

IN DEFENSE OF “SIN TAXES”: TAX POLICY, VIRTUE ETHICS, AND BEHAVIORAL ECONOMICS

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I. INTRODUCTION

Can “sin taxes” be ethically justified? These excise taxes targeted at disfavored goods and services have been prominent in the news in recent years.¹ On March 25, 2010, the Texas Supreme Court heard arguments on the constitutionality of Texas’ five dollar charge on strip club patrons, commonly known as the “Pole Tax.”² Legislators in the state of Washington endorsed a large increase in sales taxes on “explicit movies, magazines, and other sex-themed products, which has been referred to as the “skin tax.”³ Alcohol and tobacco have long been subject to sin taxes, at both the state and federal levels.⁴ The recent debates on health care reform have seen proposals for new sin taxes to finance reform efforts, in particular taxes on sugary soft drinks.⁵ States have also implemented, or considered implementing, sin taxes on junk food to combat obesity.⁶

While becoming more popular with legislatures at the state and federal level, sin taxes have generated significant controversy.⁷ A primary argument against sin taxes is based on ethical considerations: the claim that such taxes are unfair, discriminatory, and a threat to freedom by a “nanny state” seeking to impose its values on a recalcitrant segment of the public. This controversy is usefully illuminated by examining the influences on the sin tax policy debate of the major ethical theories developed in moral philosophy and widely discussed in standard business ethics textbooks.⁸ The three primary ethical theories discussed in such textbooks are (1) “deontology”, (2) “consequentialism”, and (3) “virtue ethics”.⁹ Each of these ethical theories, in turn, provides the foundation for a theory of the

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¹ Rachel E. Morse, *Resisting the Path of Least Resistance: Why the Texas “Pole Tax” and the New Class of Modern Sin Taxes are Bad Policy*, 29 B.C. THIRD WORLD L.J. 189, 190 (2009).

² Paul J. Weber, *Texas High Court hears Strip Club ‘Pole Tax’ Case*, Mar. 25, 2010, <http://www.msnbc.msn.com/id/36040463/>.

³ Curt Woodward, *States Uncover ‘Skin Tax’*, Feb. 28, 2009, BOSTON HERALD, <http://www.bostonherald.com/business/general/view.bg?articleid=1155236>.

⁴ Morse, *supra* note 1, at 190.

⁵ Center for Budget and Policy Priorities, *Taxing High-Sugar Soft Drinks Could Help Pay for Health-Care Reform*, May 27, 2009, <http://www.cbpp.org/cms/index.cfm?fa=view&id=2830>.

⁶ Morse, *supra* note 1, at 194.

⁷ *Id.*

⁸ See, e.g., JOSEPH W. WEISS, BUSINESS ETHICS: A STAKEHOLDER AND ISSUES MANAGEMENT APPROACH 95-151 (2008).

⁹ *Id.*

proper ends of legislation, which can then be used to evaluate tax policy. This article will analyze sin taxes under each of the major ethical theories to determine if sin taxes can be ethically justified under any of them.

The use of ethical theory to analyze tax policy has become more common in recent years. Historically, tax policy has been normatively evaluated using technical economic analysis along with generic standards of “fairness”, but the ethical presuppositions involved in such analysis have seldom been made explicit.¹⁰ In recent years, major books and articles have examined tax policy by drawing more explicitly on work in ethical theory and political philosophy (primarily versions of deontology and consequentialism, discussed below).¹¹ But analysis of tax policy using virtue ethics has been neglected. This article contributes to filling this gap in the literature. Following the approach of Lawrence B. Solum (the leading scholar on virtue theory in the legal academy), this article will not attempt to make the philosophical case for virtue ethics. Doing so would require hundreds of pages, and that case has been ably made by others.¹² In his article applying virtue ethics to constitutional interpretation, Solum describes his project as follows: “[F]or the sake of argument, let us assume there that there is something to virtue ethics. We can then ask the very interesting question, ‘If virtue ethics were sound, what would the implications for constitutional theory be?’” Similarly, this article will ask: “If virtue ethics were sound, what would the implications for ‘sin tax’ policy be?”¹³

Part II of this article will describe the claim that sin taxes are unethical because they are unfair, discriminatory and a threat to freedom of choice, and how this attack is founded in deontology. It will examine how the concept of the “neutral state” flows from deontology, and how many on both the political “right” (in the form of libertarianism) and the political “left” (in the form of egalitarian liberalism) oppose sin taxes as antithetical to the neutral state. Part III will discuss the traditional defense of sin taxes as increasing the “utility” or “welfare” of society, and how this defense is founded in consequentialist ethics. It will argue that such a defense is weak, because equally powerful consequentialist arguments can be mustered against sin taxes. Part IV will argue that virtue ethics, and the “virtue jurisprudence” that flows from it, provides the best foundation for the defense of sin taxes with its tenet that the proper end of legislation is the inculcation of virtue in the citizenry. Part V will briefly conclude.

¹⁰ Patrick B. Crawford, *Analyzing Fairness Principles in Tax Policy: A Pragmatic Approach*, 76 DENV. U. L. REV. 155 (1998).

¹¹ See generally LIAM MURPHY & THOMAS NAGEL, *THE MYTH OF OWNERSHIP: TAXES AND JUSTICE* (2002); TAXATION, ECONOMIC PROSPERITY, AND DISTRIBUTIVE JUSTICE (Ellen Frankel et al. eds., 2006); Linda Sugin, *Property, Taxation and Distributive Justice: What Rawls Demands of Tax Systems*, 72 FORDHAM L. REV. 1991; Susan Pace Hamill, *A Moral Perspective on Big Businesses’ Fair Share of America’s Tax Burden*, 1 U. ST. THOMAS L.J. 857 (2004).

¹² See generally ALISDAIR MCENTIRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* (2d ed. 2004); ROSALIND HURSTHOUSE, *ON VIRTUE ETHICS* (1999); PHILIPPA FOOT, *ON VIRTUES AND VICIES* (1978).

¹³ Lawrence B. Solum, *The Aretaic Turn in Constitutional Theory* (2004), Social Science Research Network, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=512882 (last visited Feb. 28, 2010).

II. THE ETHICAL ATTACK ON SIN TAXES

A. Sin Taxes As Unfair, Discriminatory and a Threat to Freedom

As sin taxes have risen in prominence, a primary claim by opponents in the media is that they are unfair and discriminatory.¹⁴ Interestingly, this attack comes from across the political spectrum, both from those on the political “right” and those on the political “left”, as well as from analysts not identified with a particular ideology. Rev. Robert A. Sirico of the conservative Acton Institute condemns taxes on tobacco and sugary soft drinks: “Never mind if you have freely chosen to smoke a cigarette or drink a cold Coke on a hot summer’s day, . . . [t]he New Puritans who are ready to dramatically expand the welfare state and limit personal freedoms claim to know what’s best for you.”¹⁵ Condemning the alcohol sin tax, Dale Heien, in the libertarian *Cato Journal*, states that “the implied notion that alcohol consumption is sinful is a moralistic one and not supported by objective analysis.”¹⁶ Harvard Economist Edward L. Glaeser, in opposition to a proposed federal tax on soft drinks, condemns the judgmental implications of the tax, writing that “[f]or die-hard cola lovers, the pleasure of sugary soda may just be more important than the health consequences of a few extra calories.”¹⁷ Columnist Froma Harrop argues that sin taxes are offensive because “[h]ow people spend their discretionary income should be no business of government.”¹⁸ Leidhra Johnson claims that “sin taxes . . . place an unfair stigma on those who pay them. By referring to these charges as ‘sin’ taxes, they subtly refer to all participants as ‘sinners.’” She goes on to assert that “[i]f someone wants to smoke, it is his or her right to do so. It is unfair and un-American to ostracize and persecute a select group.”¹⁹

New York Governor David Patterson’s proposed soft drink tax engendered heated opposition from the Center for Consumer Freedom: “The tax code should not be a tool of social engineering against New Yorkers who choose to make choices that paternalistic officials like Governor Patterson don’t approve of . . . New York State is home to the Big Apple, not Big Brother.”²⁰ The conservative Heritage Foundation, condemning sin tax proposals at the federal level, asserted that “[s]in

¹⁴ Andrew J. Haile, *Sin Taxes: When the State Becomes the Sinner* (2009), Social Science Research Network, <http://ssrn.com/abstract=1425621> (last visited Feb. 28, 2010).

¹⁵ Robert A. Sirico, *Hate the Sin, Tax the Sinner*, AM.: J. AM. ENTERPRISE INST., May 20, 2009, available at <http://www.american.com/archive/2009/may-2009/hate-the-sin-tax-the-sinner/>.

¹⁶ Dale Heien, *Are Higher Alcohol Taxes Justified*, CATO J., Vol. 15, No. 2-3, available at <http://www.cato.org/pubs/journal/cj15n2-3-7.html> (last visited Feb. 28, 2010).

¹⁷ Edward L. Glaeser, *Demonizing, and/or Taxing, Soda*, Economix Blog, N.Y. TIMES, Sept. 22, 2009, <http://economix.blogs.nytimes.com/2009/09/22/demonizing-and-or-taxing-soda/>.

¹⁸ Froma Harrop, *Sin Is Its Own Punishment; Taxing It Is Unfair and Illogical*, PROVIDENCE J., Dec. 16, 2009, http://www.projo.com/opinion/columnists/content/CL_froma16_12-16-09_TFGPO21_v21.3f8a2f0.html.

¹⁹ Leidhra Johnson, *‘Sin Tax’: A Contradiction*, STATE HORNET, Sept. 28, 2009, <http://www.statehornet.com/2.4408/sin-tax-a-contradiction-1.557934>.

²⁰ CSD Staff, *NY Coalition and CFF Speak Out On Proposed Sin Taxes*, CONVENIENCE STORE DECISIONS, Jan. 21, 2010, <http://www.csdecisions.com/article/8819/the-ny-coalition-and-cff-speak-out-on-proposed-sin-taxes.html>.

taxes raise the costs of legal products and activities. Increased prices dissuade people from buying the products or engaging in the activities hit by these higher taxes. Congress using its power to coerce people to curb legal behaviors and activities is tyranny through the tax code.”²¹ Sin taxes have been condemned as unfair not only in the popular press, but also in legal scholarship. Jendi Reiter, for example, condemns such taxes as infringing our “human dignity in choosing our own lifestyles.”²² She argues that “a good case can be made for treating physical lifestyle choices as ethically significant since they reflect the individual’s general hierarchy of priorities with respect to risk, present versus future gratification, physical pleasure, and the proper scope of social interference in private matters. ‘A short life and a merry one’ is a genuine, if simplistic, philosophical position.”²³

B. Deontology and the Neutral State

The ethical theory underlying such attacks on sin taxes is not often made explicit by opponents. But when sin taxes are attacked as unfair and discriminatory because of their infringement on a fundamental human freedom to choose, the implicit ethical theory supporting the attack is “deontology.”

“The term ‘deontology’ is derived from the Greek word “deon”, or duty.”²⁴ It was explicated most fully by the nineteenth-century German philosopher Immanuel Kant, who held that ethics should be governed by an overriding duty he called the “categorical imperative.”²⁵ He asserted “that man, and in general every rational being, exists as an end in himself, not merely as a means for arbitrary use by this or that will.”²⁶ He formulated his categorical imperative as follows: “Act in such a way that you always treat humanity, whether in your own person or in the person of any other, never simply as a means, but always at the same time as an end.”²⁷ Thus treating people as ends in themselves means that all persons are worthy of respect because they are reasoning beings with the ability to freely choose.

²¹ Curtis S. Dubay, *Sin Taxes on Soda, Alcohol, and Cigarettes: Congress’s Latest Vice*, Heritage Foundation Webmemo, Sept. 30, 2009, <http://www.heritage.org/research/taxes/wm2635.cfm>.

²² Jendi B. Reiter, *Citizens or Sinners? – The Economic and Political Inequity of “Sin Taxes” on Tobacco and Alcohol Products*, 29 COLUM. J.L. & SOC. PROBS. 443, 446 (1996).

²³ *Id.* at 457.

²⁴ WEISS, *supra* note 8, at 107.

²⁵ Note that “natural law” theory is sometimes classified, along with Kantianism, as a deontological ethical theory, but of a very different sort from the Kantian version. Instead of being grouped with Kantian deontology, it is best seen as inextricably intertwined with virtue ethics, since both hold that ethics should flow from the goal of the human good defined by an objective human nature. See Thomas Williams, *Aquinas and the Ethics of Virtue*, Introduction, in THOMAS AQUINAS: DISPUTED QUESTIONS ON THE VIRTUES XI (E.M. Atkins ed., 2005) (“I can best make my case for the systematic unity of Aquinas’ moral theory, and illustrate the place of virtue within it, by beginning from the theory of natural law and showing how it leads inevitably to the discussion of virtue.”). Thus the natural law perspective on sin taxes will be largely consistent with that of virtue theory, and will not be discussed separately in this article.

²⁶ MICHAEL J. SANDEL, JUSTICE: WHAT’S THE RIGHT THING TO DO? 212 (2009).

²⁷ *Id.*

For Kant, because people “have different views on the empirical end of happiness and what it consists of” government should not affirm or endorse one conception of happiness over others.²⁸ In order to respect the universal human right of each individual to pursue his or her own ends, the majority should refrain from imposing its values upon those who dissent. “No one can compel me to be happy in accordance with his conception of the welfare of others,” Kant stated, “for each may seek his happiness in whatever way he sees fit, so long as he does not infringe upon the freedom of others’ to do the same.”²⁹

Thus, for deontology as expressed by Kant, the human being must be respected as an autonomous free agent.³⁰ As philosopher Michael Sandel observes, “according to this conception, we are not simply defined as the sum of our desires . . . nor are we beings whose perfection consists in realizing certain purposes or ends given by nature Rather, we are free and independent selves, unbound by antecedent moral ties, capable of choosing our ends for ourselves.” If the state is to demonstrate the proper respect for human autonomy, it must be neutral as to different conceptions of what is good for human beings, while not infringing on an individual’s right to choose his or her own version of “the good life.”³¹ There is thus a fundamental distinction between “the right” (i.e., the duty to respect an individual’s autonomy regardless of the consequences) and “the good” (i.e., both the “common good” of human society and any particular conception of “the good life” for human beings).³² And in the design of public policy, the right must take precedence over (or “trump”) the good.³³ In order to honor the individual’s fundamental right to autonomy, the state must do no more than set up a neutral framework allowing individuals to pursue their own conceptions of the good.³⁴ Government must be “the neutral state.”³⁵ Ludwig Beckman observes that “the idea of a neutral state [requires] the state to take a ‘neutral posture’ towards different ways of life. Neutrality means . . . that ‘no particular moral conception should be favored.’”³⁶

The concept of the neutral state has been endorsed by those in the Kantian tradition who have written explicitly on political philosophy and the just state, both on the political “left” and the political “right.” For example, John Rawls, the most

²⁸ *Id.* at 138.

²⁹ *Id.* at 138-39.

³⁰ MICHAEL J. SANDEL, *PUBLIC PHILOSOPHY: ESSAYS ON MORALITY IN POLITICS* 214 (2005).

³¹ *Id.* at 158 (“The liberal ethic asserts the priority of the right, and seeks principles of justice that do not presuppose any particular conception of the good”); see also Robert P. Hunt, *Abortion and the Neutral State*, *FIRST THINGS*, October 1990, <http://www.firstthings.com/article/2007/09/005-abortion-and-the-neutral-state-24> (“An answer to the problem of national self-definition in America is provided by the advocates of the ‘neutral’ state. These persons believe that any attempt by government to promote a particular conception of the good life is, given the pluralistic nature of American society, imprudent at best. At worst, it is a violation of the principles upon which sound and just government is based.”).

³² SANDEL, *supra* note 30, at 212.

³³ *Id.*

³⁴ *Id.* at 214.

³⁵ LUDWIG BECKMAN, *THE LIBERAL STATE AND THE POLITICS OF VIRTUE* 118 (2001).

³⁶ *Id.*

prominent egalitarian liberal philosopher of the twentieth century,³⁷ strongly supported the neutral state as guarantor of the individual's autonomy as an "unencumbered self."³⁸ As Noriaki Iwasa explains, "For some contemporary liberals such as John Rawls, a huge concern is political neutrality, which is the idea that a state should be neutral between competing views of the moral good sought and adopted by people."³⁹

Robert Nozick, perhaps the leading philosopher of the libertarian right in the twentieth century⁴⁰ (and a vigorous opponent of John Rawls on other issues), also vigorously endorsed the neutral state as guarantor of what he referred to as the individual's "self-ownership."⁴¹ Edward Feser observes that Nozick follows the Kantian view:

[A] human being, as a rational agent endowed with self-awareness, free will, and the possibility of formulating a plan of life, has an inherent dignity and cannot properly be treated as a mere thing, or used against his will as an instrument or resource in the way an inanimate object might be. In line with this, Nozick also describes individual human beings as self-owners.⁴²

Beckman notes that "[t]he rationale for neutrality of aims is, according to Nozick, that citizens lead different lives and that they endorse different values . . . he contends that the state has to be neutral between its citizens and this applies, he adds, 'scrupulously.'⁴³

The deontological idea of the neutral state has been influential in law and jurisprudence. The Supreme Court expressed a view consistent with the neutral state perspective in the 1992 case of *Planned Parenthood vs. Casey* while expounding on

³⁷ Martha Nussbaum, *The Enduring Significance of John Rawls*, CHRON. HIGHER EDUC., July 20, 2001, available at <http://chronicle.com/article/The-Enduring-Significance-of/7360> ("John Rawls . . . is the most distinguished moral and political philosopher of our age. Initially isolated in a world of Anglo-American philosophy preoccupied with questions of logic and language, Rawls played a major role in reviving an interest in the substantive questions of political philosophy. What makes a society just? How is social justice connected to an individual's pursuit of the good life?").

³⁸ SANDEL, *supra* note 30, at 162 ("For the unencumbered self, what matters above all, what is most essential to our personhood, are not the ends we choose but our capacity to choose them . . . 'It is not our aims that primarily reveal our nature,' writes Rawls, 'but rather the principles that we would acknowledge to govern the background conditions under which these aims are to be formed . . . We should therefore reverse the relation between the right and the good proposed by teleological doctrines and view the right as prior.'").

³⁹ Noriaki Iwasa, *The Impossibility of Political Neutrality*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1338062 (last visited March 20, 2010).

⁴⁰ Edward Feser, *Robert Nozick (1938 – 2002)*, INTERNET ENCYCLOPEDIA OF PHILOSOPHY, <http://www.iep.utm.edu/nozick/> (last visited Feb. 28, 2010) ("A thinker with wide-ranging interests, Robert Nozick is one of the most important and influential political philosophers, along with John Rawls, in the Anglo-American analytic tradition.").

⁴¹ *Id.*

⁴² *Id.*

⁴³ BECKMAN, *supra* note 35, at 128.

the right to “personal dignity and autonomy.” The Court stated: “At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.”⁴⁴

With this background, it becomes plain why sin taxes cannot be ethically justified under deontology. By targeting excise taxes on activities deemed “sinful,” the state is making a clear statement that some activities are inconsistent with a particular vision of the human good, and is providing a financial incentive for individuals to conform their behavior to the vision of the good that the state has endorsed.⁴⁵ The outcry against sin taxes as unfair and discriminatory can then be seen as an implicit claim that sin taxes violate the fundamental principles of Kantian deontological ethics and its requirement that the state be neutral. Thus, if sin taxes are to have a foundation in ethical theory, that foundation cannot be deontological ethics.

III. THE CONSEQUENTIALIST DEFENSE OF SIN TAXES

A. Utility, Pigovian Taxes, and Inelasticity

Supporters of sin taxes have traditionally relied upon consequentialist arguments to defend such taxes against attacks grounded in deontology, even if they have not made their ethical presuppositions explicit. Consequentialism holds that an action is to be ethically judged by its consequences. Lawrence Solum explains that “[c]onsequentialism is the view that morality is about consequences of decisions . . . Consequentialism is sometimes contrasted to deontology, where deontological moral and political theories maintain that there are moral rules or principles, the violation of which cannot be justified on the ground that good consequences would result.”⁴⁶ An action that increases “utility” or “welfare” is ethical; one that decreases utility or welfare is unethical.⁴⁷ Hence, two of the prominent versions of consequentialism are “utilitarianism” and “welfare economics.”⁴⁸ On consequentialism, there is no absolute rule that one must respect human autonomy regardless of the consequences. Infringement of human autonomy can be justified if the result is “good” for society.⁴⁹

⁴⁴ 505 U.S. 833, 851 (1992). Justice Scalia has derided this statement as “the famed sweet-mystery-of-life passage” that “ate the rule of law.” *Lawrence vs. Texas*, 539 U.S. 558 (2003) (Scalia, J., dissenting).

⁴⁵ Reiter, *supra* note 22, at 457.

⁴⁶ Lawrence Solum, *Legal Theory Lexicon 008: Utilitarianism*, http://lsolum.typepad.com/legal_theory_lexicon/2003/11/legal_theory_le_4.html (last visited Feb. 28, 2010).

⁴⁷ WEISS, *supra* note 8, at 104-05; Sandel, *supra* note 26, at 34.

⁴⁸ Lawrence Solum, *Legal Theory Lexicon 025: Social Welfare Functions*, <http://lsolum.typepad.com/legaltheory/2009/08/legal-theory-lexicon-social-welfare-functions.html> (last visited March 20, 2010).

⁴⁹ Solum, *supra* note 46 (“Thus, a consequentialist might believe that one may tell lies, break promises, or injure innocent persons in order to accomplish a greater good, whereas a deontologist might believe that such actions are forbidden—even if good consequences will result.”).

“The good” – defined as human utility or welfare – is prior to “the right.”⁵⁰ Consequentialism is reflected in legal theory and jurisprudence as “normative law and economics.”⁵¹

Several defenses of sin taxes have been offered that are grounded in this consequentialist theory. First, it is often argued that sin taxes are justified in order to allocate the costs of behavior having negative effects on society onto the person causing those negative effects.⁵² The external costs are internalized by requiring the person to pay a tax for engaging in the disfavored behavior.⁵³ For example, when an individual uses tobacco, or uses alcohol immoderately, that individual suffers adverse health consequences that must ultimately be paid for by society (either through increased insurance premiums or directly from the public treasury).⁵⁴ In the case of alcohol, society could suffer other adverse consequences through reduced productivity, automobile accidents caused by drunken driving, among other things.⁵⁵

When the user of tobacco or alcohol pays the sin tax, he pays a sort of “user fee” to the government which can offset the costs created by his or her behavior. The funds raised by this tax can then be used to benefit society as a whole. This argument was made originally by the economist Arthur Pigou, and thus sin taxes designed to allocate such negative “externalities” are sometimes called “Pigovian taxes.”⁵⁶

Second, it is frequently argued that sin taxes are justified as an efficient way to raise revenue for the government because the activities being taxed have what economists call “inelastic demand.”⁵⁷ The government can, in effect, take advantage of the fact that consumers of the disfavored goods and services are in some sense addicted to the particular vices associated with those goods and services, and will therefore continue to consume them in the face of price increases caused by sin taxes.⁵⁸ As David Depippo notes,

⁵⁰ SANDEL, *supra* note 30, at 211.

⁵¹ Chapin Cimino, *Virtue and Contract Law*, Social Science Research Network, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1569687 (last visited March 20, 2010) (noting that “scholars across the social sciences and humanities have been struggling to break free of the same dichotomy, between consequentialism (the philosophy on which law and economics is based) and deontology (the philosophy on which rights theories are based)”).

⁵² Haile, *supra* note 14, at 9.

⁵³ *Id.* at 10.

⁵⁴ Ryan Vinelli, *Sugar Taxes Aren't Sweet: The Case Against Pigovian Taxes on Sugar-Based Drinks*, Social Science Research Network, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1410068 (last visited March 20, 2010) (“A recent study by the Centers for Disease Control put the direct health-care cost of smoking tobacco at a staggering \$96 billion per year, and the resulting lost productivity at an additional \$97 billion per year.”).

⁵⁵ *Id.* at 11 (“Alcohol use creates countless negative externalities, including violence, crime, drunk driving, loss of worker productivity and increased health care costs. The cost of these externalities to the United States is estimated to be in the hundreds of billions of dollars every year.”).

⁵⁶ John V.C. Nye, *The Pigou Problem*, REG., Summer 2008, at 32.

⁵⁷ David J. Depippo, *I'll Take My Sin Taxes Unwrapped and Maximized, with a Side of Inelasticity, Please*, 36 U. RICH. L. REV. 543, 559-60 (2002).

⁵⁸ Haile, *supra* note 14, at 6.

British economist and mathematician Frank Ramsey expressed the relationship between selective excise taxes and price elasticity in 1927. Ramsey's rule states that 'in order to minimize the excess burden . . . taxes should be placed on goods in inverse proportion to their elasticities of demand.' Given the goal of economic efficiency through neutral tax policies, the rationale is that the less people care about changes in a commodity's price, from whatever the source, the smaller the reduction in their purchases of the commodity when its price rises, i.e., the quantity demanded falls less.⁵⁹

Because demand for a good or service associated with a vice is not "elastic", any decrease in sales (and the concomitant tax collections) due to the higher price created by the sin tax will be minimal.⁶⁰ Thus a sin tax on such goods and services will supply a steady and reliable source of revenue for the state.⁶¹

B. *The Consequentialist Tu Touque*

Consequentialism, however, provides a weak foundation for the ethical defense of sin taxes, because just as arguments can be mustered in favor of sin taxes based on *positive* consequences, equally persuasive arguments can be mustered against sin taxes based on *negative* consequences. The consequentialist defense is therefore subject to a *tu quoque* objection ("*tu quoque*" is Latin for "you, too" or "you, also").⁶² The consequentialist logic works to undercut the very consequentialist case made by sin tax supporters, and those supporters are "hoist by [their] own petard."⁶³

For example, it has been argued that sin taxes may actually have the negative effect of causing the behavior targeted by the tax to *increase* because the government develops a vested interest in sustaining the activity to preserve its source of revenue.⁶⁴ The state develops an incentive to protect the targeted vice, and its concomitant harmful consequences, in order to protect its tax base:

[O]nce a state imposes sin taxes, it stands to profit from the continued sale of a product detrimental to its citizens' health [referring to tobacco]. Any reduction in the consumption of the 'sinful' product will result in a loss of revenue for the state. This conflict of interest is even more troubling if the state relies on the

⁵⁹ Depippo, *supra* note 57.

⁶⁰ *Id.* at 558-59.

⁶¹ *Id.*

⁶² MERRIAM-WEBSTER'S ONLINE DICTIONARY, <http://www.merriam-webster.com/dictionary/tu%20quoques> (last visited Feb. 28, 2010); see Solum, *supra* note 13, at 39 (making similar use of the *tu quoque* objection in the context of constitutional theory).

⁶³ WILLIAM SHAKESPEARE, *HAMLET*, act 3, sc 4.

⁶⁴ Haile, *supra* note 14, at 19.

sin tax revenues to fund essential government services. Once such reliance occurs, the state has an interest in protecting the continued financial success of the producers of the harmful product.⁶⁵

It has also been argued that if sin taxes are too high, a criminal black market can develop as occurred in the 1920s with the Prohibition of alcohol. While Prohibition involved a complete ban, and not just a sin tax, opponents of sin taxes have pointed to smuggling operations of cigarettes in Canada in the late 1980s and early 1990s, triggered by what they say were excessive sin taxes:

One potential consequence of placing an excessive tax on something consumers refuse to give up is an increase in smuggling and related violence, as shown by the high cigarette tax implemented in the 1980s in Canada . . . the police power necessary to combat these underground markets is a large cost to society that lawmakers do not bargain for when they enact sin taxes.⁶⁶

Thus, on consequentialist reasoning, the case for sin taxes and the case against sin taxes result in a muddled standoff of sorts – not a clear victory for either side. A firm ethical foundation for the defense of sin taxes is certainly not provided.

IV. THE DEFENSE OF SIN TAXES BASED ON VIRTUE ETHICS

A. *Statecraft as Soulcraft: Government and Moral Ecology*

The third major ethical theory is that of “virtue ethics.” Virtue ethics holds that an action is ethical if it is the action that a virtuous person would take in the circumstances.⁶⁷ Virtue ethics has developed in legal theory as “virtue jurisprudence.”⁶⁸

⁶⁵ *Id.*

⁶⁶ Morse, *supra* note 1, at 214.

⁶⁷ Lawrence B. Solum, *Legal Theory Lexicon 012: Virtue Ethics*, <http://lsolum.typepad.com/legaltheory/2009/05/legal-theory-lexicon-virtue-ethics.html> (last visited Feb. 28, 2010).

⁶⁸ Lawrence B. Solum, *Legal Theory Lexicon 031: Virtue Jurisprudence*, http://lsolum.typepad.com/legal_theory_lexicon/2004/04/legal_theory_le_2.html (last visited Feb. 28, 2010) (“The moral philosophy pie can be cut in many ways, but the conventional slicing divides normative moral theory into three kinds: (1) deontological moral theories (e.g. Kant and contractualism), (2) consequentialist moral theory (e.g. utilitarianism and welfarism), and (3) aretaic moral theories (e.g. virtue ethics). Recently, however, a variety of legal theorists have begun to consider the implications of aretaic (virtue-centered) moral theory for the law.”). See generally VIRTUE JURISPRUDENCE (Colin Farrelly & Lawrence Solum eds., 2008).

Under virtue jurisprudence, the purpose of legislation is to develop a virtuous citizenry.⁶⁹ This purpose has been summed up in the slogan “statecraft is soulcraft.”⁷⁰ While the virtue ethics tradition, going back to Aristotle, has recognized that citizens cannot be forced to be virtuous by government, that tradition has recognized a limited role for law in assisting people in cultivating virtue through their own efforts. As Robert George explains:

Laws cannot make men moral. Only men can do that; and they can do it only by freely choosing to do the morally right thing for the right reason. . . . Nevertheless, the central pre-liberal tradition of thought about morality, politics and law has maintained that laws have a legitimate subsidiary role to play in helping people to make themselves moral [and to] help people to establish and preserve a virtuous character.⁷¹

Law accomplishes this objective in an indirect way by establishing a “moral ecology” that is conducive to virtue:

A physical environment marred by pollution jeopardizes people’s physical health; a social environment abounding in vice threatens their moral well-being and integrity. A social environment in which vice abounds (and vice might, of course, abound in subtle ways) tends to damage people’s moral understandings and weaken their characters as it bombards them with temptations to immorality.⁷²

Under virtue ethics, as in consequentialism, “the good” is prior to “the right.”⁷³ But in virtue ethics, the “good” is not defined as human utility or welfare – as it is in consequentialism – but as a life lived according to the traditional virtues, which results in what is called “*eudaimonia*”. As Rosalind Hursthouse, a leading virtue theorist, explains:

The concept of *eudaimonia*, a key term in ancient Greek moral philosophy, is central to any modern neo-Aristotelian virtue ethics and usually employed even by virtue ethicists who deliberately divorce themselves from Aristotle. It is standardly translated as “happiness” or “flourishing” and occasionally as ‘well-being’ . . .

⁶⁹ Solum, *supra* note 68 (“Among the issues raised by virtue jurisprudence are the following: Virtue ethics has implications for an account of the proper ends of legislation. If the aim of law is to make citizens virtuous (as opposed to maximizing utility or realizing a set of moral rights), what are the implications for the content of the laws?”).

⁷⁰ See, e.g., GEORGE F. WILL, STATECRAFT AS SOULCRAFT: WHAT GOVERNMENT DOES (1983).

⁷¹ ROBERT P. GEORGE, MAKING MEN MORAL: CIVIL LIBERTIES AND PUBLIC MORALITY 1 (1993).

⁷² *Id.* at 45.

⁷³ SANDEL, *supra* note 30.

All standard versions of virtue ethics agree that living a life in accordance with virtue is necessary for *eudaimonia*.⁷⁴

The four primary classic (also known as the “cardinal”) virtues are temperance, prudence, courage and justice.⁷⁵ Many of the sin taxes are directed at encouraging temperance in particular, and discouraging those vices opposed to temperance. “Temperance” is synonymous with “moderation” or “self-control.”⁷⁶ A temperate person “has a mind sufficiently sound to control desires. He [or she] knows his [or her] own limitations and practices restraint in action.”⁷⁷ These have been recognized as particularly crucial for the proper functioning of a democratic capitalist society.⁷⁸ Indeed, as long ago as the 1830’s, Alexis de Tocqueville expressed concern about a future erosion in the virtue of temperance and worried:

[F]ree, capitalist societies might develop so great a ‘taste for physical gratification’ that citizens would be ‘carried away and lose all self-restraint.’ Avidly seeking personal gain, they could ‘lose sight of the close connection which exists between the private fortune of each of them and the prosperity of all’ and ultimately undermine both democracy and prosperity.⁷⁹

Sin taxes can be justified as providing a disincentive to engage in vice and an incentive to engage in virtuous behavior—in particular, behavior consistent with the virtue of temperance. For example, sin taxes on alcohol and tobacco discourage intemperate use of substances that can be damaging to health; sin taxes on sugary soft drinks and junk food discourage intemperate consumption that leads to obesity; and sin taxes on strip clubs and pornography discourage intemperate indulgence and

⁷⁴ Rosalind Hursthouse, *Virtue Ethics*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY, available at <http://plato.stanford.edu/entries/ethics-virtue/#2> (last visited Feb. 28, 2010).

⁷⁵ Dierdre McCloskey, *Bourgeois Virtues?*, May 18, 2006,

<http://www.cato.org/research/articles/cpr28n3-1.html>. Note that these classic (or “cardinal”) virtues are not limited to any particular religious or sectarian tradition. While they were embraced by Catholic philosopher Thomas Aquinas, they were widely endorsed by Aristotle and other “pagan” Greek philosophers (indeed, Aquinas regarded himself as a follower of Aristotle in this matter). They have also been endorsed by modern secular virtue theorists. A defense of sin taxes based on specific religious doctrines or injunctions would fall not under virtue ethics, but would be an example of “divine command” ethics, and is not discussed in this article because divine command ethics have had a limited impact on jurisprudence and legal theory in recent decades. The implications of Judeo-Christian divine command ethics for federal tax policy have been explored in Susan Pace Hamill, *An Evaluation of Federal Tax Policy Based on Judeo-Christian Ethics*, 25 VA. TAX REV. 671-764 (2006).

⁷⁶ THE BLACKWELL DICTIONARY OF WESTERN PHILOSOPHY 680 (Nicholas Bunnin & Jiyuan Yu eds., 2009).

⁷⁷ *Id.*

⁷⁸ See generally DIERDRE N. McCLOSKEY, *THE BOURGEOIS VIRTUES: ETHICS FOR AN AGE OF COMMERCE* (2006); DANIEL BELL, *THE CULTURAL CONTRADICTIONS OF CAPITALISM* (2d ed. 1996).

⁷⁹ Stephen Malanga, *Whatever Happened to the Work Ethic*, DALLAS MORNING NEWS, Aug. 21, 2009, available at <http://www.manhattan-institute.org/html/miarticle.htm?id=5229>.

abuse of sex. Intemperance in these areas interferes with the moderation in appetites necessary for the attainment of human flourishing. By encouraging people to make virtue a habit, virtue will be inculcated in their character.⁸⁰ As George Will notes, persons “are products of the laws under which they are raised and live, and of the long legacy of their culture.”⁸¹ He goes on to assert:

No one disputes that a social order embodies certain values, or that law intimates purposes beyond itself. Law, obviously, has the important task of guaranteeing the minimal outward conformity with duties necessary for a liberal order . . . But those diversities which necessitate law also necessitate law concerned with values as well as actions—with mind as well as body. They necessitate law as a ratifier and stigmatizer, in which role law is a tutor.⁸²

In this way, sin taxes both “economize on virtue” (i.e., encourage “minimal outward conformity” with the temperate behavior necessary for the success of democratic capitalism)⁸³ and, over the long term, contribute to the development of actual, internalized virtue in the citizenry. By fulfilling the law’s “tutelary” function, sin taxes contribute to a moral ecology conducive to human flourishing. They do so in a moderate way, avoiding the harshness of absolute legal prohibition of vice by providing financial incentives away from vice and toward virtue.

B. The Slippery Slope Argument and “Libertarian Paternalism”

Sin taxes can thus find a firm ethical foundation in a virtue-centered view of the proper end of legislation, i.e., the inculcation of virtue and the discouragement of vice in the citizenry. However, the notorious “slippery slope” objection could still be lodged against a virtue-centered defense of sin taxes. After all, since virtue theory holds that the purpose of legislation is the cultivation of a virtuous citizenry, what is to prevent government from moving beyond sin taxes to outright prohibition of vice, complete with criminal sanctions?⁸⁴ What is to stop legislators from veering into authoritarian, “nanny state”-style morals legislation? Economist Thomas DiLorenzo observes that “once it becomes ‘legitimate’ for government to protect individuals from their own follies, there is no way to establish limits to governmental power.” For example, alcohol was originally subject to a targeted excise tax, but ultimately was subjected to Prohibition, which is widely acknowledged to have been a failure.⁸⁵

⁸⁰ WILL, *supra* note 70, at 77.

⁸¹ *Id.* at 76.

⁸² *Id.* at 77.

⁸³ Dwight R. Lee, *Economics with Romance*, INDEPENDENT REV., Summer 2000, http://findarticles.com/p/articles/mi_hb3316/is_1_5/ai_n28786042/?tag=content;col1 (“Economists emphasize the advantage of economizing on virtue by the establishment of incentives that motivate good conduct with a minimum amount of noble human traits.”).

⁸⁴ Morse, *supra* note 1, at 200.

⁸⁵ Reiter, *supra* note 22, at 447-48.

A virtue-centered approach to legislation requires an exercise of judgment by legislators in attempting to determine the extent to which government should intervene on behalf of virtue.⁸⁶ As Will acknowledges:

[I]t is impossible rationally to stipulate *a priori* limits to the sweep of the law in matters of morality. Such limits must be set by prudential, not theoretical, reasoning. . . . So where does one draw the line? I do not know. Is the drawing of lines potentially dangerous? Yes, indeed. But it is less dangerous than not drawing them. . . . All politics takes place on a slippery slope. The most important four words in politics are ‘up to a point.’⁸⁷

This necessary exercise in judgment can be usefully informed by recent work in the area of behavioral economics, particularly the concepts of “choice architecture” and “libertarian paternalism” as developed by Cass Sunstein and Richard Thaler.⁸⁸ Under the concept of “libertarian paternalism,” government shapes the choices faced by citizens by acting as a “choice architect,” “nudging” people in the direction of those choices that would serve their long-term self-interest, even if they lack the self-control needed to make those choice in the short-term.⁸⁹ “Libertarian paternalism,” note Sunstein and Thaler, “is a relatively weak and nonintrusive type of paternalism, because choices are not blocked off or fenced off.”⁹⁰ The paternalism remains libertarian in the sense that every attempt is made to preserve choice by allowing the citizen to opt-out of the ideal choice if they insist. Sin taxes fit in well with this concept, since they preserve choice, even as they tilt the playing field in the direction of the virtuous choice. Sin taxes thus recognize that “moral reflexivity” is necessary in the exercise of many virtues: “Moral goods are reflexive,” observes Robert George, “in that they are reasons to choose which include choice in their very meaning; one cannot participate in these goods other than by acts of choice, that is, by internal acts of will, and the internal disposition established by such choices.”⁹¹ A key difference between a virtue-centered libertarian paternalism and the Sunstein-Thaler version is that Sunstein and Thaler measure the long-term self-interest of persons in terms of “welfare” (with all the consequentialist implications carried by that term).⁹² A virtue-centered libertarian paternalism would measure the long-term self-interest of persons in terms of *eudaimonia*, or human flourishing. Sin taxes can best be seen as a key tool used by government to incentivize people towards temperance, and contribute to the attainment of human flourishing, in a way that avoids the authoritarian risks of the overweening nanny state.

⁸⁶ WILL, *supra* note 70, at 92.

⁸⁷ *Id.* at 92-93.

⁸⁸ See generally Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism is not an Oxymoron*, 70 U. CHI. L. REV. 1159 (2003).

⁸⁹ See generally CASS R. SUNSTEIN & RICHARD H. THALER, *NUDGE* (2008).

⁹⁰ Sunstein & Thaler, *supra* note 88, at 1162.

⁹¹ GEORGE, *supra* note 71, at 43.

⁹² Sunstein & Thaler, *supra* note 88, at 1162.

V. CONCLUSION

As the use of sin taxes by government becomes both more prevalent and more controversial, it is important that such use is ethically justified. An examination of the major ethical theories available reveals that deontological ethics will not be able to provide such justification because of its emphasis on autonomy and the neutral state; indeed, proponents of deontological ethics are likely to be adamantly opposed to sin taxes as unfair and discriminatory against dissenting visions of the good life. Consequentialist ethics can offer some support for sin taxes by pointing to the positive effects of a sin tax policy: in particular, the proper allocation of externalities and provision of a steady source of tax revenue to the state. However, since equally powerful consequentialist arguments can be mustered against sin taxes (e.g., the tendency to create black markets and to give the state a vested interest in the continuation of harmful behavior), the consequentialist defense is severely undercut. It is only virtue ethics that provides a clear and coherent ethical basis for the defense of sin taxes as policy, especially when the legislation of virtue is informed by the concept of libertarian paternalism borrowed from behavioral economics. When seen as a moderate means of inculcating virtue and human flourishing while preserving freedom of choice, sin taxes are provided a coherent and compelling ethical justification by virtue theory.

