cultural arguments was not confined to Jewish politicians. J.F. Huntington, the Board of Inland Revenue official sent to Palestine in 1934, echoed the cultural arguments made by Jewish opponents of the income tax, talking about matters such as Jewish and Arab standards of living, “morality,” “standards of truthfulness,” and the “engrained habits of bribery in an oriental country.” Perhaps the arguments made by Arab landlords when the British attempted to introduce an estate duty in early 1943, that such a tax was “contrary to the laws of Islam,” belong in the same category.

It may be the case that the images used in the debate reflected widely shared

AMENDMENTS (1947); S. MOSES, *THE INCOME TAX ORDINANCE OF PALESTINE* (1942); S. MOSES, *THE INCOME TAX (AMENDMENT) ORDINANCE, 1942* (1942); S. MOSES, *THE INCOME TAX (AMENDMENT) ORDINANCE 1943*; S. MOSES & WALTER SCHWARZ, *THE INCOME TAX ORDINANCE OF PALESTINE* (2d ed. 1946); S. MOSES, *THE 1947 INCOME TAX AMENDMENTS* (1947); D. ROSOLJO & E.W. KLIMOWSKY, *MAS HACHNASA BE-YISRAEL [INCOME TAX IN PALESTINE]* (1944) (Isr.); F.H. STRAUSS, *THE A B C OF INCOME TAX IN PALESTINE* (1941).

94. See, e.g., *Preface* to STRAUSS, *supra* note 93; MOSES, *THE INCOME TAX ORDINANCE OF PALESTINE* 3–8 (1942); *Guide to Income Tax*, PALESTINE POST, July 2, 1942, at 4; *Introduction* to EICHELGRÜN, *supra* note 57; FELLMAN, *supra* note 76, at 23–26; ROSOLJO & KLIMOWSKY, *supra* note 93.

95. See, e.g., E.W. Klimowsky, *Cyprus Income Tax and Commerce*, PALESTINE POST, Apr. 19, 1941, at 5; S. Moses, *Tax on Undistributed Profits*, PALESTINE POST, Oct. 27, 1942, at 2; *Readers' Letters: Tax on Bonus Shares*, PALESTINE POST, Mar. 24, 1943, at 4; S. Moses, *The Future of Income Tax*, PALESTINE POST, Jan. 10, 1944, at 4.

96. *Readers' Letters: Income Tax*, PALESTINE POST, Nov. 23, 1944, at 4.

97. For a detailed discussion, see Likhovski, *supra* note 22, at 759–61.

attitudes that did exist in “reality.” Indeed, it is possible to argue that the potency of the cultural arguments used by the Jews to convince the British that income tax should not be imposed in Palestine is found in the fact that these arguments resonated in some way with an actual reality that was familiar to British officials. After all, why would Huntington change his mind about the desirability of income taxation once he reached Palestine? And more generally, why would the British agree not to impose a tax which, it seems, was in their interest to impose?

There are two problems with the “resonance” argument. First, it assumes that cultural arguments were indeed potent. But it is impossible to know from the sources whether this was the case. Cultural arguments never appeared alone. They were always accompanied by other, noncultural arguments, and it is difficult to tell which arguments, the cultural or noncultural ones, actually motivated the action of British officials. Second, the “resonance” may not have been with reality but with an orientalist discourse about reality that Ruppin and Huntington shared with other elite actors in the debates.

It seems that it is difficult to choose between an approach which sees the tax debates as a neutral and passive reflection of local “culture,” and an approach which finds in the debates evidence for the construction (conscious or unconscious) of a misleading representation of this local “culture.” It may indeed be the case that the cultural arguments made by Jews, British, and Arabs reflected in some way attitudes that actually existed in Palestine. But perhaps the “cultural difference” argument had little relation with some outside reality. It may have simply been one argument in an arsenal of arguments utilized to prevent the imposition of undesirable taxes and justify the selective application of these taxes by administrators once they were enacted.

III. TAX PRIVACY: ENGLAND 1799–1816

1. The History of Tax Privacy as a History of Culture

One of the sections of Jeanette S. Martin and Lillian H. Chaney’s book *Global Business Etiquette* deals with the subject of “small talk or chitchat.” The section includes a long list of dos and don’ts (“when conversing with Italians, avoid making comments about the Mafia, Italian politics, taxes and religion,” and “in Australia and New Zealand . . . avoid bringing up treatment of the Aborigines, kangaroo population control, or labor disputes”). One of the observations made in this section is that “the Chinese feel it is acceptable to ask personal questions about salary and marital status which would be viewed as inappropriate by U.S. persons.”⁹⁸

98. JEANETTE S. MARTIN & LILLIAN H. CHANEY, *GLOBAL BUSINESS ETIQUETTE: A GUIDE TO INTERNATIONAL COMMUNICATION AND CUSTOMS* 130, 132 (2006); *see also* FARID ELASHMAWI, *COMPETING GLOBALLY: MASTERING MULTICULTURAL MANAGEMENT AND NEGOTIATION* 28, 197 (2001) (opining that one should not ask Americans or the French about their salary).

Different national cultures seem to have (at least according to this type of popular business ethnography) different attitudes on the privacy of information about individual wealth and income. Such attitudes also change over time. What is considered “private” at one point in time is not necessarily what will be considered “private” at another point.

Many modern income tax systems protect the information that taxpayers provide to the tax authorities from disclosure to the general public and even from disclosure to other government agencies.⁹⁹ However, historically, not all tax systems protected tax privacy. In the United States, there were periods in the nineteenth and early twentieth centuries when some of the federal income tax information provided by taxpayers to the Internal Revenue Service was made public, and even today some states allow limited access to information about property and income tax payments by corporate and individual taxpayers.¹⁰⁰ In 1950s Israel, the Government published a register of taxpayers’ annual income (*sefer nishbomim*) listing the reported income of taxpayers so that those taxpayers who underreported their income would be revealed and be subject to shaming.¹⁰¹ Until 2004, the Japanese tax office published the names, addresses, and tax liability of taxpayers whose income exceeded a certain amount. Similar practices appeared (and sometimes still exist) in a number of other jurisdictions.¹⁰² Thus, what seems

99. There is a distinction between tax confidentiality, which is the right to require that the tax authorities not disclose information revealed by the taxpayer to third parties, and tax privacy, or secrecy, which is the right of the taxpayer not to reveal information to the authorities. This Article will use the term “tax privacy” to refer to both privacy and confidentiality. For the distinction, as well as a detailed discussion of contemporary UK confidentiality provisions, see Robert Mitchell, *Confidentiality and the Law of Taxation*, in *UK LAW FOR THE MILLENNIUM* 354–444 (John W. Bridge ed., 2d ed., London: UKNCCCL, 1998). For a discussion of the relevant U.S. provisions, see Paul Schwartz, *The Future of Tax Privacy*, 56 NAT’L TAX J. 883 (2008).

100. See REPORT ON ADMINISTRATIVE PROCEDURES OF THE INTERNAL REVENUE SERVICE TO THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, S. Doc. 94-266, 825–1135 (1975); Marjorie E. Kornhauser, *Doing the Full Monty: Will Publicizing of Tax Information Increase Compliance?*, 18 CAN. J. L. & JURIS. 95 (2005); Marjorie E. Kornhauser, *Shaping Public Opinion and the Law in the 1930s: How a ‘Common Man’ Campaign Ended a Rich Man’s Law*, 73 LAW & CONTEMPORARY PROBLEMS 123 (2010); David Lenter et al., *Public Disclosure of Corporate Tax Return Information: Accounting, Economics and Legal Perspectives*, 56 NAT’L TAX J. 803, 807–11 (2003); Richard D. Pomp, *The Disclosure of State Corporate Income Tax Data: Turning the Clock Back to the Future*, 22 CAP. U. L. REV. 373 (1993); Schwartz, *supra* note 99.

101. See Likhovski, *supra* note 34, at 665.

102. See HAROLD C. WILKENFELD, *TAXES AND PEOPLE IN ISRAEL*, at xiv (1973) (discussing the publication of taxpayer returns in Israel, Japan, and Sweden); Schwartz, *supra* note 99, at 888–89 (discussing Italy); Lenter et al., *supra* note 100, at 811–12 (discussing public access to corporate tax returns in Japan, Norway, Sweden, and Finland as well as attitudes to the publication of tax evasion information in other countries); Ian MacDougall, *That’s Rich: Norway’s Tax List Reveals Everyone’s Wealth*, THE SCOTSMAN (Oct. 23, 2009), available at <http://news.scotsman.com/world/That39s-rich-Norway39s-tax-list.5760129.jp> (discussing Norway); Minoru Nakazato, J. Mark Ramseyer & Eric B. Rasmusen, *THE INDUSTRIAL ORGANIZATION OF THE JAPANESE BAR: LEVELS AND DETERMINANTS OF ATTORNEY INCOMES*, Harvard John M. Olin Center for Law, Economics and Business discussion paper no. 559, available at http://www.law.harvard.edu/programs/olin_center/.

natural to some—the “right” of taxpayers not to have their income tax information revealed to fellow taxpayers—is actually the outcome of a specific historical trajectory.¹⁰³

There are many possible questions to ask once one realizes that tax privacy is a contingent historical phenomenon: How did income tax information become secret in specific jurisdictions? What arguments were used to justify tax privacy? Who opposed and who supported tax privacy? How did the specific contours of tax privacy reflect changing notions of citizenship and of the power of the state? The question that is most pertinent to the current article, however, is whether the history of tax privacy can be linked to the broader cultural history of privacy and, even more broadly, to debates about the nature of modernity.¹⁰⁴ There are two contradictory ways of linking the history of tax privacy to the broader story.

One way to view the appearance of the notion of tax privacy is to see it as one manifestation of a more general trend—the history of a gradually emerging private sphere, protected from the prying eyes of society and state. Such a history might also link the notion of tax privacy to the wider story of the rise of individual identity, based on an “inner” essence of the individual whose core beliefs were to be protected from state intervention by a series of legal and constitutional safeguards.¹⁰⁵

There is now a sizeable body of studies by social and cultural historians (as well as by historical sociologists) of the history of privacy in the early modern and modern periods. These studies examine sites such as politics and the economy, architecture, print culture, the family, and sexual behavior, attempting to trace changing notions of privacy.¹⁰⁶ While some of these works question the notion of

103. In this Article I examine privacy issues related to individuals, not corporations. Of course, the need to choose between privacy and transparency also exists in the corporate sphere, and it seems that similar debates appeared there. See generally A.C. Storrar & K.C. Pratt, *Accountability vs Privacy, 1844–1907: The Coming of the Private Company*, 10 ACCT. BUS. & FIN. HIST. 259 (2000).

104. A few aspects of the history of tax privacy in the Anglo-American world have already been studied. See Chantal Stebbings, *The Budget of 1798: Legislative Provision for Secrecy in Income Taxation*, 1998 BRIT. TAX REV. 651 (1998) (discussing the initial stages in the emergence of tax privacy in late eighteenth-century England); REPORT ON ADMINISTRATIVE PROCEDURES, *supra* note 100 (a major study of American tax administration which contains a chapter briefly discussing milestones in the history of American tax privacy); Kornhauser, *Shaping Public Opinion*, *supra* note 100 (an important study that analyzes the debates surrounding attempts to make American tax returns public in the 1930s). However, the existing works do not attempt to link the specific history of tax privacy to the broader historical context, especially to the burgeoning literature on the cultural history of privacy.

105. See DROR WAHRMAN, *THE MAKING OF THE MODERN SELF: IDENTITY AND CULTURE IN EIGHTEENTH-CENTURY ENGLAND* (2004) (suggesting that late eighteenth-century England witnessed a major transformation in the notions of self-identity. It was during this time that conception of self-identity as something rigid, static, unitary, essentialist, and internal replaced a more dynamic, shallower, and more malleable notion of identity that existed before the late eighteenth century). See also LORRAINE DASTON & PETER GALISON, *OBJECTIVITY* 191–251 (2007) (discussing a somewhat similar transition in the images of “the scientific self”).

106. For examples of histories of privacy, see *A HISTORY OF PRIVATE LIFE*: (5 vols., Philippe Ariès, et al. eds., 1998); PATRICIA MEYER SPACKS, *PRIVACY: CONCEALING THE*

a linear and progressive growth in the scope of privacy, the scholarly consensus seems to see a more or less unidirectional emergence of a comprehensive, modern notion of privacy in the seventeenth and eighteenth centuries.¹⁰⁷

This approach is also echoed in the literature on the emergence of a *legal* notion of privacy, which has been studied by David Seipp and, more recently, Lawrence Friedman.¹⁰⁸ Seipp and Friedman explore in great detail the emergence of the legal right to privacy in nineteenth- and twentieth-century America, focusing mostly on the protection of reputation and describing a host of common law legal tools designed to safeguard individual reputations in private law contexts, for example, analyzing the use of the torts of libel, slander, and invasion of privacy. Their work mainly focuses on American law in the nineteenth century, and pays less attention to an older site—English law in the late eighteenth and early nineteenth century. In addition, Seipp and Friedman are mostly interested in tort law, rather than areas of public law, such as taxation, where legal notions of privacy seem to have appeared first.¹⁰⁹

A second, opposite way to tell the history of tax privacy would be to analyze the emergence of tax privacy in relation to the history of the modern state. Conventional accounts of the modern era often associate modernity with the appearance of a host of intrusive practices by the state and by nonstate institutions (for example, mental hospitals). Modern individuals are far more exposed than

EIGHTEENTH-CENTURY SELF (2003); DAVID VINCENT, *THE CULTURE OF SECRECY: BRITAIN, 1832–1998* (1998); Sarah Toulalan, *Private Rooms and Back Doors in Abundance: The Illusion of Privacy in Pornography in Seventeenth Century England*, 10 *WOMEN'S HIST. REV.* 701 (2001).

107. The interest in the rise of the modern notion of the private sphere can be traced back to Habermas's work. See, e.g., JÜRGEN HABERMAS, *THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE: AN INQUIRY INTO A CATEGORY OF BOURGEOIS SOCIETY* 27–31 (1991). For surveys of the literature that also criticize the clear binary distinction between the private and public as well as the notion of a smooth linear emergence of the concept of privacy, see MICHAEL MCKEON, *THE SECRET HISTORY OF DOMESTICITY: PUBLIC, PRIVATE, AND THE DIVISION OF KNOWLEDGE* (2005); AMANDA VICKERY, *BEHIND CLOSED DOORS: AT HOME IN GEORGIAN CULTURE* 25–27 (2009); Dena Goodman, *Public Sphere and Private Life: Toward a Synthesis of Current Historiographical Approaches to the Old Regime*, 31 *HIST. & THEORY* 1 (1992); Tim Meldrum, *Domestic Service, Privacy and the Eighteenth-Century Metropolitan Household*, 26 *URB. HIST.* 27 (1999).

108. See LAWRENCE M. FRIEDMAN, *GUARDING LIFE'S DARK SECRETS: LEGAL AND SOCIAL CONTROLS OVER REPUTATION, PROPRIETY, AND PRIVACY* (2007); DAVID J. SEIPP, *The Right to Privacy in American History*, in *HARVARD PROGRAM ON INFORMATION RESOURCES POLICY REPORT P-78-3*, 1978.

109. Current histories of the right of privacy argue that this right emerged only in the mid or late nineteenth century. According to David Seipp, it is not possible to talk about a general legal right of privacy before the late nineteenth century, because the infringement of individuals' privacy by other individuals was dealt with by nonlegal tools, and the infringement of privacy by the federal government was limited to specific issues such as the post and the census. Seipp's account does contain a brief discussion of privacy and early American income taxation noting that some of the opposition was based on the grounds that it was inquisitorial. See Seipp, *supra* note 108, at 51. For the argument that the emergence of the private and public, and, in consequence, the appearance of the very notion of privacy, is intimately connected to the appearance of the tax state, see Schumpeter, *supra* note 13, at 103.

were people in previous generations to practices designed to collect information about them and thus indirectly control their lives; indeed, the argument is that these practices shaped their very being.¹¹⁰ Modern taxation, which necessitates “fiscal anthropometrics”—the collection of information about taxpayers on a vast scale—is sometimes described as a perfect example of the intrusive information-gathering nature of modernity.¹¹¹ Thinking about the history of tax privacy in this context would lead to a view of the notion of tax privacy as an active tool of political resistance to the growing power of the state rather than being merely a passive reflection of wider cultural trends. The appearance of tax privacy arguments can be used as proof that the history of modernity is not a story about the growing power of the state to penetrate ever deeper into the private affairs of the subjects, but instead a story of resistance and conflict: modern income taxation entailed far more penetration into the private affairs of the taxpayers. However, this novel attempt by the state to exercise more power over its subjects did not go unanswered. Taxpayers reacted to state penetration by inventing the notion of privacy. The state was not free to collect information or, by “knowing” its subjects, free to force them to comply with taxation. Instead, state attempts to penetrate the private sphere were resisted by an emerging middle class, who managed to obtain important concessions from the state guaranteeing their privacy.

So should we view the history of tax privacy merely as a passive reflection of wider unconscious cultural notions or was tax privacy a tool consciously forged to fight the growing power of the state? This is the dilemma that animates the case

110. See, e.g., MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1977); MICHEL FOUCAULT, ‘SOCIETY MUST BE DEFENDED’: LECTURES AT THE COLLÈGE DE FRANCE, 1975–1976 (David Macey trans., 1997); MICHEL FOUCAULT, SECURITY, TERRITORY, POPULATION: LECTURES AT THE COLLÈGE DE FRANCE, 1977–1978 (Graham Burchell trans., 2009); Michel Foucault, *Governmentality*, in THE FOUCAULT EFFECT 87 (Graham Burchell et al. eds., 1991); Colin Gordon, *Governmental Rationality*, in THE FOUCAULT EFFECT 1, 9–11; Pasquale Pasquino, *Theatrum Politicum: The Genealogy of Capital*, in THE FOUCAULT EFFECT 105, 109–10; Christopher Tomlins, *Framing the Fragments. Police: Genealogies, Discourses, Locales, Principles*, in THE NEW POLICE SCIENCE: THE POLICE POWER IN DOMESTIC AND INTERNATIONAL LAW 248 (Markus Dubber & Mariana Valverde eds., 2006). For somewhat similar ideas, see NORBERT ELIAS, THE CIVILIZING PROCESS (Eric Dunning et al. eds., Edmund Jephcott trans., Blackwell Publishers Ltd. rev. ed. 2000) (1939); JAMES C. SCOTT, SEEING LIKE A STATE: HOW CERTAIN SCHEMES TO IMPROVE THE HUMAN CONDITION HAVE FAILED (1998). See also JOHN BARRELL, THE SPIRIT OF DESPOTISM: INVASIONS OF PRIVACY IN THE 1790S (2006) (discussing growing state intervention and (political) control of the private sphere and the history of privacy in late eighteenth-century England).

111. See Yanni Kotsonis, “Face-to-Face”: *The State, the Individual, and the Citizen in Russian Taxation, 1863–1917*, in 63 SLAVIC REV. 221, 234 (2004). Some aspects of the story do not seem to fit this approach to the relationship of income taxation and modernity. Margaret Lamb for example, has argued, based on an impressive analysis of the income tax appeal of the author Thomas Carlyle in 1855, that as late as the 1850s, English tax appeals were conducted in a way reminiscent of the older premodern “sovereign power” phase of governing and that there were only a few indications at this time of the emergence of self-disciplining calculable subjects. See Lamb, *supra* note 87.

study discussed in this part of the Article.

My discussion will proceed in the following way: I will first give a brief outline of the history of tax privacy in late eighteenth- and early nineteenth-century Britain. Second, I will discuss the reaction of English taxpayers to income taxation by showing how contemporary observers perceived income taxation as administratively (rather than substantively) novel because of power that was given to the state to collect information about the financial affairs of English subjects. Third, I will discuss taxpayers' resistance to the attempt to collect information about them, focusing on the argument made by some opponents of the tax that it established an "inquisition," which undermined a "constitutional" protection from state intrusion. Finally, I will ask what this specific case study can tell us about the possibility of using the history of tax law debates in writing more general cultural histories of privacy.

2. *The Early British Income Tax and the Notion of Privacy*

Income taxation first appeared in Renaissance Italy and taxes on income were also known in seventeenth- and eighteenth-century France and the Netherlands, but the modern history of income tax legislation begins in late eighteenth-century Britain.¹¹² In January 1798, in the fifth year of England's war with France, Prime Minister William Pitt the Younger reformed the existing system of British taxation by introducing the Triple Assessment.¹¹³ The Triple Assessment unified a long series of taxes on male servants, carriages, houses, windows, lights, dogs, clocks, and watches (the "assessed taxes") into a single system taxing luxury goods that could serve as markers of wealth.¹¹⁴ Income appeared in the Triple Assessment in the part dealing with exemptions. The Triple Assessment divided taxpayers into categories according to presumed income. The assessments of each category varied according to a specific schedule of rates. Taxpayers could request an exemption or abatement according to their "annual income."¹¹⁵ The Triple Assessment failed to raise the expected revenue, and a year later Prime Minister Pitt proposed a new tax—the first English income tax—

112. See generally PETER HARRIS, *INCOME TAX IN COMMON LAW JURISDICTIONS: FROM THE ORIGINS TO 1820* (2006). See also Likhovski, *supra* note 38.

113. An Act for Granting His Majesty an Aid and Contribution for Prosecution of the War, 1798, 38 Geo. 3, c. 16 (Eng.); see also WILLIAM KENNEDY, *ENGLISH TAXATION, 1640–1799*, at 169 (London, G. Bell and Sons Ltd. 1913) (1964); Likhovski, *supra* note 38, at 160–64; HARRIS, *supra* note 112, at 384–85.

114. On the triple assessment as a proxy for a property tax, see Harris, *supra* note 112, at 384. Other items previously assessed included, for example, hair powder and dogs. See, e.g., EDWARD BOSWELL, *THE CIVIL DIVISION OF THE COUNTY OF DORSET* 36–37 (Dorchester, Weston, Simonds, & Sydenham, 2d ed., corr., augm., and improved., 1833); B. E. V. SABINE, *A HISTORY OF INCOME TAX* 20 (1966). On the dog tax, see, for example, Lynn Festa, *Person, Animal, Thing: The 1796 Dog Tax and the Right to Superfluous Things*, 33 *EIGHTEENTH-CENTURY LIFE* 1 (2009).

115. 38 Geo. 3, c. 16, § 4 (Eng.); see also Harris, *supra* note 112, at 384.

which came into force on January 9, 1799.¹¹⁶ Now all taxpayers, not just those seeking exemption or abatement, were to make a declaration as to their income.¹¹⁷

As tax historian Chantal Stebbings has noted, there are two types of disclosure that can be created by the income tax. One type is the disclosure of private financial circumstances to government officials who are supposed to assess the taxpayers. The other type is the disclosure of private financial circumstances to the public.¹¹⁸ Although Pitt believed that disclosure to government officials was inevitable, he tried his best to convince opponents of the tax that taxpayer information would not leak to the general public. A number of devices were employed to prevent such leakage: the tax was administered by propertied commissioners whose wealth would guarantee their respectability, and therefore would prevent the leakage of information (a personal estate worth at least £10,000 was the minimum property requirement of commissioners in the counties); special bodies to deal with commercial income were appointed; oaths of secrecy were required; general rather than specific returns were demanded (that is, declarations of income would not include any specific details of the income of the taxpayer, the taxpayer being merely asked to declare a sum which represented no less than ten percent of his income); and the returns were sealed and tax officials used a code to hide the names and income of specific taxpayers.¹¹⁹

Because the income tax did not yield the expected revenue, Pitt attempted to amend it, putting forward in April 1800 a bill that would have eliminated many of the secrecy provisions found in the earlier acts; for example, the bill required taxpayers to provide detailed rather than general returns and limited the scope of authority of the commercial commissioners. However, opposition in Parliament resulted in a far weaker bill being enacted which had little effect on the existing scope of secrecy.¹²⁰

In 1802, following the conclusion of the Peace of Amiens, the 1799 income tax was abolished. It was reintroduced in 1803 by Henry Addington (who replaced Pitt as prime minister between 1801 and 1804). Addington retained some of the measures that Pitt enacted. However, he also introduced the use of a scheduler system, which allowed taxpayers to submit different returns based on different

116. An Act to Repeal the Duties Imposed by an Act, Made in the Last Session of Parliament, for Granting and Aid and Contribution for the Prosecution of the War; and to Make More Effectual Provision for the Like Purpose, by Granting Certain Duties upon Income, in Lieu of the Said Duties, 1799, 39 Geo. 3, c. 13 (Eng.) [hereinafter 1799 Act]; see also PIROSKA E. SOOS, *THE ORIGINS OF TAXATION AT SOURCE IN ENGLAND 145-47* (1997).

117. 1799 Act, *supra* note 116, § 38; see also Harris, *supra* note 112, at 406.

118. Stebbings, *supra* note 104, at 651.

119. *Id.* at 653-62; see also 1799 Act, *supra* note 116, §§ 2, 17, 22, 23, 99; An Act to Repeal the Duties Imposed by an Act, Made in the Last Session of Parliament, for Granting an Aid and Contribution for the Prosecution of the War . . . , 1799, 39 Geo. 3, c. 22 (Eng.); An Act to Enable the Commercial Commissioners Appointed to Carry Into Execution Certain Acts for Granting Duties Upon Income . . . , 1799, 39 Geo. 3, c. 42, § 8 (Eng.).

120. Stebbings, *supra* note 104, at 662-63.

sources of income to different officials. In this way, no single official would have a comprehensive knowledge of the taxpayer's income, and thus the danger of information leakage revealing the taxpayer's entire income would be minimized. An additional tool used by Addington was the deduction of tax at source rather than asking taxpayers to report their income.¹²¹

For a while, it seemed as if Addington's 1803 tax successfully balanced the need of the state to collect information and the taxpayers' desire to maintain their privacy, but in 1816 a major debate over income taxation erupted, and this debate ultimately led to the abolition of the tax. Two major arguments were raised by opponents of income taxation. One argument had to do with the assertion often repeated by the government that income taxation was a war measure that would be repealed as soon as the war ended. Napoleon's final defeat and exile to Saint Helena in 1815 spurred opponents of the income tax to demand its abolition. The second argument used by opponents of the tax had to do with its novelty. In what sense was the tax a novel one?

3. *The Novelty of Income Taxation*

Histories of income taxation sometimes describe the emergence of income taxation in the late eighteenth century as part of a continuous evolutionary process. The income tax incorporated many features found in previous taxes, and one can trace the origins of some of its categories, such as the distinction between capital and income, backward to centuries of poll, land, and other types of direct taxes. Gradualist histories of income taxation therefore do not describe the emergence of the income tax as a rupture. Instead, they see continuity, arguing that the taxation of income existed in an embryonic form in English taxation since the Middle Ages.¹²²

While many terms and definitions used by the early English income tax acts can indeed be linked to the past, the assumption of continuity may also be misleading. Income taxation was also a major change in the history of English taxation: luxury taxes on a haphazard list of items—servants, carriages, horses, houses, windows, dogs, clocks, and watches—were replaced by a tax on “all income,” and a system focused on external markers of wealth was suddenly transformed into one focused on an internal, hard-to-know attribute of taxpayers—their income. In this sense, the rise of income taxation can be seen as a reflection, in the tax field, of the more general emergence of the modern, unitary, inner notion of the self that historian Dror Wahrman discusses in his

121. *Id.* at 664–65.

122. See Harris, *supra* note 112, at 389, 407, 465, 467, 473–75, 488–89; see also DAUNTON, *supra* note 87, at 13–17. For an earlier gradualist statement, see EDWIN R.A. SELIGMAN, *THE INCOME TAX: A STUDY OF THE HISTORY, THEORY AND PRACTICE OF INCOME TAXATION AT HOME AND ABROAD* 4–5 (1911).

work.¹²³ The shift from a tax system focused on visible objects to one taxing invisible attributes (income) also meant a shift from voluntary to involuntary taxation. Until the enactment of the income tax, taxation was perceived by taxpayers as being, in a certain sense, voluntary because the luxuries, the markers of wealth that were being taxed, were revealed by the taxpayer to the state by their very possession or consumption (and indeed often flaunted by the taxpayers as status symbols). Now suddenly the system became one in which the state had the power to demand from each taxpayer upon oath the “particular circumstances” of his “private situation.”¹²⁴ The revolutionary aspect of the 1799 tax was thus not found in the legal categories used by the new tax (“income versus capital” for example). Instead, the shift was administrative—the income tax was novel because it was based on a new type of relationship between the taxpayer and state, one in which the state was empowered to ask taxpayers to involuntarily reveal information about their “inner” financial affairs.¹²⁵

The emergence of an intrusive system of information gathering for tax purposes was part of a wider process in which the central state created systems of information collection and inspection.¹²⁶ Some aspects of the “information state” already existed prior to the eighteenth century.¹²⁷ However, the income tax was seen by contemporaries as significantly different. This was because state knowledge of the income of its subjects required far more information about invisible aspects of taxpayers’ lives.¹²⁸

123. On the “making of the modern self,” see Wahrman, *supra* note 105.

124. W. HAMILTON REID, MEMOIRS OF THE PUBLIC LIFE OF JOHN HORNE TOOKE, ESQ. 139 (London, Sherwood, Neely & Jones 1812); *see also* THE NEW ANNUAL REGISTER, OR GENERAL REPOSITORY OF HISTORY, POLITICS AND LITERATURE FOR THE YEAR 1799, at 116, 134 (London, G. G. & J. Robinson 1800); William Phillips, *The Origin of Income Tax*, 1967 BRIT. TAX REV. 113, 119 (1967). On the taxation of luxury items, *see also* CHRISTOPHER J. BERRY, THE IDEA OF LUXURY: A CONCEPTUAL AND HISTORICAL INVESTIGATION 206–08 (1994).

125. On the novel intrusive nature of the tax as the major reason for its unpopularity, *see* ARTHUR HOPE-JONES, INCOME TAX IN THE NAPOLEONIC WARS 114–15 (1939). *See also* Lamb, *supra* note 87, at 271, 293 (2001) (noting that income taxation was novel in the sense that it created calculable subjects). For studies of income and other forms of direct taxation in nonwestern and colonial contexts that have already noted the novelty of modern taxation and connected it to a state’s desire to “know” its subjects and to tear down barriers protecting the taxpayers from the power of the state: *see, for example*, Kotsonis, *supra* note 111, at 221 (discussing this process in late Imperial Russia); Yanni Kotsonis, “No Place to Go”: *Taxation and State Transformation in Late Imperial and Early Soviet Russia*, 76 J. MOD. HIST. 531 (2004) (discussing the process in early Soviet Russia); Bush & Maltby, *supra* note 54 (discussing colonial Africa).

126. DAUNTON, *supra* note 87, at 194; *see also* Miles Ogborn, *Local Power and State Regulation in Nineteenth-Century Britain*, 17 TRANSACTIONS INST. BRIT. GEOGRAPHERS 215 (1992).

127. *See generally* EDWARD HIGGS, THE INFORMATION STATE IN ENGLAND: THE CENTRAL COLLECTION OF INFORMATION ON CITIZENS SINCE 1500 (2004). On the use of invasive practices in the collection of taxes, *see also* JOHN BREWER, THE SINEWS OF POWER: WAR, MONEY AND THE ENGLISH STATE, 1688–1783 (1988) (discussing the growing power of the early modern state to gather information); BARRELL, *supra* note 110, at 145–209 (discussing intrusive practices, such as the taxpayer register, or the use of informers, which were associated with the 1795 tax on hair powder).

128. *See, e.g.*, 2 JAMES ANDERSON, RECREATIONS IN AGRICULTURE, NATURAL-HISTORY,

This novel aspect of the tax clearly appears in contemporary debates about income taxation. In the early eighteenth century, reporting information about one's wealth to the state was not seen as a problem.¹²⁹ By the mid-eighteenth century, however, privacy concerns about taxation were already present. Adam Smith suggested that a window tax was better than a hearth tax because windows are visible markers of wealth and would thus not require the tax collector to enter the taxpayer's home. Smith also argued that "it is a hardship upon a man in trade to oblige him to show his books, which is the only way in which we can know how much he is worth. It is a breach of liberty and may be productive of very bad consequences by ruining his credit."¹³⁰

Smith's approach was mentioned by Prime Minister Pitt in 1797, two years before the enactment of the income tax. The taxation of income is not possible, said Pitt, because a person's wealth should only be taxed once it is exposed to the gaze of the state by consumption: "I know no act to make property the subject of taxation while it is not rendered conducive to the pleasure or convenience, or rendered visible by the optional expenditure of the person who possesses it," said Pitt on that occasion.¹³¹

Once the income tax appeared in 1799, observers were quick to note its novelty, one observer commenting that "[t]he income act 'is certainly the political innovation of the greatest magnitude that hath taken place in our day.'"¹³² Opposition to the income tax based on its novelty continued to inform debates until 1816 when income taxation was abolished. In these debates, the income tax was often called "singular and unparalleled,"¹³³ "a harsh innovation upon our system,"¹³⁴ and "a tax [that] is wholly and absolutely new—new in the history of

ARTS, AND MISCELLANEOUS LITERATURE 50–55 (London, T. Bensley 1800) (discussing the argument that outward appearances may not give an accurate knowledge of income).

129. See 2 FRANCIS HUTCHESON, *A SYSTEM OF MORAL PHILOSOPHY* 341 (Continuum International Publishing Group 2005) (1755) (suggesting "a census or an estimation made of all the wealth of private families" whose only impact, it was said, would be to detect "a few broken merchants" thus preventing them from defrauding their creditors); THOMAS ANDREWS, *AN ENQUIRY INTO THE CAUSES OF THE ENCREASE AND MISERIES OF THE POOR OF ENGLAND* 82 (London, A. Bettesworth & C. Hitch 1738) (discussing the need to require merchants to declare their wealth annually); see also KENNEDY, *supra* note 113, at 125.

130. ADAM SMITH, *LECTURES ON JUSTICE, POLICE, REVENUE AND ARMS* 239–40 (Edwin Cannan ed., 1896); see 2 ADAM SMITH, *WEALTH OF NATIONS* 845–46 (R.H. Campbell & A.S. Skinner eds., Glasgow ed. 1976); see also HOPE-JONES, *supra* note 125, at 5; Beverly Moran, *Adam Smith and the Search for an Ideal Tax System*, in *THE NEW FISCAL SOCIOLOGY*, *supra* note 15, at 201, 204 (discussing Smith's objections to income taxation).

131. *TIMES*, Feb. 21, 1816, at 3. See also Robin L. Einhorn, *Liberty, Democracy and Capacity: Lessons from the Early American Tax Regimes*, in *THE NEW FISCAL SOCIOLOGY*, *supra* note 15, at 155, 158 (describing an earlier version of the visibility requirement found in the 1646 Massachusetts "country rate" that taxed "all personal and real estates" and required tax commissioners to make a list of "all visible estate either at sea or on shore")

132. ANDERSON, *supra* note 128, at 58.

133. *TIMES*, Feb. 13, 1816, at 3.

134. V., *To the Editors of the Times*, *TIMES*, Feb. 6, 1816, at 3.

the world.”¹³⁵

Of course, despite the fact that many Englishmen argued that the tax was novel, the fact is that income taxation (and the procedural mechanisms associated with it) was not invented in 1799. Englishmen may not have been aware of the invasive practices, including declarations of income and the right to inspect account books, found in places like Renaissance Florence, but they were certainly aware of the similarity between the modern income tax and biblical tithes.¹³⁶ Some opponents of the income tax therefore spent a lot of energy trying to distinguish between modern income taxation and biblical tithes. An 1816 pamphlet tried to confront this problem by arguing that the main difference between biblical tithes and the modern tax was that Moses, the creator of biblical tithes,

had no iniquities to exercise—no commissioners to appoint, to examine secret papers, and pry into the mysteries of enterprise, and the secrets of private families—no merchants’ books and manufacturers’ registers to ransack and misinterpret. He penetrated into no cabinets and pensioned no spies—challenged no returns and encouraged no hireling denunciators . . . the property of his people, *all open to the sun*; all agricultural, flocks, or corn; was easily ascertained¹³⁷

However, modern English society is “composed of such million individuals, of mixed, heterogeneous, and indefinable possessions; such complicated interests, and such unseizable gains.”¹³⁸ Because the income of certain taxpayers is easily concealed, and that of others is not, the modern income tax is a “wretched and most ill-advised copy of the Mosaical tythe; attempted in time and place so totally different, the very reverse of the other, that its exercise here becomes at once impertinent and ridiculous.”¹³⁹

4. *The Inquisition Argument*

One of the major arguments used by the opponents of the income tax to prove its novelty was the “inquisition argument.” Taxes imposed in the last decade of the eighteenth century, such as the tax on hair powder or the Triple Assessment, were already condemned for “erecting an inquisition of commissioners, assistant commissioners, surveyors, assessors, inspectors, clerks,

135. TIMES, Feb. 24, 1816, at 2.

136. On the pre-1799 history of income taxation, see HOPE-JONES, *supra* note 125, at 9; SELIGMAN, *supra* note 122, at 41–47; Joseph J. Thorndike, *An Army of Officials: The Civil War Bureau of Internal Revenue*, 93 TAX NOTES 1739, 1739–42 (2001). On English and continental eighteenth-century income tax schemes, see generally William Phillips, *The Origin of Income Tax*, 1967 BRIT. TAX REV 113 (1967). On pre-modern notions of income, see, for example, Adam Chodorow, *Maaser Kesajim and the Development of Tax Law*, 8 FLA. TAX REV. 153 (2007).

137. D.E., COMPARATIVE REFLEXIONS ON THE MOSAICAL TYTHE, THE TYTHE OF MODERN TIMES AND THE INCOME TAX OF THE LATE WM. PITT 12 (Exeter, E. Woolmer 1816).

138. *Id.* at 10.

139. *Id.* at 12.

and informers,” who were “licensed thieves.”¹⁴⁰ Once the income tax appeared in 1799, privacy concerns became even more pronounced. The tax would contravene the principle that “every man’s house was called his castle.” It was considered “a most harsh and severely oppressive tax” because of

the sort of inquisition that was about to be set up to enforce and collect it. In fact, every man was to have an exciseman set over him in his house, in order to pry into, and almost put him to the rack, to compel him to discover all those private circumstances of his income, which, for a thousand reasons, he must anxiously wish to preserve locked up in his own breast.¹⁴¹

Another critic of the tax decried the “tremendous inquisition, the income tax, invented, no doubt, to curb the pride, and crush the spirit, and break the backs, necks and hearts of all good Englishmen!”¹⁴² One Member of Parliament argued in 1802 that “the income tax has created an inquisitorial power of the most partial, offensive and cruel nature. The whole transactions of a life may be inquired into, family affairs laid open.”¹⁴³ Opposition to the income taxation “inquisition” was often framed using constitutional terms. One of the tax’s harshest critiques was the Whig MP George Tierney, a personal enemy of Pitt.¹⁴⁴ Tierney often argued that the income tax was unconstitutional (in the English sense) because it undermined privacy. In one parliamentary debate in 1800 Tierney complained that the tax

struck a vital blow at the Constitution; for by the operation of it, spies and informers were generated and encouraged [H]e would not say that there was anything disgraceful in men going round and ascertaining the number of horses a man keeps or the number of windows in a house, but it was quite different when men were required to give a report of

140. JOSEPH CAWTHORNE, *THE INJUSTICE AND IMPOLICY OF THE BILL TO INCREASE THE ASSESSED TAXES* 12, 33 (London, J. Parsons 1798); see also BARRELL, *supra* note 110, at 204 (discussing the tax on hair powder).

141. 11 *THE PARLIAMENTARY REGISTER* 341 (1797–1800). See also *THE NEW ANNUAL REGISTER*, *supra* note 124, at 116, 124, 125, 133, 135, 138; 2 WILLIAM WOODFALL, *AN IMPARTIAL REPORT OF THE DEBATES THAT OCCUR IN THE TWO HOUSES OF PARLIAMENT* 391 (London, T. Chapman 1798–1799). On the sources of the maxim “an Englishman’s home is his castle,” see Amanda Vickery, *An Englishman’s Home Is His Castle: Thresholds, Boundaries and Privacies in the Eighteenth-Century London House*, 199 *PAST & PRESENT* 147, 154 (2008). On the use of informers in late eighteenth-century England, see, for example, Clive Emsley, *The Home Office and Its Sources of Information and Investigation 1791–1801*, 94 *ENGLISH HIST. REV.* 532 (1979).

142. THOMAS JONES, *THE DISMISSAL OF HIS MAJESTY’S MINISTERS CONSIDERE[D]* 11 (London, J.S. Jordan 1800). A petition against the tax submitted by the City of London in the House of Commons in March 1802 stated that “the said tax, by vesting an arbitrary and inquisitorial power in the hands of Commissioners, is vexatious and degrading to individuals, destructive to the credit and happiness of families, subversive of that spirit of independence so necessary to the security of a free state.” See *A Common Council Holden in the Chamber of the Guildhall of the City of London, Tuesday, the 30th of March, 1802*, *TIMES*, Apr. 1, 1802, at 1.

143. DAUNTON, *supra* note 87, at 46.

144. See, e.g., Stebbings, *supra* note 104, at 653.

one's income, which, on the supposition of concealment, could only be ascertained or known by bribing clerks, servants, etc.¹⁴⁵

Tierney was not the only opponent of the tax who used constitutional privacy arguments. In calling for the repeal of the income tax, Benjamin Travers of London said in 1802 that the tax “was an attack on the [l]iberty and [c]onstitution of the country and . . . even more arbitrary than the [i]nquisition of Spain.”¹⁴⁶ A petition submitted by the City of London to the House of Commons in March 1802, called for the repeal of the income tax, stating that by giving inquisitorial power to commissioners, the tax “establishes a dangerous and alarming innovation upon the principles of the British Constitution.”¹⁴⁷ A meeting of prominent London merchants convened to discuss the proposition for reviving the income tax in 1803 explained that the income tax was objectionable “not so much on account of the impost paid . . . as upon the arbitrary and unconstitutional powers under which it was exacted, by Commissioners armed with inquisitorial authority to examine into the private affairs of commercial men, which was repugnant to the spirit and feeling of Englishmen”¹⁴⁸

It seems that after the reintroduction of income taxation in 1803 opposition to the tax on the basis of its inquisitorial nature disappeared.¹⁴⁹ This was partly the result of the fact that the reintroduced tax was structured in a way that prevented any single official from obtaining information about the taxpayer's total income. Indeed, in a debate in 1806 even the opponents of the tax admitted that “it certainly was divested of some principles extremely obnoxious . . . [such as] [t]he principle of disclosure . . . a principle so peculiarly galling to the feeling of Englishmen”¹⁵⁰

There were a few diehard critics of the tax from 1803 to 1812. For example, one Member of Parliament, William Smith, still complained in 1806 of officials “vested with the power of prying into the property and private affairs of persons in all classes, high and low”¹⁵¹ A solicitor, Charles Rivers, argued in a pamphlet published in 1808 that the tax assessors and surveyors had power “to act the part of [s]pies and [i]nformers, who are said to receive 5 [percent] as a remuneration on all additional payments made through their information,”¹⁵² and

145. *Parliamentary Intelligence*, TIMES, June 6, 1800, at 2; see also T.H.B. OLDFIELD, 2 THE REPRESENTATIVE HISTORY OF GREAT BRITAIN AND IRELAND 100–01 (London, Baldwin, Cardock & Joy 1816).

146. *Repeal of the Income Tax*, TIMES, Mar. 19, 1802, at 3.

147. *A Common Council Holden in the Chamber of the Guildhall of the City of London, Tuesday, the 30th of March*, 1802, [Classified Advertising] TIMES, Apr. 1, 1802, at 1.

148. *City Meeting*, TIMES, June 23, 1803, at 3.

149. SELIGMAN, *supra* note 122, at 105–06.

150. *Parliamentary Intelligence*, TIMES, May 8, 1806 (speech by William Smith); see also *Parliamentary Intelligence*, Jan. 30, 1807 (stating that the new tax “got rid of many vexations [in the old tax], and particularly of the inquisitorial power that was much complained of”).

151. *Parliamentary Intelligence*, TIMES, May 8, 1806 (speech by William Smith).

152. CHARLES RIVERS, THE APPEAL OF AN INJURED INDIVIDUAL TO THE BRITISH NATION

that Commissioners who hear tax appeals subject taxpayers belonging to the professions to an “inquisitorial torture . . . of being asked questions concerning the supposed concealment of” their property. These Commissioners, said Rivers, are “obscure individuals, many of whom are very illiterate, of narrow contracted ideas, and large prejudices.” He even insinuated that the Commissioners, who do not receive remuneration, share the five percent reward with the informers.¹⁵³ However, generally speaking, between 1803 and 1812 the inquisition argument seems to have disappeared.

Beginning in 1812, and culminating in the debate surrounding the abolition of the tax in 1816, the inquisitorial argument was revived. In an 1812 meeting of the Livery of London, one participant decried “the inquisition of the Income-tax,” which “was suspended over our heads; and we are called before tribunals at their own pleasure, to give an account of our private affairs.”¹⁵⁴ Another London merchant described the growth in the bureaucracy administering the tax, noting that “this machine appeared now advancing to its perfection and it would soon be able to grind to dust the greater part of the trading population of London. It was a machine most tyrannically constructed and which could not be honestly or honourably carried into execution,” adding that people often falsely reported incomes that were greater than their actual income in order to preserve their credit worthiness.¹⁵⁵ In an 1814 meeting of the Livery of London, one of the speakers talked about the “infernal machine of taxation.”¹⁵⁶ In a debate about the tax in the House of Commons in February 1815, one member said that “the tax was inquisitorial in the highest degree. People might as well go before the bench of bishops to state their faith, as before the income-tax commissioners to make a declaration of their affairs.”¹⁵⁷

Attacks on the income tax peaked in February and March 1816, during the campaign to abolish the tax following the end of the Napoleonic wars. Many letters, petitions and newspapers articles written during this period referred to the “detestable” tax as “a project of establishing a permanent inquisition into every man’s income.”¹⁵⁸ A *Times* editorial portrayed the income tax as an ominous, all-

5–6 (London, J.M. Richardson 1808).

153. *Id.* at 5–10.

154. *Meeting of the Livery of London*, *TIMES*, Mar. 27, 1812, at 1.

155. *Common Hall*, *TIMES*, Mar. 27, 1812, at 3.

156. *Common Hall*, *TIMES*, Dec. 14, 1814, at 3.

157. *House of Commons*, *TIMES*, Feb. 21, 1815, at 2.

158. *The Question of the Income Tax Being Settled*, *TIMES*, Mar. 20, 1816, at 3; see also *The Happy Condolence of the Courier Newspaper*, *TIMES*, Mar. 21, 1816, at 3 (“the British inquisition”); *We Perceive*, *TIMES*, Mar. 22, 1816, at 3 (“a cruel inquisition”); *The Proceeding in the House of Commons*, *TIMES*, Mar. 26, 1816, at 3 (“an odious inquisition”); *TIMES*, Sept. 6, 1817, at 2 (“fiscal inquisition”); V., *To the Editor of the Times*, *TIMES*, Feb. 15, 1816, at 3 (“[T]he most unprincipled and hateful of all measures that could be devised for breaking down the spirit of a great people, and enabling their rulers to command, by overwhelming armed force, the tyrannical exposure of any private transaction—the rude violation of the most sacred sanctuaries of honour, faith, and feeling amongst men,” a “state

knowing spirit haunting every Englishman:

There is nothing that men in a state of society hold sacred, into which [the tax] does not obtrude itself or thrust its odious agents. It pries into the marriage-settlements, and claims of consanguinity, among the living; it ransacks the wills of the dead; it hunts deeds, bonds and mortgages, in the deepest recesses of the bureau, and drags them to light. Rushing into the counting-house, it spreads wide the ledger and thereby blasts commercial confidence, and chills mercantile speculation. It stands at the door of the shopkeeper and counts his customers: it mounts the chariot of the physician, and numbers his fees. It adjusts the claims between debtor and creditor, whose relation to each other should only be known to themselves. It computes the feeling of filial piety, of gratitude, and humanity, by items of pounds, shillings, and pence; for it estimates the support allowed to decrepit old age, to decayed services, perhaps to penitent or discarded guilt.¹⁵⁹

Another contemporary report talked about “a tax so searching and un pitying” that “it strips us perfectly naked,” granting the commissioners

the right of fetching up every man in this country from his home, his barn, his shop, his counting-house, and of demanding from him how he lives,—what profits he makes by his toil, his trade, or profession,—what allowance he assigns out of it for the maintenance of children or parents, or other poor relatives,—what debts he has incurred with others, or others have with him: there is not, in truth, a secret which, from motives of feeling, honour, delicacy or convenience, a man would keep inviolate in his own bosom, that the persons acting under this inquisitorial process have not a right to tear from him.¹⁶⁰

Readers praised the *Times* for attacking the tax that enabled “the tyrannical exposure of any private transaction—the rude violation of the most sacred sanctuaries of honour, faith, and feeling amongst men,” which was a “lay inquisition,” undermining the “whole fabric of English freedom,” with “the despotic spirit of this inquisitorial impost, with its brood of petty tyrants in every village through the land.”¹⁶¹

Arguments made during the 1816 campaign to abolish the tax repeated the earlier assertions that income taxation undermined the English constitution. The tax was again described as “adverse to the freedom and spirit of the British Constitution.”¹⁶² This tax, said one speaker at a county meeting “was so

inquisition,” “lay inquisition,” and an “inquisitorial impost, with its brood of petty tyrants in every village through the land . . . a government, exercising inquisitorial prerogatives in the collection of a single tax, will easily build upon this precedent of tyranny, and the subject, used to submit in one case, [will] tolerate his degradation in many more.”)

159. *Editorial*, *TIMES*, Feb. 6, 1816, at 3.

160. *TIMES*, Feb. 13, 1816, at 3.

161. *To the Editors of the Times*, *TIMES*, Feb. 15, 1816, at 3.

162. *TIMES*, Mar. 4, 1816, at 2.

inquisitorial in its nature, and unconstitutional in its principle, that in no way, by no argument, could it be justified”¹⁶³

When attempts were made to reintroduce income taxation after 1816, opponents were quick to use privacy arguments again. Thus, for example, when proposals appeared in 1817 for the reintroduction of the tax, *The Times* declared that “we deny . . . that in a free country Government has a right to know the property of all its subjects, and still less has it a right to force them to make confession of that property by penal statutes.”¹⁶⁴ Indeed, echoes of the same attitude can be found in the debates surrounding the revival of income taxation in 1842.¹⁶⁵

Despite the prevalence of the inquisition argument, not all Englishmen saw intrusion as a bad thing. One type of response to privacy arguments was to argue that the negative impact on privacy was small in relation to the benefits of the tax. Another approach was to say that the intrusion into the private affairs of the taxpayers was actually desirable because of the benefits to individuals and to society that would ensue from the data collected on incomes.

The argument in support of income tax as an information-collection tool can be found in an early discussion of income taxation, a 1738 pamphlet written by Thomas Andrews. Andrews argued that the information collected by income taxation would enable the creation of rules that would limit the use of luxuries by people whose income was small, thus preventing people from passing off as belonging to a higher class: “rules might be taken more easily and justly,” said Andrews,

from such a method of taxing, than from anything else that I can think of, to regulate people’s expenses, and to confine the enormous luxuries of the age within some reasonable bounds—were those people, their wives and children, whose income was not rated on the taxes, at so much a year, prohibited [from] wearing silk another keeping a livery-servant; another stiling [sic] himself a gentlemen, esquire etc. another keeping his

163. *Surrey County Meeting*, *TIMES*, Mar. 11, 1816, at 3.

164. *A Morning Paper of Yesterday*, *TIMES*, Sept. 6, 1817, at 2; see also THOMAS PEREGRINE COURTENAY, *A TREATISE UPON THE POOR LAWS* 151–52 (London, John Murray 1818) (noting the scrutiny of private affairs that the tax entails).

165. RICHARD VYVYAN, *A LETTER FROM SIR RICHARD VYVYAN, BART. M.P., TO HIS CONSTITUENTS UPON THE COMMERCIAL AND FINANCIAL POLICY OF SIR ROBERT PEEL’S ADMINISTRATION* 12–14 (London, J. Bohn 1842) (The tax was “an inquisitorial impost,” and the fact that it compels “every free-born Englishman” to “render an account to the government of all his pecuniary transactions . . . is hostile to the spirit of liberty.”). The success of the inquisition argument led to its use against less intrusive taxes. Thus, in a debate about the Irish window tax in 1818, an Irish Member of Parliament said that

this tax had that inquisitorial character which was charged against the income tax here. If every Englishman’s house was his castle, the Irish could have little cause to say so while this tax existed. A man might enter any house, on any day from 8 in the morning till sunset and a refusal involved a penalty of 20l.

Parliamentary Intelligence, *TIMES*, Apr. 22, 1818, at 2.

coach; another wearing jewels etc. it would be a good way toward helping us out of the confusion we are at present fallen into in these things; and, at once, restore the honours and distinctions of this sort, due to our nobility, gentry, merchants and others of real ability; and give a beautiful face of oeconomy and order to the state. In doing so, the laws would, in some measure, confine people to the practice of frugality, and take it out of their power to spend their substance in vainly mimicking their superiors.¹⁶⁶

A later proponent of the income tax, George Edwards, echoed this approach. In a book written in support of income taxation in 1788, Edwards argued that income taxation is not revolutionary.¹⁶⁷ He did, however, admit that it would lead to administrative innovation: the establishment of a “[p]olice of public service” to collect the tax.¹⁶⁸ Edwards then asked whether this new “[p]olice of public service” would be intrusive, and in reply he said that the “great secrecy which so many people observe in regard to the amount of their incomes” is “ridiculous” because “at least three fourths of every man’s acquaintances know what is the amount of his income.” “Is the whole community to suffer on account of such folly and absurdity of a few?” he asked rhetorically, arguing that the income tax was too good an idea to be rejected because of “a few proud and squeamish feelings of a very small part of the community,” who “refuse to save their county, by communicating two or three absurd secrets to a confidential person, who would never reveal them . . .” Such persons, he concluded rather dramatically, would meet their just fate, “if their naked bodies lay unburied upon fields covered with their gore.”¹⁶⁹

One of the arguments Edwards used in support of the tax was that it gave not only the government but also subjects a new way of obtaining information about national and individual consumption and regulating it: “[a] nation hitherto much blamed on account of its natural dissipation and extravagance will be directed to the most proper means of removing this stigma: for the observation of all its inhabitants will be turned to their incomes; and their attention directed to economy.”¹⁷⁰

Such sentiments were also found in other works. Thomas “Clio” Rickman, a

166. ANDREWS, *supra* note 129, at 83. Some might read this passage as satire, but, based on the context it seems that Andrews was serious. He devoted a whole chapter of his pamphlet to an attack on luxuries, noting however that “nothing ought to be accounted luxurious which is proper to distinguish between the different orders and degrees of persons in the commonwealth.” *Id.* at 22–23.

167. See GEORGE EDWARDS, *THE AGGRANDISEMENT AND NATIONAL PERFECTION OF GREAT BRITAIN* 246 (London, Debrett 1788).

168. *Id.* at 254, 260.

169. *Id.* at 270–71.

170. *Id.* at 245. This may be an interesting example of two contradictory Foucauldian notions of the use of knowledge—knowledge as a technique of domination and as a technique of the self. See generally JÜRGEN HABERMAS, *THE PHILOSOPHICAL DISCOURSE OF MODERNITY: TWELVE LECTURES* 27 (1987).

Quaker poet and political pamphleteer rejected, in 1800, the categorization of income information as private, equating it not with the inner essence of individuals but instead with outward appearances: “I do not see why the exact state of a man’s pecuniary affairs should not be known, as well as the colour of his coat, or the complexion of his countenance.” Indeed, Rickman thought that the tax was justified not just because of the revenue it provided but also because

it would be well if every iota of every man’s income, whether in or out of business, could be known. If it could be ascertained, what property every man hath, and how he gets and applies it; it would be, like a correct chart to a mariner, a guide over the rocks, and through the mazes of society.¹⁷¹

5. *Tax Privacy and English Culture*

What lessons can one learn from the history of the tax privacy debates? While it is clear that privacy was a major issue for late eighteenth- and early nineteenth-century English taxpayers, it seems that the history of tax privacy cannot be reduced to a story about the reflection of general cultural notions of privacy in tax law debates. There are two reasons why this is so. First, the privacy of information about income was presented by opponents of the income tax as an English tradition, but it was, in fact, a contested notion. Privacy was not a concern shared by everybody in English society. Supporters of the income tax, such as Edwards and Rickman, thought that privacy should not be an important concern (and, evidently, the government agreed, at least until 1816). Of course, one could argue that culture is never homogenous, and that therefore the existence of a variety of approaches to tax privacy is not problematic: there were minority and majority positions about privacy and Edwards and Rickman (but also the government) represented the minority position.

However, tax privacy was not merely a contested notion. It was also quite dynamic. Privacy arguments appeared in debates about the tax between 1799 and 1803, and again after 1812, especially in 1816. In the intervening period it seems that most English taxpayers were more or less resigned to the intrusion into their private financial affairs that the income tax entailed.

171. THOMAS CLIO RICKMAN, *MR. PITT’S DEMOCRACY MANIFESTED* 9–10, 28 (London, A. Seale 1800). On Rickman’s pamphlet see also SELIGMAN, *supra* note 122, at 85–86. Publicity was also seen as a way of preventing tax evasion, and in some discussions of the income tax immediately after its enactment, one could find members of parliament supporting the publication of tax return information because of such considerations. For example, in a debate in the House of Commons on an amendment to the income tax act ordering that returns will be given sealed to the assessors, one MP, Sir James Pulteney, supported the publication of taxpayer returns as a way of preventing tax evasion. Another MP, W. Buxton, said that “he was a friend of publicity, because it was desirable that those who lived above their incomes should have the real state of their fortunes exposed.” The Chancellor of the Exchequer, however, said that while he supported the publication of the returns, not merely as a way to ensure payment, but also because “it would give satisfaction to the country to see what was paid by each individual,” this was not a suggested measure in the amendment that was being debated. WOODFALL, *supra* note 141, at 389–93.

The income tax debates, therefore, do not provide a keyhole through which we can get a glimpse of the way English culture in the late eighteenth and early nineteenth century viewed privacy. Privacy was a contested and dynamic term, and tax law debates (and also the actual provisions of the income tax act) were not merely passive mirrors of the general culture, but also a site in which notions of privacy were being shaped.

As in the first case study, here too one might claim that privacy arguments against income taxation could only have been raised *because* they resonated with a widely shared notion of privacy espoused by the majority of English taxpayers, and epitomized by maxims such as “an Englishman’s home is his castle.” However, it is impossible to tell from the sources used here whether privacy was a widely shared notion in English culture prior to the debates or whether these debates created a sense of privacy that did not previously exist.

Indeed, it seems logical to argue that while relatively unarticulated notions of privacy did exist in “outside” culture prior to the debates, the income tax debates (and the impact they had on the creation of formal tax privacy norms in English income tax legislation) actually changed the notion of privacy in English culture. Income tax legislation required taxpayers to reveal their income to the state, but at the same time created mechanisms that protected this information from leakage to fellow taxpayers. Thus, the notion of privacy in English culture was transformed by the legislation. It gained force as far as relations between the individual and the rest of *society* were concerned but lost force in the relationship between the individual and the *state*.

Just as in the previous case study, the arguments discussed in this section of the article (in this case, about privacy) may have been a tool invented to further political interests, either consciously or not, of the opponents of the tax, a passive and authentic reflection of some widely shared beliefs of large segments of a given society, or a combination of both, and deciding between these three alternatives is difficult.

However, just as in the first case study, there are some aspects of debate that are more certain. It seems that the most obvious point that an analysis of the debate reveals is that opponents of the tax used “constitution” as an argument to undermine the income tax. Comparing the use of “constitution” here and “culture” in the previous case study is one of the points I would like to discuss now, in the Conclusion of the Article.

CONCLUSION: “THE THUNDER OF WORLD HISTORY”?

In the nineteenth century, many lawyers and historians became interested in the elusive pursuit of spirits. Legal theories originating in the German historical school assumed that law reflected the national spirit (*Volksggeist*) and that the role of lawyers was to explain how each specific legal norm is a reflection of the “spirit of the people.” Cultural history, *Geistesgeschichte*, sought to discover not only the

national spirit but also the “spirit of the age”—*Zeitgeist*—in products of the past.¹⁷² Schumpeter’s “spirit of a people” echoes this nineteenth-century tradition.

Schumpeter’s antiquated notion of culture—national, homogenous, autonomous, and distinct from other spheres of human activity—is no longer in fashion. However, Schumpeter’s “symptom” and “cause” analysis of the relation of taxation and society seems more modern. One finds in it an echo of the two dominant twentieth-century modes of analyzing the relationship of law and society and law and culture.

As the two case studies analyzed in this article show, it is sometimes difficult to clearly find the exact vector of causation between “law” and “culture.” Cultural arguments such as “income tax is culturally specific and therefore cannot be imposed in Palestine” or “income tax is unconstitutional because it gives the state too much power to penetrate the affairs of its subjects, and thus contravenes traditional views of state-subject relations,” appeared in debates about income taxation in Palestine and Britain. These arguments may have reflected a set of notions that actually existed “outside” and prior to these debates, but this “culture” may have had little relation to actual notions that existed at the time. It may have been a conscious construct that served the political and economic needs of specific interest groups with little relation to reality, or an unconscious discursive formation that, again, had little relation to reality.

Perhaps, it might be argued, the inability to clearly separate reflection and construction (or some determinate combination of both) is the result of the use of the wrong sources. The research projects described in this article devoted a lot of attention to tax *debates* rather than tax *law* in the narrow sense—law found in legislation or case law. While reflection and constitution may have been intertwined in such debates, they may be more easily separable in specifically *legal* texts. In addition, the government documents and newspaper reports, used in the first project, or the parliamentary records, newspaper reports, pamphlets, and petitions employed in the second project, may simply not be the right sources to determine the relation of culture and law. One should have looked elsewhere—for example one could have used sources describing everyday practices involved in encounters between tax collectors and taxpayers,¹⁷³ or quantitative approaches.¹⁷⁴

172. See, e.g., F.C. VON SAVIGNY, OF THE VOCATION OF OUR AGE FOR LEGISLATION AND JURISPRUDENCE (Lawbook Exchange, Ltd. ed. 2002) (Abraham Hayward trans., 1842) (on law); BURKE, *supra* note 8, at 8–9 (on nineteenth-century cultural history).

173. See Lamb, *supra* note 87.

174. For an example of a contemporary attempt to capture “culture” based on quantifiable data collected in large surveys, see Shalom H. Schwartz, *Culture Matters: National Value Cultures, Sources and Consequences*, in UNDERSTANDING CULTURE: THEORY, RESEARCH AND APPLICATION 127 (Robert S. Wyre et al. eds., 2009). A survey-based approach is, of course, irrelevant to past societies, although quantitative methods tracing the changing fortunes of key cultural terms in legal texts are still possible. For one example of an attempt to use a quantitative analysis of legal texts to learn something about cultural notions, see Assaf Likhovski, ‘Tyranny’ in *Nineteenth-Century American Legal*

It is only when our informants are engaged in daily practices and are paying less attention to what they say, or when we have many informants whose information can be cross-checked, that we can really learn about the relationship between law and culture (just as dreams are the proper way to gain access to the unconscious of specific individuals).

My response to such a critique is that the problem may be deeper than simply a problem of sources. It seems that there is an irresolvable tension in the definition of both law and culture. Both entities have top-down and bottom-up, conscious and unconscious, explicit and implicit definitions. Thus, “culture” is sometimes defined as a bottom-up and unconscious, almost natural, entity emanating from “the people,” and sometimes as a top-down product of elite actors consciously striving to shape reality in the interest of power.

In the same way, law is sometimes equated with custom, and therefore viewed as a bottom-up and unconscious product of a more general “culture.” This view can be traced back to the German historical school. At other times law is defined (by Positivist legal theory) as a top-down and explicit product of elite human agents, connected to “culture” only in the sense that law can actively shape cultural notions.

Both definitions of law are ultimately mixed. The historical school’s view of the law as a popular, bottom-up customary phenomenon also includes a role for a scholarly professional elite whose task is to organize and develop customary law.¹⁷⁵ Similarly, at least one modern positivist definition of law, that formulated by H.L.A. Hart, ultimately grounds law in a widely shared and implicit social norm (the rule of recognition).¹⁷⁶

This jurisprudential ambiguity is, I think, responsible for the ambiguous law and society formulations about the causal relationship between law and culture. The same ambiguity is ultimately also the reason for the problems that I encountered in my two research projects: it is unclear whether taxation generally and tax law specifically are repositories of unconscious widely shared notions or tools used by identifiable elite actors, or some combination of both. This ambiguity, rather than any dearth of sources, is the root of my inability to tell a neat causal story.

So how should we study the cultural history of tax law? I believe that even if the sources I studied cannot be used to tell a definitive causal story about outside “culture” and its relationship to “law,” we can still study these texts in order to map and historicize the legal use of the category “culture” in such texts—we can try to find out who were the actors (economic and administrative experts, lawyers

Discourse: A Rhetorical Analysis, 28 J. INTERDISC. HIST. 205 (1997) (a quantitative analysis of the use of the term “tyranny” and related terms in American case law).

175. See SAVIGNY, *supra* note 172, at 28.

176. See H.L.A. HART, *THE CONCEPT OF LAW* at vii, 100, 123 (2d ed. 1997).

and judges, politicians and government officials) who used such arguments; what were the stages in the life of the law (for example the preenactment, enactment, application, abolition of tax law) in which these arguments were used; what alternative terms (“constitution,” “morality,” “habits,” “custom,” “culture”) functioned in the same way in arguments about taxation in different places and different times and what caused the shift from one term to another (why was “constitution” used in early nineteenth-century England in the same way that “culture” or “tradition” was used in twentieth- and twenty-first-century Palestine and Israel);¹⁷⁷ what did the term “culture” or related terms encompass; and what types of sources and analogies were used in the argument (think for example of the comparison of income taxation to biblical tithes found in the tax privacy debate). We need not only focus on trying to find how law reflects culture, or how culture was constituted by law, or some combination of the two—we can also ask when and how was the rhetorical move “the tax is not appropriate because it does not fit long-standing and widely shared traditions” used in tax-law-related debates.¹⁷⁸

Mapping the ways in which the “cultural move” was rhetorically used by different actors might lead to new insights about the nature of tax law and lawyers and judges dealing with it. For example, we might ask why lawyers in Mandatory Palestine ignored arguments about cultural difference. Perhaps the lawyers’ attempts to ignore difference is related to the nature of legal discourse—law being a way of simplifying reality, ignoring its complexity, and applying the same rules to events which are different in order to reach the same results (analogy and precedent seem to be two major legal tools to do so). This, obviously, is inaccurate. While judges and lawyers involved in projects of legal transplantation do sometimes ignore local culture, that is not always the case. Indeed, even the legal history of Mandatory Palestine provides examples in which British judges and lawyers used “cultural” arguments to reject the transplantation of English contract or tort norms.¹⁷⁹ If this is indeed the case, however, then we can ask what made judges and lawyers think of tax law as more universal and non-culturally specific than other areas of law.

As we can see from the example with which I began this Article, tax lawyers do not always ignore culture. In the *Abu-Hatsera* case, which opened this Article, a lawyer used a cultural argument to support the case of a client attempting to

177. One important example of the type of questions that can be asked when using such an approach can be found in BIRLA, *supra* note 10 (historicizing the emergence of “culture” as a distinct sphere (and a distinct type of legal argument and distinction) in the late nineteenth-century Indian context).

178. Note that I am not arguing that “law” has no causal relationship to its “outside” (on this type of argument see, for example, Gordon, *supra* note 17, at 88–93). It may well be that law and society have some sort of causal relationship. My argument is simply that in addition to trying to discover this relationship, it is interesting to focus on noncausal aspects of the history of law.

179. See ASSAF LIKHOVSKI, *LAW AND IDENTITY IN MANDATE PALESTINE* 61–83 (2006).

escape taxation. What conditions, legal or otherwise, allowed him to use such an argument? One might speculate that in the Israeli case at least, the appearance of cultural arguments in law may have been related both to “internal” legal changes (the decline of formalism in Israeli law between the 1950s and the present) and “external” ideological ones (a decline of the melting-pot ideology which characterized the early Israeli state in the 1950s and its replacement by a multicultural world view in the last two decades).¹⁸⁰

The nineteenth-century British example is different than the twentieth-century Palestinian one because the participants in the debates did not include professional lawyers. One reason for this difference may be the different types of sources used. However, the difference may also be an indication of the growing role of lawyers (and law) in debates about tax matters between the early nineteenth- and twentieth-century, tax law and tax administration becoming the domain of legal experts rather than of politicians or ordinary taxpayers.¹⁸¹

Proceeding from the nineteenth-century British example to the early twentieth-century Palestine one and finally to the twenty-first-century miracle-working rabbi case with which I began this Article, we see at first laypersons (using “constitution”) as an argument against income taxation, then officials and experts (using “culture”) as an argument and ending with a lawyer (using “tradition”) as an argument. This trajectory may merely be the result of chance (and of the different types of conflicts involved in each of the three cases), but one might also use it to historicize the use of cultural arguments, finding in this trajectory, perhaps, an indication of the growing power of lawyers, and the growing power of law, as it gradually emerged as a major arena for the discussion of the nature of society and its practices, including taxation, in the twentieth century.

The points that I made here are just speculations. I hope, however, that the case studies I described in this Article show the desirability of adding a layer of rhetorical analysis to the traditional *causal* approaches of studying the histories of tax law and culture. The causal approaches should, of course, not be abandoned, but we should warn ourselves that sometimes when we use tax history to discover “the spirit of a people,” we may be merely chasing ghosts.

180. See generally MENACHEM MAUTNER, *LAW AND THE CULTURE OF ISRAEL* (2011).

181. The growing importance of law can also be found in the fact that until the late nineteenth century income tax disputes were viewed in the UK as an administrative rather than as a legal matter. See generally V. Grout & B. Sabine, *The First Hundred Years of Tax Cases*, 1975 BRIT. TAX REV. 75. See also R. Cocks, *Victorian Barristers, Judges and Taxation: A Study in the Expansion of Legal Work*, in *LAW, ECONOMY AND SOCIETY IN ENGLAND, 1750–1914: ESSAYS IN THE HISTORY OF ENGLISH LAW* 445, 446 (G.R. Rubin & D. Sugarman eds., 1984); Chantal Stebbings, *Income Tax Tribunals: Their Influence and Place in the Victorian Legal System*, in *STUDIES IN THE HISTORY OF TAX LAW* 57 (John Tiley ed., 2004).