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RESISTING THE PATH OF LEAST RESISTANCE: WHY THE TEXAS “POLE TAX” AND THE NEW CLASS OF MODERN SIN TAXES ARE BAD POLICY

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Abstract: Sin taxes—traditionally levied on alcohol and tobacco—are inherently regressive and disproportionately burden the poor, yet they are firmly entrenched as a practice and offer a quick fix in times of fiscal need. Opponents to this method of generating revenue cite its regressive nature and argue that sin taxes are paternalistic and bad social policy. Others disagree, contending that smokers need every incentive to quit, or that alcoholics should be required to mitigate the social costs of their habit. In recent years, a new class of sin taxes has reached deeper into popular culture than ever before, confusing the basic role of the tax system with the improper role of government as social engineer. This Note argues that the use of new sin taxes must be curbed in order to protect the political and socio-economic minorities who consistently face a disproportionate burden under every new sin tax.

INTRODUCTION

In every community those who feel the burdens of taxation are naturally prone to relieve themselves from them if they can . . . . One class struggles to throw the burden off its own shoulders. If they succeed, of course it must fall upon others. They also, in their turn, labor to get rid of it, and finally the load falls upon those who will not, or cannot, make a successful effort for relief. This is, in general, a one-sided struggle, in which only the rich engage, and it is a struggle in which the poor always go to the wall.¹

In 2007, the Texas state legislature passed a law imposing a five dollar per-customer tax on strip clubs.² The tax, which went into effect on January 1, 2008, was expected to affect approximately 150

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² TEX. BUS. & COM. CODE § 47(B) (2008).
businesses in the state and generate an additional forty million dollars a year in revenue. Although the proceeds were earmarked for a noble cause—a portion of the money was designated for use in funding programs for victims of sexual assault—the tax was decried as unconstitutional and discriminatory, and has met opposition from club owners, patrons, employees, and even some legal scholars.

3 See Texas Slaps “Pole Tax” on Strip Clubs, Int’l Herald Trib. Online, Dec. 21, 2007, http://www.iht.com/articles/ap/2007/12/21/america/Texas-Strip-Club-Tax.php; Emily Ramshaw, Strip Bars May Face State Fees, Dallas Morning News, Feb. 13, 2007, at 1A. Although it is unknown exactly how many strip clubs exist in Texas, there are 152 “sexually oriented businesses” registered with the Texas Alcoholic Beverage Commission. See Ramshaw, supra. The revenue estimates are based on established figures from liquor sales and indicate that the registered clubs are host to approximately eight million visits a year. See Texas Slaps “Pole Tax” on Strip Clubs, supra.

4 See Texas Slaps “Pole Tax” on Strip Clubs, supra note 3. Almost immediately after the law took effect, the Texas Entertainment Association—a business group comprised of adult entertainment and cabaret venues—filed suit, charging that the tax violates their First Amendment right to freedom of expression. See Texas Strip Clubs Alter Argument Against $5-Per-Customer-Fee, Dallas Morning News Online, Dec. 27, 2007, http://www.dallasnews.com/sharedcontent/dws/news/texassouthwest/stories/122807dntestripclubfee.4c5a252.html. The plaintiffs won their first battle when, in March 2008, a Texas state district court judge ruled that the tax was unconstitutional. See Christy Hoppe, Strip Clubs Still Might Have to Pay Disputed Fee, Dallas Morning News, Apr. 18, 2008, at 3A. However, the state district court’s judgment was automatically suspended when the Texas Attorney General’s Office filed an appeal. See id. Subsequently, the Texas Comptroller mailed a letter explaining to strip clubs that their payments were still due. See id. The Supreme Court has held that nude dancing “is expressive conduct within the outer perimeters of the First Amendment.” See Barnes v. Glen Theatre, 501 U.S. 560, 565 (1991). However, the Court has also upheld laws banning nudity, stating that while nude dancing is protected expression, it is “only marginally so,” and there are different levels of protection due different forms of expressive conduct. See id.; see also City of Erie v. Pap’s A.M., 529 U.S. 277, 278–79 (2000) (upholding a local ordinance making it illegal to knowingly or intentionally appear nude in public—thus effectively requiring nude dancers to wear, at minimum, pasties and a G-string—on the grounds that the ordinance was a valid content-neutral restriction on immoral conduct). In addition to the First Amendment, the tax is also being opposed on other grounds. See Corrie MacLaggan, State Defends Strip Club Fee in Court Filing, Austin Am. Statesman, Dec. 18, 2007, at B1. Laura Stein, a communications professor at the University of Texas has predicted the tax “is not going to stand or fall based on First Amendment questions. The stronger issue here is whether this is unfair taxation.” See id. The suit also alleges that the law imposes an occupation tax in violation of the state constitution, and that it falsely suggests a connection between the adult entertainment industry and sexual violence. See Texas Slaps “Pole Tax” on Strip Clubs, supra note 3. Jonathan Turley, a constitutional law professor at George Washington University, has suggested the Texas tax could pave the way for punitive taxes in an array of unpopular or borderline arenas, going as far as to suggest that abortion could be made subject to a sin tax. See Texas Strip Clubs Alter Argument Against $5-Per-Customer-Fee, supra; Texas Slaps “Pole Tax” on Strip Clubs, supra note 3. The club owners further allege that the tax will drive some smaller bars out of business. See Texas Slaps “Pole Tax” on Strip Clubs, supra note 3. Dawn Rizos, operator of the Dallas club, The Lodge, told the Associated Press she expects the tax “will kill some of the smaller clubs.” Id. Chandra Brown, president of the company that owns Players, a small Amarillo
Dubbed the “Texas ‘Pole’ Tax,” this levy on strip clubs is one of a new set of modern sin taxes that has been imposed on a wide range of activities in recent years. Sin taxes—targeted excise taxes imposed on the sale of disfavored goods or services—are not uncommon; the United States has a history of taxing vices such as alcohol and tobacco in order to generate revenue in times of war, or to raise money for education. Although sin taxes are generally proposed in times of fiscal need, lawmakers often justify them by citing moral concerns. The argument posits that a given activity, such as smoking, is bad for society. By raising taxes on cigarettes, lawmakers force smokers to internalize the costs of their habit and will perhaps discourage some people from purchasing cigarettes altogether. But while discouraging anti-social or destructive behavior is a desirable goal, sin taxes are not club, stated that adding a five dollar tax to the existing four dollar cover that her club currently charges will “drive away customers and force the club to close.” Id. Brown believes her customers can not afford the surcharge and will refuse to pay it. Id. See Texas Slaps “Pole Tax” on Strip Clubs, supra note 3. Other new taxes involve video games, junk food, bottled water, sugary soda and ammunition. See David Cox, Assemblymember Cox 5th District Report, Vol. 1, Issue 2, Apr. 2002 (listing new tax proposals in California, including an ammunition tax, proposed by state senator Don Perata (D-Oakland) that would place a five-cent tax on every cartridge or round of ammunition sold in the state); John P. Gamboa, Sin Taxes Give the Market a Bad Rap, DAILY AZTEC, Jan. 30, 2008, at A1, available at http://www.thedailyaztec.com/2.7447/1.794878 (describing proposals in New Mexico and Wisconsin to tax video games, TVs and electronics); Dan Shapley, An Eco-Sin Tax on Bottled Water, DAILY GREEN, Dec. 24, 2007, http://www.thedailygreen.com/environmental-news/latest/bottled-water-tax-47122402 (describing Chicago as “the first major U.S. city to tax bottled water,” beginning in 2008); Robert A. Sirico, Commentary: Twinkies, Smokes and Fries: The Fallacies of Sin Taxes, BUDGET & TAX NEWS, Sept. 2006, available at http://www.heartland.org/policybot/results.html?articleid=19660 (describing recent proposals for “new and creative measures aimed at fatty snacks, fast food, and soft drinks”); John Skorburg, Oakland Mayor Floats Sin Taxes on Junk Food and Drinking, BUDGET & TAX NEWS, Feb. 2004, available at http://www.heartland.org/policybot/results.html?artId=14343 (referencing a recommendation by the mayor of Oakland, California, that the state address budget problems “by taxing behaviors such as drinking and eating junk food”). See David J. DePippo, I’ll Take My Sin Taxes Unwrapped and Maximized, with a Side of Inelasticity, Please, 36 U. RICH. L. REV. 543, 544 (2002); Texas Slaps “Pole Tax” on Strip Clubs, supra note 3. See Jendi B. Reiter, Essay, Citizens or Sinners? The Economic and Political Inequity of “Sin Taxes” on Tobacco and Alcohol Products, 29 COLUM. J.L. & SOC. PROBS. 443, 451 (1996); Skorburg, supra note 5. See Jeff Strnad, Conceptualizing the “Fat Tax”: The Role of Food Taxes in Developed Economies, 78 S. CAL. L. REV. 1221, 1247 (2005) (describing a cigarette tax as a surrogate self-control device for smokers who know they should quit, but do not seem able to do so on their own). See id.
an appropriate remedy for societal ills.\textsuperscript{10} Sin taxes are inherently regressive; they put a disproportionate burden on the poor, and they can create more problems than they solve.\textsuperscript{11} Not only do sin taxes burden the individual consumer, but they also jeopardize small businesses and promote unfair competition, and can lead to downsizing and layoffs for workers.\textsuperscript{12} In an effort to stamp out one particular activity, sin taxes may encourage smuggling and create violent black markets, especially when the item being taxed is available for less in a neighboring city or state.\textsuperscript{13} There is often considerable class bias influencing the decision of which activities to tax; the bulk of things subject to this extra burden are those most popular with the poor and working classes.\textsuperscript{14}

Although sin taxes burden the poor and working classes disproportionately, they tend to be billed as being for the greater good. Sin taxes are often linked to programs purported to cure the ills caused by the activity being taxed, and are widely accepted by the general public because they are indirect taxes that affect only a select minority.\textsuperscript{15} When lawmakers impose a new sin tax, those who otherwise oppose taxation tend to look the other way.\textsuperscript{16} Supporters of increased cigarette taxes, for example, argue that smoking imposes great costs on society, such as increased healthcare costs and harm done to those


\textsuperscript{11} See Baxandall, supra note 10, at 26; Reiter, supra note 7, at 447; Sirico, supra note 10.


\textsuperscript{13} See Muska, supra note 12. "In the late 1980s, Canada attempted a large luxury tax on cigarettes, only to find that a substantial and violent black market soon formed to supply smokers. Legal sales (and tax revenues) fell, while more money had to be re-routed to stop the criminal activity." See \textit{Luxury Tax}, INVESTOPEDIA, http://www.investopedia.com/terms/l/luxury_tax.asp (last visited Dec. 4, 2008).

\textsuperscript{14} See Baxandall, supra note 10, at 26; DePippo, supra note 6, at 555; Reiter, supra note 7, at 454. Baxandall cites a 1990 study by Harvard Law School Professor Kip Viscusi in which Viscusi determines that the poor do smoke more than the affluent. See Baxandall, supra note 10. According to Viscusi’s findings, over thirty percent of smokers earned less than $10,000 a year. See id.

\textsuperscript{15} See Gamboa, supra note 5 (explaining that New Mexico’s proposed “Leave No Child Inside” campaign includes a plan to spend money raised by the video game tax on outdoor education programs); \textit{Texas Slaps “Pole Tax” on Strip Clubs}, supra note 3 (detailing the plan for money raised by the strip club tax to go towards helping victims of sexual violence). Discussed further in section IV, these links, while well-intentioned, are often misguided. See Gamboa, supra note 5.

\textsuperscript{16} See Gamboa, supra note 5.
who are exposed to second hand smoke.\textsuperscript{17} A tobacco tax forces smokers to help defray these costs that might otherwise fall to the state.\textsuperscript{18} Proponents also argue that an extra charge for cigarettes might be the incentive an otherwise educated addict needs to finally quit her unhealthy habit.\textsuperscript{19} And although sin taxes are not without problems, they are such an integral part of the revenue system that many state budgets are now largely dependent on the money they bring in.\textsuperscript{20}

Yet while sin taxes are an established mechanism for solving budget crises and influencing behavior, commentators have long voiced concern about an eventual slide down a slippery slope into legislative abuse of the sin tax tool.\textsuperscript{21} While sin taxes have increased over

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\item See id. at 22.
\item See id. Although supporters of tobacco taxes argue the revenue is needed to offset the public health costs placed on society by smokers, there is disagreement as to what those costs actually are. See id. By one estimate, the average external costs of a pack of cigarettes (such as additional medical care and reduced productivity) exceeds seven dollars a pack, more than the per-pack tax in any state. See id. (referencing numbers put forth by the Centers for Disease Control). But the Congressional Research Service, which takes into account in its calculations money saved on healthcare costs by smokers’ shortened life spans, estimates that the per-pack societal costs of smoking is only thirty-three cents. See id.
\item See Strnad, \textit{supra} note 8, at 1246–47. Strnad suggests that cigarette taxes function “as a powerful self-control device,” giving some smokers the extra incentive they need to kick the habit. See id. Strnad cites the practice of tearing up a dollar bill every time one reaches for a cigarette as a means of punishing oneself and training oneself not to smoke. See id. In effect, rather than tearing up a dollar, smokers are just giving it to the government. See id.
\item See Baxendall, \textit{supra} note 10, at 24. “Over the past several decades, with demands on state governments increasing and other taxes unpopular, state legislators once again looked to sin as a way to balance their budgets.” See id. (discussing consistent increases in state tobacco taxes throughout history). State lotteries, one of the most lucrative methods of making money from vice, bring in approximately $400 million a year, more than alcohol and cigarette taxes combined. See id. at 26. Baxendall states that since 2001, “the allure of sin taxes has grown even greater . . . as state governments, facing sudden deficits, have needed new sources of funds.” See id. Baxendall points to a Rhode Island measure that automatically raises the per-pack cigarette tax by ten cents every year, and to a recent Connecticut cigarette tax increase of sixty-one cents a pack. See id. During the 1990s, Baxendall observes, “legislators grew accustomed to the rising tax receipts . . . and committed state governments to higher spending levels. Some cut income taxes, tolls, or licensing fees, and many . . . let their rainy-day funds dwindle. When state revenues fell, states—required by law to balance their budgets—had to scramble to find money where they could.” See id.
\item See Common Sense Says…., COMMON SENSE FOUND., May 2002, http://www.common-sense.org/?fnoc=.common_sense_says/02_may (last visited Nov. 14, 2008) (bolstering a 2002 argument that cigarette taxes unfairly burden the poor and are not the proper way to fix state budget problems by noting that, despite the belief held by supporters that cigarette taxes will improve public health, “many common behaviors give physicians fits, and we can’t and shouldn’t tax all of them. . . . Twinkies and fast food contribute to our nation’s growing obesity, which weighs on our health care system, yet no one has proposed a French fry tax. Can that be far behind?”); Reiter, \textit{supra} note 7, at n.67 (citing several proposals for sin taxes on fatty foods to encourage healthier lifestyles and replace tobacco tax
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time, they have been generally limited to tobacco and alcohol. Recently, a new class of sin taxes has appeared that reaches deeper into popular culture than ever before. Proposed taxes on strip clubs, junk food, video games, sugary sodas, bottled water, and ammunition would bring with them all the traditional ills of sin taxes and would also confuse the appropriate role of the tax system with the improper role of government as social engineer.

This Note will argue that the use of new sin taxes must be curbed in order to protect the poor and working classes, who are most adversely affected by each new tax. Part I will explain the basic requirement of fairness in taxation, and part II will supply a brief history of sin taxes in the United States. Part III will give an overview of the sin taxes that have emerged in the new millennium and will suggest that the tax system has reached a tipping point. Part IV will examine the reasons states are so quick to rely on sin taxes to fill budget gaps, and part V will fully discuss the harms caused by these taxes, arguing that they are inefficient and bad policy, even from the government’s perspective. Part VI will suggest that moral policing is not the appropriate role for the tax system, and will suggest alternative approaches to solving state budget crises and ways to discourage unhealthy habits. This Note will conclude that where there is no system in place to monitor sin taxes’ punitive and detrimental effects, they are the wrong tools for discouraging unpopular behavior. The practice of enacting new sin taxes should be curbed.

revenue when the tobacco tax finally reduces tobacco consumption, Reiter asks: “Does anyone see a slippery slope?”); Texas Slaps “Pole Tax” on Strip Clubs, supra note 3 (quoting George Washington University constitutional law professor Jonathan Turley suggesting that acceptance of the Texas strip club tax could “expose any unpopular industry to punitive taxes. It could be abortion clinics”).

22 See Baxendall, supra note 10, at 20. “The term ‘sin tax’ . . . refers almost exclusively to taxes on tobacco, alcohol, and gambling.” See id.

23 See Gamboa, supra note 5; Sirico, supra note 5; Texas Slaps “Pole Tax” on Strip Clubs, supra note 3.

24 See Muska, supra note 12 (calling sin taxes “the tool of choice for social engineers”); Cox, supra note 5; Gamboa, supra note 5; Sirico, supra note 5; Shapley, supra note 5; Robert A. Sirico, The Sin Tax Craze: Who’s Next?, The Acton Institute, Apr. 28, 2004, www.acton.org/commentary/commentary_196.php (arguing that once a government begins taxing “morally ambiguous activities,” it has crossed the line into “the business of protecting its citizens from themselves); Skorburg, supra note 5; Texas Slaps “Pole Tax” on Strip Clubs, supra note 3.
I. The Fairness Requirement in Taxation

To generate a steady and sustainable revenue stream, a tax system should be structured so that it can achieve three basic goals. An ideal system will be efficient, wasting the fewest dollars possible; it will be simple, so that it is easy to administer; and it will be equitable. Equity in taxation comes in two forms; horizontal equity requires treating alike taxpayers, such as those in the same income bracket, alike, while vertical equity prescribes levying taxes with an eye to taxpayers’ ability to pay. Because unfair excise taxes played an integral role in the American Revolution, many state constitutions, and indeed the federal Constitution, were drafted to include provisions guaranteeing equality in taxation. Despite these provisions, the practical effects of modern American tax practices are not always fair. In the arena of sin taxes particularly, excises placed on specific goods or services disfavored by the majority put a disproportionate burden on minority groups. As legislatures become increasingly creative in designing sin taxes, the taxes target smaller and smaller groups, and any voices of protest are reduced to distant whispers. At the same time, the majority hardly notices a new tax has been implemented, and so the inequities inherent in flat purchase point taxes do not register in the general social conscience. Were new flat taxes to apply more broadly, advocates for the poor and disenfranchised certainly would take notice and object.

26 See id.
27 See DePippo, supra note 6, at 562; NCLS, Principles of a High-Quality State Revenue System, supra note 25. The federal income tax system does match tax rate with ability to pay; the income tax is on a progressive rate schedule with the wealthier paying a higher proportion of their income in taxes. See NCLS, Principles of a High-Quality State Revenue System, supra note 25.
28 See U.S. Const. art. I, § 8, cl. 1 (“Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises . . . but all Duties, Imposts and Excises shall be uniform throughout the United States”); Barker, supra note 1, at 13 (“Many state constitutions adopted provisions on equality, uniformity, or proportionality in tax over the course of the nineteenth century.”).
29 See Baxandall, supra note 10, at 26 (citing disproportionate burden sin taxes place on the poor).
30 See id.
31 See id. (noting that groups subject to sin taxes “may resent being singled out, but they are a minority who garner little sympathy”).
32 See id.
33 See id.
In his writings on the constitutional requirements of equality in taxation, William Barker points to the inherent selfishness of man. Barker notes the influence of John Locke on early American attitudes towards taxation, and specifically references the strongly held beliefs that “there should be no taxation without representation, and that the burden of taxation should be equally allocated among the citizens of a society.” Barker suggests that a properly functioning democratic government should further these aims. He goes on to note, however, that given the opportunity, the wealthy will take advantage of any opportunity to shift the tax burden from themselves onto those who are less empowered. Barker observes that “this is, in general, a one-sided struggle” by the rich, and that in the end, “the poor always go to the wall.” Although this imbalance in financial agility—and the ability of the rich to avoid or evade taxation—has existed throughout American history, it is unfair and irresponsible to perpetuate such discrepancies where they can be easily avoided.

II. A Brief History of Sin Taxes

The use of sin taxes in the United States preceded the federal income tax system by over a century. Before the sixteenth amendment was passed in 1913 authorizing the federal income tax, excise taxes were the government’s primary source of revenue. Initially implemented as temporary taxes during war time, sin taxes on alco-

34 See Barker, supra note 1, at 3.
35 See id. at 2 (paraphrasing John Locke, The Second Treatise on Government 193 (Haffner Publ’g 1947) (1690)).
36 See id.
37 See id. at 3.
38 Id. During Prohibition, the existing tax on alcohol, while remaining on the books, ceased producing revenue for the government. See Reiter, supra note 7, at 448. Historian John C. Burnham argues that one of the reasons the rich were in support of the repeal of Prohibition was because they realized a liquor tax would shift the revenue focus away from the income tax and place the burden back on the poor and middle class consumers of alcohol. See id. Reiter goes on to cite millionaire Pierre Du Pont, who suggested that the liquor tax would raise so much revenue there would no longer be a need for an income tax, “an outcome which obviously suited him quite well.” See id. at 449.
39 See Barker, supra note 1, at 3.
40 See U.S. Const. amend. XVI (granting Congress the “power to lay and collect taxes on incomes”); Reiter, supra note 7, at 446 (discussing the early history of sin taxes in the United States).
41 See DePippo, supra note 6, at 546.
hol and, later, tobacco proved so lucrative that the government came to rely on them full time.\textsuperscript{42}

Ironically, one of the causes of the American Revolution had been the excise taxes imposed on the colonies by England.\textsuperscript{43} Nevertheless, in 1790, Alexander Hamilton proposed a tax on whiskey to help repay the new nation’s war debts.\textsuperscript{44} Despite the tax, whiskey consumption remained relatively steady.\textsuperscript{45} The demand for alcohol appeared inelastic; people bought the same amount, no matter the price.\textsuperscript{46} Lawmakers took advantage of the inelasticity of demand and continued to impose excise taxes on alcohol.\textsuperscript{47} To make the tax more palatable to the general public, politicians offered the justification that “sellers of such morally suspect products should give some of their profits back” for the common good.\textsuperscript{48} Similar moral reasoning has been offered to generate support for sin taxes throughout American history.\textsuperscript{49}

Despite their proffered justifications, however, sin taxes have historically burdened the poor.\textsuperscript{50} In the late eighteenth century, a number of poor Midwestern distillers revolted against Hamilton’s whiskey tax in what is popularly known as the Whiskey Insurrection.\textsuperscript{51} The tax, which charged small-scale producers by the gallon but which allowed those who produced in volume to pay a discounted flat rate, affected the smaller producers disproportionately.\textsuperscript{52} They rioted, and the whiskey tax was ultimately repealed in 1802.\textsuperscript{53} The tax was reinstated as a

\textsuperscript{42} See id. Today, a single cigarette can yield almost eight cents for some state governments, and another two cents in revenue for the federal government. See Baxandall, supra 10, at 20.

\textsuperscript{43} See Reiter, supra note 7, at 446.

\textsuperscript{44} See DePippo, supra note 6, at 545.

\textsuperscript{45} See Reiter, supra note 7, at 446.

\textsuperscript{46} See id.

\textsuperscript{47} See id.

\textsuperscript{48} See id. at 444.

\textsuperscript{49} See Strnad, supra note 8, at 1244 (discussing taxes on cigarettes and fatty food, both items which are argued to be at the center of self-control issues).

\textsuperscript{50} See DePippo, supra note 6, at 546.

\textsuperscript{51} See id.

\textsuperscript{52} See id.

\textsuperscript{53} See id. Rebellions against excise taxes are not uncommon in history. See Boston Tea Party Ship & Museum, http://www.bostonteapartyship.com/history.asp (last visited Apr. 4, 2008). In 1773, a group of American patriots, led by Samuel Adams and calling themselves the Sons of Liberty, rebelled against Britain’s Tea Act of 1773. See id. On the evening of December 16, 1773, a large group of patriots stormed three ships that were docked in Boston Harbor and emptied 342 crates of tea in to the water. See id. The tea belonged to the British-owned East India Company, a company which had been effectively granted a monopoly in the colonies by exemption from an excise tax that still applied to American merchants. See id. Fueled by a deep and widespread discontent with a series of commercial
temporary measure during the War of 1812, but was repealed again in
1817. It was not until the Civil War that alcohol taxes became a per-
manent fixture on the American tax landscape, but even then, only
liquor was subject to taxation. Beer and wine remained tax-free.

Federal tobacco taxes also began as a temporary measure, but
they too became permanent during the Civil War. As with alcohol,
the demand for tobacco products remained high, despite the in-
creased cost to consumers. In 1921, individual states began charging
their own taxes on tobacco products, levying them on top of the exist-
ing federal tax. Both the federal and state governments became ac-
customed to the revenue derived from tobacco taxes, and the money
increasingly constitutes a large portion of most modern budgets.

III. Atop the Slippery Slope: We Have Reached
the Tipping Point

A 2006 Americans for Tax Reform study of state tax trends shows
that over the preceding two and a half decades, states moved away from
broad increases in income and sales taxes in favor of enacting more
targeted excise taxes. The new set of taxes goes beyond the traditional

tariffs imposed on them by England, the patriots took a stand against taxation without
representation. See id. The Boston Tea Party was a response not only to the British tea mo-
nopoly, but to a series of unfair excise taxes that included the Sugar Act of 1764, which
taxed coffee, sugar, and wine; the Stamp Act of 1765, which taxed newspapers, playing
cards and other printed materials; and the Townshend Act of 1767, which levied additional
excises on goods such as paper, paints, glass, and tea. See id. As a major rebellion against
unfair taxation, the Boston Tea Party is known for its significance in helping to start the
American Revolution. See id.

54 See DePippo, supra note 6, at 546.
55 See Reiter, supra note 7, at 447. The effect of taxing hard liquor was that many peo-
ple switched to hemp, opium, or moonshine. See id.
56 See id.
57 See id. at 445.
58 See id.
59 See id.
60 See Reiter, supra note 7, at 446. In the 1950s, when cigarette smoking was at its
height, state governments were unable to respond adequately to new medical information
about the true dangers of smoking, due to their dependence on the revenue generated by
tobacco taxes. See id. It was this dependence on sin tax money that prevented states from
outlawing smoking outright, or taking bigger steps to curbing indulgence in the dangerous
habit. See id. This moral hazard that confronts governments when they are forced to
choose between a reliable revenue source and true furtherance of public health or welfare
is discussed in Part V.

61 See Sandra Fabry, Newest Sin Tax Targets: Soft Drinks, Vending Machines, Drive-Throughs,
budget%20tax/article.html?articleid=20469 (last visited Nov. 14, 2008); DANIEL CLIFTON &
evils of cigarettes and alcohol, and reaches farther into popular culture than ever before. The Texas “pole tax,” for example, is one of a new set of modern excise taxes, recently enacted or proposed, that target activities currently deemed undesirable. In San Francisco, Mayor Gavin Newsom proposed a tax to be paid by the sellers of sugary soft drinks. The revenue from the soft drink tax would go to a city initiative designed to encourage healthier eating and exercise. Kelly Brownell, director of the Yale Center for Eating and Weight Disorders has long advocated for a federal “Twinkie tax” to be levied on junk food, with the revenues to be funneled into nutrition and exercise programs. Chicago has just passed the first “eco-sin” tax, charging five cents per bottle on bottled water to encourage consumers to drink from the tap. In 2008, California revived a 2003 bill that proposed to tax ammunition because it causes gun injuries. And in Wisconsin, state senator Jon Erpenbach proposed taxing video games in order to raise money for the juvenile criminal justice system.

Although sin taxes have always met both opposition and support, the arguments of the past tend to focus on alcohol and tobacco. When an objector said, “but what’s next, a fat tax?” supporters were
quick to dismiss the slippery slope threat.\textsuperscript{71} Once upon a time, proponents of “serious” regulations would argue that “nobody would ever advocate a tax on fatty foods.”\textsuperscript{72} But in his discussion of a proposal to levy a sin tax on soda, Robert Murphy of the Mises Institute points out that some defend the taxes by saying, “We’ve done it with cigarettes.”\textsuperscript{73} Murphy goes on to suggest that “beyond the injustice of more looting every time you buy a soda, these proposals would be yet more precedent of future government invasions of liberty. In twenty years, when someone proposes that slothful television viewing be regulated, some scientist will no doubt say, ‘We did it with Coke.’”\textsuperscript{74} The threat of future government invasions of liberty has been echoed by economist Thomas DiLorenzo who said, “once it becomes ‘legitimate’ for government to protect individuals from their own follies, there is no way to establish limits to governmental power.”\textsuperscript{75} Sin taxes are “a dangerous harbinger of an ever-expanding Nanny State.”\textsuperscript{76}

This Nanny State may not be far off.\textsuperscript{77} As state budgets grow to exceed the revenue generated from the established alcohol and tobacco taxes, lawmakers look elsewhere to supplement the state’s income.\textsuperscript{78} Paul Gessing, government affairs director at the National Taxpayers Union has suggested that as revenue from these traditional sin taxes becomes inadequate, states will seek out ways to extract money from smaller groups.\textsuperscript{79} As the increase in creativity and the variety of sin tax proposals over the last two decades shows, states have

\begin{itemize}
\item \textsuperscript{72} See id.
\item \textsuperscript{73} See \textit{id}. There have been numerous proposals for taxes on fatty foods, the most prominent of which is Yale University Rudd Center for Food Policy and Obesity director Kelly Brownell’s infamous call for a national “Twinkie tax.” See Joe Nocera, \textit{Food Makers and Critics Break Bread}, N.Y. Times, Mar. 25, 2006, at C1.
\item \textsuperscript{74} Murphy, \textit{supra} note 71.
\item \textsuperscript{75} See Muska, \textit{supra} note 12.
\item \textsuperscript{76} See id. On CNN’s Crossfire in 2002, pro-sin tax Center for Science in the Public Interest director Michael Jacobson said, “we could envision taxes on butter, potato chips, whole milk, cheeses and meat.” See Fabry, \textit{supra} note 61. Taxes on staples such as the food items in Jacobson’s lists would put a terrible burden on the poor who already spend a significantly greater proportion of their income on food. See \textit{id}.
\item \textsuperscript{77} See Muska, \textit{supra} note 12.
\item \textsuperscript{78} See Skorburg, \textit{supra} note 5 (citing Oakland, California mayor Jerry Brown’s 2004 proposal for a new junk food tax that would raise money for the city).
\end{itemize}
already begun targeting smaller groups, marking the start of the slide down the slippery slope.\(^{80}\)

IV. Why Use Sin Taxes?

A. The Path of Least Resistance

“Taxation,” said King Louis XIV’s financial minister, Jean-Baptiste Colbert, “is the art of trying to pluck the most feathers from a goose while producing the least hissing.”

—Phinneas Baxandall\(^{81}\)

Sin taxes are generally the easiest kinds of taxes to impose, and so they are often the first choice of lawmakers who are looking to close gaps in state budgets or make up deficits.\(^{82}\) Sin taxes appeal to voters, the majority of whom will not be affected by any given tax.\(^{83}\) Although they burden the poor and working classes disproportionately, they are indirect taxes that affect only one select minority at a time, and so they rarely face much opposition.\(^{84}\) Concern for disparity in taxation is lost when the tax is a sin tax.\(^{85}\) No one minds the small taxes on vices that do not affect them personally, and those who would otherwise oppose taxation tend to look the other way.\(^{86}\) The smaller or more targeted the group who will be affected by the tax, the less chance there is for voter discontent.\(^{87}\) Where general tax hikes were once the obvious solution to growing state budgets, voters in every state have taken to rejecting tax hikes, directly, by voter referenda, or indirectly, by voting legislators out of office.\(^{88}\)

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80 See Shapley, supra note 5; Sirico, supra note 5; Skorburg, supra note 5; Texas Slaps “Pole Tax” on Strip Clubs, supra note 3.
81 Baxendall, supra note 10, at 26.
82 See Clifton & Karasmeighan, supra note 61, at 2.
83 See id. at 4 (arguing that “[b]y targeting their tax increases to narrower segments of the population, legislators divide taxpayers into smaller groups and minimize voter backlash”); Fabry, supra note 79.
84 See Fabry, supra note 79.
85 See Baxandall, supra note 10, at 26.
86 See id.
87 See Clifton & Karasmeighan, supra note 61, at 4.
88 See id. at 2; Fabry, supra note 79. A number of states increased taxes during the recession in 1990. See Clifton & Karasmeighan, supra note 61, at 4. In New Jersey, Governor Jim Florio (D) raised income taxes, corporate taxes, and the sales tax, and then lost his bid for reelection in 1993. See id. at 2. In New York, incumbent Mario Cuomo lost the race for governor to George Pataki, where the campaign focused heavily on recent tax increases in the state. See id. State-wide tax hikes can also backfire by increasing “out-migration”: the
Interestingly, sin tax proposals garner much more support when there is a connection between the thing being taxed and the use to which the tax dollars are put, then when there is no such nexus. Lawmakers often propose to tie tax revenue to programs intended to cure the ills caused by the activity at issue, although these links are often misguided, or are at best, attenuated. The Texas pole tax passed by overwhelming margins when the 2007 proposal included putting the proceeds towards supporting the victims of sexual assault; when an identical tax was proposed in 2004, with a plan to put the money into schools, the tax—then nicknamed “Tassels for Tots”—was dismissed as inappropriate.

Exodus of older and wealthier taxpayers to states with lower tax rates. See id. at 3. When general tax rates increase too much, those whom are most affected tend to pick up and move to states where the high-income bracket taxes are more forgiving. See id. In response to the increasing out-migration trend in the 1990s, the states cut income taxes a total of 137 times in the second half of the decade. See id. The tax cuts reduced state revenue by almost $20 billion, leading many states to claim they were confronting the worst budget deficits since the Great Depression. See id.

89. See Texas Slaps “Pole Tax” on Strip Clubs, supra note 3.

90. See id. In 2003, California legislators justified a proposed ammunition tax by citing the costs of gun injuries. See “Sin” Taxes Create Moral Quandary, supra note 68. Although gun injuries would not be possible without bullets, ammunition is hardly the sole cause of gun-related problems. See Gamboa, supra note 5. California would be better served by enhancing education about gun safety or working to take illegal guns off the streets. See id. In New Mexico, lawmakers have proposed sin taxes on video games and televisions as part of a campaign entitled “Leave No Child Inside,” which aims to use a sin tax to motivate children to go outside and play. See id. In his article on the proposed video game tax, Gamboa points out that according to the Entertainment Software Association, the average gamer is a thirty-three year old adult, not an elementary school child. See id. Gamboa concedes that obesity is a major public health problem that ought to be addressed, but he cautions that a video game tax would be misguided. See id. Gamboa suggests lawmakers should focus their attention on parenting and should facilitate education on how to better raise children. See id. If legislators are truly concerned about childhood obesity, a better tailored approach would be to increase requirements for physical education in schools. See Nat’l Ass’n of Children’s Hospitals and Related Insts., Childhood Obesity Statistics and Facts (2007), available at http://www.childrenshospitals.net (search “childhood obesity statistics,” follow hyperlink). As of January 2007, Illinois was the only state with a daily minimum requirement for physical education. See id.

91. See Texas Slaps “Pole Tax” on Strip Clubs, supra note 3. Despite lawmakers’ promises that the money from the tax will go towards helping rape victims, this is only a partial truth. Twelve million of the estimated forty million dollars the tax is expected to bring in have been earmarked for sexual violence programs—the state can do whatever it wants with the rest. See Ramshaw, supra note 3. In its report of a high-quality state revenue system, the National Conference of State Legislatures actually argues against earmarking tax revenue on the grounds that rigid budgets are more susceptible to disruption and collapse than those where allocation of funds is more flexible. See NCLS, Principles of a High-Quality State Revenue System, supra note 25.
Reverend Robert A. Sirico, president of the Acton Institute for the Study of Religion and Liberty has pointed out that high taxes on disfavored activities, such as smoking, drinking, and gambling appeal to voters who see the taxes as a way to discourage these objectionable activities.\textsuperscript{92} The activities being targeted also tend not to have a lot of organized support.\textsuperscript{93} Frequenters of strip clubs are unlikely to want their proclivities widely known—given the choice between protesting the tax for a chance to have it reduced, and keeping their strip club attendance private, many club-goers will choose to remain quiet and just pay the tax.\textsuperscript{94} Lawmakers count on this lack of vocal opposition, and there is no strip club lobby in Washington to persuade them to act otherwise.\textsuperscript{95} Across the board, activities subject to sin taxes carry (or acquire) a stigma that discourages consumers from objecting to the tax, and so these taxes slip by unchallenged.\textsuperscript{96}

**B. Justifications for Taking the Path of Least Resistance**

In order to generate voter support, lawmakers tend to offer two justifications for imposing a sin tax—to raise money, and to correct morals.\textsuperscript{97} Ironically, these justifications are at odds with one another; you either stamp out an activity, or you make money off of its continued consumption.\textsuperscript{98} This conflict puts governments in the position of having to decide whether to encourage destructive behavior in order to maintain the same income levels, or to come up with more creative ways to balance tight budgets.\textsuperscript{99} This moral hazard of governments indicates that legislators may not always be acting with their citizens’

\textsuperscript{92} See Skorburg, supra note 5.

\textsuperscript{93} See Baxandall, supra note 10, at 26 (observing, “smokers may resent being singled out, but they are a minority who garner little sympathy”); Randy Dotinga, Love the Sinner, Hate the Sin Tax, Wired Mag., Aug. 8, 2005, available at http://www.wired.com/politics/law/news/2005/08/68433 (describing the proposal of the Internet Safety and Child Protection Act of 2005, and observing “the adult industry has zero clout in Washington and is an easy target”).

\textsuperscript{94} See Dotinga, supra note 93.

\textsuperscript{95} See id.

\textsuperscript{96} See Baxandale, supra note 10, at 22 (stating that “sin taxes are levied on things that are fun”); Reiter, supra note 7, at 451 (observing that groups subject to sin taxes “may be among the few interest groups which no one dares to defend. The behavior of supposedly self-indulgent consumers may be demonized in order to justify balancing the budget on their backs”).

\textsuperscript{97} See Reiter, supra note 7, at 444 (arguing that the policy sin taxes “reveals a constant tension between fiscal and sumptuary goals”).

\textsuperscript{98} See ‘Sin’ Taxes Create Moral Quandary, supra note 68.

\textsuperscript{99} See id.
best interests at heart, and is a compelling argument against allowing states to combine fiscal and social duties in one system. The moral hazard presented by the power to impose sin taxes is discussed further in Part V.

1. The Moral Justification: When the Government Knows What’s Best

Paternalism can be defined as “interference with a person’s freedom of action out of a desire to protect that person’s welfare, interests, or values (as perceived by the paternalistic actor.)” Assume, for a moment, that a sin tax has truly been motivated by paternalistic concern for the individual. In this scenario, the government’s primary goal in enacting the tax is to protect its citizens from themselves, and any revenue generated is incidental. To justify state paternalism, legal philosopher Ronald Dworkin offers the theory that each citizen is responsible for the well-being of all others and so should use his or her “political power to reform those whose defective practices will ruin their lives.” Critics argue this logic is flawed in at least two ways. Paternalism interferes with liberty and personal autonomy, and it is also inefficient. As Dworkin notes, “life ruination” is subjective; “it is difficult to imagine whether such a life could be called ‘good’ in the sense of ‘beneficial’ to the person living it, if she herself did not perceive it as such.” When a government imposes on its citizens choices that they would not make for themselves in the name of their own welfare, their priorities are unlikely to change to align with their new behavior. This forced shift in behavior, unaccompanied by a true shift in personal preference or belief, interferes with the individual’s liberty. As Jendi Reiter states, “paternalistic taxation unjustifiably restricts the individual liberties which are essential to mature human development and to the legitimacy of the democratic process.” She notes that “since citizens’

100 See id.
101 See Reiter, supra note 7, at 451.
102 See id.
103 See id.
104 See id. (discussing Dworkin).
105 See id.
106 See Reiter, supra note 7, at 452.
107 See id.
108 See id. at 453.
109 See id.
110 Id. at 444. Reiter analogizes buying to voting and points out the importance of freedom to make choices in American tradition See id. at 457. She notes that American tradition is grounded in the principles of democracy and a free market government. See id.
ability to make . . . choices is the legitimating principle of democratic government,” it is dangerous to assume government is acting appropriately when it “promote[s] a policy devoted to creating the appearance of rational decision-making at the expense of true reasoned choice.”

Reiter argues that all citizens have a “human dignity interest” in choosing their own lifestyles. Reiter also argues that paternalism is inefficient in that it is bad for morale. “Regardless of whether the subjective suffering of those stigmatized should constrain paternalistic policy choices, benefit to the community is probably insufficient to justify moralistic lifestyle regulation, for a community divided by blame lacks the cohesion and compassions necessary to solve social problems.” In other words, if people resent the restrictions placed on them by a society, they will not work together well to solve social problems. Where state moralizing interferes with liberty and demoralizes the individuals it is designed to help, it creates a new set of problems. Fortunately, sin taxes are never truly about morals.

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111 See Reiter, supra note 7, at 455.
112 See id. at 456. Reiter cites Kant’s categorical imperative and states, “people should be treated as ends in themselves because respect for persons entails respect for their ability to make value decisions.” See id. at 457. Undervaluing the ability to make choice undervalues autonomy in general. See id.
113 See id. at 453–54. Rather than resort to sin taxes, which are often rife with class bias, Reiter suggests lawmakers who are sincerely interested in curbing bad behavior and curing social ills should take a step back and consider the bigger picture. See id. at 454. She argues for considering “the social conditions which [keep] people down and [make] momentary gratification seem more attractive than a longer life of self-denial.” See id. “Lower-income people, who spend more of their income on tobacco than professionals do may feel that their lives and their jobs are not satisfying enough for them to prioritize long-term longevity over smoking’s short-term relief from tension.” Id. “A more humane society would try to reduce the costs of quitting, rather than increase the costs of continuing to smoke.” Id. Reiter suggests that if we are truly interested in the social welfare of people who we think make bad choices, we should make it easier for them to make good choices, such as helping people to quit smoking, rather than putting burdens on the choices they currently make. See id.
114 Id. at 453–54.
115 See id.
116 See Reiter, supra note 7, at 454.
117 See Baxandall, supra note 10, at 24 (discussing how, while tax rates on tobacco products were rising in the mid-1980s, their moderate success in reducing smoking “limited the proceeds going to state coffers”). Baxandall goes on to show that when revenue from cigarette taxes tapers off, states turn to gambling as another funding source. See id. States will make money through lotteries and profit-sharing agreements with “casinos, riverboats, and slot machines.” See id. Casinos and lotteries are lucrative, and the taxes come with absolutely no pretense of aiming to reduce vice. See id.
2. It’s All About the Money

Despite lawmakers’ common contention that a given sin tax is for the greater good, on closer examination, these taxes reveal themselves to be almost exclusively fiscally motivated.118 The items subject to sin taxes—taxes either enacted, or merely proposed—tend to be those with higher inelasticity of demand.119 Historically, the federal government relied on alcohol and tobacco as sin tax staples; both are addictive goods that consumers will continue to purchase, even in the face of extremely high excises.120 Today, the bulk of new sin tax proposals focus on fatty foods and soft drinks.121 Food is certainly a necessity that consumers will not be able to give up, and while buyers have a choice in the kinds of food they buy, their choices are constrained by affordability and influenced by convenience, and it is unlikely that junk food will ever disappear entirely.122

An examination of the legislative history of various sin taxes will reveal that, no matter the justifications offered to the public, sin taxes are enacted when states are having budget crises and need money.123 In 2004, the mayor of Oakland, California proposed taxing alcohol and junk food explicitly to solve the state’s “budget woes.”124 This

118 See Skorb, supra note 5. State cigarette taxes gained force as a powerful mechanism for generating revenue in the 1920s. See Baxandall, supra note 10, at 26. Unlike alcohol, which was seen as sinful, smoking became socially acceptable following World War I. See id. During the War, soldiers made cigarettes—the sales of which had been banned entirely in seventeen states in 1909—glamorous. See id. at 24. Soldiers were given cigarettes as part of their rations, and “a cigarette in the mouth became an identifying feature in patriotic depictions of the ‘Yank.’” See id. Baxandall states: “[T]ellingly, the first state-level taxes on cigarettes were not passed at the height of anti-cigarette fervor at the beginning of the twentieth century, but in the 1920s, when cigarettes first became socially acceptable.” See id. at 26. It was not until cigarette sales were significantly robust and steady that states deemed the activity one worth burdening. See id.

119 See DePippo, supra note 6, at 568. DePippo cites the fact that rationales for the sin tax on alcohol have “come in and out of fashion over the history of the nation,” but the tax itself remained, even during prohibition. See id.

120 See id.

121 See Fabry, supra note 61; Nocera, supra note 73; Skorb, supra note 5.

122 See Jane Wardle et al., Sex Differences in the Association of Socioeconomic Status with Obesity, 92 Am. J. Pub. Health 1229, 1229 (2002). Wardle et al. examine the reasons behind findings that individuals in lower-status socioeconomic groups are at higher risk of becoming obese. See id. The authors note that resources available to buy food are determined by income, and that “low-status jobs are associated with lack of autonomy, which might make it more difficult for one to manage time effectively to adopt a healthy lifestyle.” See id. Where junk food is inexpensive and readily available, it is often the easiest choice for consumers who lack the means to make more deliberately healthful purchases. See id.

123 See Clifton & Karasmeighan, supra note 61, at 3; Skorb, supra note 5.

124 See Skorb, supra note 5.
candid proposal prompted a surprised remark from the Cato Institute’s Radley Balko, who noted that politicians usually attribute their sin tax proposals to a desire to stop unhealthy behavior.125 Balko marvels: “I’ve never before heard an elected official say that the real purpose is to raise money. That’s a novel approach.”126 Balko goes on to note that sin taxes do make money for the state, and that he does not generally take a government at its word when officials say their primary purpose in passing a sin tax is to stop the behavior at issue.127 “Sin taxes usually are proposed only when governments face large budget shortfalls.”128 Balko claims state and local governments are “addicted” to the revenue they generate from cigarette taxes and would take a hit if people stopped smoking.129 Although the Oakland mayor’s proposal did not materialize into law, it demonstrated that he thought the city needed higher taxes in some form to “put the state’s financial house in order.”130 The proposal met opposition from Governor Arnold Schwarzenegger who believed California’s financial problems are the result of overspending, and not under-taxation.131

125 See id.
126 See id.
127 See id.
128 See id. New York State, under Governor Eliot Spitzer, implemented a tax on illegal drugs which is normally enforced when drug dealers are arrested. See Delen Goldberg, Paying for Your Sins; Why Gov. Spitzer Wants to Raise Taxes—and Revenue—on New Yorkers’ Guilty Pleasures, POST-STANDARD (Syracuse, N.Y.), Feb. 2, 2008, at A1. Governor Spitzer also proposed that the state allow for more gambling, and that liquor stores be allowed to open seven days a week. See id. These proposals were clearly not about stamping out sin so much as about generating revenue for the state. See id. According to the Distilled Spirits Council, Sunday alcohol sales grossed over $92 million, giving the state over $14 million in sin tax revenue in 2006. See id.
129 See Skorburg, supra note 5.
130 See id.
131 See id. Rather than jump to implement a new sin tax, legislators concerned with solving a state’s budget problems must look to the cause of those problems. See id. Lawmakers should determine whether the budget shortfall has actually been caused by the external costs of the activity they propose taxing, or whether the state is just overspending, generally. See id. In 2003, general fund spending in all fifty states had increased by over 88% from 1990 levels, going from $274.7 billion a year to $518 billion. See Chris Edwards et al., States Face Fiscal Crunch After 1990s Spending Surge, 80 CATO INST. BRIEFING PAPERS 1–2, (2003); Fabry, supra note 79. Several state governors have been cited as seeing the problem as one of overspending as well. See id. In his first address to California in 2004, Governor Schwarzenegger said: “We have no choice but to cut spending, which is what caused the crisis in the first place. If we continue spending and don’t make cuts, California will be bankrupt.” See Skorburg, supra note 5. Mississippi Governor Haley Barbour (R) promised to veto a fifty-cent cigarette tax increase that passed in the state legislature in 2005, stating that he “rejects tax increases as a matter of principle and sees the state’s budget problems as being on the spending side.” See Fabry, supra note 79. The state’s cigarette tax would have risen from eighteen cents a pack to sixty-eight cents. See id. Governor
In 2005, the Mississippi Senate considered a bill to raise cigarette taxes.\textsuperscript{132} Sen. Alan Nunnelee (R-Tupelo), chairman of the Senate Public Health Committee, decided not to bring the bill for a vote, saying:

I\’m not opposed to seeing the tax on cigarettes increase as long as it is offset by a tax cut elsewhere. So far, the proponents will not even consider a revenue-neutral cigarette tax bill, which I feel reveals their true motives. They want government to take in more money so they can spend it to buy constituencies.\textsuperscript{133}

In other words, if legislators really were more concerned with stopping smoking than they were with raising money, they would provide a tax cut somewhere else to relieve the burden of a higher cigarette tax.\textsuperscript{134} Failure to offset new tax burdens with reciprocal relief violates the principles of an equitable tax system.\textsuperscript{135}

V. THE HARMS CAUSED BY SIN TAXES

Sin taxes stray from the notion that an ideal tax system achieves equity by taxing people in proportion to their ability to pay.\textsuperscript{136} A sin tax, like any flat point-of-sale tax, will consume a greater proportion of a poorer person\’s income, and is thus automatically regressive.\textsuperscript{137} David DePippo points out that \textquote{after poorer taxpayers attempt to provide themselves with the basic necessities of life, they do not have any real tax-paying ability.}\textsuperscript{138} Elizabeth Whelan, president of the American Council on Science and Health has said that taxing food is an un-
scientific way to combat obesity, noting that people in lower income brackets spend a disproportionate amount of their income on food to begin with, and adding: “food obviously supports life.” It should be noted that sales taxes are automatically at least somewhat regressive, as they apply to everyone at the same rate, whereas some people have incomes so low that they do not pay income taxes at all.

Sin taxes are also regressive in the manner in which they are selectively applied to only certain activities. It is argued that “since lower-income citizens tend to smoke and drink more than the affluent,” increases in liquor and tobacco taxes automatically place a greater burden on the poor. Jendi Reiter and David DePippo both cite an unmistakable gloss of class bias in the process of choosing activities for taxation. Reiter writes:

There is nothing about dangerous sports like hang gliding or skiing which promotes the Protestant work ethic any more than smoking, drinking, or eating Big Macs, but these risky amusements are never singled out for social stigmatization because such sports have a classier, more sophisticated image than smoking and being overweight.

DePippo echoes this idea, writing:

One need only to look to the ‘vices’ chosen for taxation—smoking and drinking—to see that these activities pervade the daily lives of the lower classes. Activities traditionally engaged in by the middle and upper classes, such as skiing, are nary the subject of a sin tax, yet they are arguably just as physically dangerous.

139 See Fabry, supra note 61.
140 See Reiter, supra note 7, at 461 (discussing the safety-net for low income taxpayers that is built into the income tax system via the earned income tax credit). The earned income tax credit is an anti-poverty tool first established in 1975, whereby working taxpayers who earn less than a certain amount are eligible for a substantial offset to their social security taxes. See It’s Easier than Ever to Find out if You Qualify for EITC, http://www.irs.gov/eitc (last visited Apr. 4, 2008). The tax credit is meant to help low-income individuals, and to provide incentive to work. See id.
141 See DePippo, supra note 6, at 555; Reiter, supra note 7, at 454.
142 See Muska, supra note 12. Robert Levy of the Cato Institute cites statistics: “more than half of any tobacco price increases will be paid by smokers with annual incomes under $30,000; only one percent will be paid by smokers earning more than $100,000.” See id.
143 See DePippo, supra note 6, at 555; Reiter, supra note 7, at 454.
144 See Reiter, supra note 7, at 454.
145 See DePippo, supra note 6, at 555.
In sum, poor people are more likely to consume the items being taxed, and in greater quantity.\textsuperscript{146}

Sin taxes jeopardize small businesses.\textsuperscript{147} Chandra Brown, president of Karpod Inc., one of the parties challenging the Texas “pole tax,” has said of the customers who frequent Players, a small Amarillo club, “They won’t pay it. They won’t come in. They can’t afford it.”\textsuperscript{148} Not only have small club owners in Texas expressed concern that the strip club tax will reduce patronage to the point of shutting down business, but the tax can hurt employees as well.\textsuperscript{149} Even if they are not forced to close, smaller retailers and service providers whose businesses are subjected to a new sin tax inevitably lose customers.\textsuperscript{150} In an interview, Elle, a 28-year old former dancer in Amarillo said she “worries the tax will hurt women like herself who work their way through college by stripping.”\textsuperscript{151} A sin tax creates a reduced supply of a product, driving some marginal sellers out of the market.\textsuperscript{152} If demand for an item falls because the price exceeds what people are willing to pay, then manufacturing slows down and people lose jobs.\textsuperscript{153} This phenomenon could happen with anything subject to a sin tax; lap dances, video games, or even bottled water.\textsuperscript{154}

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\item \textsuperscript{146} See Muska, supra note 12.
\item \textsuperscript{147} See Texas Slaps “Pole Tax” on Strip Clubs, supra note 3.
\item \textsuperscript{148} See id.
\item \textsuperscript{149} See id.
\item \textsuperscript{150} See id.
\item \textsuperscript{151} See id. Even those taxes categorized as luxury taxes—facially designed to tax the rich—can have destructive consequences. See Muska, supra note 12. “For example, who is most harmed by a luxury tax placed on an expensive car—the buyer, who presumably has money to spare, or the middle-class worker who builds the car only to see sales fall when the luxury tax curbs demand?” Luxury Tax, Investopedia.com, http://www.investopedia.com/terms/l/luxury_tax.asp (last visited Nov. 16, 2008). One commentator described the Texas strip club tax as “an excellent example of the worst type of deceitful tax.” See Unfair Texas Strip Club Tax, Pribek.net, Dec. 22, 2007, www.pribek.net/2007/12/22/unfair-texas-strip-club-tax. He notes that while the tax money initially comes out of the pocket of the customer, the individual who is affected most is “the dancer, who makes, for practical purposes, all of her money from tips.” See id. After paying the fee, the customer is “sitting there with five less dollars in his pocket.” Id. Suggesting that this five dollars ultimately comes out of the dancer’s tip, he notes that she “is paying five dollars in tax for every customer.” See id. “You can try to solve a valid problem by [taxing] an ‘industry’ and justify the tax because that industry is unpopular to some, but in the end, all you accomplish is taxing the workers at the lowest rung of the ladder.” See id.
\item \textsuperscript{153} See id.
\item \textsuperscript{154} See Gamboa, supra note 5; Sadowsky, supra note 152; Shapley, supra note 5; Texas Slaps “Pole Tax” On Strip Clubs, supra note 3.
\end{itemize}
Sin taxes further create unfair competition between businesses located near jurisdictional borders. In 1998, California increased its cigarette tax by fifty cents a pack, marking the tax revenue for early childhood development programs. Rather than pay the tax, California residents who lived near the border with Nevada—a state with significantly lower cigarette tax—merely went across state lines to buy cigarettes, leaving sales in California way down. In January 1999, a Reno newspaper “reported that Nevada retailers along the border [had] seen cigarette sales boom.” Previously, in 1994, Michigan raised cigarette taxes by fifty cents. The tax increase was followed by a twenty-one percent drop of taxable sales, while sales in neighboring states rose.

Sin taxes can have opposite consequences from those their backers originally intended. Instead of increasing revenue, they can reduce it. Sin tax revenue is not sustainable—economists argue that sin taxes work only as temporary solutions to budgetary problems. As demand for a product decreases, revenue will fall, and legislatures will be forced either to raise taxes or impose new ones to generate the money they were expecting.

Sin taxes can also make “morally questionable” behaviors more appealing by making them forbidden, and they can increase the external costs of a sin, spreading them out to society as a whole. Despite the argument that a sin tax serves to make consumers internalize some of the costs of their behavior, oftentimes the tax will have the practical ef-

155 See Muska, supra note 12; Shapley, supra note 5. In his discussion of the bottled-water tax in Chicago, Dan Shapley discusses the risk of Chicago residents going to grocery stores outside the city to buy water without having to pay the tax, and then buying their groceries while they are there. See Shapley, supra note 5. Shapley predicts that the bottled water tax will hurt grocery stores in Chicago in a more significant way than the law’s drafters anticipated. See id.
156 See Muska, supra note 12.
157 See id.
158 See id.
159 See Sadowsky, supra note 152.
160 See id.
161 See Sirico, supra note 10.
162 See id.
164 See id.
165 See Sirico, supra note 10. Sin taxes can also influence people to switch vices rather than give them up, such as drinking beer instead of liquor or switching to hard drugs. See id.
fect of externalizing costs.\textsuperscript{166} When the price of an item increases substantially, it can induce people to shop on the black market.\textsuperscript{167} For example, “because of high taxes, the bootleg cigarette market has thrived for decades in New York City, diverting millions of dollars from lawful businesspeople into the pockets of criminals and terrorist organizations.”\textsuperscript{168} This same risk of smuggling occurs any time alcohol taxes undergo an abrupt increase.\textsuperscript{169} It is also true that the barriers to adolescents obtaining cigarettes are diminished when there is access to a robust underground market—young people are less likely to be de-

\textsuperscript{166} See id.
\textsuperscript{167} See id.

\textsuperscript{169} See Sirico, \textit{supra} note 10.
tended from smoking when the state cannot monitor and regulate sales.\textsuperscript{170}

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.\textsuperscript{171} During the 1980s and early 1990s, Canadian cigarette smuggling was a tremendous problem.\textsuperscript{172} Cigarettes that were manufactured in Canada and exported to the United States were then smuggled back into Canada where the original wholesalers would sell them on the black market for a fraction of what the state would have them charge, but still at a considerable profit.\textsuperscript{173} Smugglers crossed the border on snowmobile to avoid customs, and the situation resulted in considerable violence and gunplay.\textsuperscript{174} In just three months—from November, 1993 to January, 1994—Canadian police made 125 arrests for possession of bootleg cigarettes, and in February, 1994, the police were engaged in a shoot-out on an Indian reservation (where cigarettes were also exempt from the national tax.).\textsuperscript{175} The instant the Canadian government relented and cut the cigarette tax in half, the violence disappeared.\textsuperscript{176}

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.\textsuperscript{177} Robert Sirico observes that black markets form, not in response to literal price, but as a function of the demand

\textsuperscript{170} See Muska, \textit{supra} note 12 (noting “Canada found that the thriving black market generated by its tax hikes made it easier for underage smokers to get their nicotine fixes—no more shoplifting, no more fake IDs, no more waiting round in parking lots for someone’s older brother”).

\textsuperscript{171} See Sirico, \textit{supra} note 10.

\textsuperscript{172} See id.

\textsuperscript{173} See id. Legally, a case of cigarettes (50 cartons) costs $2500. See id. Smugglers would pay only $700 a case, and would then sell the cigarettes underground for twice that amount, a price still significantly below the legal price. See id. Elaborate smuggling schemes brought eighty percent of Canada’s exported cigarettes back into the country for sale underground. See id.

\textsuperscript{174} See id.

\textsuperscript{175} See id.

\textsuperscript{176} See Clyde Farnsworth, \textit{Canada Cuts Cigarette Taxes to Fight Smuggling}, \textit{N.Y. Times}, Feb. 9, 1994, at A3. Canadian Prime Minister Jean Chretien announced Canada “was slashing taxes on cigarettes to try to stamp out widespread smuggling from the US, where taxes [were] about one-fifth as high.” See id.

\textsuperscript{177} See Sirico, \textit{supra} note 10. If the United States were to implement a nation-wide cigarette tax like Canada’s, “tobacco would come across the borders” cheaply, somehow. See id. “Massive police power would have been expanded to prevent leakage,” at both the Canadian and Mexican borders. See id. Sirico asserts that, “you can’t stop the growth of an underground market.” See id. Sin taxes “foster disrespect for the law.” See id.
for a product. High taxes on something people are willing to do without will not do much damage, but even a modest tax increase on a product that consumers value will incite them to fight the tax. He writes: "The social consequences of even a small tax are to induce informal entrepreneurs into the market." By contrast, if consumers are able just to give up the habit, such as they might with strip clubs in Texas, the tax harms small business owners and their employees.

In addition to creating unnecessary costs for society, sin taxes distribute the burden disproportionately even amongst users of the taxed products, shifting the costs incurred by a few abusers onto the general consuming population. Phineas Baxandall points out that "only a fraction of those who drink abuse alcohol or suffer health problems, and many enjoy health benefits." He goes on to observe that "the risks that drinkers pose to others may have less to do with how much alcohol they consume and more to do with how much they drive." Not everyone should have to pay for the misuse of a few, especially when this burden falls largely on the poor. In his paper, "Back Door to Prohibition: The New War on Social Drinking" the Cato Institute’s Radley Balko claims that sin taxes "unfairly force all drinkers to pay for the societal costs" incurred by the small proportion who abuse alcohol. He observes that "problem alcoholics are unlikely to stop drinking because of higher alcohol taxes, so low and middle income social drinkers bear the brunt of the tax." Although consumers pay a per-bottle or per-drink flat tax for alcohol, the same drink poses a far different risk to "a twenty one-year-old college student whose weekly intake consists of seven beers while driving on Friday night," than it does to "a forty-year-old who drinks a beer each night with dinner." Nevertheless, they are both charged the same penalty for purchasing alcohol. Baxandall suggests a better way to address the harm done to society by alcohol abuse is through criminal

178 See id.
179 See id.
180 See id.
181 See Muska, supra note 12.
182 See Balko, supra note 137, at 6; Skorburg, supra note 5.
183 See Baxandall, supra note 10, at 22.
184 See id.
185 See Balko, supra note 137, at 6.
186 See id.
187 See Skorburg, supra note 5.
188 See Baxandall, supra note 10, at 24.
189 See id.
sanctions, such as those imposed on drunk drivers.\textsuperscript{190} He further notes that alcohol is known to have some health \textit{benefits} for moderate drinkers.\textsuperscript{191} Although it would be extraordinarily difficult to devise a tax scheme that accommodates those who are drinking for their health while penalizing those who’s drinking has a negative effect on society, a sin tax that punishes all consumers alike is inefficient and unfair.\textsuperscript{192} Jason Mercier, a budget analyst at the Evergreen Freedom Foundations has denounced sin taxes as morally wrong, insisting that “targeting one class of citizens to pay for the programs of another is . . . shortsighted.”\textsuperscript{193}

Finally, sin taxes are punitive.\textsuperscript{194} They occasionally even impose a double penalty, as with New York State’s tax on illegal drugs.\textsuperscript{195} Under Governor Eliot Spitzer, the state imposed a “crack tax,” generally collected when a drug dealer is arrested.\textsuperscript{196} The law technically requires a dealer to buy stamps from the government before he sells drugs—much like the stamps cigarette retailers are required to purchase before they put cigarettes on the shelves.\textsuperscript{197} In practice, however, once dealers are arrested, they are punished for not paying taxes on top of their punishment for dealing drugs.\textsuperscript{198} Someone arrested in New York with twenty-seven pounds of marijuana would owe the state approximately $43,000 in taxes.\textsuperscript{199} Ethan Nadelmann, executive director of the Drug Policy Alliance said:

These tax stamp bills and laws smack of the gratuitous piling on of punitive sanctions that permeates the overall drug war . . . . More than half a million people come out of prison each year but face daunting prospects getting a fresh start, in part because they are obliged to pay fines, like this tax stamp, that end up causing far more harm than good.\textsuperscript{200}

\textsuperscript{190} \textit{See id.}
\textsuperscript{191} \textit{See id.} (listing medically recognized benefits of moderate alcohol consumption, including reduced risk of heart disease, stroke, and dementia).
\textsuperscript{192} \textit{See id.}
\textsuperscript{193} \textit{See Fabry, supra note 79.}
\textsuperscript{194} \textit{See Fabry, supra note 61; Reiter, supra note 7, at 463.}
\textsuperscript{195} \textit{See Goldberg, supra note 128.}
\textsuperscript{196} \textit{See id.}
\textsuperscript{197} \textit{See id.}
\textsuperscript{198} \textit{See id.}
\textsuperscript{199} \textit{See id.}
\textsuperscript{200} \textit{See Goldberg, supra note 128.}
Owing tens of thousands of dollars in taxes makes it harder for offenders to readjust to society when they are released from jail.\textsuperscript{201} It should come as no surprise that the majority of convicted drug offenders come from disadvantaged backgrounds.\textsuperscript{202} Indeed, with the arbitrary imposition of sin taxes, the poor do “go to the wall.”\textsuperscript{203} Compared to the series of ills caused by sin taxes, the benefits they create are minimal.\textsuperscript{204}

VI. The Appropriate Role of the Tax System

Sin taxes create a moral hazard for the government, causing it first to label an activity as morally suspect, and then to develop a vested interest in people continuing the now officially sinful activity.\textsuperscript{205} Robert Sirico suggests that sin taxes cause policy makers to “vacillate between wanting to discourage undesirable behavior and wanting to encourage it for revenue purposes.”\textsuperscript{206} In 2005, a bill was introduced in Congress that would have levied a twenty-five percent tax on internet pornography.\textsuperscript{207} The bill, entitled the Internet Safety and Child Protection Act of 2005, met major opposition from the religious right.\textsuperscript{208} Opponents argued that if the government stood to make money from adult websites, it would lack incentive to discourage the maintenance and patronage of such sites.\textsuperscript{209} Rick Schatz, president of the National Coalition for the Protection of Children and Families said, “there would be concern that the government would change its focus to tax pornographic materials rather than control production and distribution.”\textsuperscript{210}

The moral hazard trap can be avoided if the government simply refrains from using the tax system to regulate morals, and leaves this duty to a more appropriate institution.\textsuperscript{211} Sirico cautions against blurring the line between private morality and public policy.\textsuperscript{212} He contends the job of discouraging unhealthy or dangerous behavior “is better left to the traditional institutions of family, church, and school.”\textsuperscript{213} When

\begin{footnotesize}
\begin{enumerate}
\item See id.
\item See id.
\item See Barker, supra note 1, at 3.
\item See id.; Sirico, supra note 10.
\item See Dotinga, supra note 93; Fabry, supra note 79; Sirico, supra note 10.
\item See Sirico, supra note 10.
\item See Dotinga, supra note 93.
\item See id.
\item See id.
\item See Sirico, supra note 10.
\item See Skorburg, supra note 5.
\item See Sirico, supra note 5.
\end{enumerate}
\end{footnotesize}
“politicians and bureaucrats” are “charge[d] with sanctioning sin in areas that are morally ambiguous,” they face a conflict of interest, whereas more traditional community institutions do not.\textsuperscript{214} Rather than permitting lawmakers to put themselves in the position of having to choose between stamping out sin and generating revenue for the state, the government should abstain from passing judgment altogether, and should not attempt to regulate legal activities on moral grounds.\textsuperscript{215}

A more appropriate role would be to focus on controlling spending, or on how to better educate the public about the dangers of certain sinful activities.\textsuperscript{216} Revenue can be raised in a number of other ways, some as simple as increasing income taxes.\textsuperscript{217} If the government does not covertly desire a portion of the population to continue smoking or overeating in order to meet revenue projections, it will then be better situated to genuinely help reduce participation in those activities.\textsuperscript{218} Grover Norquist, president of Americans for Tax Reform argues that even if one accepts obesity as a public health issue, rather than a personal one, “the tax code is not the place to try to solve this problem. The tax code should not be corrupted and used as a consumer control device, but solely as a means to raise revenue for necessary programs.”\textsuperscript{219}

Sirico argues the government should regulate crime, not vice.\textsuperscript{220} Taxing an activity such as smoking, rather than simply outlawing it, indicates a judgment on the part of the government that smoking is “less morally justifiable” than other activities, but not so reprehensible as to be considered a crime.\textsuperscript{221} By contrast, robbery or murder are unambiguously criminal.\textsuperscript{222} Sirico argues that while there is no such thing as a “victimless” crime, civil authority is not the appropriate judge of all behavior.\textsuperscript{223} He contends that morally ambiguous activities should be left to those “social institutions that are often more trustworthy in determining the limits of nonviolent behavior.”\textsuperscript{224} Allowing the community

\begin{footnotes}
\item[214] See id.
\item[215] See id.
\item[216] See id.
\item[217] See id.
\item[218] See Skorburg, supra note 5.
\item[219] See Fabry, supra note 61.
\item[220] See Sirico, supra note 5.
\item[221] See id.
\item[222] See id.
\item[223] See id.
\item[224] See id.
\end{footnotes}
to regulate behavior, rather than the state, which has impure and conflicted interests, will alleviate the problem of moral hazard.\footnote{225 See Sirico, supra note 5. Some states and communities are seeking to discourage sins such as smoking and unhealthy eating by implementing regulations that will function independently from the tax system. See H.B. 282, 2008 Leg., Reg. Sess. (Miss. 2008); Jim Buchta, Condominium Owners Tell Smokers: Take It Outside, STAR TRIB. (Minneapolis, MN), Feb. 14, 2008, at 1A; Mississippi Pols Seek to Ban Fats, THE SMOKING GUN.COM, Feb. 1, 2008, http://www.thesmokinggun.com/archive/years/2008/0201081fat1.html. Residents of a condominium in Minneapolis recently voted to ban smoking in individual units, common areas, garages, and on private balconies. See Buchta, supra. Proponents of the ban argued that smoke from some units seeped through the walls into neighboring units and affected all residents, even non-smokers. See id. Over seventy-five percent of owners in the complex voted in favor of the ban, reflecting a slightly greater percentage than the number of smokers state-wide. See id. In fairness to current residents, the ban will only be binding on future buyers, but those new owners who break the rule—which was effective beginning May 1, 2008—will be subject to fines and other penalties. See id. Buchta notes that “such bans are becoming more common in rental housing, as concern spreads about the effects of secondhand smoke.” See id. “Some say that Minnesota is on the cutting edge of what could become a nationwide trend.” See id. In February, 2008, legislators in Mississippi introduced a bill that would prohibit restaurants in the state from serving obese customers. See H.B. 282, 2008 Leg., Reg. Sess. (Miss. 2008); Mississippi Pols Seek to Ban Fats, supra. The bill would require the Mississippi Council on Obesity to collaborate with the state’s Department of Health in creating weight criteria guidelines, and would then bind restaurants to the newly established guidelines. See H.B. 282, 2008 Leg., Reg. Sess. (Miss. 2008). Whereas it has been suggested that the bill is too extreme to pass as-is, the proposal shows that there are legislative approaches to influencing behavior that do not involve the tax system, and that are clearly meant to discourage certain behaviors, rather than disguised to hide ulterior financial motives. See Mississippi Pols Seek to Ban Fats, supra; see also Douglas Glen Whitman & Mario J. Rizzo, Paternalist Slopes, 2 N.Y.U. J.L. & LIBERTY 411, 443 nn.86–87 (2007) (pointing to New York City’s 2006 ban of most trans fats in restaurants and to a California city ban on outdoor smoking in public places).}

The National Conference of State Legislatures has taken the position that the revenue system should be economically neutral.\footnote{226 See NCLS, Principles of a High-Quality State Revenue System, supra note 25; Fabry, supra note 61.} This goal cannot be achieved if tax policy is used to make budget decision and to influence behavior.\footnote{227 See Fabry, supra note 61.} In her discussion of ways to mitigate the harm caused by second hand smoke, Jendi Reiter observes that there are plenty of ways to discourage disfavored activities that would “affect people equally, regardless of income” or socio-economic status.\footnote{228 See Reiter, supra note 7, at 466.} She suggests second hand smoke can be combated through exercising “private property rights, informal social pressure, and environmental regulations” as well as through education and information-spreading, rather
than through a tax on cigarettes. Reiter notes that these alternative methods would affect all smokers equally, regardless of their income.

Critics of sin taxes have proposed a wide variety of non-tax solutions to the “moral” problems legislators purport to address through the tax system. In North Carolina, in 2002, the Common Sense Foundation proposed that the state stop subsidizing tobacco companies that sell cigarettes in foreign markets. The foundation claimed such a change would save the state over $8.7 million in lost tax revenue. The foundation also proposed raising the corporate tax rate, rather than taxing the individual consumer. The proposal referred to a 1991 corporate tax increase by the North Carolina general assembly during a then-budget crisis, and pointed out that the increase had hardly any effect on businesses. The foundation also suggested that a universal healthcare system would save the state over $1 billion a year. Elsewhere, the organization, Connecticut Voices for Children has suggested that “to counteract the regressive nature of sin taxes,” the revenue generated could be used to provide tax-relief to low-income households. Sin tax revenue could go towards increasing programs like the Earned Income Tax Credit or could be put towards a property tax or rent credit for those who qualify. Other alternatives include increased education, tobacco control, and anti-smoking programs and campaigns. Legislatures could also provide tax cuts elsewhere in state budgets to offset the burden of a new sin tax. Reciprocal budget cuts would serve as an act of good faith to indicate a sincere desire to combat the targeted behavior, rather than a veiled attempt to raise money without alarming too many voters.

At its most basic, states should control spending, rather than levying new taxes to make up the difference between budgets deficits and

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229 See id.
230 See id.
231 See Common Sense Says..., supra note 21.
232 See id.
233 See id.
234 See id.
235 See id.
236 See Common Sense Says..., supra note 21.
237 See Scalettar & Geballe, supra note 163.
238 See id.
239 See Common Sense Says..., supra note 21.
240 See Fabry, supra note 79.
241 See id.
income stream. 242 Jason Mercier calls for a “uniform tax policy that treats all citizens equally.” 243 He insists that lawmakers have no business as social engineers. 244 Mercier states: “Cherry picking ‘sin’ taxes and other revenue raising schemes deemed to be politically safe ignores the most important equation in budget sustainability: spending restraint and prioritization.” 245

Conclusion

Sin taxes, for all their historical weight, are unfair to the poor. 246 They place a disproportionate burden on minority groups who, repeatedly, are unable to advocate for themselves for better tax treatment. 247 In a political climate where public health and smart decision-making are valued, there are far better ways to influence public behavior than through taxes. 248 Although new excises may seem like an easy quick fix for legislators who need to balance budgets without upsetting voters, they are unwise policy and create more problems than they solve. 249 Sin taxes pose problems for the government as well as for taxpayers. 250 Furthermore, sin taxes violate the core principle of equity in taxation. 251

The new rush of creative sin taxes is symptomatic of a fiscal system that has drifted too far over the line into social engineering. 252 When legislatures get comfortable with imposing taxes on new activities, their

242 See Clifton & Karasmeighan, supra note 61, at 6. The authors propose several methods by which states could reasonably curb spending. See id. They propose a “constitutional limit” that would require states to keep spending in line with the rate of population growth plus inflation, and thus entitlement programs, “such as free healthcare, increased public employee benefits, and state aid to localities” would not be implemented in times of economic growth, only to be revealed as unsustainable over the long term. See id. at 3, 6. The authors also propose “large scale reform of state pension and healthcare systems,” and curbing “reliance on volatile revenue sources such as non-wage income including capital gains and dividends.” See id. at 6. They contend that “removing capital gains revenue from the general budget,” will increase states’ ability to foresee budget patterns, thus reducing their appetite[s] for tax increases. See id.

243 See Fabry, supra note 79.

244 See id.

245 See id.

246 See Baxandall, supra note 10, at 1.

247 See id.; Dotinga, supra note 93.

248 See Common Sense Says..., supra note 21.

249 See Baxandall, supra note 10, at 26; Sirico, supra note 10.

250 See Sirico, supra note 10.

251 See NCLS, Principles of a High-Quality State Revenue System, supra note 25.

252 See Muska, supra note 12; Cox, supra note 5; Gamboa, supra note 5; Sirico, supra note 5; Sirico, supra note 5; Shapley, supra note 5; Skorburg, supra note 5; Texas Slaps “Pole Tax” on Strip Clubs, supra note 3.
proper role gets lost. A mildly controversial tax can gain popular acceptance, and can then increase incrementally until it reaches extreme proportions. With no established set of rules or guidelines to monitor the growth of the system, governments will slide down the slope so long warned about but not truly expected. Governments must take responsibility for their spending and balance their budgets in a realistic way in order to prevent further abuse of the sin tax tool.

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253 See Sirico, supra note 5.
254 See Murphy, supra note 71.
255 See Common Sense Says..., supra note 21; Reiter, supra note 7, at 454F n.67; Texas Slaps “Pole Tax” on Strip Clubs, supra note 3.
256 See Clifton & Karasmeighan, supra note 61, at 3, 5.