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Sin Taxes: Have Governments Gone Too Far in Their Efforts to Monetize Morality?

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SIN TAXES: HAVE GOVERNMENTS GONE TOO FAR IN THEIR EFFORTS TO MONETIZE MORALITY?

Abstract: In June 2016, Philadelphia became the largest city in the United States to pass a soda tax, which went into effect on January 1, 2017. Soda taxes, an umbrella term for taxes that are assessed on sugar-sweetened beverages, represent the latest incarnation in a recent wave of non-traditional “sin taxes.” Sin taxes target behaviors that the government considers to be socially undesirable, and traditionally have been levied to curb consumption of alcohol and tobacco products. As state and local governments continue to face burgeoning budget deficits, legislators have increased the amount of existing sin taxes and expanded the sin tax base by taxing everything from sugar-sweetened beverages and junk food to disposable plastic bags. This Note argues that, notwithstanding the significant allure sin taxes possess as revenue generating tools, legislators must carefully evaluate each new potential “sin” independently on its own merits, and understand the inherent limitations of sin taxes, their regressive nature, and the attenuated public health justifications that accompany many non-traditional sin taxes. This Note argues that legislators should thus be wary of an unbridled expansion of sin taxes into non-traditional areas, and consider alternative methods of curbing unhealthy private behaviors, such as requiring manufacturers of sinful goods and services to affix warning labels on their offerings and improving consumer access to healthier substitutes.

INTRODUCTION

In June 2016, Philadelphia became the largest city in the United States to pass a tax on soda and other sugary drinks.¹ The passage of the Philadelphia soda tax was a significant milestone because at that time, only one such proposal had passed in Berkeley, California, with forty other soda taxes having previously

¹ Michael Burke, *Philadelphia Becomes First Major City to Pass Soda Tax*, USA TODAY (June 16, 2016), <http://www.usatoday.com/story/news/2016/06/16/philadelphia-becomes-first-major-city-pass-soda-tax/85999128/> [<https://perma.cc/A6E7-3SZG>] (noting that Philadelphia’s sugary drinks tax covers soda, teas, energy drinks, and sport drinks, and expressly carved out drinks containing over 50% fruit juice, vegetable juice, or milk). In March 2013, then New York City Mayor Michael Bloomberg proposed to limit the size of sugary drinks sold at restaurants and theaters to sixteen ounces (known as the “Portion Cap Rule”), but the proposal was struck down by the New York State Supreme Court as being “arbitrary and capricious.” *In re N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y.C. Dep’t of Health & Mental Hygiene*, 23 N.Y.3d 681 (2013); see Margot Sanger-Katz, *Soda Tax Passes in Philadelphia. Advocates Ask: Who’s Next?*, N.Y. TIMES (June 16, 2016), http://www.nytimes.com/2016/06/17/upshot/soda-tax-passes-in-philadelphia-advocates-ask-whos-next.html?_r=0 [<https://perma.cc/4VP3-QNF7>] (noting that the Philadelphia soda tax of 1.5 cents per ounce will apply to all sugar or artificially-sweetened drinks sold within the city limits).

been defeated in city and state governments across the United States.² The Philadelphia version covers sodas, sports drinks, energy drinks, and other sugary drinks, with the tax revenue funding early childhood education and other social programs.³

The Philadelphia soda tax is one recent example of a “sin tax.”⁴ Sin taxes are a form of tax assessed on certain behaviors that the government considers to be detrimental to society.⁵ Sin taxes are uniquely powerful tools because they allow governments to discourage harmful individual behaviors while simultaneously raising revenue from them.⁶ Traditionally, sin taxes covered goods such as alcohol and tobacco products, but in recent years there has been a concerted push by legislators at all levels of government to broaden the application of sin taxes to cover new non-traditional “sins” such as sugary soft drinks and junk food.⁷

The basic mechanics behind how sin taxes work are relatively straightforward: imposing a tax on a good or service makes it more expensive for consumers, which in turn should lead consumers to purchase fewer of those goods and services.⁸ Because a total reduction in demand for the sinful goods and services to zero would be unrealistic and indeed self-defeating, governments rely on the fact that even after the tax has been added at least some people will still purchase

² Sanger-Katz, *supra* note 1. The Philadelphia soda tax was heavily contested, with the soft drink industry and local grocers spending nearly \$5 million to lobby and advertise in opposition to the tax, claiming it was simply a “grocery tax.” *Id.*

³ Burke, *supra* note 1; see Allison Aubrey, *Taxing Sugar: 5 Things to Know About Philly’s Soda Tax*, NPR (June 9, 2016), <http://www.npr.org/sections/thesalt/2016/06/09/481390378/taxing-sugar-5-things-to-know-about-phillys-proposed-soda-tax> [<https://perma.cc/S4KD-4YXA>] (highlighting that the soda tax in Philadelphia was originally three cents per ounce and exempted artificially sweetened drinks such as diet sodas).

⁴ Brian Galle, *What the Soda Tax Means for Consumers*, FORTUNE (July 6, 2016), <http://fortune.com/2016/07/06/philadelphia-soda-tax-consumers/> [<https://perma.cc/WTX5-DACS>]. Taxes on soda and cigarettes are different from other sales taxes because they help people avoid harming themselves and thus benefit the communities that pay them. *Id.*

⁵ Rachele H. Perkins, *Salience and Sin: Designing Taxes in the New Sin Era*, 2014 BYU L. REV. 143, 143–184; see also Richard H. Mattoon & Sarah Wetmore, *Sin Taxes: The Sobering Fiscal Reality*, 339 CHI. FED. RES. LETTER (Fed. Reserve Bank of Chi., Chi., Ill.), 2015, <https://www.chicago.fed.org/publications/chicago-fed-letter/2015/339> [<https://perma.cc/5N9B-FUES>] (noting that sin taxes both discourage individuals from engaging in socially disfavored behaviors and reimburse the public for the costs arising from those behaviors).

⁶ Jonathan Cummings, *Obesity and Unhealthy Consumption: The Public-Policy Case for Placing a Federal Sin Tax on Sugary Beverages*, 34 SEATTLE U. L. REV. 273, 280 (2010); James R. Hines Jr., *Taxing Consumption and Other Sins*, J. ECON. PERSP., Winter 2007, at 49, 50; Vann R. Newkirk II, *UK’s Sugar Tax: Do ‘Sin Taxes’ Work? The Wages of Sin Taxes*, ATLANTIC (Mar. 19, 2016), <http://www.theatlantic.com/international/archive/2016/03/the-wages-of-sin-taxes/474327/> [<https://perma.cc/MRH5-XEES>].

⁷ Perkins, *supra* note 5, at 145. In recent years, some lawmakers have even pushed for widening the definition of sin taxes to include taxing indoor tanning and strip clubs. *Id.* Lawmakers have also taken aim at goods whose consumption harm the environment, such as disposable paper and plastic bags. *Id.* at 146.

⁸ Newkirk, *supra* note 6.

the sinful goods and services.⁹ The key to sin taxes is that the goods and services usually targeted by governments to be taxed as sins are demand inelastic, meaning that in theory, even modest sin taxes should generate considerable revenue.¹⁰

Despite their tantalizing potential to raise substantial revenue for cash-strapped governments, sin taxes come at a cost.¹¹ For starters, sin taxes tend to be regressive, hitting the poorest members of society the hardest and effectively penalizing lower income individuals for their unhealthy consumption choices, which are often dictated by their cost-sensitivity and a lack of access to viable healthier alternatives.¹² Sin taxes have also been criticized on the grounds that they fuel wasteful spending wars on lobbying and advertising on both sides of the tax.¹³ In some cases, even after the sin tax is passed, a portion of the revenue may be diverted from its originally billed purpose and instead used to fund other unadvertised programs.¹⁴ Sin taxes may also produce negative unintended con-

⁹ See *id.* (noting that some people will still consume sinful goods and services even after such good and services are taxed). If consumption of a good or service were entirely eliminated, there would not be any sales transactions remaining to be taxed and the government would be unable to raise any revenue. *Id.*; see also Catherine Rampell, *For Cash-Strapped States, Sin Is Sure Lucrative*, N.Y. TIMES (Apr. 17, 2010), <http://www.nytimes.com/2010/04/18/weekinreview/18rampell.html> [<https://perma.cc/GV4W-AJ2X>] (noting that if a sin tax caused all consumers to stop their consumption immediately, it would lead to withdrawal and eliminate a revenue source on which states have come to depend).

¹⁰ See Perkins, *supra* note 5 (noting that consumer demand for inelastic goods and services will not change as much as an elastic good or service and thus tends to be more efficient). Price elasticity measures how sensitive demand is to a particular price change; inelastic goods and services enjoy demand changes that outweigh the price changes. Tatiana Andreyeva et al., *The Impact of Food Prices on Consumption: A Systematic Review of Research on the Price Elasticity of Demand for Food*, 100 AM. J. PUB. HEALTH 216, 216 (2010); Amy Gallo, *A Refresher on Price Elasticity*, HARV. BUS. REV. (Aug. 21, 2015), <https://hbr.org/2015/08/a-refresher-on-price-elasticity> [<https://perma.cc/RB83-79AK>].

¹¹ See Adam J. Hoffer et al., *'Sin Tax' Costs Outweigh Benefits*, U.S. NEWS & WORLD REP. (Feb. 5, 2013), <https://www.usnews.com/opinion/blogs/economic-intelligence/2013/02/05/sin-tax-costs-outweigh-benefits> [<https://perma.cc/EKW3-54ZK>] (arguing that the costs associated with sin taxes in the form of regressivity, wasteful lobbying, and misdirected tax revenues may be on net more harmful than beneficial to society); Newkirk, *supra* note 6 (highlighting that sin taxes impose a special burden on the poor, who consume more sinful goods and services than the wealthy).

¹² See Adam J. Hoffer et al., *Sin Taxes: Size, Growth, and Creation of the Sindustry* 1, 14 (Mercatus Ctr., Working Paper No. 13-04, 2013) (noting that while sales taxes are generally regressive, sin taxes on the consumption of goods like cigarettes and alcohol are especially regressive because the poor tend to consume such goods in greater amounts compared to higher income individuals).

¹³ Hoffer, *supra* note 11. In 2009, the soft drink industry spent over \$57 million on lobbying efforts in order to combat taxes on their products. *Id.*; see also Sanger-Katz, *supra* note 1 (stating that to combat the \$5 million the soft drink industry spent in opposition to the tax, advocates for the Philadelphia sin tax spent about \$2 million, \$1.6 million of which was donated by former New York City Mayor Michael Bloomberg).

¹⁴ JEAN-FRANÇOIS MINARDI & FRANCIS POULIOT, *THE UNINTENDED CONSEQUENCES OF TAXES ON TOBACCO, ALCOHOL AND GAMBLING* 2 (2014); Claudia Vargas et al., *Big Chunk of Soda Tax Money Not Going to Pre-K*, INQUIRER (Phila.) (July 16, 2016), http://www.philly.com/philly/news/20160614_Drink_tax_proposal_had_some_sweeteners.html [<https://perma.cc/2M6Z-ZTPZ>]. Despite the fact that the Philadelphia soda tax was sold to the public as being necessary for funding universal pre-kindergarten, nearly 20% of the soda tax revenue (approximately \$16 million of the \$91

sequences, particularly if the sin tax is quite large, as consumers may try to avoid paying the tax, creating a black market for those goods and services.¹⁵

Even on the benefits side of the equation, as legislators push to expand the sin tax base to cover soda and other socially disfavored goods and services, it is at best uncertain whether soda taxes and other non-traditional sin taxes have the same public health benefits commonly attributed to “traditional” sin taxes.¹⁶ While traditional sin taxes on alcohol and tobacco products compensate the public for negative externalities like drunk driving and carcinogenic second-hand smoke, the negative externalities associated with the consumption of sugary drinks, for example, are far less clear.¹⁷ This is in large part due to the relative youth of these taxes and the complexities with linking sugar intake from soft drinks to obesity, a condition that can be affected by many other factors aside from diet, such as fitness, environment, and genetics.¹⁸ It has been argued that non-traditional sugary drinks and junk food taxes are justified because their consumption is a public health burden that drives up the costs of healthcare for everyone, but this argument could also justify taxing *any* behaviors which burden the healthcare system, such as keeping terminally ill patients on indefinite life support.¹⁹

This Note argues that state and local governments looking to raise funds through expanding the sin tax base into non-traditional areas like sugary drinks and junk food must treat these taxes as different *in kind* to traditional sin taxes on alcohol and tobacco, and resist the strong temptation to use sin taxes as a mere proxy to regulate the consumption of any socially disfavored good or service.²⁰ Part I of this Note provides a historical overview of sin taxes from their origins during the Revolutionary War to the present day, and explores the key features of sin taxes which have made them an increasingly used and relied-upon tool for

million that the Philadelphia soda tax would generate per year) will be used to help fund other programs such as employee benefits, homelessness, and the city’s community college. Vargas, *supra*.

¹⁵ MINARDI & POULIOT, *supra* note 14, at 3. In Canada, a large increase in the 1990s on cigarette taxes caused the share of cigarettes purchased on the black market to skyrocket from 1% to 31% within six years. *Id.*

¹⁶ See Newkirk, *supra* note 6 (noting that in the absence of clear individual or public health benefits, non-traditional sin taxes like sugar taxes are primarily justified on their ability to raise revenue).

¹⁷ See *id.* (showing a direct link between soda taxes and decreases in obesity is difficult because soda taxes have only been in effect for a few years and obesity can be caused by multiple factors other than diet, including fitness, genetics, and the individual’s environment). For example, studies conducted by the Mexican government and researchers in the United States show that in Mexico, which was one of the earliest adopters of a one peso per liter soda tax, it remains too early to tell if the tax has cut diabetes and obesity rates, despite a drop-off in soda sales. Margot Sanger-Katz, *Yes, Soda Taxes Seem to Cut Soda Drinking*, N.Y. TIMES (Oct. 13, 2015), https://www.nytimes.com/2015/10/13/upshot/yes-soda-taxes-seem-to-cut-soda-drinking.html?_r=0 [<https://perma.cc/FD3M-YUJ8>].

¹⁸ Newkirk, *supra* note 6.

¹⁹ *Id.*

²⁰ See *infra* notes 1–180 and accompanying text.

lawmakers.²¹ Part I also outlines the primary justifications which have been advanced for taxing sin and concludes with a discussion on the recent efforts by legislators to expand the reach of sin taxes to cover non-traditional items like sugary soft drinks and junk food.²² Part II discusses the limitations of sin taxes and the inherent tension between its twin aims of raising revenue and curbing undesirable consumer behavior.²³ Part II also lays out the principal negative consequences associated with sin taxes and sets forth a few alternatives to sin taxes as a means of nudging individuals to make healthier lifestyle choices, including direct regulation of sinful goods and services and enhanced labeling requirements for sinful goods and services.²⁴ Part III analyzes the ways in which sin taxes may be reformed to both accentuate its positive impacts and reduce some of its negative consequences, and evaluates the merits of several proposed alternatives to sin taxes.²⁵ Part III argues that legislators seeking to expand sin taxes into non-traditional areas in order to promote public health should treat them as different in kind to traditional sins and proposes a hybrid solution which, among other things, would couple modestly set sin taxes with mandatory labeling requirements to provide consumers with better information about the health risks which may arise from their purchase decisions.²⁶

I. THE BIRTH AND RISE OF THE “SINDUSTRY”

Sin taxes are aimed at goods and services whose consumption produces harmful societal side effects.²⁷ Thus, sin taxes are often justified on the grounds that they discourage behaviors that impose negative spillover costs on third parties.²⁸ Section A of this Part briefly examines the history and evolution of sin taxes, from their inception during the American Revolution to the present day.²⁹ Section B highlights some of the unique features of sin taxes compared to other forms of taxation that make them such an attractive and increasingly used tool for lawmakers seeking to raise revenue.³⁰ Section C presents the three main justifications for sin taxes including their ability to raise revenue, their potential to enhance private health outcomes, and their ability to promote social welfare by

²¹ See *infra* notes 27–98 and accompanying text.

²² See *infra* notes 27–98 and accompanying text.

²³ See *infra* notes 99–159 and accompanying text.

²⁴ See *infra* notes 99–159 and accompanying text.

²⁵ See *infra* notes 160–180 and accompanying text.

²⁶ See *infra* notes 160–180 and accompanying text.

²⁷ See Hoffer, *supra* note 12, at 2 (noting that historically goods such as tobacco, alcohol, salt, stamps, tea, and motor fuels have all been subject to excise taxes).

²⁸ See *id.* at 3 (explaining that the social welfare justification for sin taxes is essentially a market correction mechanism because without the sin tax consumers will likely consume above the socially optimal quantity of the sinful good or service).

²⁹ See *infra* notes 33–38 and accompanying text.

³⁰ See *infra* notes 39–48 and accompanying text.

reducing the negative externalities attendant with sinful consumption patterns.³¹ Finally, Section D discusses the recent trend towards an expansion of sin taxes, in which legislators are adding to a growing list of sins, which to date has included items ranging from soda and plastic bags to indoor tanning services.³²

A. The History of Sin Taxes

One of the earliest sin taxes in the United States was an excise tax passed in 1791 on the sale of domestically produced whiskey and other alcoholic spirits, a measure proposed by Alexander Hamilton as a way to repay the national debt in the wake of the Revolutionary War.³³ Hamilton, then President George Washington's Secretary of the Treasury, believed that in addition to generating revenue, the whiskey tax would help warn the public about the negative effects associated with consuming alcohol.³⁴

Since that time, taxes on alcohol have continued to play a significant role in raising revenue for the government.³⁵ Prior to the ratification of the Sixteenth Amendment in 1913, which granted Congress the power to impose a federal income tax, excise taxes on alcohol and tobacco represented the government's primary source of revenue.³⁶ In fact, the lost tax revenue during the Great De-

³¹ See *infra* notes 49–90 and accompanying text.

³² See *infra* notes 91–98 and accompanying text.

³³ Perkins, *supra* note 5, at 149–50. The tax was assessed on whiskey and other alcoholic spirits produced in the United States and ultimately led to violent protests that culminated in the Whiskey Rebellion of 1791. *Id.* at 107–08; Michael Hoover, *The Whiskey Rebellion*, U.S. DEP'T OF THE TREASURY, ALCOHOL AND TOBACCO TAX AND TRADE BUREAU, https://www.ttb.gov/public_info/whisky_rebellion.shtml [<https://perma.cc/DD8J-5MBH>]. The tax, known as the Distilled Spirits Tax of 1791, was calculated on a per gallon basis and was paid, in cash, by whiskey and other alcohol spirit producers directly to the U.S. government. Hoover, *supra*.

³⁴ Perkins, *supra* note 5, at 149–50; see also Newkirk, *supra* note 6 (noting that The Sugar Act of 1764, though not intended to be a sin tax, had the effect of one by simultaneously raising revenue for the British Crown while also discouraging alcohol consumption by making sugar, a key input in the production of rum, more expensive than before).

³⁵ Perkins, *supra* note 5, at 150. In 1862, an alcohol tax was passed to raise revenue to help fund the Civil War effort and remained in effect even during Prohibition. *Id.*

³⁶ *Id.* The Sixteenth Amendment provided that “[t]he Congress shall have power to lay and collect taxes on incomes, from whatever source derived . . .” U.S. CONST. amend. XVI. An excise tax is a tax that is due at the time a specific good or service is purchased and is commonly built into the price of the good or service. *Excise Tax*, <https://www.irs.gov/businesses/small-businesses-self-employed/excise-tax> [<https://perma.cc/4HTW-JPSG>] (last updated Nov. 20, 2017); see Phineas Baxandall, *Taxing Habits: When It Comes to State Taxes, Sin Is In*, FED. RES. BANK BOS. REGIONAL REV., Q1 2003, at 19, 24 (noting that in 1910, revenue generated from alcohol and tobacco taxes comprised 37% of the federal budget). Early federal excise taxes targeted goods such as tobacco and refined sugar, but faced intense opposition in the seventeenth and eighteenth centuries and, today, are much less important sources of revenue than they once were. Hines, *supra* note 6, at 51–52. Indeed, all federal excise taxes were eliminated at various points in time, and since the passage of the Sixteenth Amendment in 1913, the federal income tax quickly replaced federal excise taxes as the primary source of the federal government's revenue. *Id.* at 52. Nevertheless, some federal excise taxes still

pression as a result of Prohibition proved to be a key factor in the government's decision to ultimately repeal Prohibition years later, underscoring the importance of tax revenue collected from taxes on alcohol.³⁷

According to figures published by the U.S. Census Bureau, excise taxes on alcohol and tobacco products still remain crucial sources of revenue for the government, with total state receipts for sales of alcoholic beverages in 2015 totaling \$6.43 billion, and state sales of tobacco products nationwide accounting for over \$17.7 billion in tax revenue over the same period.³⁸

B. Sin Taxes as Attractive Political Tools

Sin taxes are particularly attractive to lawmakers because they are relatively easy to pass and later amend, if necessary.³⁹ One unique feature of sin taxes is that they typically face fewer political opponents compared to general taxes because they only apply to those who actually purchase the sinful good or service, making them more likely to be passed into law.⁴⁰ Furthermore, resistance to sin taxes also tends to be less robust because sin taxes are intended to operate, at least in part, for the good of society by reducing the quantity of some defined social harm, such as secondhand smoke in the case of cigarette taxes or drunk driving in the case of alcohol taxes.⁴¹ Moreover, because sin taxes are already reflected in the prices of the disfavored goods and services at the time of purchase and not assessed separately after the fact, they are less visible and obvious to consumers than other taxes, such as property or income taxes.⁴²

exist today, with the most prominent perhaps being the federal gasoline tax, which was passed in 1933 as part of an effort to reduce traffic congestion and pollution. *Id.*

³⁷ Perkins, *supra* note 5, at 150. After Prohibition was repealed in 1933, federal excise taxes accounted for around 15% of federal revenue with revenue from the federal alcohol tax totaling \$500–600 million per year. Hines, *supra* note 6, at 52.

³⁸ 2015 State Government Tax Collections, U.S. CENSUS BUREAU, <https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk> [<https://perma.cc/YG6T-QCFN>]. By way of comparison, in 2015, state income tax receipts totaled over \$387.2 billion and total tax revenues approximately \$916.5 billion. *Id.*

³⁹ Mattoon & Wetmore, *supra* note 5; Perkins, *supra* note 5, at 152; see Eduardo Porter, *A Tax Code of Politics, Not Reason*, N.Y. TIMES (Apr. 10, 2012), <http://www.nytimes.com/2012/04/11/business/economy/a-tax-code-of-politics-not-practicality.html> [<https://perma.cc/B4BG-EKLW>] (noting that income taxes are less effective at raising revenue than other taxes for political reasons). Income taxes split Democrats and Republicans with Democrats generally in favor of taxing wealthier Americans to fund public programs for the poor and Republicans preferring to use tax exemptions and deductions to help wealthy Americans avoid the full brunt of the income tax. Porter, *supra*.

⁴⁰ Perkins, *supra* note 5, at 153. Sin taxes affect fewer individuals than an income tax, for example, because not everyone smokes or drinks alcohol. See *id.* (discussing, in general, the applicability of sin taxes to only select portions of the population).

⁴¹ See *id.* (noting that sin taxes are intended to advance some social benefit).

⁴² Baxandall, *supra* note 36, at 26. While sin taxes have a long tradition in the United States, today's sin taxes are accompanied by a host of problems, including regressivity and problems stemming from their inability to distinguish between responsible and irresponsible consumption behaviors. *Id.* at 19. See generally Raj Chetty et al., *Salience and Taxation: Theory and Evidence*, 99 AM. ECON.

Taxing consumption is also far simpler than collecting income taxes because consumption taxes are levied at the point of sale and are entirely independent of an individual's income level.⁴³ Perhaps just as important, consumption taxes are not only easier to collect, but are also more difficult to evade.⁴⁴ Further, sin taxes do not create perverse incentives like other forms of taxation, such as income taxes which can penalize desirable activities such as working.⁴⁵ Because taxing an activity generally reduces the quantity of that activity, an increase in income taxes for example would operate to discourage working and thus distort decision-making in a way that tends to hurt the economy.⁴⁶ In contrast to sin taxes, general taxes have faced widespread voter backlash, as evidenced both by the outcomes of specific referenda and the lack of popular support for the legislators who propose them come re-election.⁴⁷ Finally, because consumption of a sinful good or service is not essential, sin taxes are viewed as "voluntary user fees," which lends sin taxes an appearance of fairness that is lacking amongst other common forms of taxation.⁴⁸

REV. 1145 (2009) (describing "tax salience" as how visible the tax is when built into the price of a good or service and noting that when taxes are built into a price, it may help obscure the actual tax rate). Studies have shown that taxpayers are more likely to ignore the after-tax price of a good and focus on the pre-tax price in situations where tax salience is lower. Jacob Goldin, *Optimal Tax Salience*, 131 J. PUB. ECON. 115, 115 (2015); Perkins, *supra* note 5, at 144.

⁴³ Porter, *supra* note 39. Consumption taxes are commonly observed in Western Europe where several nations believe that all citizens have a right to enjoy a minimum income. *Id.*

⁴⁴ *Id.* Consumption taxes also create fewer perverse incentives with respect to the quantity of work or investment an individual undertakes in response to the tax. *Id.* Some scholars believe that consumer taxes also independently benefit society by encouraging savings and thereby helping to promote economic growth. *Id.* Consumption taxes are also harder to evade than income taxes and thus should have a more robust revenue stream. See Kathleen DeLaney Thomas, *The Psychic Cost of Tax Evasion*, 56 B.C. L. REV. 617, 618 (2015) (noting that a major problem with income taxes is that people cheat on their returns, in part because only about 1% of individual taxpayers are audited and the penalties for underreporting are also relatively small).

⁴⁵ Porter, *supra* note 39.

⁴⁶ See Martin Feldstein, *Effects of Taxes on Economic Behavior*, 61 NAT'L TAX J. 131, 134, 137 (2008) (suggesting that changes in the income tax rate not only affect labor supply, but also taxpayers' consumption levels); N. Gregory Mankiw, *I Can Afford Higher Taxes. But They'll Make Me Work Less*, N.Y. TIMES (Oct. 9, 2010), <http://www.nytimes.com/2010/10/10/business/economy/10view.html> [<https://perma.cc/F5SP-ZSU3>] (implying that tax increases would diminish incentives to keep working because the marginal return to labor would be correspondingly decreased); see also Megan McArdle, *Why States Like Sin Taxes*, BLOOMBERG (Jan. 23, 2015), <https://www.bloomberg.com/view/articles/2015-01-23/what-states-get-out-of-sin-taxes> [<https://perma.cc/WJ4D-WXKT>] (noting that consumption taxes raise the price of current and future consumption equally, and thus do not distort decisions on when to engage in the taxed behavior). Revenue generated from income taxes can also be extremely inconsistent, fluctuating with individual employment changes, whereas sin tax revenue tends to be more steady and reliable. McArdle, *supra*.

⁴⁷ Perkins, *supra* note 5, at 152–53; Sandra Fabry, *Reliance on 'Sin' Taxes Draws Opposition*, HEARTLAND INST. (June 1, 2005), <https://www.heartland.org/news-opinion/news/reliance-on-sin-taxes-draws-opposition?source=policybot> [<https://perma.cc/S9HK-Q5WJ>].

⁴⁸ See Baxandall, *supra* note 36, at 26 (suggesting one reason for the relative popularity of using sin taxes to raise revenue is because the public views them as voluntary user fees). To borrow a quote

C. Justifications for Sin Taxes

The main justifications advanced in support of sin taxes include their ability to raise revenue, advance private health outcomes by discouraging individual consumption of sinful goods and services, and promote public health by compensating society for the costs of sinful consumption.⁴⁹ Subsection 1 of this Section details the revenue-raising justification for sin taxes.⁵⁰ Subsection 2 discusses the way sin taxes operate to nudge individuals towards making healthier lifestyle choices for themselves by raising the cost of purchasing sinful goods and services.⁵¹ Finally, Subsection 3 explains the public health and social welfare arguments that are made in favor of instituting sin taxes.⁵²

1. Sin Taxes Are Effective Revenue-Raising Instruments

Perhaps the least controversial justification for sin taxes is that they are extremely effective tools for raising revenue for governments.⁵³ According to one estimate, the United States collects over \$96.2 billion per year from state and federal gambling, tobacco, and alcohol taxes alone.⁵⁴ The revenue-raising successes enjoyed by this triumvirate of traditional sin taxes have not gone unnoticed by cash-strapped governments desperate to balance their budgets.⁵⁵

Sin taxes are such effective revenue raisers because the goods and services they target are all relatively demand inelastic, which means that consumers are relatively insensitive to price changes and will therefore purchase about the same quantity of the good or service as before the sin tax.⁵⁶ In theory, this means that, provided the government has properly selected the good or service to impose the sin tax on, consumers will purchase about the same quantity of the good or service, even though the price of that good or service is now higher due to the tax.⁵⁷

from Jean-Baptiste Colbert, the finance minister of Louis XIV, sin taxes are effective because they “pluck the most feathers from a goose while producing the least hissing.” *Id.*

⁴⁹ Mattoon & Wetmore, *supra* note 5.

⁵⁰ See *infra* notes 53–60 and accompanying text.

⁵¹ See *infra* notes 61–72 and accompanying text.

⁵² See *infra* notes 73–90 and accompanying text.

⁵³ See Jordan E. Otero, *Banking on Sin: States Profit as Taxes Rise on Vice*, WASH. TIMES (Oct. 26, 2011), <http://www.washingtontimes.com/news/2011/oct/26/banking-on-sin-states-profit-as-taxes-rise-on-vice/> [<https://perma.cc/662H-Z4HK>] (noting that governments lean heavily on sin tax revenue).

⁵⁴ *Id.* Of the \$96.2 billion in state and federal tax receipts, gambling accounted for \$24.9 billion, tobacco \$44.3 billion, and alcohol \$27 billion. *Id.*

⁵⁵ Perkins, *supra* note 5, at 152.

⁵⁶ Adam Hoffer et al., *Regressive Effects: Causes and Consequences of Selective Consumption Taxation* 1, 8, 9 (Mercatus Ctr., Working Paper, 2015). While purchases of any good will decrease in response to a price increase of that good, the effectiveness of the tax also depends on the ability of consumers to find available substitutes for the taxed good. *Id.* at 8.

⁵⁷ Perkins, *supra* note 5, at 173. In addition, taxes on inelastic goods have the added benefit of being more economically efficient because they create less deadweight loss (a measure of societal welfare) than taxes on demand-elastic goods. *Id.* at 174.

Indeed, numerous states have noticed the relative indifference consumers have when it comes to sinful consumption and responded accordingly by adopting a two-pronged strategy to increase revenue: raising the tax rate on existing sin taxes and simultaneously adding to a growing list of goods and services to be taxed as sins.⁵⁸ Legislators are even considering legalizing products or activities that they have previously prohibited in order to enlarge the sin tax base, with proposals to legalize gambling and marijuana being considered in several states.⁵⁹ In Colorado, for instance, where recreational marijuana is legal, revenue from taxing marijuana sales has grown dramatically each year, from \$56 million in 2014 and \$113 million in 2015 to \$140 million in 2016.⁶⁰

2. Sin Taxes Improve Private Health Outcomes

In addition to enlarging the public treasury, advocates emphasize sin taxes' ability to promote private health outcomes by decreasing consumption of sinful goods and services on an individual basis.⁶¹ Because sin taxes force taxpayers to account for both the private and social costs of their behavior *prior* to their purchase decision, sin taxes have the potential to reduce the overall aggregate level of sinful consumption to a more socially optimal level.⁶²

Sin taxes are able to accomplish this because they are a form of Pigovian tax, a tax that is designed to help individuals account for, or internalize, the negative side effects their personal consumption habits impose upon other members of society.⁶³ A properly designed Pigovian tax imposes a tax with a value cali-

⁵⁸ *Id.* at 153. Most of the new sin taxes being considered are on unhealthy consumption choices such as drinking soda and indoor tanning, the latter of which is subject to a 10% federal tax under the Affordable Care Act, but eco-taxes on plastic bags and bottled water are also gaining steam. *Id.* at 153–54.

⁵⁹ JOSEPH HENCHMAN & MORGAN SCARBORO, MARIJUANA LEGALIZATION AND TAXES: LESSONS FOR OTHER STATES FROM COLORADO AND WASHINGTON 2 (2016); Perkins, *supra* note 5, at 156; see also Dana Radcliffe, *Should States Raise Revenues by Expanding Legal Gambling?*, HUFFINGTON POST (Aug. 30, 2011), http://www.huffingtonpost.com/dana-radcliffe/should-states-raise-reven_b_942118.html [<https://perma.cc/53K8-BTH4>] (noting a proposal in New York which would convert the state's racetrack casinos into full-fledged casinos with table games in addition to the current electronic slot machine offerings).

⁶⁰ HENCHMAN & SCARBORO, *supra* note 59, at 4.

⁶¹ Mattoon & Wetmore, *supra* note 5. Some scholars argue that decreasing consumption of sins and compensating society for the costs of such sinful consumption have been the primary justifications for imposing sin taxes since colonial times. *Id.*; see Hoffer, *supra* note 12, at 4–5 (noting that today, sin taxes are more frequently defended as helping individuals avoid harming themselves through their consumption decisions rather than on public health grounds).

⁶² Perkins, *supra* note 5, at 157.

⁶³ *Id.*; see Robert H. Frank, *Heads You Win. Tails, You Win, Too.*, N.Y. TIMES (Jan. 5, 2013), <http://www.nytimes.com/2013/01/06/business/pigovian-taxes-may-offer-economic-hope.html> [<https://perma.cc/WSW4-Q8L6>] (noting that Pigovian taxes were named for Arthur C. Pigou, a British economist known for his 1920 book *The Economics of Welfare*).

brated to reflect the social cost of that behavior.⁶⁴ With the addition of a Pigovian tax, the consumer is forced to internalize that additional social cost when making their purchase decision, as the price now reflects the sum of both the private and social cost of their behavior.⁶⁵ Without the Pigovian tax, individuals would only consider the smaller, private cost to themselves of their own behavior, which would skew their decision-making and lead to a quantity of consumption that exceeds the socially optimal level for that good or service.⁶⁶ Therefore, with the social cost transformed into a tax, the quantity of consumption is shifted to a more economically efficient level.⁶⁷

Taking tobacco taxes as an example, a 10% increase in the cigarette tax has been found to cause a 3% reduction in tobacco use, which reflects both a decrease in tobacco use amongst existing smokers and fewer new smokers.⁶⁸ In the context of soda taxes, a 2016 study published in the *American Journal of Public Health* found that consumption of sugary drinks fell by around 20% in Berkeley neighborhoods after its soda tax was passed, and increased in San Francisco, which did not have a soda tax at the time of the study.⁶⁹ The results square with the findings of a joint study published in *The BMJ* (formerly the *British Medical Journal*) by the Instituto Nacional de Salud Pública and the University of North Carolina, which analyzed the effect of Mexico's soda tax after its passage.⁷⁰ In

⁶⁴ Perkins, *supra* note 5, at 157; *Pigouvian Taxes*, THE ECONOMIST (Aug. 19, 2017), <https://www.economist.com/news/economics-brief/21726709-what-do-when-interests-individuals-and-society-do-not-coincide-fourth> [<https://perma.cc/64GV-NYV7>]. Other examples of Pigouvian taxes include a tax in France on noisy aircraft at airports, and carbon taxes, which have been passed in Denmark, Finland, Mexico, and Chile. *Pigouvian Taxes*, *supra*.

⁶⁵ See Frank, *supra* note 63 (illustrating the operation of a Pigovian tax in the context of a car purchase). When choosing between two cars to buy, the heavier of the two cars should be subject to a higher tax so that the individual purchaser is forced to account for the greater social costs associated with the heavier vehicle's more damaging environmental impact and wear and tear on the roads when making their final decision. *Id.*

⁶⁶ See *id.* (noting that Pigovian taxes make everyone better off by not only raising revenue for public programs but also reducing negative externalities).

⁶⁷ Perkins, *supra* note 5, at 157; see *Pigouvian Taxes*, *supra* note 64 (noting that the main problem with relying on prices and markets to curb bad behavior is that the prices in the real world fail to build in the social costs).

⁶⁸ Mattoon & Wetmore, *supra* note 5; see also Baxandall, *supra* note 36, at 20 (noting that studies show that increasing the price of a cigarette by 10% is correlated with a decrease of 3–5% in smoking, with cigarette taxes being especially effective with respect to teenagers who have less income and are more price sensitive).

⁶⁹ Dan Charles, *Berkeley's Soda Tax Appears to Cut Consumption of Sugary Drinks*, NPR (Aug. 23, 2016), <http://www.npr.org/sections/thesalt/2016/08/23/491104093/berkeleys-soda-tax-appears-to-cut-consumption-of-sugary-drinks> [<https://perma.cc/8ZWP-397D>]. Berkeley residents also reported drinking more water as a result of their decreased soda consumption. *Id.*

⁷⁰ M. Arantxa Colchero et al., *Beverage Purchases from Stores in Mexico Under the Excise Tax on Sugar Sweetened Beverages: Observational Study*, 352 *BMJ* (ONLINE RESEARCH REPORT) 5 (2016), <http://www.bmj.com/content/352/bmj.h6704> [<https://perma.cc/T8PE-5HC7>]. The study sought to determine the effect on beverage purchases in Mexico's stores a year after the tax on sugar-sweetened beverages was instituted. *Id.* at 1.

that study, researchers found that since the tax was passed in 2013, sales of soda were down twelve percent by the end of 2014.⁷¹ The authors of the Mexican soda tax study did note, however, that notwithstanding the apparent correlation between the implementation of the soda tax and the fall in consumption of sugar-sweetened beverages, they were unable to establish that the tax had *caused* the decline in consumption.⁷²

3. Sin Taxes Help Consumers Internalize Negative Externalities Associated with Their Consumption

Finally, supporters of sin taxes also point to the ability of sin taxes to advance public health by decreasing not only sinful consumption, but also the negative side effects associated with it.⁷³ Economists generally agree that government intervention is justified whenever there is an inefficient quantity of either production or consumption, known as a “market failure.”⁷⁴ Specifically, in the context of sin taxes, the market failure takes the form of overconsumption of sinful goods and services, which is the direct result of consumers who make their purchase decisions without having to account for the cost of their consumption to society.⁷⁵ These social costs, also referred to as negative externalities, take many forms: for instance, consuming alcohol increases the risk of drunk driving and domestic violence; smoking tobacco products creates secondhand smoke, which is both a carcinogen and an allergen.⁷⁶

⁷¹ *Id.* at 5. The reduction was largest amongst poorer households with their purchases of sugar-sweetened beverages down by 17.4% by December 2014 and overall purchases of beverages that were not taxed increased by 4%, with most such purchases being attributed to bottled water. *Id.*

⁷² *Id.* The study’s authors highlighted other variables concurrent with the soda tax as complicating the causation analysis, including changes in Mexico’s economy during that time, and other public health and anti-obesity programs specifically aimed at sugar-sweetened beverages. *Id.* “Sugar-sweetened beverages” are drinks that contain sweeteners such as sucrose, high-fructose corn syrup, or fruit-juice concentrates. Kelly D. Brownell et al., *The Public Health and Economic Benefits of Taxing Sugar-Sweetened Beverages*, 361 *NEW ENG. J. MED.* 1599, 1599 (2009).

⁷³ See Brownell et al., *supra* note 72, at 1599 (describing the link between intake of sugar-sweetened beverages and obesity and the potential reduction in health costs from taxing sugar-sweetened beverages). In particular, a high intake of refined sugars increases triglyceride levels and blood pressure, which increases an individual’s risk for both heart disease and diabetes. *Id.* at 1601; see also Hines, *supra* note 6, at 50 (noting that revenue generated from sin taxes on gasoline may be used to fund highway construction and maintenance while taxes on alcohol and tobacco may be used to help cover related health care costs).

⁷⁴ Brownell et al. *supra* note 72, at 1599. In the context of sugar-sweetened beverages, consumers may lack full and complete information about their consumption decisions and overweigh short-term decisions. *Id.*

⁷⁵ *Id.* The social costs are not insignificant, with one study estimating that in 2008, the medical costs attributed to obesity-related care reached \$147 billion annually, or roughly 9.1% of total U.S. health care expenditures. Eric A. Finkelstein et al., *Annual Spending Attributable to Obesity: Payer- and Service-Specific Estimates*, 28 *HEALTH AFFAIRS* 822, 828 (2009).

⁷⁶ See Newkirk, *supra* note 6 (noting that sin taxes are designed to both save people from themselves and protect those around them).

The cost of medical care for smoking-related conditions exceeds \$130 billion annually in the United States.⁷⁷ In terms of the human toll from smoking, secondhand smoke caused nearly 34,000 deaths from heart disease per year from 2005 to 2009 among adults who didn't smoke, and over 7300 deaths per year from lung cancer over the same period for adult non-smokers.⁷⁸

Although society clearly bears substantial costs for smoking-related illnesses, smokers also tend to die earlier than non-smokers, meaning smokers actually save the public some money in the form of foregone social security benefits that they are unable to collect.⁷⁹ However, despite those savings, smoking also costs approximately \$151 billion per year in lost productivity due to premature deaths and an additional \$5.6 billion per year in deaths attributable to secondhand smoke exposure.⁸⁰

The public health justifications for alcohol present a trickier case, given that not everyone who drinks alcohol does so in an abusive fashion.⁸¹ Moreover, the risk that drinking alcohol poses to others is usually associated with drinking and driving, which further narrows the number of people contributing to drunk driving deaths.⁸²

Nevertheless, an increase in the alcohol tax caused a notable decrease in monthly drunk driving deaths, particularly among young people in the two years following the tax increase.⁸³ In addition, alcohol abuse imposes costs on others, as alcohol abusers often miss time at work, impose higher costs on the healthcare system, and impair family relationships.⁸⁴

The main argument advanced for non-traditional sin taxes like sugary drink and junk food taxes (collectively “anti-obesity taxes”) is that they will help re-

⁷⁷ U.S. DEP'T OF HEALTH & HUMAN SERV., THE HEALTH CONSEQUENCES OF SMOKING—50 YEARS OF PROGRESS: A REPORT OF THE SURGEON GENERAL 870 (2014), <https://www.surgeon-general.gov/library/reports/50-years-of-progress/full-report.pdf> [<https://perma.cc/Y6TU-ZZFFV>].

⁷⁸ *Secondhand Smoke (SHS) Facts*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/tobacco/data_statistics/fact_sheets/secondhand_smoke/general_facts/ [<https://perma.cc/MUG3-PCQC>] (last updated Feb. 21, 2017).

⁷⁹ Jeff Strnad, *Conceptualizing the “Fat Tax”: The Role of Food Taxes in Developed Economies*, 78 S. CAL. L. REV. 1221, 1326 (2004). Smokers raise health care costs but offset those costs by saving the public from having to pay them retirement benefits for as long as non-smokers. *Id.* at 1241.

⁸⁰ U.S. DEP'T OF HEALTH & HUMAN SERV., *supra* note 77, at 679.

⁸¹ See Baxandall, *supra* note 36, at 22 (noting that the risk drinkers pose to others has more to do with their driving habits than their drinking habits). Indeed, medical research has shown that drinking modest amounts of red wine can actually be beneficial to your health by reducing the risks of heart disease, stroke, and dementia. *Id.*

⁸² *Id.*

⁸³ Alexander C. Wagenaar et al., *Effects of a 2009 Illinois Alcohol Tax Increase on Fatal Motor Vehicle Crashes*, 105 AM. J. PUB. HEALTH 1880, 1885 (2015). Fatalities from drunk driving fell 9.9% per month in the two years following Illinois' 2009 alcohol tax hike, which imposed a tax of 1 cent per serving of beer and 5 cents per serving of spirits. *Id.* at 1883.

⁸⁴ Baxandall, *supra* note 36, at 22.

duce the ever-growing cost of health care.⁸⁵ Anti-obesity tax advocates argue that because poor diet is linked to obesity and other chronic diseases, which are expensive to treat, their dietary choices impose costs on people of normal weight in the form of higher health care costs.⁸⁶ These same advocates point out that obese individuals impose health care costs on *all* individuals, including non-obese people, particularly if they are beneficiaries of a government-provided health care program.⁸⁷ This additional layer of cost creates a negative externality because the private cost of health care for some individuals (the obese) has now spilled over and been absorbed into the public cost of health care generally, and anti-obesity tax advocates believe that soda taxes or junk food taxes present one solution to control these costs.⁸⁸ Despite the appeal of this argument, there simply isn't enough evidence at this time to suggest that these taxes make individuals any healthier, let alone contribute to bettering the public's health.⁸⁹ Data regarding the public health benefits of non-traditional sin taxes, such as sugary drink taxes are simply not as robust compared to the public health effects associated with traditional sin taxes.⁹⁰

D. A New Era of Sin Taxes

Today, much of the impetus for expanding the sin tax base has come from the growing need for governments to raise revenue, as legislators face tightening budgets and growing deficits.⁹¹ In addition to raising the rates applicable to ex-

⁸⁵ See Katherine Pratt, *A Constructive Critique of Public Health Arguments for Anti-obesity Soda Taxes and Food Taxes*, 87 TUL. L. REV. 73, 77 (2012) (noting that advocates of obesity taxes are invoking the same public health arguments as supporters of tobacco taxes have relied on in the past). Obese people pay 36% more for health care and spend 77% more on medication than people of average weight. *Id.* at 84.

⁸⁶ *Id.* at 77–78. The higher health care costs attributable to caring for obese persons can be imposed directly through taxpayer-funded programs such as Medicaid, or indirectly by making insurance premiums more expensive. *Id.*; see Brownell, *supra* note 72 (describing the potential taxes on sugar-sweetened beverages have to reduce health care costs).

⁸⁷ Pratt, *supra* note 85, at 78; see Brownell, *supra* note 72, at 1599 (noting that taxing sugar-sweetened beverages can promote good health care outcomes and help recoup health care costs associated with their consumption).

⁸⁸ Brownell, *supra* note 72, at 1599; Pratt, *supra* note 85, at 78.

⁸⁹ Newkirk, *supra* note 6.

⁹⁰ *Id.* Even if the negative externalities argument were accepted for non-traditional sin taxes like junk food and soda taxes, it would still be difficult to isolate the contribution of specific foods or drinks to obesity. Pratt, *supra* note 85, at 86.

⁹¹ Mattoon & Wetmore, *supra* note 5. Increasing sin taxes was one of the strategies employed by state and local governments for making up some of the revenue shortfall due to the Great Recession. *Id.* The Philadelphia soda tax campaign focused on the ability to help fund new public programs like universal preschool with the influx of revenue and did not emphasize the public health benefits which had been the primary message of earlier, failed campaigns in Philadelphia. Vauhini Vara, *There's Now a Soda Tax in Philadelphia, But Not Because Sugar Is Bad for You*, NEW YORKER (June 16, 2016), <http://www.newyorker.com/business/currency/theres-now-a-soda-tax-in-philadelphia-but-not-because-sugar-is-bad-for-you> [<https://perma.cc/6PWM-SMLR>].

isting sin taxes on alcohol and tobacco, legislators at all levels of government are actively trying to expand the scope of sin taxes to cover other products and services.⁹² To date, legislators have already taken aim at soda, junk food, tanning, strip clubs, and environmentally unfriendly consumption such as plastic bag use.⁹³

To wit, on June 16, 2016, Philadelphia became the largest U.S. city to pass a soda tax.⁹⁴ Subsequently, several other cities have passed taxes on sugary drinks as a means to combat obesity, including San Francisco, Oakland, and Boulder.⁹⁵ The recent flurry of soda taxes perhaps suggests that public opinion is finally turning with respect to accepting non-traditional sin taxes.⁹⁶

In Chicago, a “check-out bag tax” of seven cents per disposable bag went into effect in all retail stores on February 1, 2017, with the cost at most large chain retailers like Walgreens, Target, CVS, and Whole Foods passed directly on to customers.⁹⁷ The revenue from the tax, which applies to disposable paper bags as well as disposable plastic bags, will be split between the city of Chicago and the retailer, with the tax intended to encourage consumers to rely on more environmentally friendly reusable bags.⁹⁸

II. THE NEGATIVE EFFECTS OF SIN TAXES: THE BITTER WITH THE SWEET

Sin taxes have enjoyed tremendous success in raising revenue, and that success has not gone unnoticed as today’s legislators try to recoup the tax revenue that was lost during the Great Recession.⁹⁹ Nevertheless, sin taxes are not

⁹² Perkins, *supra* note 5, at 153. For example, the Children’s Health Insurance Program Reauthorization Act, signed into law in February 2009 by President Obama, effectively tripled the federal tax on tobacco products. *Id.*; see also Mattoon & Wetmore, *supra* note 5 (noting that from 2000 to 2015, there were 111 increases in tobacco taxes and 23 increases in alcohol taxes).

⁹³ Perkins, *supra* note 5, at 153; see Hoffer, *supra* note 12, at 20 (noting that in Minnesota a 6.5% tax is levied on fur clothing and that in Alabama purchases of playing cards are subject to a ten-cent tax).

⁹⁴ Sanger-Katz, *supra* note 1 (stating that the passage of the sugary drinks tax in Philadelphia is notable because Philadelphia is one of the largest U.S. cities and also one of the poorest).

⁹⁵ Allison Aubrey, *Souring on Sweet? Voters in 4 Cities Pass Soda Tax Measures*, NPR (Nov. 9, 2016), <http://www.npr.org/sections/thesalt/2016/11/09/501472007/souring-on-sweet-voters-in-4-cities-pass-soda-tax-measures> [<https://perma.cc/898U-T44W>].

⁹⁶ *Id.*

⁹⁷ Lauren Zumbach, *Chicago’s Bag Tax Takes Effect Wednesday. Here’s What You Need to Know.*, CHI. TRIB. (Jan. 26, 2017), <http://www.chicagotribune.com/business/ct-chicago-checkout-bag-tax-0127-biz-20170126-story.html> [<https://perma.cc/MR4S-ZSAZ>]. Chicago had attempted to ban disposable plastic bags earlier, before passing the seven-cent tax on both disposable paper and plastic bags. *Id.*

⁹⁸ *Id.* Notwithstanding the new disposable bag tax, Whole Foods and Target will continue to offer customers some money back for each reusable bag used. *Id.*

⁹⁹ Hoffer, *supra* note 12, at 2.

costless instruments for raising revenue, and there are several negative consequences accompanying the passage of any sin tax.¹⁰⁰

Section A of this Part sets forth the negative consequences of implementing sin taxes which should curb the enthusiasm of legislators seeking to expand the reach of sin taxes into new domains.¹⁰¹ Section B presents some alternatives regulators may consider to replace or supplement sin taxes in their efforts to curb unhealthy private behaviors and improve public health.¹⁰²

A. *The Negative Effects of Sin Taxes*

While the revenue-raising justification may be enough on its own for some lawmakers to impose a sin tax, lawmakers should nevertheless be aware of the regressive nature and negative consequences associated with sin taxes before designating new categories of goods and services as sins.¹⁰³ Subsection 1 of this Section addresses one major criticism of sin taxes, namely their regressivity and the fact that they tend to disproportionately impact the poor.¹⁰⁴ Subsection 2 discusses other negative consequences of sin taxes, including the diversion of promised tax revenues to fund specific programs, the tendency of sin taxes to trigger lobbying and advertising wars, and the rise of black markets as consumers attempt to avoid paying sin taxes.¹⁰⁵

1. Sin Taxes Are Regressive, Hitting the Poorest Members of Society the Hardest

While sin taxes are undoubtedly attractive policy tools given their effectiveness in raising revenue and the relative ease with which they can be passed, they also tend to disproportionately burden lower income individuals.¹⁰⁶ Similar to sales and excise taxes, a sin tax is regressive because the poor spend a greater percentage of their income to pay the tax as compared to their wealthier counter-

¹⁰⁰ See *infra* notes 103–129 and accompanying text.

¹⁰¹ See *infra* notes 103–129 and accompanying text.

¹⁰² See *infra* notes 130–159 and accompanying text.

¹⁰³ See Hoffer, *supra* note 11 (describing how sin taxes may harm society through, *inter alia*, its regressive nature and tendency to spur wasteful spending on lobbying for and against the tax).

¹⁰⁴ See *infra* notes 106–118 and accompanying text.

¹⁰⁵ See *infra* notes 119–129 and accompanying text.

¹⁰⁶ Mattoon & Wetmore, *supra* note 5; see also Brownell, *supra* note 72, at 1603 (noting that the poor tend to be more affected by smoking-related illnesses and have health problems related to bad eating habits); Perkins, *supra* note 5, at 166 (noting that a \$3 tax on cigarettes weighs more heavily on a poor person than a wealthier person).

parts.¹⁰⁷ In some ways, the poor are actually burdened twice because they also disproportionately consume more sinful goods and services.¹⁰⁸

Unlike income taxes, which incorporate progressive features that help correlate income level with the ability to pay, such as lower rates for the poor and tax-exempt status for the poorest, sin taxes completely lack these elements.¹⁰⁹ Sin taxes violate both horizontal and vertical tax equity, two cornerstone principles of tax policy design.¹¹⁰ Sin taxes violate horizontal tax equity because sin tax liability only falls upon individuals who actually purchase the sinful good or service; two individuals earning the same income as each other may owe completely different amounts of sin tax.¹¹¹ Sin taxes also violate vertical tax equity because the amount of the tax paid by a rich “sinner” is not any greater than the amount of tax owed by the poor sinner.¹¹² Indeed, sin taxes not only disproportionately affect the poor, but are also an indiscriminate tool that applies to responsible consumers and lifelong addicts alike.¹¹³

In the soda context, a Gallup poll conducted in 2013 showed that non-whites and low-income Americans drank more regular soda (as opposed to diet soda) than other Americans.¹¹⁴ The same poll also found, unsurprisingly, that overweight Americans were more likely to drink soda.¹¹⁵ Similarly, a 2008 study of New York City adults found that individuals living in households with an income of twice the poverty level or less were more likely to drink soda than those from higher income households.¹¹⁶ Thus, socially disadvantaged populations,

¹⁰⁷ Hoffer, *supra* note 12, at 14. The poor, by virtue of their income level, also have fewer substitutes available to them to switch to, making their consumption of sinful goods even more inelastic. *Id.*

¹⁰⁸ *Id.*; see Aubrey, *supra* note 3 (noting that the Philadelphia Mayor Jim Kenney seemed to acknowledge the fact that the poor seem to drink more soda than their wealthier peers when he criticized the soda industry for making “enormous profits on the backs of poor people”).

¹⁰⁹ Otero, *supra* note 59. In Quebec, the tobacco tax hits the poor four times harder than the wealthy, with the wealthiest spending about 1.4% of their income on tobacco taxes and the poorest spending about 5.2%. MINARDI & POULIOT, *supra* note 14, at 3.

¹¹⁰ Hoffer, *supra* note 56, at 8.

¹¹¹ *Id.* Horizontal tax equity requires individuals with the same level of income to shoulder the same tax burden while vertical tax equity demands that wealthier individuals should have to pay greater taxes than their poorer counterparts. *Id.*; see also Pratt, *supra* note 85, at 123 (noting that in the United States, individuals generally prefer progressive taxes which scale taxes based on ability to pay and dislike regressive taxes which are not so calibrated).

¹¹² Hoffer, *supra* note 56, at 8.

¹¹³ Baxandall, *supra* note 36, at 19.

¹¹⁴ Elizabeth Mendes, *Regular Soda Popular with Young, Nonwhite, Low-Income*, GALLUP (Aug. 15, 2013), <http://www.gallup.com/poll/163997/regular-soda-popular-young-nonwhite-low-income.aspx?version=print> [<https://perma.cc/GS4Q-5H7C>] (indicating that 45% of those earning less than \$30,000 per year drank regular soda, while only 20% of those earning \$75,000 per year or more drank regular soda).

¹¹⁵ *Id.*

¹¹⁶ Colin D. Rehm et al., *Demographic and Behavioral Factors Associated with Daily Sugar-sweetened Soda Consumption in New York City Adults*, 85 J. URB. HEALTH 375, 378 (2008). The study found that soda consumption was also tied to television watching, with 38% of those watching

which are the groups most impacted by obesity and most likely to be frequent soda consumers, are more directly hit by a soda tax.¹¹⁷ These taxes erode the disposable income of the poor, making it more difficult for them to meet their immediate needs and prioritize their long-term health.¹¹⁸

2. Sin Taxes May Lead to Misappropriated Tax Revenues, Wasteful Spending, and the Creation of Black Markets for Sinful Goods and Services

In addition to disproportionately affecting the poor, sin taxes also have other significant negative consequences.¹¹⁹ For example, sin taxes are often advanced as helping fund specific programs and worthy causes, but sometimes these funds are used to satisfy other expenditures leaving only a small portion to the originally promised programs.¹²⁰ Similarly, sin tax advocates have publicly promised to link sin tax revenues to help fund certain causes in order to help get the tax passed, with the public only discovering after the fact that much of the promised revenue will actually be used to fund causes that were not previously mentioned.¹²¹ One reason sin tax revenues are often successfully diverted is that they target unpopular activities, and therefore, when cigarette tax revenue paid by smokers, for example, is used to help fund health care for low income individuals, neither the public at large nor politicians typically speak up in opposi-

five or more hours of television per day being frequent soda consumers, compared to 21% of those watching less than an hour of television per day. *Id.*

¹¹⁷ See *id.* (finding that among New York City adults, frequent consumption of sugar-sweetened soda was correlated with low household income). The article hypothesizes that the low cost of soda and the marketing in convenience stores which are commonly found in low-income New York City neighborhoods could explain the higher rates of soda consumption among the poor. *Id.* at 382.

¹¹⁸ Rachel E. Morse, Note, *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, 208 (2009); Benjamin B. Lockwood, *Regressive Sin Taxes 1* (Nat'l Bureau of Econ. Research, Working Paper No. 23085, 2017); see Hoffer et al., *supra* note 56, at 35 (suggesting that wealthier individuals have an easier time prioritizing their long-run health compared to their poorer counterparts).

¹¹⁹ See MINARDI & POULIOT, *supra* note 14 (noting that sin taxes may negatively impact the most disadvantaged populations in society).

¹²⁰ *Id.* For example, in Quebec, the government increased the tobacco tax to fund the construction of a stadium, but only 18.4% of the 48% in revenue originally promised to the project was actually used for the stadium's construction. *Id.*

¹²¹ Vargas, *supra* note 14. In Philadelphia, Mayor Kenney promised to use the soda tax revenues to fund early childhood education, but only 49% of the revenue from the soda tax will go to pre-kindergarten education. *Id.*

tion.¹²² Thus, sin taxes may help legislators cloak their true intentions under the guise of reducing some social harm.¹²³

Another major criticism of sin taxes is that the debate over their passage leads to wasteful spending, with millions of dollars being spent on lobbying efforts to fight their passage.¹²⁴ Indeed, the American Beverage Association alone has spent millions to combat soda taxes across the country, even donating ten million dollars to a Philadelphia children's hospital as a display of goodwill.¹²⁵ Conversely, proponents of soda taxes must raise substantial sums of money in order to narrow the funding gap in advertising and promotion of the taxes.¹²⁶

Sin taxes also incentivize different methods of tax avoidance either legally, through online purchases and cross-border purchases, or illegally, through the creation of black markets and trafficking, with the result being that governments not only lose a portion of sin tax revenue, but must also expend significant additional resources to combat tax evaders.¹²⁷ According to estimates by the U.S. Department of Justice, illegal cigarette trafficking, involving buying cigarettes in bulk from lower tobacco tax jurisdictions and transporting them into higher tobacco tax jurisdictions for resale, costs the Federal and state governments approximately five billion dollars in revenue each year.¹²⁸ In Denmark, the government passed a short-lived "fat tax" in October 2011 on foods with more than 2.3% saturated fat, only to find that its citizens did not decrease their consumption but rather engaged in cross-border shopping and went abroad for their groceries to avoid the tax.¹²⁹

¹²² See Kelly Phillips Erb, *Massachusetts Cigarette Taxes Raise Millions but Not for Anti-Smoking Programs*, FORBES (July 15, 2016), <https://www.forbes.com/sites/kellyphillips/2016/07/15/massachusetts-cigarette-taxes-raise-millions-but-not-for-anti-smoking-programs/#35d79bce5a02> [<https://perma.cc/B57C-FRJ5>] (reporting that not a single penny of the \$285 million generated from Massachusetts' \$1 per pack cigarette tax was used to fund anti-smoking programs).

¹²³ See MINARDI & POULIOT, *supra* note 14 (noting that sometimes sin taxes are redirected to fund programs that are unrelated to the reasons for the sin tax). Of course, sin tax revenues can also be redirected in the case of traditional sin taxes such as cigarette taxes. Erb, *supra* note 122.

¹²⁴ Mattoon & Wetmore, *supra* note 5; Hoffer, *supra* note 11.

¹²⁵ Vara, *supra* note 91. The American Beverage Association has thrown its considerable weight into fighting soda taxes before, having spent over \$100,000 in 2012 to defeat a soda tax campaign in Richmond, California. *Id.*

¹²⁶ *Id.* As part of Berkeley's campaign to pass their soda tax, the city spent over \$900,000 (\$650,000 of which came from former New York City Mayor Michael Bloomberg), but was still outspent by the American Beverage Association, which doled out over \$2 million to fight the tax. *Id.*

¹²⁷ Mattoon & Wetmore, *supra* note 5.

¹²⁸ *Id.* Smuggling cigarettes is an especially big problem in some states like Illinois because of the much lower tax rates for cigarettes in nearby Missouri and Kentucky. *Id.*

¹²⁹ MINARDI & POULIOT, *supra* note 14, at 3. The Danish government eventually abolished the fat tax just a year later in November 2012 and also scuttled its plans to impose a sugar tax. *Id.*

B. Alternatives to Sin Taxes

If governments genuinely care about improving the health of their citizens, there are a variety of ways apart from sin taxes to advance the public welfare.¹³⁰ Subsection 1 of this Section discusses the use of direct regulation, including the effects an outright ban on sinful goods and services would likely have.¹³¹ Subsection 2 discusses proposals related to improving the quality of information consumers receive at the time of purchase, which could help consumers make better decisions, all other things being equal.¹³² Finally, Subsection 3 discusses ways in which governments may improve consumer access to healthier substitutes, in effect using a “carrot” to incentivize and facilitate healthier purchases instead of the “stick” of sin taxes.¹³³

1. Direct Regulation: Outright Bans of the Sinful Good or Service

Outright bans of the sinful good or service are one way in which governments may take direct aim at the underlying sin, but they are not without their own problems.¹³⁴ Outright bans of a sinful good may seem like an extreme measure, but they have been tried in some countries, with varying degrees of success.¹³⁵ For example, in March 2017, Kenya announced it would ban plastic bags, joining Rwanda which banned non-biodegradable plastic bags in 2008.¹³⁶

An outright ban may generate negative unintended consequences, such as giving rise to black markets for the sinful good or service.¹³⁷ Indeed, even extremely high cigarette taxes in New York and Washington State have led to

¹³⁰ See generally Gary Sacks et al., ‘Traffic-light’ Nutrition Labelling and ‘Junk-food’ Tax: A Modelled Comparison of Cost-Effectiveness for Obesity Prevention, 35 INT’L J. OBESITY 1001, 1001–1009 (2011) (comparing the costs of imposing sin taxes on junk food against a policy which would require nutrition labelling to be displayed on the front of unhealthy foods).

¹³¹ See *infra* notes 134–140 and accompanying text.

¹³² See *infra* notes 141–150 and accompanying text.

¹³³ See *infra* notes 151–159 and accompanying text.

¹³⁴ See Adam J. Hoffer et al., *Sin Taxes and Sindustry: Revenue, Paternalism, and Political Interest*, 19 INDEP. REV. 47, 47, 50 (2014) (noting that a complete ban would lead to several undesirable consequences).

¹³⁵ See *Kenya Tries to Ban Plastic Bags—Again*, THE ECONOMIST (May 23, 2017), <http://www.economist.com/news/middle-east-and-africa/21719471-will-ban-make-kenya-cleaner-or-start-black-market-bags-kenya-tries> [<https://perma.cc/YVL7-HLAV>] [hereinafter *Kenya Ban*] (noting that Kenya had tried and failed to prohibit plastic bags on two other occasions in 2007 and 2011); see also Zumbach, *supra* note 97 (stating that Chicago had tried and failed to ban disposable plastic bags before successfully passing a seven cent tax on disposable paper and plastic bags).

¹³⁶ Emilie Clavel, *Think You Can’t Live Without Plastic Bags? Consider This: Rwanda Did It*, GUARDIAN (Feb. 15, 2014), <https://www.theguardian.com/commentisfree/2014/feb/15/rwanda-banned-plastic-bags-so-can-we> [<https://perma.cc/XL8X-NGLY>] (describing how Rwanda banned plastic bags in 2008 and the country’s plans to potentially ban other types of plastic as well); *Kenya Ban*, *supra* note 135. Kenyans are estimated to use about twenty-four million plastic bags each month, or roughly two per person. *Kenya Ban*, *supra* note 135.

¹³⁷ *Kenya Ban*, *supra* note 135.

cross-border shopping and expanding black markets for cigarettes.¹³⁸ In Rwanda, after the government banned plastic bags, a black market arose selling plastic bags smuggled in from nearby Congo.¹³⁹ In addition, outright bans may cause economic harm and job loss to the industry whose goods are subject to the ban, and consumers looking to avoid the ban may simply switch to other alternatives, which would severely undermine the benefits of the ban.¹⁴⁰

2. Improved Labeling of Sinful Goods and Services

While taxes (through higher prices) may signal to consumers the unhealthy nature of certain items like sugary drinks, some advocates have proposed that such signals be made more clear and explicit, with manufacturers of sinful goods being required to feature health warning labels directly on their products.¹⁴¹ Under this approach, consumers would be given additional and higher quality information to encourage them to make healthier choices prior to making a purchase, rather than being punished for their sinful purchases after the fact.¹⁴²

For example, as a consequence of the Affordable Care Act and other state and local laws, chain restaurants will be required to label their menu items with information including the number of calories in their offerings.¹⁴³ With the caloric content of menu items more transparent to restaurant patrons, the new menu labeling requirements are designed to incentivize restaurants to introduce healthier alternatives, and indeed, many restaurants have developed healthier, lower-calorie items in response.¹⁴⁴

¹³⁸ Hoffer, *supra* note 134, at 50. According to 2013 statistics from the Washington State Department of Revenue, it is estimated that some 101.4 million packs of cigarettes in Washington were purchased without paying the cigarette tax. *Id.*

¹³⁹ *Kenya Ban*, *supra* note 135.

¹⁴⁰ *Id.* Given a ban on plastic bags, some speculate that consumers will respond by turning to paper bags which would put greater stress on forests. *Id.*

¹⁴¹ Eliza Barclay, *Warning Labels Might Help Parents Buy Fewer Sugary Drinks, Study Finds*, NPR (Jan. 14, 2016), <http://www.npr.org/sections/thesalt/2016/01/14/463061869/warning-labels-might-help-parents-buy-fewer-sugary-drinks-study-finds> [<https://perma.cc/2T4D-KWVD>]. Currently, California, New York, and Baltimore are considering proposals that would make labeling sugary drinks with health warnings mandatory. *Id.*

¹⁴² See Hoffer, *supra* note 56 (noting that some economists have proposed better educating consumers about the health consequences of their consumption choices and increasing the visibility of healthier alternatives).

¹⁴³ *Menu Labeling Requirements*, <https://www.fda.gov/Food/GuidanceRegulation/GuidanceDocumentsRegulatoryInformation/LabelingNutrition/ucm515020.htm> [<https://perma.cc/R75P-3DZ6>] (last updated Nov. 11, 2017). The menu labeling rule applies to restaurants and chain retail food establishments with twenty or more locations. *Id.* Though the menu labeling requirement originated as part of the Affordable Care Act and set an initial deadline of December 1, 2015, for restaurants to comply with the requirements, the compliance date has since been extended several times with the current deadline now set for May 7, 2018. *Id.*

¹⁴⁴ Pratt, *supra* note 85, at 90. The restaurant Romano's Macaroni Grill has already revamped its fettucine alfredo dish in the wake of a federal menu labeling law to reduce its calorie count from 1,130 to 770 calories and nearly halved its saturated fat content. *Id.* at 122. In anticipation of the new menu

In a study of approximately 2400 parents from a variety of backgrounds, researchers found that sixty percent of parents would choose to purchase a sugar-sweetened beverage if that beverage did not have a health-warning label affixed to it.¹⁴⁵ Interestingly, the number of parents who would choose to purchase the sugar-sweetened beverage dropped to forty percent if the sugar-sweetened beverage had a warning label on it.¹⁴⁶ Thus, the study indicates that in the context of sugary drinks, providing more information to parents on the health effects of sugary drinks may constitute a major factor in their ultimate purchasing decisions for their children.¹⁴⁷

In the context of junk food, so-called “traffic-light nutrition labelling” proposals which would mark foods with different colors based on their total fat, saturated fat, sugar, and salt contents have gained traction in recent years.¹⁴⁸ A 2011 Australian study analyzed the effects of traffic-light labelling on junk food and found that the enhanced labelling would lead to similar body mass index and weight reductions in both males and females compared to if those same items were instead subject to an obesity tax.¹⁴⁹ Thus, both the sugar-sweetened beverage study and the traffic-light nutrition labelling study seem to strongly suggest that providing consumers with better nutritional information and education through enhanced labelling can promote healthier decision-making and lifestyles.¹⁵⁰

3. Improving Access to Healthier Alternatives

Proponents of sin taxes argue that consumers will simply switch to healthier substitutes when faced with a sin tax on a good, but this view presupposes that a healthier substitute exists (what would a healthy substitute be for a cigarette?) that is comparable in price and a reasonably good substitute for the sinful

labeling requirements, chains like Starbucks, Au Bon Pain, and The Cheesecake Factory have responded by reworking their offerings and developing lower-calorie alternatives. *Id.*

¹⁴⁵ See Christina A. Roberto et al., *The Influence of Sugar-Sweetened Beverage Health Warning Labels on Parents' Choices*, 137 PEDIATRICS 1, 6, 9 (2016) (concluding that health warning labels on sugary drinks have increased parents' awareness of the health consequences associated with consuming the beverages and may lead to parents decreasing purchases of sugary drinks for their children).

¹⁴⁶ *Id.* The warning labels featured text such as: “Safety Warning: Drinking beverages with added sugar[s] contributes to obesity, diabetes, and tooth decay.” *Id.*

¹⁴⁷ See Barclay, *supra* note 141 (cautioning that the study is encouraging but does not offer any details on how effective the warning labels might be if implemented in reality).

¹⁴⁸ See generally Sacks, *supra* note 130. Traffic-light nutrition labelling would use the three colors on a traffic light to mark whether the food contains low (green), medium (yellow), or high (red) levels of that nutrient. *Id.* at 1002. Traffic-light nutrition labelling has been recommended by the Food Standard Agency in the United Kingdom since 2006. *Id.*

¹⁴⁹ *Id.* at 1005.

¹⁵⁰ See Barclay, *supra* note 141 (noting that labels on sugary drinks put consumers on notice about the negative consequences of consuming the beverages and also seemed to affect their buying decisions).

item.¹⁵¹ Thus, in addition to the fact that consumers may not know of viable, healthier substitutes for their sinful consumption, consumers also may not have proper access to them, even if they were made aware of their existence.¹⁵² A 2009 study by the U.S. Department of Agriculture, found that 2.3 million families live both over a mile away from a supermarket and do not have a car.¹⁵³ Food deserts, defined as areas that lack a supermarket, moreover tend to be associated with poorer and minority neighborhoods.¹⁵⁴ Thus, governments need to be cognizant of the fact that even if consumers could be convinced to live healthier lives and steer away from unhealthy consumption, some consumers may be unable to, owing to a lack of access to healthier alternatives and ready access to fast food.¹⁵⁵ People who live in areas with limited access to supermarkets tend to turn to small grocery or convenience stores, which often either do not sell the same selection of healthy foods as supermarkets or sell them at a substantial markup.¹⁵⁶ Thus, in many cases, the same price conscious consumers who would be subject to sin taxes on unhealthy items are effectively taxed on access to healthy foods as well by virtue of where they live.¹⁵⁷

While some have pointed out that poorer areas may not have the demand to support an affordable healthy food supply, governments could, for example, offer subsidies or alter their zoning policies to incentivize supermarkets to set up shop in underserved areas.¹⁵⁸ Further, changing consumer preferences by providing better nutritional education and information on these products may also drum up demand for healthier goods.¹⁵⁹

¹⁵¹ See Hoffer, *supra* note 56, at 10 (suggesting that one reason consumers are relatively indifferent about price changes in soda, candy, and fast food may be that they simply are either unaware of or cannot find adequate substitutes).

¹⁵² *Id.* The elasticity of demand for a good depends on the availability of viable substitutes for that good, with goods which have relatively few substitutes tending to be demand-inelastic. *Id.*

¹⁵³ ECON. RESEARCH SERV., U.S. DEP'T OF AGRIC., ACCESS TO AFFORDABLE AND NUTRITIOUS FOOD: MEASURING AND UNDERSTANDING FOOD DESERTS AND THEIR CONSEQUENCES 35 (2009). Another 3.4 million households, or 3.2% of the U.S. population, live between a half mile and one mile from a supermarket and do not own a car. *Id.* at 20.

¹⁵⁴ Renee E. Walker et al., *Disparities and Access to Healthy Food in the United States: A Review of Food Deserts Literature*, 16 HEALTH & PLACE 876, 876 (2010). In addition to having fewer supermarkets, studies have found that residents in minority neighborhoods also are more frequently targeted by advertisements for tobacco and alcohol products and have a harder time gaining access to medications. *Id.*

¹⁵⁵ See ECON. RESEARCH SERV., *supra* note 153 (noting that the types of foods individuals have access to are important factors in their diet and their risk for obesity and other related diseases).

¹⁵⁶ *Id.*

¹⁵⁷ See *id.* (detailing one study of 40,000 U.S. households which found that consumers who get their groceries from convenience stores usually pay higher prices on average compared to those who shop at supermarkets).

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

III. THE INHERENT LIMITATIONS OF SIN TAXES AND SUGGESTED REFORMS FOR CURRENT AND FUTURE SIN TAXES

The twin aims of sin taxes, raising revenue and curbing the quantity of socially undesirable behaviors, are in fact intimately tied to one another and in constant tension.¹⁶⁰ Governments should be aware that the revenue raised by sin taxes tends to be unsustainable and actually may decline over time, suggesting that while a sin tax may be effective in deterring some sinful consumption, its effects are not limitless, particularly in the long run.¹⁶¹ By way of illustration, tobacco taxes have been successful in decreasing smoking amongst existing smokers and in deterring new users from taking up smoking, but studies also have shown that after the initial decline in usage, there is a point where the level of consumption no longer decreases.¹⁶² This suggests that there seems to be a segment of the smoking population whose demand is so inelastic that *any* price increases in the form of tobacco taxes has no effect at all on their purchases of tobacco products.¹⁶³ Indeed, legislators must understand that a key limitation of sin taxes is that they exhibit diminishing marginal returns with respect to curbing demand of sinful goods, with successive tax increases eventually producing fewer benefits on net.¹⁶⁴

Interestingly, regardless of the actual sin tax rate set by governments, the quantity of sinful consumption is also constrained from the outset by the price-elasticity of the good.¹⁶⁵ In studies measuring consumer responsiveness to price

¹⁶⁰ MINARDI & POULIOT, *supra* note 14, at 1. If sin taxes effectively reduce consumption of sinful goods and services, then the amount of tax revenue governments are able to collect from sin taxes will fall. *Id.*; see Mattoon & Wetmore, *supra* note 5 (questioning whether sin taxes are truly intended to curb sinful behaviors or simply raise revenue for state governments).

¹⁶¹ Mattoon & Wetmore, *supra* note 5. Government revenue does increase with rises in tobacco taxes, but the additional revenue is not always maintainable over time. *Id.*

¹⁶² MINARDI & POULIOT, *supra* note 14.

¹⁶³ *Id.* In Quebec for instance, 40% of Quebecers smoked in 1987, but from 2003–2014, tobacco usage stayed at around 24% notwithstanding the fact that in the same time period, the price of cigarettes increased by 100%. *Id.*

¹⁶⁴ See *id.* (warning that while sin tax increases have been justified because of their ability to change consumption habits, such desired changes may not always be feasible). When taxes no longer decrease the individual's consumption level, the sin tax effectively operates to punish that individual by forcing them to pay ever increasing prices for the sinful good. *Id.*; see also Mattoon & Wetmore, *supra* note 5 (discussing that while sin taxes have been criticized for being regressive and disproportionately burdening the poor, the poor are also more likely to quit smoking as a result of higher tobacco taxes, and thus also disproportionately benefit from the sin tax).

¹⁶⁵ See Hoffer, *supra* note 56, at 8–9 (describing several studies that sought to quantify the median price elasticity (a measure of consumers' responsiveness to price changes) for various sinful goods, with the median price elasticity of sweets found to be -0.34, meaning that a 1% increase in the price of sweets only reduced consumption by 0.34%). A price elasticity that has an absolute value less than one means the good is demand-inelastic. *Id.* at 9. By way of comparison, cigarettes and alcohol had approximately the same median price elasticities of -0.40 and -0.497, respectively, while soft drinks had a median price elasticity of -0.79, suggesting consumers are much more responsive to changes in the price of soft drinks than cigarettes or alcohol. *Id.*

changes in soft drinks, sweets, cigarettes, and alcohol, researchers found that the price elasticity for each of these items was well below one, which means that a 1% increase in price (as a result of the tax) produces a less than 1% reduction in quantity.¹⁶⁶ Consequently, while sin taxes do influence individual behavior, their ability to affect consumer purchases is somewhat attenuated given the strongly inelastic nature of the sins being taxed.¹⁶⁷

While sin taxes are far from perfect tools, governments may redesign them in certain ways to better serve both their revenue-raising and consumption curbing goals.¹⁶⁸ For starters, the amount of the tax is often either too large or too small.¹⁶⁹ Taxes on alcohol tend to be set too low to discourage consumption while taxes on tobacco products are so high that they eliminate smoking altogether.¹⁷⁰ Ironically, if a sin tax is set too high, it will be too effective at discouraging unhealthy consumption and raise little revenue, but if the tax is set too low, it will provide considerable revenue but not curb sinful consumption in any meaningful manner.¹⁷¹

In addition to more precisely calibrating the actual amount of sin taxes, the revenue derived from some sin taxes is usually not designated for public health programs at all.¹⁷² For example, in Philadelphia, the soda tax was advertised to primarily help fund universal prekindergarten and not anti-obesity programs.¹⁷³ In this context, earmarking some of the revenue to fund nutritional programs and

¹⁶⁶ *Id.* at 9.

¹⁶⁷ *Id.*

¹⁶⁸ See Brownell, *supra* note 72 (noting that while taxing sugar-sweetened beverages may lead to private and public health benefits, such taxes are often too small to be effective at deterring consumption of sugary drinks).

¹⁶⁹ *Id.*

¹⁷⁰ Hoffer, *supra* note 56, at 3.

¹⁷¹ MINARDI & POULIOT, *supra* note 14, at 3. Furthermore, if sin taxes are set too high, black markets for the taxed good may arise and thus dramatically reduce the amount of sin tax revenue collected. See SCOTT DRENKARD, CIGARETTE TAXES AND CIGARETTE SMUGGLING BY STATE, 2015 1 (2017), <https://files.taxfoundation.org/20171106130335/Tax-Foundation-FF565.pdf> [<https://perma.cc/8MGF-CZRL>] (finding that New York, which has the highest cigarette tax in the country, also had the highest rate of smuggled cigarettes entering the state, with about 56.8% of cigarettes consumed in New York in 2015 having entered as a result of smuggling); Kevin Hartnett, *Boston's Black-market Cigarette Problem*, BOS. GLOBE (Feb. 2, 2014), <https://www.bostonglobe.com/ideas/2014/02/02/boston-black-market-cigarette-problem/mJpfuuFZXXYxrBiEgTcyJM/story.html> [<https://perma.cc/ZKK3-BNFJ>] (reporting that in Boston, approximately 40% of cigarettes consumed were obtained through the black market as part of smokers' efforts to avoid the state cigarette tax). Smuggling can be casual, involving small quantities purchased in one area being transported to another for personal consumption, or commercial, operating on a larger scale and potentially involving counterfeit state tax stamps or counterfeit sinful goods themselves. DRENKARD, *supra*.

¹⁷² See Vargas, *supra* note 14 (describing how revenue from the soda tax passed in Philadelphia would be divided up amongst homelessness programs, disability settlements, parks and recreation, and early childhood education).

¹⁷³ *Id.* Indeed, of the \$409.5 million projected to be raised in the five years after the passage of the Philadelphia soda tax, only \$4.5 million will be allocated to providing a healthy beverages tax credit. *Id.*

anti-obesity efforts instead of universal prekindergarten would more directly help the same populations that are hit hardest by the tax.¹⁷⁴ Highlighting the importance of *how* the sin tax revenue will be utilized is a 2008 poll of New York residents in which 52% of those polled said they would support a soda tax, with the percentage in support of a soda tax jumping up to 72% if the soda tax revenue was specifically used to support anti-obesity programs for children and adults.¹⁷⁵ Thus, lawmakers would do well to consider tying sin tax revenues to programs that take aim at the heart of the underlying sinful consumption, as doing so may increase their chances of garnering the public support that is so crucial to getting a particular sin tax passed.¹⁷⁶

In consideration of the foregoing, one way to overcome the inherent tension of sin taxes would be to adopt a hybrid approach: first, calibrate sin taxes to a moderate level that maximizes tax revenue, earmark those revenues to fund public health programs, and then regulate manufacturers of sinful goods directly to help curb sinful behavior and advance the public health.¹⁷⁷ For example, in the context of obesity taxes, governments could pass sin taxes on sugary drinks and fatty foods (and thus generate much needed revenue), but couple these taxes with traffic-light nutritional labeling and initiatives to increase consumer access to healthier alternatives.¹⁷⁸ If governments truly seek to justify non-traditional sin taxes on the basis of their public health benefits, then it may be more effective to rely on more targeted measures, such as imposing mandatory labelling on

¹⁷⁴ Brownell, *supra* note 72, at 1603. When it comes to tobacco taxes, some of the tax revenue has been specifically directed towards programs for the poor, who tend to be the most impacted by smoking-related illnesses. *Id.*

¹⁷⁵ *Id.* at 1603–04; see Michael F. Jacobson & Kelly D. Brownell, *Small Taxes on Soft Drinks and Snack Foods to Promote Health*, 90 AM. J. PUB. HEALTH 854, 856–57 (2000) (suggesting that taxing soft drinks, candy, chips, and other snack foods could help raise substantial revenues for public health campaigns). Public health building campaigns can be quite cost-effective, as a push to get consumers to drink lower fat milk in Clarksburg, West Virginia, significantly increased the number of people drinking fat-free milk at a total cost of only about twenty-two cents per person over seven weeks. Jacobson & Brownell, *supra*, at 857.

¹⁷⁶ See Brownell, *supra* note 72 (suggesting that taxes on sugar-sweetened beverages are most popular when the revenues are used for nutritional and anti-obesity programs).

¹⁷⁷ See Jacobson & Brownell, *supra* note 175 (proposing that governments tax high-calorie, fatty and sugary foods modestly and use the revenues to support public health initiatives); Hoffer, *supra* note 56, at 4 (describing how programs that seek to provide consumers with better information may influence their purchasing decisions). Calibrating the sin tax rate to the proper level can both raise revenue and shift consumption to benefit public health. Hoffer, *supra* note 56, at 6–7.

¹⁷⁸ See Hoffer, *supra* note 56, at 4 (noting the limitations of both sin taxes, which bring in revenue but may not carry all of the public health benefits in theory, and purely behavioral policies which may positively affect consumer behavior but do not generate any revenue). See generally Walker, *supra* note 154 (noting that the differences in morbidity and mortality among neighborhoods may be partially explained by the presence or absence of supermarkets).

sinful goods and services to help consumers make healthier purchase decisions.¹⁷⁹

While sin taxes can be very powerful “sticks” in affecting consumer decision-making, a redesigned sin tax which combines sin taxes with a few more “carrots” to nudge consumers into making healthier consumption decisions for themselves and those around them may well achieve the best of both worlds.¹⁸⁰

CONCLUSION

Sin taxes have been and remain a tremendously valuable tool for governments around the world to raise revenue. However, as the list of sins has expanded, many goods and services are being branded as sins not because they are socially harmful, but simply because they are merely disfavored or unpopular. The successes sin taxes have enjoyed and the relative lack of political resistance in passing them has made them an incredibly attractive tool for raising revenue, and the risk is now very real that lawmakers will fall down a slippery slope and tax any socially unpopular activity as a way to raise much needed funds. However, with many of the new non-traditional sin taxes, the public health justifications that have traditionally been cited in support of sin taxes do not apply with the same weight, if at all. At the same time, the costs in terms of regressivity and unintended consequences are far greater than with traditional sin taxes on alcohol and tobacco. Thus, governments must avoid the tantalizing low-hanging fruit that taxing socially stigmatized goods and services represent and consider alternatives to advancing public health, such as mandating warning labels on unhealthy goods and services. If governments are to strike a proper balance between revenue-raising and curbing sinful consumption, they must both encourage and empower consumers to make healthier decisions for themselves and not rely solely on the stick of sin taxes. Sin taxes work well as revenue-raising tools because they rely on addicts whose inelastic demand is resistant to price increases, but it appears now as though it is legislators who are addicted to the idea of using sin taxes.

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¹⁷⁹ See Hoffer, *supra* note 56, at 33 (noting that in addition to taxes on cigarettes, bans on cigarette advertising and warning label requirements have been used to curb cigarette smoking).

¹⁸⁰ *Id.* at 4 (distinguishing sin taxes, which are a form of hard paternalism from soft paternalism which involves providing consumers with better information about available alternatives).

