

TAXING OR PENALISING? TOBACCO, OBESITY AND TAXATION

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ABSTRACT

The paternalistic overtones of sin taxes conflict with current social norms concerning freedom, yet even the champion of liberty, J S Mill, allowed for corrective taxation in some instances. In light of his writings and by reference to the history of tobacco taxation in New Zealand, this article revisits the question of corrective taxation. The acceptability of such taxation to modify harmful behaviour continues to be a live issue given recent calls to combat obesity by taxing fatty foods and sugary drinks.

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I INTRODUCTION

If you can recall these phrases, your age is showing:

More Doctors smoke Camels than any other cigarette.¹

A spoonful of sugar makes the medicine go down, in the most delightful way!²

Times have changed: you won't see that Camel advertisement anymore; in fact you won't see *any* tobacco advertising anymore. And Mary Poppins just might be censured (if not censored) for encouraging obesity – and in children, no less! Smoking is now depicted as anti-social, and spoons full of sugar are no longer considered 'delightful' – even when others are not around to see (or smell) it. Given the ineffectiveness (let alone unpopularity) of outright prohibition, the current default position seems to be 'if you can't stop it, tax it!'³

Tobacco and sugar have both long been tapped for revenue by way of customs duty or GST, but tobacco is also subject to specific, corrective taxes intended to reduce or eliminate consumption. Annual 10 per cent increases in the tobacco excise since 2011,⁴ intended not merely to reduce but to eliminate smoking, are a key element in New Zealand's Smokefree Aotearoa 2025 policy.⁵ This policy contrasts with the general direction of New Zealand tax policy in recent decades that has been characterised by 'a light-handed approach to regulation [which] typically has not supported using the tax system to influence behaviour.'⁶ Rather the 'apparent success of excise duties in reducing demand for tobacco'⁷ provides a precedent for a similar approach to address the emerging obesity problem by taxing sugary drinks and fatty foods, and five recent articles in the *New Zealand Journal of Taxation Law and Policy* offer tobacco taxation as a precedent, if not justification, for proposed taxes to reduce harmful consumption of sugar and fat.⁸

¹ R.J. Reynolds Tobacco Company, 'More Doctors smoke Camels than any other cigarette', advertisement for R.J. Reynolds Tobacco Company, 1946. This slogan was used in print, radio and television advertising.

² *Mary Poppins* (Directed by Robert Stevenson, Walt Disney, 1964).

³ Terry Maguire, 'If You Can't Stop It, Tax It – How a King's Tobacco Obsession Has Left Us in a Mess' (2011) 287 *Pharmaceutical Journal* 727.

⁴ *Excise and Excise-equivalent Duties (Tobacco Products Indexation and Separate 10% Increase) Amendment Order 2010* (NZ).

⁵ Health Promotion Agency, *Smokefree Aotearoa 2025* <<http://www.smokefree.org.nz/smokefree-in-action/smokefree-aotearoa-2025>>.

⁶ Jessica Burns-Grant and Lisa Marriott, 'An Institutional Perspective on Fighting Obesity via the GST System: A New Zealand Case Study' (2012) 18(2) *New Zealand Journal of Taxation Law and Policy* 190, 204.

⁷ Jonathan Barrett, 'Fat Taxes: A Proportionality Approach' (2012) 18(3) *New Zealand Journal of Taxation Law and Policy* 242, 242.

⁸ *Ibid.* See also Lin Mei Tan and James Xun Liu, 'Curbing the Consumption of Soft Drinks in New Zealand: Is Tax the Solution?' (2014) 20(2) *New Zealand Journal of Taxation Law and Policy* 203, 209: 'Proponents of a soft drink tax argued that the rationale behind such a tax is not very different from the taxing of tobacco/cigarettes, which has been used successfully as a strategy to control or deter smoking'; Judith

Tobacco taxation seems not only inconsistent with current tax policy settings; it also conflicts with general social policy that asserts individual freedom concerning lifestyle choices and life issues such as soft drug use, the right to privacy in sexual matters, and even (the rather life-endangering practice of) euthanasia.⁹ John Stuart Mill's assertion that 'over himself, over his own body and mind, the individual is sovereign'¹⁰ is now generally accepted and underpins post-World War Two social policy.¹¹ Compulsion, 'either in the direct form or in that of pains and penalties for non-compliance, is no longer admissible as a means to their own good, and justified only for the security of others.'¹²

Why, then, is the tax system still used to modify private consumption behaviour? In other words, is it appropriate for the state to use its taxing power to compel persons to forego an activity that causes harm to themselves? Certainly, Parliament has the *power* to do this, but does such a tax fit within a system that is committed to neutrality, that is, designed so as not to bias people into acting in ways that would not be preferred in the absence of tax?¹³

This article does not discuss whether increased taxes are *effective* in promoting health or in reducing harmful consumption. Rather, it contributes to the discussion on corrective ('sin') taxes by reviewing the development of tobacco taxation in New Zealand since it became a British Colony in 1840. This review is set against the backdrop of certain writings of J S Mill (1806–73), who 'profoundly influenced the shape of nineteenth century British thought and political discourse.'¹⁴ Mill's discussion of individual sovereignty in *On Liberty* would, at first glance, seem to preclude the use of taxation as a means to modify private behaviour. However, while eschewing paternalism, Mill was no libertarian, for he grew up in an age of 'Benthamism and Chartism: with an emphasis on scientific method, statistics, sound administration, and a belief in the centralizing powers

Pinny, 'Tax Working Group Myopia: The Omission of Corrective Taxes to Deal with Obesity' (2010) 16(3) *New Zealand Journal of Taxation Law and Policy* 325, proposed food taxes on a similar basis to extant tobacco and alcohol taxation that would mirror current practice with tobacco, alcohol and petrol, ie an excise tax on certain foods in addition to GST; Burns-Grant and Marriott, above n 6, 213: 'While food and beverage taxes are a paternalistic policy approach, history provides many examples of successful interventions, for example, ... taxes on tobacco'; Helene Stuart and Adrian Sawyer, 'An Excise Tax on Unhealthy Food or the Removal of GST from Healthy Food as a Way of Managing Obesity: A New Zealand Perspective' (2013) 19(2) *New Zealand Journal of Taxation Law and Policy* 112, 118: 'An example of how excise taxes have been effective in New Zealand is tobacco consumption.'

⁹ The End of Life Choice Bill, a private members' bill, was introduced to the New Zealand Parliament on 8 June 2017.

¹⁰ John Stuart Mill, *On Liberty* (Gertrude Himmelfarb ed, Penguin, first published 1859, 1974 ed) 69.

¹¹ H L A Hart, *Law, Liberty and Morality* (Oxford University Press, 1963), noted that the recommendations of the Wolfenden Committee, which distinguished between law and morality, 'are strikingly similar' to those expounded by Mill in his essay *On Liberty*, above n 10, 14; while disagreeing with Hart, Lord Devlin also devoted a chapter to 'Mill on Liberty in Morals': Patrick A Devlin, *The Enforcement of Morals* (Oxford University Press, 1965). See also John Wolfenden, *Report of the Committee on Homosexual Offences and Prostitution* (Home Office, 1957).

¹² Mill, *On Liberty*, above n 10, 69.

¹³ Victoria University of Wellington Tax Working Group (TWG), *A Tax System for New Zealand's Future: Report of the Victoria University of Wellington Tax Working Group* (Centre for Accounting, Governance and Taxation Research, Victoria University of Wellington, January 2010) 13.

¹⁴ Colin Heydt, *John Stuart Mill (1806–1873)* Internet Encyclopaedia of Philosophy <<http://www.iep.utm.edu/milljs>>. Also John Skorupski, 'Mill, John Stuart' in Ted Honderich (ed), *The Oxford Companion to Philosophy* (Oxford University Press, 1995).

of the state.¹⁵ There is an inevitable conflict between the freedom of an individual to act as he or she wishes, and the role of the state in promoting social norms.

Since the purported effectiveness of taxes on tobacco is used to justify the taxation of other socially disapproved products, the topic is relevant both in New Zealand and internationally. This article proceeds as follows: the next section discusses the relationship between taxation and society and relates this to tobacco taxation, before considering the writings of J S Mill, who famously argued against paternalism in *On Liberty*. Next, the article summarises the history of tobacco taxation in New Zealand, before relating this to current calls for corrective taxes on certain foods and drinks. After discussion, the article concludes.

Full disclosure: the author does not smoke, and this article is not intended to provide an argument for or against smoking, or a review or evaluation of conflicting claims concerning the costs and effects of smoking or the effects of taxes on behaviour; that discussion is readily available elsewhere.¹⁶ Nor, despite his sweet-tooth, is the author obese.

II BACKGROUND

Taxation has been defined as ‘an individual sacrifice for a collective goal.’¹⁷ Since tax is an inevitable fact of social life,¹⁸ fiscal history is both causal and symptomatic of society.¹⁹ Taxation ‘provides an insight into the laws of social being and becoming ... as well as into the manner in which concrete conditions ... grow and pass away,’²⁰ and taxation is a means to enable society to meet its social and economic goals.²¹ Consequently:

¹⁵ Edmund Bohan, *Edward Stafford: New Zealand's First Statesman* (Hazard Press, 1994) 13.

¹⁶ For a record of the anti-smoking movement in New Zealand, see Ian McIntosh, *A Force to be Reckoned with: ASH (Action on Smoking and Health) The Twenty-One Year History of ASH* (Action on Smoking and Health, 2004). For a contrarian view, see Christopher Snowden, *Velvet Glove, Iron Fist: A History of Anti-Smoking* (Little Dice, 2009). For a critique of tax measures on smoking, see John W O'Hagan and Kevin M Carey, ‘The Proposal for Upward Alignment of Tobacco Tax in the European Community: A Critique’ (1988) 8 *British Tax Review* 329.

¹⁷ Ferdinand H M Grapperhaus, *Tax Tales from the Second Millennium* (International Bureau of Fiscal Documentation, 1998) 1. In contrast, the Oxford English Dictionary (OED), provider of ‘the meaning of everything’ (Simon Winchester, *The Meaning of Everything: The Story of the Oxford English Dictionary* [Oxford University Press, 2003]) ignores this broader context when it defines taxation as ‘a compulsory contribution to the support of government, levied on persons, property, income, commodities, transactions...’: OED, *taxation*, *n.* OED Online, Oxford University Press <<http://www.oed.com/view/Entry/65780?rskey=BtQ9ZE&result=1>>.

¹⁸ If tax is ‘an individual sacrifice for a collective goal’, then taxation presupposes a collectivity – a society – to and for whom the sacrifice is made: no society, no tax. Yet if government is necessary for the maintenance of society, and governments ‘cannot be supported without great Charge’ (John Locke, ‘Second Treatise on Government’ in Peter Laslett [ed], *John Locke: Two Treatises of Government* [Cambridge University Press, 1988] 362 [2.140]), some form of taxation is necessary to establish and maintain government and thus society: no tax, no society.

¹⁹ Joseph Schumpeter, ‘The Crisis of the Tax State’ in Richard Swedberg (ed), *The Economics and Sociology of Capitalism* (Princeton University Press, 1991) 101.

²⁰ *Ibid* 99.

²¹ Silvia A Madeo, Kenneth E Anderson and Betty R Jackson, *Somerfield's Concepts of Taxation* (Dryden Press, 1995) 4.

taxes have been central to the formation of civic identity across place and time ... Nearly every issue with which [sociologists] are concerned runs through the issue of taxation. They signify who is a member of our political community, how wide we draw the circle of 'we'.²²

Taxes may promote inclusion; to be a 'taxpayer' may be a mark of social membership.²³ However, taxes may (further) stigmatise particular individuals or groups (based on, eg, religion,²⁴ race or gender,²⁵ or even consumption behaviour), placing them on the periphery of society. Taxes, primarily intended to raise revenue, may ordinarily be distinguished from fines, which are exacted as the penalty for an offence.²⁶ However, certain exactions referred to as taxes partake of the character of fines or penalties; the larger the exaction and the more restrictive the objective, the more likely that the exaction should be classified as a penalty rather than a tax.²⁷

A Corrective Taxes

The 2010 Victoria University of Wellington Tax Working Group (TWG) distinguished between two types of taxes:

revenue taxes, those that are about raising revenue (for example income taxes and GST) to fund government spending on things like health and welfare; and

corrective taxes, those that are specifically designed to promote or discourage behaviours or to address the perceived costs of some activities.²⁸

Unlike revenue taxes, which lack a clear nexus between the tax and specific outcomes, corrective taxes have a specific social or economic goal in view.²⁹ The former are end-

²² Isaac W Martin, Ajay K Mehrotra and Monica Prasad, 'The Thunder of History: The Origins and Development of the New Fiscal Sociology' in Isaac W Martin, Ajay K Mehrotra and Monica Prasad (eds), *The New Fiscal Sociology: Taxation in Comparative and Historical Perspective* (Cambridge University Press, 2009) 1, 1.

²³ Nancy C Staudt, 'The Hidden Costs of the Progressivity Debate' (1997) 50 *Vanderbilt Law Journal*, 919. This is certainly true of indirect taxes. In the past, direct taxes were only levied on foreigners. James Coffield, *A Popular History of Taxation: From Ancient to Modern Times* (Longman, 1970) 3, notes that: 'The ancients, and especially the Romans, took a very natural, if selfish view of taxation. The main burden of their taxes did not fall on Roman citizens. It fell on those who were not citizens, their subject peoples living in the provinces. That was what the provinces were for ... We have a long way to travel before we reach the modern notion that a citizen is born in order to be taxed.'

²⁴ Esposito suggests that the Islamic poll tax (Jizyah) is a form of protection money: see John L Esposito, *Islam: The Straight Path* (Oxford University Press, 1991) 37.

²⁵ Race and gender are major concerns of critical tax theory: see Anthony C Infanti and Bridget J Crawford, *Critical Tax Theory: An Introduction* (Cambridge University Press, 2009).

²⁶ OED, *fine*, n.¹ OED Online, Oxford University Press <<http://www.oed.com/view/Entry/70359?rskey=5pV8Rg&result=1#eid>>.

²⁷ Madeo, Anderson and Jackson, above n 21, 5.

²⁸ TWG, above n 13, 13.

²⁹ Although it is primarily intended to raise revenue for general purposes, progressivity in the income tax is also directed toward a social outcome, namely society's demand for equity by affecting the distribution of (post-tax) income. See, eg, Walter J Blum and Harry Kalven Jr, 'The Uneasy Case for Progressive Taxation' (1952) 19 *University of Chicago Law Review* 417, 520: 'The case for progression, after a long critical look, turns out to be stubborn but uneasy'; Henry C Simons, *Personal Income Taxation: The Definition of Income as a Problem of Fiscal Policy* (University of Chicago Press, 1938) 128: 'the objective of policy must be

independent, whereas the latter are end-focused, with taxation being a (if not *the*) means to that end.³⁰ Certainly, corrective taxes may provide revenue, but they 'are often also justified on other grounds, or viewed as serving a special purpose.'³¹ As a form of 'negative tax expenditure',³² corrective taxes are 'intended to treat certain taxpayers or activities disadvantageously ... at a higher rate compared to what would be considered the government's benchmark tax system; so taxes imposed on cigarettes and alcohol may be regarded as negative tax expenditures.'³³ At the extreme, there may be no intention to raise revenue at all, for the tax is intended to extinguish the taxed behaviour.

'Sin taxes', a subset of corrective taxes, is 'a popular term for fees charged for guilty pleasures or human indulgence, such as smoking cigarettes and drinking alcohol',³⁴ and are intended to discourage certain socially disapproved activities.³⁵ Since they may also provide considerable revenue, there is a conflict between the revenue goal, which is met when tax revenue is maximised, and the social goal, which would be met if the harm were eliminated and no revenue collected. Even if the revenue is hypothecated for, say, health promotional activities, the ethical issue arises whether a tax on something 'bad' can be justified by the revenue it generates for something 'good'.³⁶

B Tax Policy

As a type of sumptuary law, intended to regulate expenditure,³⁷ corrective taxation has a long history, and was consistent with the interventionist social and economic policy typical of much of the 20th century. The 1967 Taxation Review Committee, commissioned by the New Zealand government 'to carry out a comprehensive review ... and to report upon any changes in taxation law or practice which appear to be desirable',³⁸ took as a given that 'the tax system must also be so designed that it can help achieve broad social

fairness among persons, not fairness among kinds of receipts (whatever that might be construed to mean).' However, the primary (and original) rationale for income taxation is to raise revenue.

³⁰ This distinction was developed by Friedrich Hayek: see Rob Vosslander, 'The Road to Freedom? Hayek and New Zealand's Tax Depreciation' (2014) 9(1) *Journal of the Australasian Tax Teachers Association* 126.

³¹ Sijbren Cnossen, 'Economics and Politics of Excise Taxation' in Sijbren Cnossen (ed), *Theory and Practice of Excise Taxation* (Oxford University Press, 2005) 2. In the context of excise taxation, Cnossen refers to revenue and corrective taxes as general and specific taxes respectively.

³² Mark Burton and Kerrie Sadiq, *Tax Expenditure Management: A Critical Assessment* (Cambridge University Press, 2013) 22.

³³ Ibid.

³⁴ Peter Lorenzi, 'Sin Taxes' (2004) 41(3) *Social Science and Public Policy* 59, 60. Corrective taxes that are not sin taxes would include non-neutral taxes not based on a specific moral cause, eg fuel taxes.

³⁵ For example, the property speculation tax was intended to discourage a specific activity: see Rob Vosslander, "'Removing a Parasitic Element": Speculation, Housing Affordability and the 1973 Property Speculation Tax' (2015) 21(2) *New Zealand Journal of Taxation Law and Policy* 169.

³⁶ Lorenzi, above n 34, 59.

³⁷ OED, *sumptuary*, *adj.* (*and n.*) OED Online, Oxford University Press <<http://www.oed.com/view/Entry/194039?redirectedFrom=Sumptuary#eid>>. See also *Sumptuary Laws: Europe, 1450 to 1789: Encyclopedia of the Early Modern World* Encyclopedia.com <<http://www.encyclopedia.com/social-sciences-and-law/law/law/sumptuary-laws>>.

³⁸ L N Ross, *Taxation in New Zealand: Report of the Taxation Review Committee* (Government Printer, 1967) 8 [Introduction].

objectives',³⁹ and not merely raise revenue. While acknowledging that 'tax policy should not normally seriously interfere with the choices of course of action of members of society, consistent with the welfare of others',⁴⁰ the 1967 Committee noted that this freedom should be 'consistent with the attainment of other objectives and conforming with accepted views of rights and duties.'⁴¹ There would be a trade-off between individual freedom and social claims, and the government was expected to intervene for the social good. Finance Minister (1967–72; 1975–84) and Prime Minister (1975–84) Rob Muldoon aptly summarised this post-war view that:

The whole concept of government is based on intervention ... Intervention is what government is about, and in a democracy it is the people who decide whether that intervention is acceptable and if they say, 'No, it is not,' then they proceed to change the government.⁴²

A shift from intervention to individualism occurred in the 1960s and 1970s, and in tax policy from the mid-1980s as the focus of New Zealand economic policy shifted from intervention to market neutrality.⁴³ In relation to tax, neutrality means that 'taxation does not alter the allocation of resources',⁴⁴ as opposed to 'an unneutral tax [which] will usually result in a deviation from an existing pattern of resource utilisation.'⁴⁵ Since the mid-1980s, this approach to regulation which opposed the use of taxes to influence behaviour⁴⁶ was most evident in the 2001 Tax Review, which maintained that:

The broad base low rates approach developed over the last twenty years is sound and should be continued ... Any exceptions to a broadly neutral approach can be a thin end of a wedge and unravel an overall general approach.⁴⁷

On this basis, the Review argued against excise taxes on alcoholic beverages, tobacco, gaming and petrol for:

although they raise a significant amount of revenue, they seem out of step with the low rate, broad base approach taken in respect of our other tax bases ... On tax policy grounds, we have a strong preference for the transparent approach to taxation exemplified by GST, which makes tax burdens independent of how New Zealanders choose to spend their money. In our view, the current excise and duty regime cannot readily be justified on conventional tax policy grounds.⁴⁸

³⁹ Ibid [8]. The earlier 1951 Taxation Committee appointed by the government had noted that '[t]axes should be levied with due regard to the encouragement of primary and secondary production but made no mention of social goals, perhaps reflecting the focus on returning to a post-war economy': T N Gibbs, *Report of the Taxation Committee* (Government Printer, 1951) [57].

⁴⁰ Ibid [13].

⁴¹ Ibid.

⁴² Robert D Muldoon, *The New Zealand Economy: A Personal View* (Endeavour Press, 2005) 119.

⁴³ See, eg, Martin Holland and Jonathan Boston, *The Fourth Labour Government: Politics and Policy in New Zealand* (Oxford University Press, 1990).

⁴⁴ Harold M Groves, 'Neutrality in Taxation' (1948) 1(1) *National Tax Journal* 18, 19.

⁴⁵ Ibid 20.

⁴⁶ Burns-Grant and Marriott, above n 6.

⁴⁷ Robert McLeod et al, *Tax Review 2001: Final Report* (New Zealand Government, 2001) [IIf].

⁴⁸ Ibid [IVf].

As noted above, the TWG similarly distinguished between revenue and corrective taxes. However, despite its championing of a broad base low rate (BBLR) tax system that would 'minimise the behavioural changes caused by tax',⁴⁹ the TWG side-stepped the issue of corrective taxes as falling outside the scope of their review.⁵⁰ Corrective taxes are an exception that proves the rule of the current New Zealand BBLR tax philosophy.

C J S Mill On Liberty

Given their corrective intent and the imbalance of power between the taxpayer and the taxpayer, corrective taxes are redolent of paternalism. Pure paternalism has been defined as 'an interference with a person's liberty of action justified by reasons referring exclusively to the welfare, good, happiness, needs, interests or values of the person being coerced.'⁵¹ Against such paternalism, Mill argued for 'one very simple principle' that:

the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others. He cannot rightfully be compelled to do or forbear because it will make him happier, because, in the opinion of others to do so would be wise, or even right.⁵²

However, Mill's subsequent discussion indicates that this principle is far from simple. In discussing the state's role in regulating consumption behaviour by taxing it, he wrote:

A further question is, whether the State, while it permits, should nevertheless indirectly discourage conduct which it deems contrary to the best interests of the agent; whether, for example, it should take measures to render the means of drunkenness more costly ... On this as on most other practical questions, many distinctions require to be made. To tax stimulants for the sole purpose of making them more difficult to be obtained, is a measure differing only in degree from their entire prohibition; and would be justifiable only if that were justifiable. Every increase of cost is a prohibition, to those whose means do not come up to the augmented price; and to those who do, it is a penalty laid on them for gratifying a particular taste. Their choice of pleasures, and their mode of expending their income, after satisfying their legal and moral obligations to the State and to individuals, are their own concern, and must rest with their own judgment.⁵³

Mill appears to tolerate no interference in the actions of another except to prevent that person from harming others: 'the individual's own good is *never* a sufficient warrant for the exercise of compulsion either by the society as a whole or by its individual

⁴⁹ TWG, above n 13, 14.

⁵⁰ Ibid. This was criticised by Pinny, above n 8.

⁵¹ Gerald Dworkin, 'Paternalism' (1972) 56(1) *The Monist* 64, 65. The issue of morality in law was addressed by Hart and Fuller in their famous debate: see Peter Cane (ed), *The Hart-Fuller Debate in the Twenty-First Century* (Hart Publishing, 2010). See also the detailed discussion in Joel Feinberg, *Harm to Self: the Moral Limits of the Criminal Law Vol 3* (Oxford University Press, 1986).

⁵² Mill, *On Liberty*, above n 10, 68.

⁵³ Ibid 170

members,'⁵⁴ for, 'Over himself, over his own body and mind, the individual is sovereign.'⁵⁵ However, Mill makes several provisos.

First, individuals must satisfy their legal and moral obligations to the state, and taxation is one such obligation. The nature and extent of this obligation is far from clear, leading to 'ideologically loaded battles over tax policy that are the bread and butter of politics.'⁵⁶ In fact, Mill exempted revenue taxation from his principle. On the one hand, to tax stimulants 'for the sole purpose of making them more difficult to be obtained is a measure differing only in degree from their entire prohibition, and would be justifiable only if that were justifiable.'⁵⁷ Yet while this consideration 'may seem at first sight to condemn the selection of stimulants as special subjects of taxation for purposes of revenue,'⁵⁸ Mill concluded that 'taxation for fiscal purposes is absolutely inevitable.'⁵⁹ In his day, indirect taxes provided a major source of revenue, so 'the State, therefore, cannot help imposing penalties, which to some persons may be prohibitory, on the use of some articles of consumption.'⁶⁰ It was certainly appropriate that taxes be imposed on 'commodities the consumer can best spare',⁶¹ but fiscal pragmatism trumped liberty, for, 'taxation, therefore, of stimulants up to the point which produces the largest amount of revenue ... is not only admissible, but to be approved of.'⁶² Such taxes should be classified as *revenue* taxes rather than *corrective* taxes, and therefore not inconsistent with Mill's anti-paternalistic principle. The need of government to raise revenue could trump individual freedom, even if this, regrettably, led to discrimination.

Mill's principle further prohibited interference where the activity harmed the agent only. Where others may be harmed by the individual's actions, intervention was justified. This could be extended to include corrective taxes to compensate others or society for the costs the activity imposed on others (but not on self), and to justify a 'quid pro quo' approach, which Mill elsewhere disparaged.⁶³ In a social context, taxation may be a means to share this cost. Since 'no man is an island',⁶⁴ and few behaviours other than thought have no effects on others (eg smoking always has some effect on the environment), it is difficult to find examples of activities that have no social effects.⁶⁵

⁵⁴ Dworkin, above n 51, 64

⁵⁵ Mill, *On Liberty*, above n 10, 69.

⁵⁶ See Liam Murphy and Thomas Nagel, *The Myth of Ownership: Taxes and Justice* (Oxford University Press, 2005) 4.

⁵⁷ Mill, *On Liberty*, above n 10, 170f.

⁵⁸ *Ibid* 171.

⁵⁹ *Ibid*.

⁶⁰ *Ibid*.

⁶¹ *Ibid*.

⁶² *Ibid*.

⁶³ John S Mill, *Principles of Political Economy with Some of Their Applications to Social Philosophy* (William J Ashley ed, Longmans, Green, Reader and Dyer, 1876) 485.

⁶⁴ John Donne, 'Devotion XVII' in T W and R J Craik, *John Donne: Selected Poetry and Verse* (Methuen, 1986) 166. Mill expressed and addressed the concern: 'How (it may be asked) can any part of the conduct of a member of society be a matter of indifference to the other members? No person is an entirely isolated being; it is impossible for a person to do anything seriously or permanently hurtful to himself, without mischief reaching at least to his near connections, and often far beyond them': Mill, *On Liberty*, above n 10, 141.

⁶⁵ 'One is always well-advised to illustrate one's definitions by examples but it is not easy to find "pure" examples of paternalistic influences': Dworkin, above n 51, 65.

Mill further qualified his principle to apply only to 'human beings in the maturity of their faculties'⁶⁶ and not those under age, or for 'those backward states of society in which the race itself may be considered as in its nonage.'⁶⁷ Such groups were appropriate targets of a (benign) paternalism. However, there is a danger that disagreement with a social norm (eg regarding smoking) is taken to be ignorance due to immaturity, and that intervention is therefore justified to remedy this defect. Individual freedom may all too easily end up being identified with conformity to social norms and expectations.

Earlier, in his *Principles of Political Economy*,⁶⁸ Mill appeared to have taken a different, and apparently contradictory, tack. There he peremptorily excluded 'all taxes on the necessities of life',⁶⁹ but argued that taxes on luxuries 'operate in some cases as an useful, and the only useful, kind of sumptuary law.'⁷⁰ In particular, stimulants provide a preferred basis of taxation for:

though in themselves as legitimate indulgences as any others, [they] are more liable than most others to be used in excess, so that the check on consumption, naturally arising from taxation, is on the whole better applied to them than to other things.⁷¹

In summary, Mill's liberty principle would seem to preclude corrective taxation on consumption unless it resulted in harm to others, since harm to self is no grounds for intervention. However, Mill accepted taxation on stimulants on economic grounds since taxation is inevitable, and stimulants provide a ready source of taxation. Besides, if tobacco is a luxury, it may be taxed.⁷² Mill also betrayed an incipient paternalism in only extending full liberty to those of age and in advanced stages of society – ignorance or immaturity might justify intervention. Moreover, Mill allowed for sumptuary laws to curb social harm. Although Mill argued against paternalism, he permitted a broad role for government for 'it is not admissible that the protection of persons and that of property are the sole purposes of government. The ends of government are as comprehensive as those of the social union.'⁷³

Mill's ambiguity reflects the difficulties of balancing the rights of an individual with those of society in general. Taxation in general provides a striking, if often invisible, instance of the question of the relative rights and responsibilities of the individual and the community. These issues are somewhat latent (if not ignored) in the case of revenue

⁶⁶ Mill, *On Liberty*, above n 10, 69.

⁶⁷ Ibid.

⁶⁸ Mill, *Principles*, above n 63. For discussion of this apparent conflict in Mill's thought, see Barry S Clark and John E Elliott, 'John Stuart Mill's Theory of Justice' (2001) 59(4) *Review of Social Economy* 467, 487, who argue that Mill's overriding goal was the expansion of social utility, but regarded 'individual interests as both an effect and a cause of social institutions. Well-designed institutions can enlarge the sentiment of justice among citizens, thereby promoting the development of higher capacities and social utility'. Mill is caught on the dilemma of individual freedom and social cohesion.

⁶⁹ Mill, *Principles*, above n 63, 523.

⁷⁰ Ibid 524.

⁷¹ Ibid 525. Adam Smith similarly distinguished between luxuries and necessities as objects of taxation, for 'it is the luxurious and not the necessary expense of the inferior ranks of people that ought to be taxed': Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (E Cannan ed, Methuen, first published 1776, 1950 ed) vol II 484.

⁷² Mill, *Principles*, above n 63, 486.

⁷³ Ibid 485.

taxes.⁷⁴ In contrast, since corrective taxes affect individual choices and behaviour, they raise questions of human freedom in a social context. At the extreme, such taxes may be difficult to distinguish from fines and penalties, in intent (and effect) placing the taxpayer outside the socially drawn circle of 'we'.

D Summary

1 Ability to pay

Despite his 'one simple principle', Mill provides revenue-based justifications for the discriminatory taxation of tobacco (and other 'sinful' goods). Like other goods, tobacco may be taxed for revenue purposes and, given the need for revenue, tobacco may provide a more productive tax base than other goods. This is suggested by the Ramsey Rule, which posits that tax rates on goods should be inversely related to their elasticity of demand.⁷⁵ Demand for price-inelastic goods is less affected by increases in price, so tax revenue should continue to increase as tax rates rise. If tobacco is addictive, tax increases will not have a direct effect on demand and so revenue will increase. However, no good is totally price inelastic in a world of scarcity, for excise taxes could raise the price of a commodity above consumers' abilities to pay, leading to both efficiency and equity concerns. If so, revenue may decline as consumers reduce their purchases of the taxed commodity, or resort to smuggling or other illicit behaviour. If revenue is the aim, increasing excise taxes may become counterproductive.⁷⁶

Mill also questioned the justice of consumption taxes given the ability of taxpayers to pay the tax, and specifically excluded 'all taxes on the necessities of life.'⁷⁷ However:

The duties which now yield nearly the whole of the customs and excise revenue, those on sugar, coffee, tea, wine, beer, spirits, and tobacco, are in themselves where a large amount of revenue is necessary, extremely proper taxes; but at present grossly unjust,

⁷⁴ The 'morality' of progressive taxation provides one exception, see above n 29.

⁷⁵ Frank P Ramsey, 'A Contribution to the Theory of Taxation' (1927) 37(145) *The Economic Journal* 47.

⁷⁶ Arthur B Laffer, *Handbook of Tobacco Taxation: Theory and Practice* (Laffer Center at the Pacific Research Institute, 2014). This concern has recently been raised in New Zealand, following significant increases in the rates of excise: see Nick Truebridge and Jamie Small, 'Government at "High Risk" of Losing \$10 Million Annually if Tobacco Black Market Surges', *Stuff.co.nz* (online), 15 January 2017, <<http://www.stuff.co.nz/national/88414136/government-at-high-risk-of-losing-10-million-annually-if-tobacco-black-market-surges>>. Aside from this modern form of smuggling, there are also reports of an increase in burglaries of convenience stores to obtain cigarettes: see, eg, Blair Ensor and Sam Sherwood, 'Black Market for Cigarettes Fuels Robberies in Canterbury', *Stuff.co.nz* (online), 30 August 2016, <<http://www.stuff.co.nz/national/crime/83723820/Black-market-for-cigarettes-fuels-robberies-in-Canterbury>>; Editorial, 'Tobacco Sellers Need Security for Stocking "Gold"', *New Zealand Herald* (online), 2 June 2017, <http://www.nzherald.co.nz/opinion/news/article.cfm?c_id=466&objectid=11867575>.

⁷⁷ Adam Smith had earlier argued for taxation to be levied on luxuries rather than necessities. The latter were necessary for the support of life, including 'whatever the custom of the country renders it indecent for creditable person, even of the lowest order, to be without.' In contrast, taxes on luxuries, since they were borne by the consumer, acted as a form of sumptuary law, and would not harm the 'sober and industrious' poor, for 'it is the luxurious and not the necessary expense of the inferior ranks of people that ought ever to be taxed': Smith, above n 71, vol II 465, 483. If tobacco was a luxury, it provided an appropriate taxation base since the taxpayer would have the ability to pay. However, despite a hint of paternalism in designating certain goods as luxuries, Smith's focus was on revenue, not correction.

from the disproportionate weight with which they press on the poorer classes; and some of them (those on spirits and tobacco) are so high as to cause a considerable amount of smuggling. It is probable that most of these taxes might bear a great reduction without any material loss of revenue.⁷⁸

This is a particular concern when those on lower incomes consume more of the taxed commodity, as is the case with unhealthy foods and tobacco.⁷⁹ Since excise taxes are borne by the end user, they are regressive.

2 *Benefits theory*

In his *Principles*, Mill denounced the benefits basis for taxation, which he castigated as the 'quid pro quo' principle.⁸⁰ However, Mill limited his liberty principle to actions that harmed no one but the actor. Where an action has social effects (ie externalities), the state might well intervene, perhaps by imposing a Pigouvian tax, in an attempt to equalise the private benefit and social costs of an activity by taxing that activity.⁸¹ It is difficult, if not impossible, however, to measure and match the actual costs of an activity, and the relevance in a social welfare state is questionable given the no-fault basis of social welfare (not to mention the public Accident Compensation Scheme in New Zealand).

LeGrand provided a modified benefits-based argument in respect of tobacco taxation, arguing that where individual behaviour causes a social cost that is outside the individual's control (eg due to an inherited condition), the community should finance the resulting costs.⁸² However, where a risk is clearly identified with certain voluntary activities (such as smoking) those who engaged in these activities should bear the resulting costs. LeGrand argued that his approach did not depend on value judgements, but McLachlan questioned why smoking, but not other activities that also create social costs (McLachlan adduces sexual activity), should be singled out for taxation in a polity where healthcare is publicly provided.⁸³ Like Mill, McLachlan accepted that a tax on tobacco was a good *revenue* tax, for 'it can be raised without a public outcry [and] it is easy and cheap to collect'⁸⁴ – but argued against the paternalism of tobacco taxation, since '[p]aternalism as such is, in general, a poor basis for public policy.'⁸⁵

3 *Paternalism*

The above justifications for corrective taxes are based either on revenue grounds, or on the harm they cause to others. The latter are not strictly paternalistic in that they have

⁷⁸ Mill, *Principles*, above n 63, 523.

⁷⁹ Ibid 526.

⁸⁰ Ibid.

⁸¹ Arthur C Pigou, *The Economics of Welfare* (Palgrave Macmillan, 2013) 185, 224: ie where the marginal private net product falls short of marginal net social product, the state may intervene to equalise the two, for example by taxation.

⁸² Julian LeGrand, *Equity and Choice: An Essay in Economics and Applied Philosophy* (HarperCollins, 1991).

⁸³ Hugh V McLachlan, 'Smokers, Virgins and Health Care Costs' (1995) 21 *Journal of Medical Ethics* 209; Hugh V McLachlan 'Tobacco, Taxation and Fairness' (2002) 28 *Journal of Medical Ethics* 381.

⁸⁴ McLachlan, 'Tobacco', above n 83, 383.

⁸⁵ Ibid.

reference to harm to others, and not to self, and so may not fall foul of Mill's 'one simple principle'. Mill did permit paternalism in the case of those under age (in mind, body or culture), but not otherwise. However, although Mill argued against paternalism, he permitted a large role for government, if indeed the ends of government were as comprehensive as those of society.⁸⁶ This would suggest that corrective taxation on tobacco might not be inconsistent with liberty, and provide a means to promote social goals such as the promotion of health.

III TOBACCO TAXATION IN NEW ZEALAND

There has been a range of justifications for tobacco taxation in New Zealand, but only recently has correction overshadowed the original revenue motivation. This section provides a summary history of the taxation of tobacco taxation in New Zealand.

A Context

New Zealand followed British precedent, where tobacco has always been subject to tax as a source of revenue. Tobacco was introduced into Western Europe around 1560, and arrived in England later that decade.⁸⁷ It was lauded by some for its sanitary and curative properties,⁸⁸ and hailed as 'the long-sought *panacea*, the herb that would heal all ills',⁸⁹ but was opposed by others on 'medicomoral' grounds.⁹⁰ In 1604 King James I published his *Counterblaste against Tobacco* in which he argued that 'there cannot be a more base, and yet hurtfull, corruption in a Countrey, then is the vile vse (or other abuse) of taking *Tobacco* in this Kingdome ...'.⁹¹ Among the ills tobacco produced, King James noted lust and bewitchment (which we might call addiction); consequent indolence in the service of the King and Commonwealth; waste and indebtedness; and pollution of home and breath. In conclusion, the use of tobacco was '[a] custome loathsome to the eye, hatefull to the Nose, harmfull to the braine, daungerous to the lungs, and in the blacke stinking fume thereof, neerest resembling the horrible Stigian smoke of the pit that is bottomelesse.'⁹²

King James' arguments sound both archaic and modern; archaic in the overt paternalism that as God's vicegerent he endeavoured to exercise concerning his subjects,⁹³ yet modern in offering a range of moral, medical and economic arguments against tobacco.

⁸⁶ Mill, *Principles*, above n 63, 475.

⁸⁷ Stephen Dowell, *A History of Taxation and Taxes in England from the Earliest Times to the Year 1885* (Longmans Green, 1888) 245.

⁸⁸ *Ibid* 246.

⁸⁹ David Harley, 'The Beginnings of the Tobacco Controversy: Puritanism, James I, and the Royal Physicians' (1993) 67(1) *Bulletin of the History of Medicine* 28, 29.

⁹⁰ *Ibid* 28. See also Simon Schama, *The Embarrassment of Riches: An Interpretation of Dutch Culture in the Golden Age* (Vintage Books, 1987) ch 3.

⁹¹ King James I, 'A Counterblaste to Tobacco' in James Craigie (ed), *Minor Prose Works of King James VI and I* (Scottish Text Society, first published 1604, 1982 ed) 83, 85. All archaic spellings as in the original.

⁹² *Ibid* 99.

⁹³ See King James I, 'The Trew Law of Free Monarchies' in James Craigie (ed), *Minor Prose Works of King James VI and I* (Scottish Text Society, first published 1604, 1982 ed) 59–86.

Despite royal objections, popular demand for tobacco created significant economic opportunities that the Crown was only too happy to exploit. Like other imports, tobacco was initially subject to the standard 2-pence per pound duty under the general heading in the Book of Rates for the Customs.⁹⁴ Rather than prohibit the use of tobacco, King James adopted the 'pragmatic approach'⁹⁵ of levying a tax of 6-shillings 8-pence per pound in addition to the standard 2-pence duty. This forty-fold hike in duty did not stem the spread of the tobacco habit, and His Majesty's Revenue benefitted accordingly. Tobacco became a royal monopoly in 1624, and local cultivation was prohibited and smuggling suppressed.⁹⁶ The English tobacco duty was adjusted frequently to meet revenue needs,⁹⁷ and before 1789 amounted to nearly 400 per cent of the value of the tobacco,⁹⁸ higher than the current level in New Zealand. The ambiguous moral status and health effects of tobacco, coupled with its revenue potential, justified high levels of taxation, and the British fiscal system was heavily reliant on indirect taxes such as those on tobacco.⁹⁹

B New Zealand

The first New Zealand excise legislation, the Customs Regulation Ordinance, replaced the New South Wales rules that had previously applied in New Zealand.¹⁰⁰ It was effective from 1 July 1841 and followed the declaration of New Zealand as a British colony two months earlier. Unlike other dutiable goods that were levied ad valorem, tobacco (like spirits and strong waters) was subject to a specific duty that was adjusted over time.

Given centuries of tobacco taxation in England, there was little need for discussion in the New Zealand Parliament during the 19th century, although there was pressure from free traders to simplify the tariff by levying the whole duty of customs on a few articles at a fixed rate.¹⁰¹ During discussion of the Duties of Customs Bill 1854, a member noted that the rates should be charged upon the luxuries rather than the necessities of life, but that instead it was charged on the articles of import upon which the duty could most easily and certainly be collected, including sugar and tobacco.¹⁰² As an accepted and justifiable source of revenue, tobacco continued to be subject to duty since it might be regarded as a luxury, and the tax was easy to collect.

The taxation of tobacco provided a ready source of revenue, but also an opportunity for local economic development. The *Tobacco Act 1879* (NZ) provided an inducement for tobacco growing in New Zealand by introducing a tax expenditure, 'a bonus of sixpence for every pound of tobacco manufactured in the colony on which the duty hereby imposed

⁹⁴ Dowell, above n 87, 248.

⁹⁵ Harley, above n 89, 42.

⁹⁶ Snowdon, above n 16, 19.

⁹⁷ Dowell, above n 87, 245ff.

⁹⁸ Ibid 257.

⁹⁹ Martin Daunton, *Trusting Leviathan: The Politics of Taxation in Britain, 1799–1914* (Cambridge University Press, 2001) 161.

¹⁰⁰ David McGill, *The Guardians at the Gate: The History of the New Zealand Customs Department* (Silver Owl Press for the New Zealand Customs Department, 1991).

¹⁰¹ New Zealand, *Parliamentary Debates*, 8 September 1854, 388.

¹⁰² The 'free trade bill' was finally passed in 1858.

shall be paid, and such bonus shall be paid by the Customs as a refund of revenue.¹⁰³ The 1930 Tobacco Industry Select Committee confirmed the appropriateness of tariff protection for local industry.¹⁰⁴ Since most tobacco was imported, tariff policy also permitted differentiation between nations to effect foreign policy preferences, as was evident in the *Customs Amendment Act 1921* (NZ).¹⁰⁵

Moral and health arguments against smoking were raised in the popular press and by various groups in society.¹⁰⁶ Paternalism was evident in the enactment of the *Juvenile Smoking Suppression Act 1903* (NZ),¹⁰⁷ a non-revenue measure that made it an offense to sell tobacco to youths under 15 years of age, or for such youth to smoke in a public place. The motivation for the legislation was that 'the question of the effect of smoking upon the juvenile population had been very much discussed,'¹⁰⁸ in light of a high level of refusals of potential army enlistees for the Boer War, for 'If a man's body were matured and healthy, smoking could do him little or no harm ... But, as far as youngsters were concerned, there could be little doubt that the effect of smoking upon the nerve system and the heart was distinctly bad.'¹⁰⁹ Moreover, smoking was said to lead a boy into crime.¹¹⁰ However, not all agreed; one MP noted that 'as to any one saying that boys under the age of sixteen years were injured by smoking the thing was absurd.'¹¹¹ Besides, he could not find more than one medical man out of fifty who did not smoke. Ironically, youth were exempted from the operation of the Act if they could produce a certificate from a legally qualified medical practitioner to the effect that the using or smoking of tobacco, cigars or cigarettes was beneficial to the health of such youth!¹¹² While it might be tempting to see this legislation related to physical well-being, the impetus was rather 'moral health and the welfare of society'.¹¹³

¹⁰³ *Tobacco Act 1879* (NZ) s 12.

¹⁰⁴ George C Black (Chairman), 'Report of the Tobacco Industry Committee' [1930] I AJHR I 17.

¹⁰⁵ See New Zealand Government, *New Zealand Official Yearbook 1931* (Government Printer, 1930); Paul Goldsmith, *We Won, You Lost, Eat That! A Political History of Tax in New Zealand since 1840* (David Ling Publishing, 2008) 155. Preferential treatment to encourage trade within the British Empire was introduced in the *Preferential and Reciprocal Trade Act 1903*. 'In 1903 the Legislature of New Zealand, with the object of encouraging trade between this country and other parts of the British Empire, imposed a surtax upon certain goods not being the produce or manufacture of some part of the British dominions. This may be regarded as the small beginning of what under the tariff of 1907 came to be a substantial qualification of the ordinary rates.' (New Zealand Government, *New Zealand Official Yearbook 1908* [Government Printer 1908], 415f.)

¹⁰⁶ This ambiguity is evident in the Roman Catholic weekly, the *New Zealand Tablet*, which published occasional comments on nicotine. In an article entitled 'Nicotine and Longevity', which somewhat sarcastically suggested that the demise of a certain Abraham Elmer at the age of 119 was due to nicotine poisoning: *New Zealand Tablet*, 20 February 1902. An earlier article noted that '[w]hether tobacco smoking is injurious or not has long been a debateable subject': *New Zealand Tablet*, 8 December 1882.

¹⁰⁷ A similar bill had been passed by the Legislative Council in 1901, but was not discussed in the House of Representatives: New Zealand, *Parliamentary Debates*, 17 November 1903, vol 127, 665. See also Sarah Thomson, *Evils of 'the Fragrant Weed': A History of the 1903 Juvenile Smoking Suppression Act* (MA Research Essay, University of Auckland, 1992).

¹⁰⁸ New Zealand, *Parliamentary Debates*, 11 November 1903, vol 127, 489.

¹⁰⁹ New Zealand, *Parliamentary Debates*, 11 November 1903, vol 127, 489f.

¹¹⁰ New Zealand, *Parliamentary Debates*, 11 November 1903, vol 127, 667.

¹¹¹ New Zealand, *Parliamentary Debates*, 11 November 1903, vol 127, 668.

¹¹² *Juvenile Smoking Suppression Act 1903* (NZ) s 4.

¹¹³ Thomson, above n 107, 42.

Aside from concerns about youth smoking, health was not raised as a rationale for government intervention. Instead, tobacco tax increases were motivated by revenue considerations. Like other taxes, the tobacco excise was increased significantly during World Wars One and Two to help pay for the wars, but the most (in)famous increase occurred in peacetime – the doubling of tobacco taxes in Finance Minister Nordmeyer's 1958 'black' Budget – to 'serve the two-fold purpose of providing sufficient revenue for Government needs and of diminishing demand for imports.'¹¹⁴ Significantly, health concerns were not mentioned in that budget or discussed in the ensuing parliamentary debates; rather, the budget was deprecated as 'an attack on the worker's standard of living',¹¹⁵ increasing the taxes on a worker's little luxuries – tobacco, alcohol and motor vehicles.

C Tobacco and Health

The first history of public health in New Zealand, which was published in 1964, made no mention of tobacco, not even in the section dealing with air pollution.¹¹⁶ Significantly, this was the year of the influential United States' Surgeon General's Report that confirmed a link between smoking and lung cancer.¹¹⁷ Similarly, the New Zealand 1967 Taxation Review Committee made no mention of health concerns, but recommended the continuation of excise duties:

in view of the nature of the commodities taxed, their importance in general to the revenue and the acceptability of excise in the public mind, we do not consider that the mere fact of regression in this sector of the tax field is of itself a sufficient reason for any change, provided the tax system as a whole is progressive.¹¹⁸

The link between tobacco taxation and health was expressed by Rob Muldoon, the Minister of Finance, in his 1970 Budget statement in which he offered several reasons for increasing the tax on tobacco.¹¹⁹ First, the government faced a deficit, and the required shortfall would be met by increasing the tax on cigarettes and tobacco. Besides, it was clear that tobacco could be subjected to additional tax 'without harming in any way the general welfare of the community',¹²⁰ suggesting that he considered tobacco a luxury rather than a necessity. Besides the revenue motive, Muldoon expanded on the corrective motive by stating that 'it is increasingly argued that discouraging the consumption of these commodities is likely to make a positive contribution to our general health.'¹²¹

¹¹⁴ New Zealand, *Parliamentary Debates*, 26 June 1958, vol 316, 285. See also Rob Vosslander, 'Narrating History: New Zealand's "Black Budget" of 1958' (2012) 17(3-4) *Accounting History* 481.

¹¹⁵ Keith Sinclair, *Walter Nash* (Auckland University Press, 1976) 311.

¹¹⁶ George Thomson and Nicholas Wilson, 'Resource Document: A Brief History of Tobacco Control in New Zealand' (Australasian Faculty of Public Health Medicine, 1997).

¹¹⁷ Luther L Terry, 'Smoking and Health: Report of the Advisory Committee to the Surgeon General of the Public Health Service' (Publication No 1103, US Department of Health, Education, and Welfare, Public Health Service, 1964).

¹¹⁸ Ross, above n 38, 372.

¹¹⁹ Robert Muldoon, 'Statement' [1970] I *AJHR*, B6A, 12, Statement.

¹²⁰ Muldoon, above n 119, 12.

¹²¹ *Ibid.*

Revenue continued to be a motivation for higher levels of taxation on tobacco, but the corrective justification changed over time. While the concern in 1970 was to improve the general health of the population, in his 1977 Budget Muldoon shifted from a focus on health to the related cost to society: 'The government is concerned at the high level of public expenditure caused directly and indirectly by the consumption of tobacco and alcohol. The adverse effects on health of smoking and drinking have been well publicised.'¹²² The increased taxation revenue would 'help sustain the high level of spending on health, including the extension of community health services.'¹²³ Tobacco was an appropriate target for a Pigouvian tax, if the related costs were social, but paternalistic if such cost were borne by the smoker.

In the 1979 Budget speech, the rhetoric shifted to the more overtly paternalistic concern about 'increasing social costs which consumption ... imposes on the community as a whole, as well as on individual consumers.'¹²⁴ Sales tax was added to the excise 'to remove the consequent inducement to consume ... and at the same time to recoup some of the real social and economic costs which their consumption imposes.'¹²⁵ However, revenue (which would increase by up to \$100 million in a full year) remained a motivation for the tax, but Muldoon acknowledged the effect of 'consumer reaction'¹²⁶ – indicating that tobacco might indeed be price elastic. Aside from the revenue motive, cost recovery, rather than the suppression of smoking, remained the primary focus.

The subsequent Lange Labour Government (1984–90) cited encouragement from 'people concerned about public health'¹²⁷ as justification for raising tobacco taxes, as were international comparisons of the tax component of the retail price of cigarettes. The corrective focus also shifted from cost recovery to smoking reduction; an annual increase in the tax was 'part of our measures to increase tax revenue and decrease the incidence of smoking ...'.¹²⁸ Inflation indexation of the excise was introduced in 1989.¹²⁹

The 1986 Budget was the last to specifically mention increased revenue as a benefit of tobacco taxation. A significant increase in the tobacco excise in 1998 was intended 'to reinforce the Government's smoking reduction strategy.'¹³⁰ This strategy was reinforced in 2011 with the announcement of an increase of the tobacco excise by 10 per cent over and above inflation in each of the following four years, a policy extended in 2016 for a further four years. The Finance Minister acknowledged the work of the Māori Party and its members in advocating this policy in the Māori Affairs Select Committee's *Inquiry into the Tobacco Industry in Aotearoa and the Consequences of Tobacco Use for Māori*.¹³¹ This report recommended that the government 'aim for tobacco consumption and smoking

¹²² Robert Muldoon, 'Budget' [1977] I AJHR B6, 41.

¹²³ Ibid 42.

¹²⁴ Robert Muldoon, 'Budget' [1979] III AJHR B6, 30.

¹²⁵ Ibid 31.

¹²⁶ Ibid.

¹²⁷ Roger Douglas, 'Budget' [1986] II AJHR B6, 38.

¹²⁸ Ibid.

¹²⁹ David Caygill, 'Budget' [1989] II AJHR B6, 27.

¹³⁰ Winston Peters, 'Budget' [1998] V AJHR B2.

¹³¹ Tau Henare, 'Inquiry into the Tobacco Industry in Aotearoa and the Consequences of Tobacco Use for Māori: Report of the Māori Affairs Committee' [2010] II AJHR I10A.

prevalence to be halved by 2015 across all demographics, followed by a longer-term goal of making New Zealand a smoke-free nation by 2025.¹³²

D Summary

Why was tobacco taxed in New Zealand? The parliamentary record suggests that revenue was the main motivation until 1970, along with economic development and trade policy. Subsequently, health concerns provided a second, and now ostensibly primary, justification for the tax. Both justifications are still evident, with the latter more commonly expressed to justify the tax, even as the tax take continues to provide substantial revenue. Tobacco taxation has thus come full circle. King James may have objected to tobacco taxation on paternalistic grounds, but he and his successors realised the revenue potential of this 'luxury'. More recently, corrective motivations have been prominent, while tobacco continues to provide a source of revenue.

IV OBESITY

The concerns motivating tobacco taxation are now repeated in calls to tax sugary drinks and fatty foods for health reasons. Like tobacco, sugar has long provided a steady source of revenue (but not corrective) taxation. In Britain,

[i]n the Victoria and Edwardian period, Liberal and Labour demanded the 'free breakfast table', arguing that taxes on necessities – tea, coffee, sugar – should be repealed. Most indirect taxes fell on tobacco, beer and spirits, which were not covered by the general opposition to indirect taxes.¹³³

Like tobacco, if the demand for sugar is inelastic, it provides a fertile tax base. However, equity concerns were raised since sugar was mainly used by the lower classes: 'At present abstainers from sugar are to be found principally among the richer classes, in those who think it too fattening, or who act under the mistaken notion that it produces acidity.'¹³⁴

New Zealand has no corrective taxes on sugar or sugar-related products, which are subject to GST at the standard rate, but like other developed countries there is pressure to use corrective taxation of sugar or sugary drinks to address the obesity epidemic. Selective taxation of sugar needs to be justified,¹³⁵ particularly given New Zealand's commitment to BBLR, where 'ordinarily, market forces are left to determine the allocation of resources.'¹³⁶ Moreover, 'unlike a tax on money or property, a government measure that seeks to interfere with people's choices about their bodies is a deep human

¹³² Ibid 5.

¹³³ Daunton, above n 99, 223

¹³⁴ Dowell, above n 87, 32, see generally 22–32.

¹³⁵ This article does not address the prior question of whether (and if so, how) taxation per se might be justified. It could be argued that all taxes now require some form of justification given the doctrine of parliamentary intendment.

¹³⁶ Patricia Meng San leong, 'Curbing Harms through Price Control: Alcohol Excises versus Minimum Prices' (2012) 18(3) *New Zealand Journal of Taxation Law and Policy* 303.

rights issue.¹³⁷ As with tobacco taxation, a number of justifications are offered for taxing sugar and fat.

Higher taxes on certain foods and drinks might be justified to ensure 'the increased cost to be borne by those who participate in the activity.'¹³⁸ This Pigouvian tax reflects the classic benefits theory basis for taxation, but begs the question as to why only some activities that cause social costs should be taxed. Neutrality (indeed, fairness) suggests that there should be no discrimination.

Assuming that a corrective tax should be levied, Barrett argues that the proportionality principle must be met – that there be 'some articulable relationship between means and ends, specifically that the means chosen by an administration be suitable or appropriate, and no more restrictive than necessary to achieve a lawful end.'¹³⁹ This would require: correctly identifying and measuring the (cost of) the social mischief; confirming the effectiveness of the proposed tax in meeting the policy objective; and considering the unintended, and perhaps unjust, effects of the policy, including the impact on rights. This suggests a benefits basis for taxation, which is difficult to operationalise and is not applied consistently.¹⁴⁰ Barrett concludes that fat taxes 'are generally disproportionate: they fail to plausibly link cause and effect; they are likely to manifest unpredictable and undesirable outcomes; and they may be discriminatory.'¹⁴¹

Like the social mischief it is intended to address, the effectiveness of a selective tax is difficult to determine. Stuart and Sawyer note that the effectiveness of taxation policy in reducing a social harm is difficult to measure since 'other factors have been effective such as advertising, smoke-free legislation and smoking cessation services.'¹⁴² Burns-Grant and Marriott also express concern about the regressive nature of increased taxes on unhealthy foods.¹⁴³

Overt paternalism has provided an underlying justification for selective taxes since at least King James I, and is evident in recent proposals for taxes on sugar and fatty foods. In her discussion of alcohol taxation, Leong suggests that an obvious justification for its taxation is that such behaviour generates significant harms.¹⁴⁴ However, while most morally 'undesirable' commodities are not subject to tax in New Zealand, she suggests two features that may justify the state in taking a more paternalistic stance, namely, irrationality and addiction, and the effect on young people. Thus, tax policy is also urged to overcome the 'time-inconsistent preferences' and 'cognitive imperfection' of consumers of unhealthy products.¹⁴⁵ This is more than a mere 'nudge' (or libertarian paternalism), which Thaler and Sunstein define and promote as 'any aspect of the choice architecture that alters people's behaviour in a predictable way without forbidding any

¹³⁷ Barrett, above n 7, 244.

¹³⁸ Pinny, above n 8, 326.

¹³⁹ Barrett, above n 7, quoting Michael Taggart, 'Proportionality Deference *Wednesbury*' (2008) *New Zealand Law Review* 423, 424–5.

¹⁴⁰ Cf LeGrand, above n 82.

¹⁴¹ Barrett, above n 7, 255.

¹⁴² Stuart and Sawyer, above n 8, 118.

¹⁴³ Burns-Grant and Marriott, above n 6, 196.

¹⁴⁴ Leong, above n 136.

¹⁴⁵ Dowell, above n 87, 327.

options or significantly changing their economic incentives,¹⁴⁶ for unlike a nudge, corrective taxation is intended to change behaviour precisely by altering economic incentives.

V DISCUSSION

At a general level, tobacco taxation confirms Schumpeter's view that fiscal history provides 'an insight into the laws of social being and becoming.'¹⁴⁷ Changes in social attitudes to tobacco consumption are evident in its taxation. Tobacco has always provided a ready source of revenue, and a number of rationales are evident in its history in New Zealand. To the extent that tobacco consumption is inelastic, the Ramsey Rule commends it as a tax base. If tobacco consumption results in social costs it may be a suitable target for a Pigouvian tax. Moreover, tobacco could be a means to promote other social goals such as trade with friendly nations, or to encourage the development of local industry and import substitution. Such economic arguments need no specific moral justification even if they cause discrimination.

In contrast, when the discrimination is based on an evaluation as to the goodness of a particular product or activity, moral judgements are involved. Such judgements assume that the taxpayer can make better decisions of what is good or bad for the persons taxed than the persons themselves can. King James I's arguments against tobacco provide a precedent for modern day sin taxes – that government should promote what is good, and may discourage what is not. This assumes some social consensus on what is the good, and some way of measuring the costs of the harm.

The New Zealand experience also demonstrates that the relationship between taxation and society is not linear, but has changed over time. In particular, tobacco taxation in New Zealand morphed from a general revenue-raising tax to a selective tax with a specific policy intent. Prior to 1984 this would have been unremarkable since it was accepted that taxation was an appropriate tool of social policy, but since the adoption of BBLR and neutrality as the preferred tax policy setting, it is anomalous. Moreover, tobacco taxation is frequently cited as precedent for taxes on other socially disapproved goods.

The 2001 Tax Review suggested that corrective taxes were vestigial, but recent calls for taxes on harmful food products indicate that there continue to be two bases for tax policy in New Zealand. Most taxes are intended to be neutral, raising revenue with minimal effect on taxpayer behaviour. However, other taxes are specifically intended to promote social policy. Such taxes conflict with current New Zealand tax norms that prioritise neutrality, and with current social norms that emphasise personal freedom to pursue legal activities. This gives rise to several concerns, aside from consistency in tax policy.

¹⁴⁶ Richard H Thaler and Cass R Sunstein, *Nudge: Improving Decisions about Health, Wealth and Happiness* (Penguin, 2009) 6.

¹⁴⁷ Schumpeter, above n 19, 101.

A A penalty, or a Tax?

If levied to raise revenue, there is no question that an impost on tobacco (or particular foods) is a tax. However, if levied as a corrective tax intended to 'promote or discourage behaviours or to address the perceived costs of some activities',¹⁴⁸ the question may be asked whether the impost is in fact a tax. If it is of the essence of taxation that it be 'nonpenal' and 'levied without receipt of a specific benefit of equal value',¹⁴⁹ then tobacco taxation in its current form – with its high level of exaction and specific objective – may better be regarded as a penalty, and not a tax, for 'the larger the exaction and the more restrictive the objective, the more likely that the exaction should be classified as a penalty rather than a tax.'¹⁵⁰ Ultimately, the power to tax is the power to destroy persons, or their activities.¹⁵¹ Such taxation is contentious. Stamp eloquently commented:¹⁵²

We have all heard that it is wrong to marry for money, but quite praiseworthy to marry where money happens to be. So taxation for other than revenue objects, to punish or discourage, taken by itself might sometimes be indefensible. It should be called what it is, a fine or penalty, and not a tax.

A significant benefit of relabelling a corrective tax as a penalty or fine is that the policy intent would be made explicit. Whereas taxation serves a range of functions, a penalty is specifically intended to deter or prevent an activity, and therefore requires a higher level of justification, particularly if the activity itself is legal. Given the relatively recent shift to parliamentary intendment as the yardstick of judicial interpretation in New Zealand, reconceptualising corrective taxes as fines or penalties rather than taxes would clarify that the primary intent of such measures was indeed corrective, rather than fiscal.

Alternatively, if the activity continues to be legal and the charge is intended to justify the resulting costs of the activity, it might be better labelled a fee. This would, however, require a more careful assessment of the actual costs to be covered, and of why that particular activity is singled out for corrective taxation. In any event, it might promote social discussion as to the limits of the state in attempting to change private behaviour.

B Equity

Mill expressed concerns about the equity of tobacco taxation. Since the incidence of smoking is higher among those on lower incomes, the tax is regressive. This concern has recently been expressed in the New Zealand media where a public health analyst suggested that 'there's no proof the tobacco tax is reducing smoking in New Zealand. "It's just a tax grab now"'.¹⁵³ There is the risk that the tax might be an ineffective and

¹⁴⁸ TWG, above n 13.

¹⁴⁹ Madeo, Anderson and Jackson, above n 21, 5.

¹⁵⁰ Ibid.

¹⁵¹ *McCulloch v. Maryland* (1819) 17 US 316, 327.

¹⁵² Josiah Stamp, *The Fundamental Principles of Taxation in the Light of Modern Developments (The Newmarch Lectures for 1919)* (Macmillan, 1921) 170.

¹⁵³ Mike McConnell, 'How Far Can You Oppress Somebody?: Anti-Smoking Campaigner Says Tax Hikes Aren't Working', *Stuff.co.nz* (online), 9 January 2017, <<http://www.stuff.co.nz/business/money/88113934/How-far-can-you-oppress-somebody-Anti-smoking-campaigner-says-tax-hikes-aren-t-working>>.

inequitable paternalism, or worse: oppressive stigmatisation dressed up as beneficial public policy. The taxation of fatty foods and sugary drinks raise similar equity concerns.

C Morality

The changing rationales for tobacco taxation reflect changes in social attitudes towards taxation, as well as broader social changes such as the adoption of the welfare state and a publicly funded health system. Taxation reflects (often tacit) moral assumptions concerning the respective rights and responsibilities of the individual and society, the place of paternalism (if any), and individual freedom. The history of tobacco taxation provides a context in which to consider and develop the ethical dimensions of taxation policy.¹⁵⁴

VI CONCLUSION

Doctors may no longer smoke Camels, and Mary Poppins may have to forego her spoonful of sugar, if society considers either to be bad for you, but they may be permitted their peccadilloes so long as they pay the taxman. Tobacco has provided a ready source of revenue since its introduction into the New World. It has also been a source of controversy. This article demonstrates the shifting basis for taxation and the interrelatedness of taxation and society, and the difficulty in balancing personal freedom and social need – an issue with which Mill also grappled. In particular, it highlights the concerns that arise when a particular tax is levied primarily for social, rather than revenue purposes. The history of tobacco taxation provides a prototype, and a caution, for proposed taxes on other socially ambiguous consumption.

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¹⁵⁴ See Murphy and Nagel, above n 56.

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