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Taxes 'on a course of conduct': Hart and the Latte Levy

Ann Mumford¹

Introduction

In his October 2018 budget, the Chancellor of the Exchequer, Phillip Hammond, announced his intention to introduce a tax upon the importation and manufacturing of plastic which falls below a threshold of thirty percent recycled plastic.² The response amongst environmental advocates was lukewarm. *The Guardian* suggested that “[t]his won’t be a budget to cheer green advocates”.³ The reason for the disappointment was Hammond’s decision *not* to introduce a tax on plastic cups (a “latte levy”) - an omission described as regrettable, especially given the fact that the Chancellor’s only other environmental measure included an investment of £10 million to address dumped waste.⁴

Hopes for a latte levy had been raised. In March 2018, the Chancellor introduced a public consultation considering how taxation might be used to assist the government in meeting the Prime Minister’s target of eliminating all avoidable plastic waste by 2042.⁵ When delivering the October budget a few months later, Hammond reminded Parliament of his intention, first announced in the Spring Statement, for the UK to “become a world leader in tackling the scourge of plastic littering our planet and our oceans”.⁶ He then explained that the tax on packaging with less than thirty per cent recycled plastic would tackle a problem which is “deadly for wildlife and oceans”.⁷ The only reason for *not* introducing a tax on plastic cups at this time, he continued, was that research had convinced him that “a tax in isolation would not...deliver a decisive shift from disposable to reusable cups across all beverage types.”⁸ In

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² Josh Gabbatiss, 'Budget 2018: Philip Hammond announces new tax on plastic packaging with less than 30% recycled material' *The Independent* (London 30 October, 2018) UK Politics <<https://www.independent.co.uk/news/uk/politics/budget-2018-plastic-waste-packaging-recycling-coffee-cups-levy-philip-hammond-a8607366.html>>

³ Richard Partington and Peter Walker, 'Key points from budget 2018 - at a glance' *The Guardian* (Economics) <<https://www.theguardian.com/uk-news/2018/oct/29/key-points-from-budget-2018-at-a-glance>>

⁴ *ibid*

⁵ Nicola Harley, 'Philip Hammond to launch public consultation on plastic waste tax' *The Telegraph* (News) <<https://www.telegraph.co.uk/news/2018/03/11/philip-hammond-launch-public-consultation-plastic-waste-tax/>>

⁶ Philip Hammond, 'Budget 2018' (*HM Treasury*, 29 October 2018) <<https://www.gov.uk/government/speeches/budget-2018-philip-hammonds-speech>> accessed 1 November 2018

⁷ *ibid*

⁸ *id*

other words, as the latte levy would not succeed in eliminating the usage of plastic cups entirely, then it should not be introduced.

Is deterring undesirable behaviour a legitimate reason for introducing a tax? Surely, deterring the use of plastic cups is a desirable end; yet, would a tax introduced with the aim of achieving this still count as a tax, or would it be something else – perhaps, a fine? This is the starting point of this article. HLA Hart famously argued that, when viewed purely from a perception of law that is formalistic and command-theory focused, taxes may appear to be indistinguishable from fines.⁹ Hart presented this as one of the problems with command theory. It was a point which he developed over time, although he consistently emphasised that a distinguishing feature of taxes is that they do not impact upon behaviour.¹⁰ This article considers the development of Hart's argument. It then proceeds to address the boundaries of the distinction between taxes and fines,¹¹ especially in light of the (failed) latte levy.

This article then considers the challenge posed by environmental taxation to the tax / fine distinction (as developed by Hart) from three perspectives. First, the presumptions of legitimacy underpinning environmental taxation are addressed. Secondly, the interactions between taxation, and other areas of law, are considered; and, third, the question of how the “puzzled” person might respond to the dis/incentives of environmental taxation is posed. It concludes by contemplating whether it is possible to ‘centralise’ a moral basis for tax.

Hart

Hart's interest in the tax / fine distinction arose from his analysis of the purpose of punishment within the criminal system. He advanced his argument as to the difference between taxes and fines in two versions, published nine years apart, of ‘Prolegomenon to the Principles of Punishment’, his Presidential address to the Aristotelian Society (PAS).¹² The second, very lightly revised and updated version, forms the first chapter of his 1968 collection of essays *Punishment and Responsibility (P&R)*.¹³ The version in PAS, however, presents a slightly fuller account of Hart's thoughts on the distinction between provisions imposing taxes and those imposing criminal liability.

⁹ In two separate publications, discussed immediately *infra*.

¹⁰ In other words, taxes on undesirable conduct risk simply becoming a cost of engaging in the behaviour. Hart's point was that such taxes do not condemn the behaviour, which, according to the theories of punishment Hart considered, is important for deterrence.

¹¹ There is a wide literature on the distinction between civil and criminal tax proceedings, and the implications of this under article 6 of the European Convention on Human Rights; on which *see, inter alia*, Philip Baker, ‘Should Article 6 ECHR (Civil) Apply to Tax Proceedings?’ (2001) 29(6-7) *Intertax* 205; and, Laurent Partouche, ‘The ‘Right to a Fair Trial’: the French Civil Supreme Court Reduces its Scope of Application to Tax Matters,’ (2005) 33(2) *Intertax* 80. This article addresses a slightly different point: the implications of the proliferation of taxation as a tool for eliminating undesirable behaviour for an aspect of Hart's account of punishment within criminal law.

¹² HLA Hart, ‘The presidential address: Prolegomenon to the principles of punishment,’ (1959) 60 Proceedings of the Aristotelian society 1-26. (retrieved from <http://www.jstor.org/stable/4544619>)

¹³ H. L. A. Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (2nd ed. Oxford University Press 2008, John Gardner, ed.; orig ed 1968), 1.

His interest in tax, generally,¹⁴ is revealed in hints throughout *Concept of Law*.¹⁵ Hart used tax as an example of an imperative within a command theory-based idea of law; for example: “[f]ew Englishmen are unaware that there is a law forbidding murder, or requiring the payment of income tax, or specifying what must be done to make a valid will.”¹⁶ Hart categorises tax law as “primary law,” and frequently refers to taxation, and other examples (like homicide), as examples of uncontested, clear legal pronouncements. The point where taxation becomes a bit more complicated, Hart acknowledged, was in the context of penal taxation, or taxation on behaviours which the government wishes to discourage.¹⁷

Hart’s grappling with the tax / fine distinction has been acknowledged, challenged, and probed for significance.¹⁸ What is not frequently acknowledged within this literature, however, is that Hart (ever so slightly) changed his mind. In *PAS*, Hart wrote: “[w]ithout recourse to the simple idea that the criminal law sets up, in its rules, standards of behaviour to encourage certain types of conduct and discourage others we cannot distinguish a punishment in the form of a fine from a tax on a course of conduct.”¹⁹ In *P&R*, however, he wrote that:

[p]unishment is different from a mere ‘tax on a course of conduct’. What I do mean is that the conception of the law simply as goading individuals into desired courses of behaviour is inadequate and misleading; what a legal system that makes liability generally depend on excusing conditions does is to guide individuals’ choices as to behaviour by presenting them with reasons for exercising choice in the direction of obedience, but leaving them to choose.²⁰

P&R, thus, has a much bolder starting point than *PAS*: punishment *differs* from a mere tax. The argument in *P&R* can be contrasted with Hart’s earlier suggestion, in *PAS*, that it is *difficult*, without reference to the underlying purpose of criminal law, to tell the difference between taxes and fines.

In *P&R*, Hart uses the phrase ‘tax on a course of conduct’ to indicate a requirement which does not involve choice; it does not ‘goad’ individuals. He appears to suggest that taxes are not always noticed by those who pay them, and in this way it fundamentally differs from punishment (punishment would have little point if not noticed by those receiving it). *P&R*, thus, takes the attack on Hart’s foil, Austinian command theory, a step further from *PAS*. *PAS*, attempting to discern a justification for punishment within the boundaries of command

¹⁴ He engaged in some tax practice at the bar. See David Sugarman and H. L. A. Hart, ‘Hart Interviewed: H.L.A. Hart in Conversation with David Sugarman’ (2005) 32 J Law Soc 267, 271.

¹⁵ H. L. A. Hart and Leslie Green, *The Concept of Law* (Oxford University Press 2012)

¹⁶ *ibid*, 60. Also, *inter alia*, “...some rules are mandatory in the sense that they require people to behave in certain ways, e.g. abstain from violence or pay taxes...” (at 67); and, “if the primary general directions are not obeyed by a particular individual, officials may draw his attention to them and demand compliance, as a tax inspector does...” (at 79); “...where the law runs counter to strong inclinations as, for example, do laws requiring the payment of taxes, our eventual compliance with them, even though regular, has not the unreflective, effortless, engrained character of a habit” (at 110).

¹⁷ See discussion, *ibid*.

¹⁸ See, *inter alia*, (amongst a wide literature) Richard A. Wasserstein, ‘HLA Hart and the Doctrines of Mens Rea and Criminal Responsibility,’ (1967) *Univ. Chicago Law Rev.* 92, 101; RA Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law*, 81 (Hart 2007); Andrei Marmor, *Philosophy of Law*, 40 (Princeton Univ Press, 2011); and, John Snape and Jeremy de Souza, *Environmental Taxation Law* 6 (Routledge, 2006).

¹⁹ Hart, *Punishment and Responsibility: Essays in the Philosophy of Law*, 6.

²⁰ *ibid*

theory, structures an argument which depends upon accepting that paying taxes does not involve choice. To this, *P&R* adds further detail, and explains that most law (with the exception of tax law) “guides”, and attempts to provide good reasons for “obedience”, whilst assiduously protecting the autonomy of individuals to make bad choices.

Hart offered fuller thoughts on the nature of tax law elsewhere.²¹ In the specific context of his analysis of punishment, his (qualified) account of the difference between punishment for crimes and imposition of taxes was based on the idea that when legislators impose taxes they do not expect the existence of the tax to affect the behaviour of the subject. Yet, what if the tax provides an incentive - a nudge²² - to behave in a particular way? Is it still a tax? And when might the imposition of ‘penal taxation’ make certain conduct a crime? For example, the label of “sin taxes”,²³ which would apply to most forms of green taxation, tends to suggest that any conduct targeted in this way is viewed as undesirable, even criminal, by the government. Yet, although a tax on petrol may impose additional costs on drivers, it does not create a duty not to drive.²⁴ Indeed, a tax on petrol neither prohibits the harmful conduct of driving automobiles, nor encourages drivers to pursue less harmful alternatives, such as driving electric cars or using public transportation. Taxes on petrol, thus, may count as little more than revenue raising activities. This is not to suggest that revenue raising activities are necessarily undesirable. Rather, this is to emphasise that some of the modern, political rhetoric surrounding such taxes is slightly out of step with the suggestion that taxes are mere costs.

What is the significance of this, beyond the risk that green taxes will become confusing, or puzzling, for taxpayers? How laws are understood by the “puzzled man”²⁵ is, of course, a concern of Hart’s. It is perhaps easiest to imagine Hart’s puzzled person in a coffee shop, desperate for a coffee but lacking a reusable cup, and wondering what to do next. Let us say that a latte tax has just been introduced. Our puzzled person can easily afford to pay the tax; yet given the Chancellor’s denunciation of plastic, it is difficult to discern whether buying lattes in disposable cups is a good idea. A little more guidance on the right thing to do would

²¹ H. L. A. Hart, ‘Between Utility and Rights’ (1979) 79 *Columbia Law Rev* 828, which discusses tax, and Nozick, throughout the text.

²² Although not considered directly within this article, the “nudging” vein of research is very relevant to the subject of environmental taxation. Briefly, the ambition of this literature perhaps best could be described as the hope to improve the lives of citizens, without either restricting the choices that they are able to make, or increasing the costs of these expenses. The idea is to render making good choices an easy option. This is based on the argument that our “choice architecture” - or, the biases and encouragements that influence the choices we all make, every day - is fragile, and susceptible to manipulation. Thus, it should be relatively straightforward to impose “soft paternalism” on citizens, in that the costs will not be not very vexing, and will achieve a change in behaviour relatively painlessly. In addition to providing an easy option for the state, soft paternalism, importantly, will protect freedom of choice. The criticisms of soft paternalism include the fact that efforts to influence others quietly are not necessarily very transparent, and also run the risk of tricking, or seeking to control, others. *See, inter alia*, Richard H. Thaler and Cass R. Sunstein, *Nudge: Improving Decisions About Health, Wealth and Happiness* (Penguin UK 2012) ; Daniel M Hausman and Brynn Welch, ‘Debate: To nudge or not to nudge’ (2010) 18 *Journal of Political Philosophy* 123 ; and, Anuj C Desai, ‘Libertarian Paternalism, Externalities, and the “Spirit of Liberty”: How Thaler and Sunstein Are Nudging Us toward an “Overlapping Consensus,”’ (2011) 36 *Law & Social Inquiry* 263 .

²³ For a discussion of the term, *see* Adam J. Hoffer, William F. Shughart and Michael D. Thomas, ‘Sin Taxes and Sindustry: Revenue, Paternalism, and Political Interest’ (2014) 19 *Indep Rev* 47; and, Andrew J Haile, ‘Sin Taxes: When the State becomes the Sinner’ (2009) 82 *Temple Law Rev* 1041.

²⁴ As argued in Lewis Kornhauser, ‘The Normativity of Law,’ (1999) 1(1/2) *American Law and Economic. Rev.* 3, 6.

²⁵ *ibid.* For the remainder of this article, the puzzled man is referred to as the puzzled person.

be helpful. Enter Hart's "bad man."²⁶ This bad actor pushes past the puzzled person, and buys a latte in a plastic cup and several additional items wrapped in plastic. The bad actor also considers the latte levy to be easily affordable. Yet, unlike the puzzled person, this is merely a financial decision. The bad actor is impervious to any societal cues that reckless consumption and disposal of plastic is dangerous for the environment.

Hart's argument, in *Concept of Law*, is that law is perhaps overly concerned with the bad actor, when it should invest more attention in the puzzled person.²⁷ Indeed, for environmental taxes (including a latte levy) to achieve its goals, it would be helpful if there were as many puzzled people as possible; that is, people who are interested in the normative message that environmental taxation intends to convey. There is thus a strong case that the message should be as clear as possible.

Presumptions about tax and behaviour

One important difference between 1959 (when Hart first considered the tax / fine distinction), and 2019, is that taxation often is used as a tool to combat activities which rule-makers show every evidence of hoping to stop entirely. Indeed, the reason offered by the Chancellor for not introducing the latte levy was precisely that: in other words, the time was not right for the levy, because studies suggested that such a tax would not eliminate the behaviour of buying beverages in disposable plastic cups. In the climate/environmental context, the normative underpinnings of the tax / fine distinction have changed, largely due to faith in the promise of an economic solution to the problem of climate change. This has important implications for the tax / fines debate,²⁸ and the role (if any) of punishment in the environmental taxation regime.

At a very basic level, traditionally, one has been *responsible* for taxes owed, but *liable* to pay a fine.²⁹ The reason for the distinction has been to convey that crimes are associated with "moral wrongs";³⁰ and, (again) traditionally, taxes have not been designed to "condemn the conduct".³¹ The language used by the Chancellor in the October budget does suggest a shift in this tradition, reflecting trust in the promise that it is possible to design taxes which eliminate undesirable behaviour, even if the attempted latte levy is a failed effort. Two key questions arise from this. First, is it legitimate to use taxes in this way? Secondly, given that it is difficult to conceive of a tax which would not, in some way, impact upon (and thus change) behaviour, what are the implications of this for the interactions between taxation, and other areas of law?

²⁶ id. Actually, Holmes' bad man. Frederick Schauer, 'Do People Obey the Law' (2014) 51 San Diego Law Rev 939, 948, citing Oliver Wendell Holmes, 'The Path of The Law' (1897) 10 Harv Law Rev 459, 459. For the remainder of this article, the bad man is referred to as the bad person, or actor.

²⁷ Hart, *The Concept of Law*, 98 : "Why should law not be equally if not more concerned with the 'puzzled man' or 'ignorant man' who is willing to do what is required, if only he can be told what it is?"

²⁸ And the nudges debate – *see* note 21, *supra*.

²⁹ R. A. Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law* (Bloomsbury Publishing 2007), 81.

³⁰ *ibid*

³¹ *id*

1) Is it somehow illegitimate to use tax law to change behaviour?

All tax law, given that it is produced by democratic legislatures, starts from a presumption of legitimacy.³² This is a basic point, but it is important to the puzzled person, who largely hopes to comply with law because of the formalistic status it carries.³³ The formal status of law serves to influence behaviour at a more profound level than basic fear of punishment. Puzzled people note the overlap between law and the choices they would otherwise make; and, they consider it important to obey the law simply for its own sake.³⁴ Thus, the puzzled person may hope to make greener choices; and, perhaps, may be confused as to whether the increase in cost of the latte is due to the 'latte levy' which has been covered in the news, or, perhaps, due to something else. The subtlety of tax, in this example, does not assist its purpose.

The subtlety of taxation may be the basis for a legitimacy-based challenge: consider, for example, the criticisms raised by Conservatives (under Prime Minister Tony Blair) that New Labour relied on "stealth taxes."³⁵ Accusations of illegitimacy also may arise when taxes are discriminatory, either in design or impact.³⁶ When discrimination is the issue, legitimacy tends to be considered in a two-fold context: first, the context of what constitutes "social justice" (as tax is a tool for achieving that); and, secondly, within the context of how tax interacts with other areas of law.³⁷ This is because tax law has the capacity to enhance some rights, and to diminish others. As Laws explained, "the very attempt to establish positive rights in such fields as education and health necessarily requires an interference with negative rights, in the form of taxation, but also in other ways."³⁸

This two-fold context has relevance beyond the specific question of discriminatory taxes. If the point of a tax is that the choice to engage in the behaviour is preserved, then the wider implications of preserving that choice are important. This will always be a question which is considered on a gradient. Efforts to address "social justice" will involve the altering of relative positions, and taxes are a tool for this. Taxes, of course, will impact upon those paying them. Yet, what if it is not the taxpayer who is being targeted (say, with income taxation), but, rather, a form of undesirable conduct? The choice of engaging in the undesirable behaviour is preserved, but this will have different consequences, depending on the wealth of the taxpayer. Is it legitimate only to preserve the choice of wealthier taxpayers to engage in offending behaviour?

2) Taxes will always interact with other areas of law, and the tax / fine distinction (or overlap) is just one example.

³² Agustín José Menéndez, *Justifying Taxes: Some Elements for a General Theory of Democratic Tax Law* (Springer Science & Business Media 2013), 2

³³ See discussion at Schauer, 'Do People Obey the Law,' 947.

³⁴ *ibid*

³⁵ This is discussed in Ruth Lister, 'New Labour: a study in ambiguity from a position of ambivalence,' (2001) 21(4) *Critical Social Policy* 425.

³⁶ L. Murphy and T. Nagel, *The Myth of Ownership: Taxes and Justice* (Oxford University Press 2002), 26

³⁷ *ibid*, 24

³⁸ John Laws, 'The Constitution: morals and rights' (1996) Public law 622, 634

If curtailing the choices of less wealthy taxpayers to engage in polluting behaviour, for example, helps to reduce CO2 emissions, then this might seem to be a good outcome. Legitimacy-based challenges might seem unimportant, because a politically expedient (at least, more expedient than the potentially unpopular option of regulating behaviour) method of controlling undesirable behaviour will have achieved a good outcome. Does the subtlety of the approach (in other words, opting for taxation, not the bolder approach of regulation) risk further puzzling the puzzled persons; and, perhaps, create a hierarchy which implies that preserving the choices of wealthier, bad actors are more important? This is a delicate question in the context of environmental law.

The delicacy of this question is best addressed not from the perspective of the comparative wealth of taxpayers, but in the context of the tension between economic growth and environmental protection. For example, taxes may not be used to interfere with the free movement of goods, persons, or services between EU member states. It is difficult to resist the conclusion, however, that the Single Market often has received protection that the environment has not shared.³⁹ The risk that this would happen is a problem which the EU has appreciated since the 1970s.⁴⁰ Thus, EU law has been drafted so as not to privilege economic growth over environmental protection. Indeed, the founding treaties specify that economic growth and environmental protection are *both* important in EU law, and that there is no hierarchy privileging one over the other.⁴¹

As these principles have played out before the courts, however, a sneaking, implicit hierarchy has emerged. This implicit hierarchy is drawn along lines of assumed preference, in that it is assumed that member states may *only* institute environmental taxes *if* they do not otherwise harm inter-member state economic activity.⁴² Thus, by default, a puzzled person may be likely to conclude that economic growth is more important than environmental protection.

Enter, the rational actor

The puzzled person's investment in the inherent legitimacy of law puts them at odds with someone Hart did not address, the rational actor, who exists at the heart of law and economics analysis. As Cooter famously explained, "[i]nstead of obeying or disobeying the law for its own sake, the rational actor in economics treats law as an obstacle or an instrument, and not a value."⁴³ Cooter's argument is that the "rational actor" model needs to be challenged; and, at

³⁹ As de Sadeleer explained, "[e]nvironmental protection had more often given way to socio-economic considerations." Nicolas de Sadeleer, *EU Environmental Law and the Internal Market* 21 (OUP 2014). He presents the example of a case considering an Austrian traffic regulation, and the allegation that it interfered with economic freedoms. The test defined by the court was that it was "...essentially necessary to determine whether this traffic prohibition can contribute in a *consistent* and *systematic* matter to reducing NO2 concentrations," which is a fairly difficult test to satisfy. *ibid* at 23, citing Case C-384/08 *Attanasio Group* [2010] ECR I-10821, para 42.

⁴⁰ *See, id.*, 24, suggesting that it will be very difficult for most EU regulations to satisfy all obligations, and there is always a risk that environmental protection will receive the least amount of attention, despite the fact that this sort of hierarchy is not present in the founding treaties. The reason for this is that, in the focus on increasing economic integration, the economic growth agenda is likely to be privileged over other concerns.

⁴¹ *ibid*

⁴² *id*

⁴³ Robert Cooter, 'Models of Morality in Law and Economics: Self-Control and Self-Improvement for the Bad Man of Holmes Symposium: The Path of the Law Today' (1998) 78 *Buffalo Law Rev* 903, 904.

the least, the rational actor needs to be anchored to some model of morality, because this would be more likely to encourage a perception of some immediate benefits of compliance.⁴⁴

This is important, Cooter explains, because compliance then would stand a chance against the attractiveness of non-compliance, the benefits of which (immediate gratification, greater freedom, etc.) may be enticing.⁴⁵ Cooter seeks, thus, to “anchor” law in the law and economics model, which he suggests has been “decentralized” by focusing on the bad actor. He argues for the *replacement* of the bad actor with ideals of self-control and self-improvement.⁴⁶

Perhaps the ‘centralization’ for which Cooter advocates might best be achieved by abandoning the subtler messages carried by taxation, and asserting a preference for fines. If law is to convey a message, it might be that it would be best if it were to aim to do so loudly. Yet, to return to Hart’s question, asserting a difference between taxes and fines requires a model *other* than the command theory of law. From the perspective of the bad actor, tax law might even be viewed as, if not equivalent to criminal law, then at least similar, given that both areas of law take things away.⁴⁷ From the perspective of the puzzled person, however, the important difference between taxes and fines, as Murphy and Nagel emphasise, is that, “[t]axes are not, in general, like criminal fines, which may be understood to impose *symbolic or moral costs* over and above their monetary costs.”⁴⁸

1) Telling the difference?

Cooter’s call for a moral centre to the rational actor model would appear to start from a command-theory vision of law. His argument that this should be changed invokes Hart’s refinement of the tax / fine distinction - from *PAS*, to *P&R*. The evolution of Hart’s distinction is important, both at a theoretical and a practical level. At a theoretical level, if the ‘command theory’⁴⁹ cannot satisfactorily distinguish between statutes imposing fines and those imposing taxes, then that, on the face of it, is a weakness of the command theory. At a practical level, the difference between taxes and fines will always matter because we may, for various reasons, need to distinguish provisions imposing taxes from those imposing fines.⁵⁰

⁴⁴ *ibid.*

⁴⁵ *id*

⁴⁶ *id*

⁴⁷ Menéndez, *Justifying Taxes: Some Elements for a General Theory of Democratic Tax Law*, 303.

⁴⁸ Murphy and Nagel, *The Myth of Ownership: Taxes and Justice*, 23 (emphasis added).

⁴⁹ For greater detail, *see* Hart, *The Concept of Law*, ch 2-4.

⁵⁰ There is no single definition of ‘tax’ for the purposes of English Law, and whether or not something is a tax is sometimes unclear. For example, for the purposes of the ‘levying Money for or to the Use of the Crowne by pretence of Prerogative without Grant of Parlyament’ clause of Article 4 of the Bill of Rights 1689 (1 W & M c 2) – see, e.g. *Customs and Excise Commissioners v Total Network SL* [2008] UKHL 19; [2008] 1 AC 1174; *Woolwich Equitable Building Society Respondents v IRC* [1993] AC 70. On some accounts, for example, repayments on student loans, or road and bridge tolls, are taxes. It may be that only a jurisdictional definition is accurate. Transfer of Tribunal Functions and Revenue and Customs Appeals Order 2009/56; Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009/273. Likewise, prior to the Human Rights Act 1998 (UK), the definition of ‘crime’ was generally regarded as only significant for jurisdictional purposes. “Criminal cause or matter” for the purposes of the Administration of Justice Act 1960 s.1 or Justice and Security Act 2013 s.6. The identifying criteria are punishment and the public nature of the proceedings. See, e.g. *Amand v. Home Secretary and Minister of Defence of Royal Netherlands Government* [1943] AC 147, *R v. Board of Visitors of Hull Prison, ex parte St. Germain* [1979] Q.B. 425.

Although taxes may be imposed to discourage the activities taxed, the law (as Hart might have argued) does not announce this as it does when it makes them criminal. Additionally, fines payable for some criminal offences may become so small that they are cheerfully paid and offences are frequent. They may then be viewed as ‘mere taxes’ because the sense is lost that the rule is meant to be taken seriously as a standard of behaviour.⁵¹

Additionally, there are various bases upon which a statute might authorise state agencies to deprive subjects of their property. When is one rather than the other appropriately used? The European Court of Human Rights takes a straightforward approach to this question. The simple desire to affect behaviour, without more, is insufficient to warrant classification as a punishment and hence for the proceedings to be criminal under the ECHR.⁵² This is amply demonstrated by the examples of energy, carbon and vehicle targeted taxes, which are the most common environmental taxes in EU Member States.⁵³ The design of such taxes occurs within the “logic and nature” of Member States’ respective tax systems, and the explicitly deterrence based nature of such levies does not transform such taxes into penalties (which would elicit protections under Article 6 ECHR). Are such taxes, however, sufficient for the urgency of climate protection?

2) Fines are best?

Fines carry the advantage, in comparison with taxes, of appearing to be a more robust response. They also carry the promise of changing people’s future behaviour, and not simply influencing immediate (can I afford the latte today?) choices. As Hart explained, if one looks beyond the command theory of law, then one of the purposes of fines is to attempt to influence the decisions that people make. What remains unclear in Hart’s account, however, is exactly what is being targeted: do fines attempt to change people’s behaviour, without changing their beliefs (*i.e.*, through fear of the fine)? Or, do fines attempt to change people’s beliefs about their behaviour (*i.e.*, through stigmatisation)?

Husak, engaging Hart’s point on taxation, argues that the simple payment of tax – for example, the requirement to pay tax when “income exceeds a certain threshold” – without more, clearly is not a punishment.⁵⁴ This remains true, even though paying a tax may involve a number of other elements which overlap with the experience of being punished; for

⁵¹ Hart, *Concept of Law*, 39.

⁵² See the literature referenced in n.10, *supra*.

⁵³ ‘Designing tax systems for a green economy transition’ <http://www.eea.europa.eu/highlights/designing-tax-systems-for-a> (last visited 15 March 2017). They also play an important role in separating the ‘connectedness’ between polluting behaviour and economic growth (as research suggests has occurred in Sweden, the GDP of which increased by 58% between 1990-2013 after the introduction of a carbon dioxide tax), but carry the risk of reducing tax revenues (as apparently happened after a Dutch tax encouraged the purchase of smaller, and less expensive, cars). *ibid*.

⁵⁴ Douglas Husak, ‘A Framework for Punishment: What Is the Insight of Hart’s ‘Prolegomenon’?’, *Hart on Responsibility* (2014) (Springer; Available at SSRN: <https://ssrn.com/abstract=2563290> or <http://dx.doi.org/10.2139/ssrn.2563290>) 7, (last accessed 20 May, 2019).

example, it may be “unpleasant”.⁵⁵ Crucially, however, the experience will not involve being stigmatized, or being “condemned”, and it is this, Husak explains, which clarifies the difference between taxation and punishment.⁵⁶ Husak suggests that Hart should have realized this; and, that “Hart’s failure to include this element makes his subsequent endeavor – his project of trying to justify punishment – incomplete.”⁵⁷

Another way of approaching this question is perhaps through acknowledging that time has passed since Hart engaged this topic, and it is clear, as it may not have been in the 1950s, that when the state intervenes to expropriate property the choice is not a binary one. The ‘age of regulation’, and the focus on corporations, has led to the development of a wide range of mechanisms for taking property. In a large settlement, for example, a corporation will notice whether it is paying tax, penalties or a fine, or even disgorging the proceeds of crime, or perhaps paying not to be prosecuted.

The option of relying on criminal sanctions over taxation, particularly in the context of the polluting corporation, may be quite attractive.⁵⁸ Arguments in favour of eschewing taxes for fines include the suggestion that it will assist the environmental cause to stigmatise, or to condemn, corporate polluters who might otherwise have absorbed the cost of their conduct as an operational expense.⁵⁹ Deterrence based arguments are also relevant on the grounds that corporate culture is particularly sensitive to the stigma of criminal prosecution. Additionally, if polluters are in jail, they cannot cause further harm.⁶⁰

It is important to note that criminal law does contain provisions addressing environmental harm. The EU’s Directive on the Protection of the Environment through Criminal Law,⁶¹ for example, was introduced in 2008 explicitly because “[e]xperience has shown that the existing system of penalties has not been sufficient to achieve complete compliance with the laws for the protection of the environment.”⁶² It came into effect against the background of Framework Decision 2003/80, which prescribed that the European Community could legislate criminal penalties for a Community Directive.⁶³ The decision here was that whilst criminal law, “as a general rule”, does not fall within the competence of the Community, nonetheless, when “effective, proportionate and dissuasive criminal penalties” are “essential”

⁵⁵ Ibid. Dolinko takes this point a step further, and suggests that it will always be uncontroversial that taxes are “rationally” justifiable, even if someone (say, “a follower of Robert Nozick”) might argue that taxes are *morally* unjustifiable. David Dolinko, ‘Some thoughts about retributivism’ (1991) 101 *Ethics* 537, 540.

⁵⁶ Husak, ‘A Framework for Punishment: What Is the Insight of Hart’s ‘Prolegomenon’?, 7.

⁵⁷ Ibid. Why did Hart neglect to include this? Husak writes, “I am at a loss to understand...”. Ibid.

⁵⁸ Joseph F DiMento, ‘Criminal enforcement of environmental law’ (1993) 525 *The Annals of the American Academy of Political and Social Science* 134, 137-138.

⁵⁹ Ibid, 138.

⁶⁰ Ibid, 138-139.

⁶¹ Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law, L 328/28 *Official Journal of the European Union* (6.12.2008).

⁶² Directive 2008/99/EC, *ibid*, *citing* para (3).

⁶³ *Commission of the European Communities v Council of the European Union*, EU: Case C-176/03 (EU Court Reports 2005 page I-07879). *See discussion* of this case at http://eulaw.typepad.com/eulawblog/2005/09/criminal_penalt.html. The point was that the Council had refused to adopt a draft directive from the Commission on the grounds that the administration of criminal law is reserved to the member states.

to ensuring that environmental legislation become fully effective, then such measures potentially could be allowed.⁶⁴

This Directive was controversial, largely because it is not strictly viewed as within the EU's competence to criminalise acts.⁶⁵ Perhaps a main objective of the directive was to reinforce the message that the EU views the protection of the environment as something that *should* be pursued within its legal framework, and not left to member states.⁶⁶ This would call the EU's ringmaster role with respect to environmental *taxation* into question;⁶⁷ or, at least, would heighten the need for clarity on the division of competences between member states and the EU on the protection of the environment.⁶⁸ Interestingly, the Directive did not require member states to harmonise the penalties; perhaps this was viewed as a step too far.⁶⁹

A question to consider is whether we should make available a range of enforcement mechanisms to regulators to use whichever mechanism seems to them most appropriate; or, whether it is preferable to specify particular financial tools, such as taxes, fines, imprisonment, or any other mechanism by which the state expropriates property according to which has the higher rate of compliance. If the latter arrangement were to be adopted, then the amounts either of fines or taxes recouped would be a secondary consideration to the levels of compliance achieved. In this sense environmental taxes would differ from the preponderance of other taxes where financial yield is the primary purpose. The legislator will not, in general, want the taxes paid any more than s/he wants the crime prosecuted.

Imposition of taxes, in this analysis, will differ from the usual regulatory tools in other ways, including the fact that taxes typically are directed against the entire jurisdiction (in the case of environmental taxes, all the people engaging in a specific, environmentally harmful activity within that jurisdiction); whereas fines, whether imposed by courts or regulators, are more targeted. In any case, the rate of enforcement will be less than 100%. Contrast this, for example, with case of income taxation, where the liability to pay will arise in 100% of cases, but there may be attrition in the rate of collection. Finally, taxes and fines might both be imposed to discourage behaviour, but taxes will not require an identification of agency or responsibility before the obligation arises to pay them.⁷⁰

‘Centralising’ the moral basis of tax

When considering these options, it is important not to succumb to the caricature of taxes as a completely neutral tool, bereft of any ethical punch. Paying taxes is part of the duties of

⁶⁴ Case C-176/03, *ibid*, at “summary.”

⁶⁵ Chris Bryant, 'Twenty-Five Years of EU Environmental Law' (2010) 25 Nat Resources & Env't 39, 42.

⁶⁶ *ibid*.

⁶⁷ For a wide ranging analysis of the case for introducing a *direct* European tax, see J. Fitoussi and J. Le Cacheux, 'Funding the EU Budget with a Genuine Own Resource: The case for a European Tax', *Report on the State of the European Union: Volume 3: Crisis in the EU Economic Governance* (Springer 2009).

⁶⁸ The EU institutions had been moving in that direction for some time before the directive, which was preceded by an ECJ decision which requires member states to criminalise certain polluting conduct. Suzanne Kingston, 'Environment' (2010) 59 International & Comparative Law Quarterly 1129, 1139, *citing* *Commission v Council*, Case C-176/03, [2005] ECR I-7879.

⁶⁹ *ibid*.

⁷⁰ “In [taxation], the state’s use of its coercive power is not constrained by responsibility requirements to the degree it is in criminal law.” Antony Duff and Andrew von Hirsch, 'Responsibility, Retribution and the "Voluntary": A Response to Williams' (1997) 56 Camb Law J 103, 104.

citizenship, and also entail the benefit of certain rights (for example, healthcare).⁷¹ The citizenship, or community-focused,⁷² context of taxation is significant, particularly in the context of compliance.⁷³ Research suggests that morality, and cultural norms, may play a significant role in tax compliance, and, possibly, an *even greater role* than the threat of punishment.⁷⁴ The point here is that taxation may present an example of a law which need not depend upon the threat of punishment in order to elicit compliance.⁷⁵ Taxes are not only part of the duties of citizenship, but also contribute to a sense of “social cooperation” and solidarity.⁷⁶ Perhaps the added value of criminalisation and punishment would be to give the obligations we all owe to each other a moral basis, as opposed to simply a cooperative agreement.⁷⁷

Given the urgency of climate change, it might be time to opt for legal measures which *label* conduct as distinctively “reprehensible”.⁷⁸ Taxation may “lack... the condemnatory bite of the criminal law”,⁷⁹ which is important if we hope that offenders will reflect on their conduct, and change their ways. If a polluting factory is taxed only at the level of damage it causes to the environment, then there would be a danger that the costs would be internalised and the factory would continue to pollute.⁸⁰ Of course, various possibilities would exist for giving financial incentives not to pollute. The question here is whether financial incentives are sufficient to address the challenges of climate change.

Although taxes generally are not designed to “condemn the conduct”,⁸¹ examples do exist of regulations which fall somewhere in between taxes and fines. As Duff explained, the German system of *Ordnungswidrigkeiten* provides penalties for breaches of regulations: although they are designed to deter “disobedience”, the conduct itself is not condemned as

⁷¹ Dennis Klimchuk, 'On the Autonomy of Corrective Justice' (2003) 23 Oxf J Leg Stud 49, 50.

⁷² “The state’s enforcing of the law - in relation to, for example, taxation - allows each person reflectively to endorse her commitment to the scheme of social cooperation.” Matt Matravers, 'Political Theory and the Criminal Law' in Robin Antony Duff and Stuart Green (eds), *Philosophical foundations of criminal law* (Oxford University Press 2013), 71.

⁷³ For an extensive discussion of the “moral obligation to pay tax,” *see* Valerie Braithwaite and John Braithwaite, 'Democratic Sentiment and Cyclical Markets in Vice' (2006) 46 British Journal of Criminology 1110

⁷⁴ Alex Raskolnikov, 'Crime and Punishment in Taxation: Deceit, Deterrence, and the Self-Adjusting Penalty' (2006) 106 Columbia Law Rev 569, 578. Patriotism also may serve as a reason for compliance. Leo P. Martinez, 'Federal Tax Amnesty: Crime and Punishment Revisited' (1990) 10 Va Tax Rev 535, 555. *See also* the literature review in Rebecca Stone, 'Legal Design for the "Good Man"' (2016) 102 Virginia Law Review 1767 fn.41, 1779.

⁷⁵ It might be assumed, therefore, that tax compliance would not fit easily within a utilitarian justification of punishment; although, in fact, utilitarian assumptions appear to permeate the approach of many states to tax administration. Indeed, exemplary prosecutions are standard parts of tax enforcement. *See* Peter Alldridge, *Criminal Justice and Taxation*, ch.5 (Oxford University Press 2017)

⁷⁶ Matravers, 'Political Theory and the Criminal Law', 71.

⁷⁷ *ibid*

⁷⁸ Andrew P Simester and Andreas Von Hirsch, *Crimes, harms, and wrongs: On the principles of criminalisation* (Bloomsbury Publishing 2011)

⁷⁹ *ibid*

⁸⁰ Additionally, “...the non-actors (in this example, everyone other than the factory) will be indifferent as to whether the factory owner chooses to produce an extra quantum of pollution and pay the corresponding fine or chooses not to pollute.” Russell Korobkin, 'Libertarian Welfarism' (2009) 97 Calif Law Rev 1651, 1666.

⁸¹ Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law*, 81.

“morally wrong”.⁸² That sort of condemnation is reserved for fines, and the criminal law.⁸³ Significantly, Duff notes that the European Court of Human Rights has classified *Ordnungswidrigkeiten* as criminal,⁸⁴ which (as this classification confers procedural protections), renders them (in a comparison of options available) less easily administered. Ease of administration is an important issue, especially if one considers the question of urgency.

Perhaps partially due to their administrative ease, environmental taxes are set to play a key role in global efforts to meet the targets of the Paris Agreement, whether in the form of carbon taxes or charges.⁸⁵ What would Hart’s puzzled person make of environmental taxation in the age of the Paris Agreement? There would be an effort to find a way to calculate the least painful outcome from the range of sometimes confusing incentives and disincentives.⁸⁶ And, the bad actor? As with the rational actor, the query might be, ‘what is in it for me?’ (with little consideration of the impact on others) Is the bad actor, however, the best test of legislative initiatives designed to prevent environmental pollution? Given the importance of collective action in environmental protection, and if we assume (perhaps, optimistically) that there are more puzzled people than bad actors, then the association of a moral imperative to environmental taxation might present a useful focus.⁸⁷

Can a moral imperative be achieved without punishment? Cooter suggested that simply identifying a normative basis for law could be sufficient to ‘centre’ the rational actor. The subtlety of taxation might mean that is is not the best medium for carrying this message, at least, not without further effort to draw attention to the message. Simply raising the price of a latte may not be sufficient. The increase in cost might be missed. Reducing the price of the latter for customers who bring their own mug might carry a stronger message. No matter how strongly conveyed the message, however, it is at least questionable whether a latte levy ever would be sufficient to eliminate the use of disposable plastic cups by bad actors entirely, which was the test implied by the Chancellor.

This analysis started from the point not of considering the merits of such a stringent test; but, rather, from the point of observing how much the discourse surrounding tax, fines, choice and punishment has changed. When Hart, in *P&R*, argued that punishment differs from a “tax on the course of conduct,” he emphasised that a purpose of law is to provide reasons that help people to make decisions. This was a subtle but significant shift from his earlier argument (in

⁸² *ibid*

⁸³ *id*

⁸⁴ *id*, *citing Oztürk v Germany*, (1984) 6 EHRR 409.

⁸⁵ United Nations, ‘Committee of Experts on International Cooperation in Tax Matters Fourteenth Session’ (30 March 2017) <http://www.un.org/esa/ffd/wp-content/uploads/2017/03/14STM_CRP6_carbon-tax.pdf> (last accessed 1 June, 2019).

⁸⁶ “One gets the sense that Hart’s Puzzled Man has the internal point of view of a British tax barrister, which Hart once was, or at least the stereotypical Englishman who queues with grave abandon.” Jeffrey A Pojanowski, ‘The place of force in general jurisprudence’ (2015) 21 *Legal Theory* 242, 245.

⁸⁷ The challenge to the *juste retour* model of funding the EU – in other words, member states expecting to get back exactly what they put in – was an important focus of the Monti Review of EU own resources. The argument is that as a taxpayer should not expect to receive back in services an exact financial representation of what he paid in, similarly, neither should member states. The idea is that payment of taxes is an important part of the social contract. Euractiv, ‘Monti group challenges the ‘juste retour’ principle in EU budgeting’ (2017), at <https://www.euractiv.com/section/euro-finance/news/monti-group-challenges-the-juste-retour-principle-in-eu-budgeting/> (last accessed 1 June 2019).

PAS) that a command-based account of law may *fail to distinguish* between taxes and fines, which (by Hart's implication) are clearly different. The "clearly different" point appears to fade away, in the *P&R* revision. He was more interested (in *P&R*) in making the argument that the law may provide reasons for making choices, whilst preserving the freedom to make the choice. Hart makes clear that a punishment is not a tax, but is more focused on discussing the significance of the former, than the latter.

The latte levy would appear to have been designed within a rather command-theory focused understanding of the law. The Chancellor implied that he was hoping, from this tax, for a prediction of a surer outcome. This is one important shift in the discourse: interest in the outcome of tax (as opposed to its immediate impact on the payer). Another difference is the Chancellor's expression of faith in the ability of a tax, to such an extent that it appears to have been burdened with such high expectations. The hope appears to have been to remove undesirable behaviour almost unnoticed – a perfectly designed latte levy, that (presumably) would make it impracticable for coffee shop owners to continue to supply them (as, again presumably) the wealthy, bad actor is unlikely to be influenced by an increase in cost of (for them) a (comparatively) inexpensive item? This is perhaps a new iteration of Austinian command theory – as translated through the rational actor; and, reflective of a new belief in the potential power of tax.

Conclusion

This article began by considering the decision of the Chancellor to decline to introduce a tax on plastic cups, on the basis that research suggests that such tax would not succeed sufficiently in deterring undesirable behaviour. This provided the starting point for a consideration of the difference between taxes and fines, and Hart's views on the subject. Hart's grappling with the tax / fine distinction has been acknowledged, challenged, and probed for significance. What is not frequently acknowledged within this literature, however, is that Hart (ever so slightly) changed his mind. This article explained how; and, argued that, given the example presented by the modern, legal framework underpinning environmental taxation, Hart might well have changed his mind, again.

The thrust of Hart's argument was that taxes, without more, may lack the element of stigmatization, which is crucial if the aim (as with the latte levy) is to influence future choices. Arranging the economic influences on our choices in such a way that we consistently make the socially desirable choice does sound attractive. If the consequence is that these choices remain unmoored, or as Cooter argued, and not centred in a normative or moral basis, then the risk may be that the attractive outcome is but a quick fix. The challenge of identifying a moral basis for taxes may differ, because of its comparative subtlety, from the construction of a justification for punishment; but the rhetoric of the failed latte levy would indicate that this process already has begun.