

EQUITY IN THE AMORAL STATE: THE NEXUS BETWEEN CHARITIES, GAMBLING AND THE TAXATION-REDISTRIBUTION SYSTEM

JONATHAN BARRETT AND JOHN VEAL*

ABSTRACT

This article considers equity in the interactions between charities, electronic gaming machine ('EGM') operators and government, both in the technical sense, as used in taxation theory, and in the sense of overall justice in society. First, the New Zealand context of charity, gambling and government is sketched. An overview of relevant law and taxation is given, and the connections between charities, gambling and the tax-redistribution system outlined. Second, equity (horizontal and vertical) as used in taxation theory, is applied to EGM taxation. Another facet of fairness — geographical equity — is noted. Third, a broad concept of equity as overall justice in society is applied to the interactions between charity, gambling and government. It is concluded that governments' and charities' collusion with EGM operators is inequitable and morally indefensible.

* Jonathan Barrett is a Senior Lecturer in Taxation and Commercial Law in the School of Accounting and Commercial Law, Victoria University of Wellington. His doctoral research related to taxation and human rights. John Veal is a Principal Lecturer in Taxation in the Open Polytechnic School of Business. He is a co-author of *Staples Tax Guide*, an annual guide to New Zealand taxes.

I INTRODUCTION

‘Arising out of religious or moral disapproval,’ Charles Clotfelter says, ‘sumptuary laws dating back to the ancient Greeks have been used to restrict or forbid certain kinds of consumption.’¹ Richard Musgrave conceives sumptuary taxes as the reverse of public subsidies for merit goods, and notes that subsidies for merit goods and taxes on demerit goods² both ‘interfere with consumer sovereignty’.³ Consistent with the neoliberal principle of respecting consumer sovereignty,⁴ New Zealand ostensibly pursues neutrality in its tax system⁵ — evident, in particular, in its ‘pure’ goods and services tax (GST) which, unusually, does not distinguish between merit and demerit goods and services.⁶ However, while we may encounter occasional references to ‘sin taxes’ in contemporary political discourse,⁷ such vestiges of moral opprobrium regarding the consumption of alcohol, gambling and tobacco are generally absent from tax policy debate. The confidence of previous generations of lawmakers that certain forms of consumption are morally wrong and therefore suitable for punitive tax or legal treatment may seem quaint from a contemporary perspective. However, it is submitted that gambling gives rise to acute moral and equity issues which do indeed call for non-neutral legal and tax treatment.

This article considers equity in the interactions between charities, government and gambling operators, specifically electronic gaming machine (EGM) trusts. Equity is considered both in the technical sense, as used normally in taxation literature, and in a broader sense of fundamental justice in society.⁸ First, the New Zealand context of charity, government and gambling is sketched. A brief overview of relevant law and

¹ Charles T Clotfelter, ‘Gambling Taxes’ in Sijbren Cnossen (ed), *Theory and Practice of Excise Taxation: Smoking, Drinking, Gambling, and Driving* (OUP Oxford, 2005) 84, 104.

² See Richard A Musgrave and Peggy B Musgrave, *Public Finance in Theory and Practice* (McGraw-Hill, 2nd ed, 1976) 65 on merit and demerit goods.

³ Richard A Musgrave, *The Theory of Public Finance* (McGraw-Hill Book Co, 1959) 178. Musgrave also notes that, from the perspective of ‘the broader framework of social values’, sumptuary taxes are not necessarily inefficient: see *ibid*.

⁴ Richard Epstein, a prominent libertarian philosopher and frequent guest and polemicist for the New Zealand Business Roundtable (since subsumed into the New Zealand Initiative), argues that taxes should ‘preserve the relative priorities that individuals attach to various activities’: see Richard A Epstein, ‘Taxation in a Lockean World’ in Jules Coleman and Ellen Frankel Paul (eds), *Philosophy and Law* (Basil Blackwell, 1987) 39, 55.

⁵ The absence of a general capital gains tax is the most significant breach of the neutrality principle in the New Zealand tax system.

⁶ See David White and Richard Krever, ‘Preface’ in Richard Krever and David White (eds), *GST in Retrospect and Prospect* (Brookers, 2007) vii, viii.

⁷ For example: ‘National’s coalition partner, the Maori Party, has taken a hard line on “sinners’ taxes”, and co-leader Tariana Tu wants the Government to increase the excise tax on tobacco’ reports Isaac Davison, ‘Cigarettes, Booze, in the Gun’, *The New Zealand Herald* (online), 16 May 2012 <http://www.nzherald.co.nz/business/news/article.cfm?c_id=3&objectid=10806947>.

⁸ The principal underpinning of this article is Aristotelian virtue ethics, which, as discussed in Part IV below, requires us to take account of others’ wellbeing. Compare with John Rawls’s concept of justice as fairness: see John Rawls, *A Theory of Justice* (The Belknap Press of Harvard University Press, rev ed, 1999) 10–15. Martha Nussbaum, whose thinking is central to the article, has developed Rawlsian liberalism through the prism of Aristotelian virtue ethics: see, generally, Martha C Nussbaum, *Frontiers of Justice* (Harvard University Press, 2006).

taxation is given. Second, well-established principles of equity in taxation are applied to EGM taxation. Beyond traditional conceptions of horizontal and vertical equity, a further potential facet of fairness — geographical equity — is noted. Third, a broad concept of equity as other-oriented morality or overall justice in society is applied to the interactions between charity, gambling and government; conclusions are then drawn.

II NEW ZEALAND CONTEXT

This part of the article outlines the context of gambling in New Zealand, with a focus on EGMs.

A Revenue and Tax

1 *History of Gambling in New Zealand*

State-sponsored gambling in New Zealand began in 1961 with the establishment of the Golden Kiwi lottery — but not before the government had struggled with the moral issues surrounding direct promotion of gambling.⁹ Until 1979, legal gambling was limited to the racing industry (TAB) and the New Zealand Lotteries Commission. The government introduced Lotto in 1987 and the first casino opened in Christchurch in 1994.¹⁰ From 1996, the TAB was able to accept bets on all sporting events.

In 1973,¹¹ the first gaming machines made ‘their way across the Tasman from Australia’ but remained technically illegal.¹² David Grant says:¹³

Despite the continuing confiscations of machines and the fining of operators, it was futile to stop their proliferation because they were so popular. Addicts played for hours, like robots, seemingly as dehumanised as the machines themselves. Finally, in October 1986, the Minister of Internal Affairs Peter Tapsell admitted that he was losing the battle, ruled against banning them and urged that they be authorised for use in hotels and sports clubs.

Despite amendments to the *Gaming and Lotteries Act 1977* (NZ), the *Gambling Act 2003* (NZ) was enacted ‘to counter the rapid, uncontrolled growth and rampant corruption in the gaming machine sector’.¹⁴ The Department of Internal Affairs (DIA) is the

⁹ See David Grant, *On a Roll: A History of Gambling and Lotteries in New Zealand* (Victoria University Press, 1994) 221.

¹⁰ Expenditure on gambling in casinos increased from NZ\$40 million in 1995 to NZ\$509 million in 2012, an increase of 1172 per cent.

¹¹ Grant, above n 9, 288 notes that American-made ‘fruit’ machines first arrived in New Zealand in the 1930s but were soon declared illegal.

¹² Steve Deane, ‘Our Love of a Punt’, *The New Zealand Herald* (online), 29 August 2013 <http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=11115846>. See also John Markland, ‘Gaming in New Zealand’ (1996) 7 *Social Policy Journal of New Zealand* 79, 79–81.

¹³ Grant, above n 9, 289.

¹⁴ Deane, above n 12. See also the *Racing Act 2003* (NZ) which established the New Zealand Racing Board.

government agency charged with administration of the *Gambling Act*, which includes overt public health considerations.¹⁵

EGMs 'in New Zealand are operated by non-club gaming societies [which] operate gaming machines in commercial venues, and clubs [chartered clubs, Returned and Services' Associations (RSAs) and sports clubs] that typically operate gaming machines in their own premises'.¹⁶ In 2011, approximately one-fifth of non-casino EGMs were operated by clubs on their own premises.¹⁷ The number of non-casino EGMs increased from 7700 in 1994 to a peak of 24 221 in 2003 but, as at 31 March 2013, there were 17 542 such machines in New Zealand.¹⁸

2 *Gambling Expenditure*

In 2012, total gambling expenditure amounted to NZ\$2.065 billion, with NZ\$854 million being spent on non-casino EGMs — a seven-fold increase on 1991's NZ\$107 million expenditure.¹⁹ ('Expenditure' is the gross amount wagered less the amount paid out or credited as prizes or dividends, in other words, the amount lost by players or the gross profit of the gaming operator.)²⁰ For the quarter ended 30 June 2013, EGM profits by society type were as follows: non-club NZ\$179.97 million (87.4 per cent); sports clubs NZ\$2.96 million (1.4 per cent); chartered clubs NZ\$15.86 million (7.7 per cent); and RSA clubs NZ\$7.27 million (3.5 per cent) — a total of NZ\$206.06 million.²¹

3 *Gaming Duties*

In terms of the *Gaming Duties Act 1971* (NZ), separate duties are raised on totalisators,²² lotteries,²³ casinos²⁴ and EGMs. According to Inland Revenue Department (IRD)

¹⁵ See *Gambling Act* part 4 but also see Peter J Adams and Fiona Rossen, 'A Tale of Missed Opportunities: Pursuit of a Public Health Approach to Gambling in New Zealand' (2011) 107 *Addiction* 1051, 1051–56 for an argument that the legislation is 'business as usual'.

¹⁶ Policy Group, 'The Distribution of Non-Casino Gaming Machine Profits in New Zealand' (DIA, 2012) 4.

¹⁷ *Ibid*, 5.

¹⁸ See *ibid* and DIA, 'Pokie Spending and Numbers Continue to Drop' (Press release, 24 July 2014).

¹⁹ DIA, *Gambling Expenditure Statistics* (2014)

<http://www.dia.govt.nz/diawebsite.nsf/wpg_URL/Resource-material-Information-We-Provide-Gambling-Expenditure-Statistics>.

²⁰ *Ibid*.

²¹ DIA, *Report 3: GMP by Number of Machines at Venue for Quarter to June 2013* (2013), <[http://www.dia.govt.nz/pubforms.nsf/URL/DetailedGMPdata-June2013.pdf/\\$file/DetailedGMPdata-June2013.pdf](http://www.dia.govt.nz/pubforms.nsf/URL/DetailedGMPdata-June2013.pdf/$file/DetailedGMPdata-June2013.pdf)>.

²² Totalisator duty is payable monthly, at the rate of four per cent of betting profits. Betting profits means all amounts received by the New Zealand Racing Board for totalisator racing betting, sports betting and fixed-odds racing betting less the amount of refunds paid less the amount paid as winning dividends: see *Gaming Duties Act 1971* (NZ) s 4.

²³ Lottery duty is payable at the rate of 5.5 per cent of the nominal value of all the tickets represented in the drawing of the lottery, whether the tickets have been sold or not: see *Gaming Duties Act* s 9.

²⁴ Casino duty is payable monthly, at the rate of four per cent of the 'casino win'. Casino win means the gaming income of the casino less the amount of gaming wins paid out and the amount of any casino losses from the previous period. Gaming income means all money paid to the casino to purchase chips or to play any casino gambling. Gaming wins means all money paid or returned by the casino to redeem chips or to pay out winnings: see *Gaming Duties Act* s 12N.

statistics, a total of NZ\$270.7 million in gaming duty revenue was collected in 2012.²⁵ EGM duty is payable monthly at the rate of 20 per cent of EGM profits. (EGM profits are the difference between total machine income and the total amount paid as prizes.)²⁶

4 *Problem Gambling Levy*

A problem gambling levy was introduced with effect from 1 October 2004.²⁷ The levy rates are set by Order in Council and reviewed every three years. The rates applying from 1 July 2013 are: casino operators' casino wins (0.74 per cent), non-casino gaming machine operators' gaming machine profits (1.31 per cent), New Zealand Racing Board's betting profits (0.60 per cent) and New Zealand Lotteries Commission's turnover less prizes paid and payable (0.30 per cent).²⁸

5 *Other Taxes*

Gambling supplies are subject to GST.²⁹ However, racing organisations and EGM operators are generally exempt from income tax.³⁰

B Distribution of EGM Profits

A non-casino EGM licence holder must annually distribute at least 37.12 per cent of its gross proceeds (exclusive of GST) for an 'authorised purpose'.³¹ An 'authorised purpose' in relation to Class 4 (EGM) gambling is a charitable purpose; a non-commercial purpose that is beneficial to the whole or a section of the community; and promoting, controlling, and conducting race meetings under the *Racing Act*, including the payment of stakes.³² Non-club gaming societies distributed approximately NZ\$252 million to community organisations in 2011.³³ Sporting organisations received NZ\$121 million (48 per cent of the total allocation of all funding by public societies) in 2011, with rugby union receiving the largest proportion (18 per cent). Horse racing, soccer, cricket and netball also received significant allocations. Social and community services together received 41 per

²⁵ IRD, *Revenue Collected, 2003 to 2012* (2013) <<http://www.ird.govt.nz/aboutir/external-stats/revenue-refunds/tax-revenue/>>. On 13 May 2013, the authors wrote to the IRD Duties Unit requesting a breakdown of the composite amount of gaming duties by duty type (totalisator, lottery, gaming machine and casino). IRD had not at the time of writing provided details of those amounts.

²⁶ *Gaming Duties Act* s 12C.

²⁷ See *Gambling Act 2003* (NZ) ss 317 to 325.

²⁸ For the period 1 July 2013 to 30 June 2016. Levy payments are subject to GST: see *Gambling (Problem Gambling Levy) Regulations 2013/190* (NZ).

²⁹ Gambling is 'the consideration in money is the portion of the amount of money a person pays to participate in the gambling (including a New Zealand lottery) that represents the proceeds (after deducting the amount of all prizes paid and payable in money) in respect of the gambling': see *Goods and Services Tax Act 1985* (NZ) s 10(14).

³⁰ See *Income Tax Act 2007* (NZ) ss CW 47 and CW 48 respectively.

³¹ *Gambling (Class 4 Net Proceeds) Regulations 2004* (NZ), reg 10(1). In 2012, the five largest EGM trusts (Infinity Foundation Ltd, Pub Charity, New Zealand Community Trust, The Lion Foundation and The Trusts Community Foundation Ltd) distributed 40.6 per cent of their profits (losses to gamblers).

³² *Gambling Act* s 4, definition of 'authorised purpose'. With regard to the last authorised purpose, it will be noted that EGM proceeds may be used to promote betting on horse races — gambling funding gambling.

³³ DIA, above n 19, 11.

cent of the total funding allocated by public societies (NZ\$104.4 million). Clubs allocated NZ\$50.6 million in EGM profits to authorised purposes in 2011. However, such allocations are typically for the clubs' own authorised purposes (notably club operating costs). DIA concludes that only a small percentage of this money was distributed in the form of grants to the wider community.³⁴

C Case study: What Happens to the Money Gambled on EGMs?

The following case study illustrates what happens (on average) to NZ\$100 gambled on an EGM.

\$90.70 is paid back to the pool of players as prizes.³⁵

The balance of \$9.30 is collected by the gaming machine operator and disbursed as follows:

	NZ\$
GST ³⁶	1.21
Gaming machine duty ³⁷	1.86
Problem gambling levy ³⁸	0.14
Venue payments ³⁹	1.24
Depreciation ⁴⁰	0.65
Other operating costs of operator ⁴¹	1.01
Available for distribution as grants ⁴²	3.19
Total	9.30

³⁴ DIA, above n 16.

³⁵ Derived from DIA, above n 19.

³⁶ NZ\$9.30 × 3/23.

³⁷ NZ\$9.30 × 20 per cent.

³⁸ NZ\$9.30 × 1.4 per cent. The levy decreased to 1.31 per cent with effect from 1 July 2013, so from that date the levy would be 12 cents.

³⁹ The figures for venue payments, depreciation and other operating costs are based on the latest available average figures for the five largest gaming machine operators (see above n 31).

⁴⁰ See *ibid*. Depreciation primarily relates to gaming machines owned by the operator.

⁴¹ See *ibid*.

⁴² The minimum distribution required is 37.12 per cent of the operator's GST-exclusive gross proceeds. In the above example, this would equate to \$3.00. See Gambling (Class 4 Net Proceeds) Regulations 2004 (NZ), reg 10(1). From the first financial year starting after 4 September 2014, the minimum distribution will increase to 40 per cent and will be raised to 42 per cent over five years: see Gambling (Class 4 Net Proceeds) Amendment Regulations 2014 (NZ), reg 4.

The distribution of funds can be summarised as:

	NZ\$
Returned to players as prizes	90.70
Paid to Government as taxes and levies	3.21
Operator expenses	2.90
Paid out as grants to charities and sports groups	3.19
Total	100.00

Of critical importance to note: first, nine-tenths of the money spent on EGM machines is randomly redistributed among the pool of EGM players. Although the same maybe true for other forms of discretionary spending, this amounts to roughly NZ\$2 billion a year that might be productively invested (and investment returns taxed); second, the distributable amount is split in roughly three equal ways between government, EGM operators, and community organisations. EGM trusts enjoy a veil of respectability by virtue of the community grants they make,⁴³ yet while the community grants are significant,⁴⁴ they constitute a negligible proportion of the money ‘wasted’ on EGMs.⁴⁵ Raising public benefit funds via EGM trusts also appears inefficient.⁴⁶

⁴³ A leading EGM trust, The Lion Foundation, has controversially used an MBA thesis to promote its distributions to community groups as an unalloyed public good. The thesis concluded: ‘Overall, it seems clear that New Zealand continues to be a country that benefits extraordinarily from the efforts of its volunteers and the funding support they receive from organisations such as the Foundation. We should celebrate and be proud of this.’ See Vicki Caisley et al, *The Impact of Grant Funding on Communities in New Zealand: A Case Study* (MBA Thesis, Massey University, 2013) 87. For a critique of the students’ methodology and the Lion Foundation’s use of the research, see comments reported in Steve Deane, ‘Pokie Group Faces Flak over Study’, *The New Zealand Herald* (online), 11 October 2013

<http://www.nzherald.co.nz/gambling/news/article.cfm?c_id=215&objectid=11138319>.

⁴⁴ In 2012, the five largest EGM trusts (see above n 31) distributed around NZ\$150 million.

⁴⁵ Playing EGM machines clearly provides some short-term pleasure for participants — as does, say, smoking — but, as psychologists recognise, wellbeing requires satisfaction of both hedonic (pleasure-based) and eudaimonic (virtue-based) aspects of happiness. Engagement in hedonic activities, such as playing EGM machines, ‘[does] not satisfy basic psychological needs [and] can at best only partially satisfy needs and at worst can distract from foci that would yield fulfilment’: see Richard M Ryan and Edward L Deci, ‘On Happiness and Human Potentials: A Review of Research on Hedonic and Eudaimonic Well-being’ (2001) 52 *Annual Review of Psychology* 141, 153.

⁴⁶ Based on the case study figures, only 34.3 per cent (3.19/9.30) of EGM trust revenue ends up in the hands of good causes. This proportion may be compared this with the New Zealand Red Cross which, in the year ended 30 June 2013, had fundraising income of \$32.16m and fundraising expenditure of \$3.7 million, giving a surplus of \$28.45 million (88.5 per cent). See *New Zealand Red Cross Annual Report 2013* (2013) <https://www.redcross.org.nz/yk-files/79b55226496ab238e18951f7eaa716a7/NZRC_Annual%20Report%202013.pdf>.

III EQUITY

A Technical Equity

Aristotelian distributive justice requires equal distribution of burdens and benefits among those equally situated and, by implication, unequal distributions among those unequally situated.⁴⁷ This form of justice may be characterised as ‘geometric’ equality, which ensures that distribution is made according to community members’ varying circumstances.⁴⁸ Following these principles, in taxation, horizontal equity lies in equally situated taxpayers paying the same amount of tax, whereas vertical equity lies in the different treatment of unequally situated taxpayers.⁴⁹ Vertical equity is normally considered to exist when those with greater ability to pay, pay more tax than those less able to pay. Conversely, regressive taxes are generally considered to be vertically inequitable.⁵⁰ Contemplating equity in relation to gambling taxes, Clotfelter says:⁵¹

Horizontal equity ... seems to be satisfied a priori, in that those who consume the taxed goods are subject to the same taxes and tax rates ... there is nothing in the administration of gambling taxes that would suggest the kind of discrimination implied by horizontal inequity. Gambling taxes ... may disproportionately take from those most susceptible to the urge to wager, but these differences do not appear to represent classifications on which horizontal equity should be judged, any more than the differences in tastes that cause other excise tax collections to differ among individuals. On the other hand, vertical equity ... is surely an important consideration, as demonstrated by the attention that distributional questions have received in the literature on gambling.

Empirical studies of the incidence of gambling taxes are virtually unanimous: ‘taxes on gambling are regressive’.⁵² Because those with lower incomes tend to gamble proportionately more of their incomes, particularly in relation to EGMs, they tend to pay proportionately greater amounts of gaming duty — whether or not they are aware of this — than those on higher incomes.⁵³ This phenomenon might be explained in terms of consumer preference but, because EGMs are addictive,⁵⁴ assertions of rational consumer choice are implausible. Furthermore, since non-casino EGMs are predominantly situated in poorer neighbourhoods,⁵⁵ the entire EGM set up can be seen as regressive.

⁴⁷ R W M Dias, *Jurisprudence* (4th ed, Butterworths, 1976) 66.

⁴⁸ Eugene Kamenka, ‘What Is Justice?’ in Eugene Kamenka and Alice Erh-Soon Tay (eds), *Justice* (Edward Arnold, 1979) 1, 3.

⁴⁹ Bernard Herber, *Modern Public Finance* (5th ed, Irwin, 1983) 119.

⁵⁰ *Ibid*, 23.

⁵¹ Clotfelter, above n 1, 105.

⁵² *Ibid*, 106.

⁵³ It is a moot point whether the problem gambling levy is substantively regressive. It is submitted that, because the levy is based on risk of harm and funds are hypothecated to alleviating gambling harm, monetary regression is not an important consideration.

⁵⁴ See Roger Collier, ‘Do Slot Machines Play Mind Games with Gamblers?’ (2008) 179(1) *Canadian Medical Association Journal* 23, 23. Furthermore, as Adams and Rossen, above n 15, 1055 observe, ‘most [gambling] products — particularly EGMs — possess considerable leeway in the way contingencies can be manipulated to maintain addicted behaviour’.

⁵⁵ See Ministry of Health, *Problem Gambling Levy for 2013/14 to 2015/16: Regulatory Impact Statement* (2013) [55] < <http://www.health.govt.nz/system/files/documents/pages/regulatory-impact-statement-problem-gambling-levy-2013-14-2015-16.pdf>>.

B Geographical Equity

It is widely considered fair that EGM profits should be mostly hypothecated to the areas where the relevant EGMs are located.⁵⁶ This expectation may be described as an element of geographical equity. A disproportionate amount of EGM expenditure takes place in high-deprivation areas.⁵⁷ In 2009, 56 per cent of all EGM expenditure occurred in census area units with a decile rating of 8 or above (indicating high deprivation); Māori and Pasifika peoples are overrepresented in these areas.⁵⁸ Distributable EGM funds are commonly paid to community groups in the 'region' in which the EGM machines are located,⁵⁹ but, even if distributions were fully 'regionalised', some funds necessarily leave the community in the form of taxes and possibly operator fees.⁶⁰ Along with any transfers from high-deprivation communities to community organisations in wealthier areas, such leakage would constitute geographical inequity.⁶¹

The issue of EGMs and geographical inequity was highlighted in a series of investigative articles published in *The New Zealand Herald* in August 2013.⁶² From a policy perspective, the articles indicate that the concept of 'area' (in relation to the distribution of EGM funds) is problematic, and the system is open to abuse. In the first regard, the wealthy Auckland suburb of Remuera has a mere 23 EGM machines, yet Remuera's College Rifles Rugby Club has received more than \$1 million from EGM trusts, most of which have a significant presence in impoverished neighbouring suburbs in South Auckland.⁶³ In the second regard, in 2012, 'the Otago Rugby Union bought three South Auckland pubs then syphoned \$5 million in pokie profits out of the areas — mainly Manuera — to help prop up the failing Dunedin sporting body'.⁶⁴ While caution should be exercised in seeking to generalise from anecdotes, the potential for inequity and abuse is real.

⁵⁶ This expectation of geographical equity is evident from statements by EGM trusts (see, for example, below n 59) and proposed legislation and regulations (see below n 65).

⁵⁷ Ministry of Health, above n 55, [55].

⁵⁸ Francis Group, *Informing the 2009 Problem Gambling Needs Assessment: Report for the Ministry of Health* (2009) 9 <[http://www.moh.govt.nz/moh.nsf/pagesmh/1104/\\$File/informing-2009-problem-gambling-needs-assessment-may09.pdf](http://www.moh.govt.nz/moh.nsf/pagesmh/1104/$File/informing-2009-problem-gambling-needs-assessment-may09.pdf)>. 'Pasifika' is an umbrella term used to identify members of the 22 non-indigenous, Pacific Island communities in New Zealand: see Ministry of Education, *Pasifika Peoples in New Zealand Education: A Statistical Snapshot 2004* (Ministry of Education, 2004).

⁵⁹ See, for example, The Trusts Community Foundation Ltd, *Chairman's Report & Annual Review* (2013) <<http://www.ttcfltd.org.nz/chairmans-report-annual-review>> but see below n 64 on funds from impoverished Manuera being distributed in wealthy Remuera. Presumably, these contiguous but economically differently situated suburbs are considered to be in the same region.

⁶⁰ Ministry of Health, above n 55, [56]; Steve Deane, 'Pokie Cash: Robbing the Poor to Give to the Rich', *The New Zealand Herald* (online), 27 August 2013 <http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=11114737> notes that in 2009 the Otago Rugby Union bought three South Auckland taverns in order to gain control of their EGM machines.

⁶¹ Ministry of Health, above n 55, [57]. Distributions to organisations that typically benefit wealthier community members might not constitute geographical inequity but would have regressive effects.

⁶² Notably Deane, above n 60.

⁶³ See *ibid.*

⁶⁴ Brian Rudman, 'We're Relying on Money Poured through Pokies', *The New Zealand Herald* (online), 24 October 2012 <http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10842420>.

In response to various inequities arising from EGMs, Te Ururoa Flavell, a Māori Party Member of Parliament, introduced a private member's Bill which included a requirement that at least 80 per cent of distributable EGM funds should be returned to the areas in which the gambling took place. The National Party-controlled Commerce Committee decided that any such measures should be in the form of regulations rather than amendment to the principal Act, and *Gambling Act* s 114, as amended by *Gambling (Gambling Harm Reduction) Amendment Act 2013* (NZ) s 12, was enacted accordingly. Any further harm mitigation under the *Gambling Act* will be at ministerial discretion. In September 2013 DIA issued a consultation document inviting submissions on: increasing the transparency of grant-making decisions; increasing the minimum rate of return to authorised purposes; regulating local distribution of gambling proceeds; and changing the venue payments system for non-casino EGMs.⁶⁵

The Green Party withdrew support for Flavell's Bill at the Committee stage because a principal aim of the original Bill, which was to give councils and communities the power to cut the number of EGMs in their area or eliminate them altogether, had not just been 'watered down' but would 'actually restrict councils wanting to reduce the number of pokies in their area'.⁶⁶ Critically, the original Bill would have abolished EGM trusts and brought EGMs under council control and thus introduced some democratic oversight at a local level. It may be inferred that the Green Party assumed that, faced with the inequities of EGMs, local voters would pressurise councils to eliminate EGMs from their communities.⁶⁷

In sum, measured against the yardstick of vertical equity, gambling taxes are, in general, found to be regressive. Furthermore, if, following Liam Murphy and Thomas Nagel,⁶⁸ we look beyond specific taxes to consider the overall equity of the EGM tax-distribution system, and take into account issues of geographical equity, at the very least, the potential exists for gross inequity.

⁶⁵ See DIA, *Gambling Act 2003 Public Consultation on Four Class 4 Gambling Proposals* (2013) <[http://www.dia.govt.nz/pubforms.nsf/URL/Gambling_Public-consultation-on-four-Class-4-gambling-proposals_September-2013.pdf/\\$file/Gambling_Public-consultation-on-four-Class-4-gambling-proposals_September-2013.pdf](http://www.dia.govt.nz/pubforms.nsf/URL/Gambling_Public-consultation-on-four-Class-4-gambling-proposals_September-2013.pdf/$file/Gambling_Public-consultation-on-four-Class-4-gambling-proposals_September-2013.pdf)>. The first response has been to increase the minimum distribution requirement to 42 per cent over five years under Gambling (Class 4 Net Proceeds) Amendment Regulations 2014 (NZ), reg 4.

⁶⁶ See Green Party, 'Green Party No Longer Supports Flavell Gambling Bill' (media release), 17 June 2013 <<http://www.scoop.co.nz/stories/PA1306/S00280/green-party-no-longer-supports-flavell-gambling-bill.htm>>.

⁶⁷ Is such an assumption well-founded? Certainly, some local authorities have introduced or are considering EGM sinking lid policies. Auckland, for example, will not permit a new Class 4 venue to be established when an existing venue closes. Furthermore, existing Class 4 venues may not relocate from one part of the city to another: see Auckland Council, *Class 4 Gambling (Pokie) Venue Policy* (2013) <<http://www.aucklandcouncil.govt.nz/EN/planspoliciesprojects/councilpolicies/gamblingvenuepolicies/Documents/class4gamblingpokievenuepolicy.pdf>>. However, when Invercargill council was offered a significant donation on condition it banned EGMs, it rejected the offer, describing it as 'impossible' to accept: see Neil Ratley, 'Crimp Offer: \$500,000 for Race but Pokies Go', *The Southland Times* (online), 3 July 2013 <<http://www.stuff.co.nz/southland-times/news/8870240/Crimp-offer-500-000-for-race-but-pokies-go>>.

⁶⁸ Liam Murphy and Thomas Nagel, *The Myth of Ownership: Taxes and Justice* (Oxford University Press, 2005) 131.

IV EQUITY AS VIRTUE IN SOCIETY

This part of the article departs from the forms of technical equity normally encountered in the tax literature to consider a fundamental manifestation of equity in society derived from virtuous, other-oriented moral behaviour.

A Universal Justice

In the Aristotelian classification, the distributive justice discussed in the preceding part is *particular* justice;⁶⁹ we now move to *universal* justice. For Aristotle, universal justice is the ‘whole of virtue in its other-regarding aspect’ so that ‘all branches of moral virtue involve our relations to others’.⁷⁰ Such universal justice might suggest something metaphysical, above or beyond us, but is, in fact, something that should be present in every interaction between people. Since empathy is the root of all ethics,⁷¹ other-regarding virtue simply requires us to reflect that radical sensitivity in our behaviour. As Alasdair MacIntyre says, doing the virtuous thing is doing ‘what anyone filling such and such a role ought to do’.⁷² For Rosalind Hursthouse, ‘[v]irtue ethics ... emphasizes the virtues, or moral character ... Suppose it is obvious that someone in need should be helped ... a virtue ethicist [would emphasise] the fact that helping the person would be charitable or benevolent’.⁷³ Hursthouse questions ‘[w]hether virtue ethics can be expected to grow into “virtue politics” — i.e. to extend from moral philosophy into political philosophy’ but concedes that Martha Nussbaum has plausibly indicated⁷⁴ ‘that Aristotelian ideas can, after all, generate a satisfyingly liberal political philosophy’.⁷⁵ It is submitted that if juristic persons — the State, charities, corporations and so forth — operate in the human moral sphere, they should be deemed moral agents and be held to the same virtue norms as people.⁷⁶

B Morally Distinguishable Institutions

The term ‘morality’, as used in this article, denotes ‘a code of conduct that, given specified conditions, would be put forward by all rational persons’.⁷⁷ The Golden Rule

⁶⁹ In the Aristotelian scheme, particular justice is divided into distributive and corrective (or commutative) forms: see Dias, above n 47, 66.

⁷⁰ Lesley Brown, ‘Introduction’ in Aristotle, *The Nicomachean Ethics* (David Ross, trans, OUP Oxford, 2009) i, xxiv.

⁷¹ Bertrand Russell, *History of Western Philosophy and Its Connection with Political and Social Circumstances from the Earliest Times to the Present* (Routledge, 2nd ed, 1961) 738.

⁷² Alasdair MacIntyre, *After Virtue: A Study in Moral Theory* (Duckworth, 3rd ed, 2007) 184.

⁷³ See Rosalind Hursthouse, ‘Virtue Ethics’ in Edward N Zalta (ed) *The Stanford Encyclopedia of Philosophy* (Fall 2013 ed) <<http://plato.stanford.edu/archives/fall2013/entries/ethics-virtue/>>.

⁷⁴ See Nussbaum, above n 8, 216–23.

⁷⁵ Hursthouse, above n 73.

⁷⁶ It is not only morality that requires us and juristic persons to consider others. The law of torts can be characterised as a prohibition on causing harm to others: see, for example, W V H Rogers, *Winfield and Jolowicz on Tort*. (Sweet & Maxwell, 14th ed, 1994) 1–2. Of course, not all forms of harm to others give rise to actions in tort, thus the law recognises the concept of *damnum sine injuria* (wrong without a remedy) as illustrated by *Bradford Corp v Pickles* [1895] AC 587. It is submitted that moral obligation is not similarly determined by the existence of a remedy.

⁷⁷ See Bernard Gert, ‘The Definition of Morality’ in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (2012) <<http://plato.stanford.edu/archives/fall2012/entries/morality-definition/>>.

invocation to treat others how you wish to be treated is, according to Simon Blackburn, 'found in some form in almost every ethical tradition'.⁷⁸ This basic and universal of idea of morality as virtuous regard for others allows us to distinguish different institutions on moral grounds. Charities may plausibly be characterised as *moral* institutions.⁷⁹ They are commonly motivated by a religious belief that promotes some or other conception of virtuous behaviour in relation to others; legally, they must promote a public benefit⁸⁰ and organisational interest-holders may not themselves directly benefit.⁸¹ In essence, charity subordinates immediate self-interest and promotes the interests of others in need. In contrast, neoliberal government may be characterised as *amoral*; generally, it holds no concept of the public good.⁸² Its interest in proscribing traditional 'sins', such as smoking, drinking and gambling, is limited to the extent that they may represent a costly public health hazard.⁸³ Finally, EGM operators may be characterised as *immoral* because they profit from the apparent economic irrationality of many others and the addiction of a significant few others.⁸⁴ In the EGM context, these morally distinguishable bodies necessarily interact with one another.

Charities fill the gaps in social provision left by the 'hollow state';⁸⁵ they receive grants from government to effectuate public goods and services,⁸⁶ and benefit from egregious tax concessions.⁸⁷ Despite this necessary collaboration with government, charities occasionally play the role of critic and conscience of State social policies⁸⁸ but the potential removal of grants may have a chilling effect on such morally-informed

⁷⁸ See Simon Blackburn, *Ethics: A Very Short Introduction* (Oxford University Press, 2003) 101 See also, generally, Harry J Gensler, *Ethics and the Golden Rule* (Routledge, 2013). Perhaps the boldest expression of concern for 'the other' in modern ethics is provided by Emmanuel Levinas: see, generally, Emmanuel Levinas, *Humanism of the Other* (Nidla Poller, trans, University of Illinois Press, 2003) [trans of: *Humanisme de l'autre homme* (first published 1972)].

⁷⁹ This is not to say that all charities always act ethically: see, for example, Rowena Sinclair, Keith Hooper and Marini Mohiyaddin, 'The Quality of Charities' Audit Reports in New Zealand' (2011) 9(2) *New Zealand Journal of Applied Business Research* 23, 23–41 on the sharp accounting practices of certain registered charities.

⁸⁰ See *Re Greenpeace of New Zealand Inc* [2014] NZSC 105 (6 August 2014).

⁸¹ See Preamble to the *Charitable Uses Act 1601* 43 Eliz I c 4; *Commissioner of Income Tax v Pemsell* [1891] AC 531; *Charities Act 2005* (NZ) s 13(1).

⁸² Critics might argue that unlike classical liberalism, which eschews any particular conception of the good, neoliberalism does indeed pursue a particular conception of the good — markets being imagined everywhere. As Patrick Fitzsimons observes, under neoliberalism, 'it is not sufficient that there is a market: there must be nothing which is not market': see Patrick Fitzsimons, 'Neoliberalism and Education: the Autonomous Chooser' (2002) 4 *Radical Pedagogy* (unpaged) <http://radicalpedagogy.icaap.org/content/issue4_2/04_fitzsimons.html>.

⁸³ But see arguments that health is the 'new morality', for example, Jonathan Metzl and Anna Kirkland, *Against Health: How Health Became the New Morality* (New York University Press, 2010). The online journal *Spiked* has consistently critiqued public health measures as disguised moralising: see, for example, Christopher Snowden, 'The Disease of 'Public Health'', *Spiked* (online), 4 November 2013 <http://www.spiked-online.com/newsite/article/the_disease_of_public_health/14204>.

⁸⁴ Immorality of this nature may also be seen in terms of sociopathy — a failure to empathise with others or at least a wilful continuation of harm to others.

⁸⁵ A phrase used by Colin Pollitt, *New Perspectives on Public Services: Place and Technology* (Oxford University Press, 2012) 3.

⁸⁶ New Zealand charities received government grants of NZ\$4.997 billion in 2011: see Charities Commission, *Annual Report 10/11* (Charities Commission, 2011) 7.

⁸⁷ See, in particular, *Income Tax Act* ss CW 41, CW 42, CW 43 and LD 3.

⁸⁸ See, for example, Social Policy and Parliamentary Unit, *The Growing Divide: A State of the Nation Report from the Salvation Army 2012* (Salvation Army New Zealand, Fiji and Tonga Territory, 2012).

critique.⁸⁹ In March 2014, the New Zealand government announced that it would cease funding the bulk of the Problem Gambling Foundation's funding (although funding was later extended until 2015). Opposition parties characterised this move as 'payback' for the foundation's trenchant criticism of the government's SkyCity deal.⁹⁰

Government establishes the regulatory structure for both charities and gambling operators;⁹¹ it taxes the latter⁹² and hypothecates some revenue to remedying the social mischiefs caused by gambling through the problem gambling levy.⁹³ But government does not simply benefit from gambling, statute law makes legal gambling possible in the first place.⁹⁴ Furthermore, the EGM profit distribution scheme relieves government of expenditure in social and cultural fields it might otherwise bear.⁹⁵

EGM operators may bring fleeting pleasure to many, but they also bring abject misery to a significant minority.⁹⁶ As noted, they make a significant contribution to the fiscal system. EGM trusts are also significant donors to non-for profit (NFP) organisations, including some charities.⁹⁷

⁸⁹ See, for example, David Sutton, Caroline Cordery and Rachel Baskerville, *Paying the Price of the Failure to Retain Legitimacy in a National Charity: the CORSO Story* (Working Paper No 47, Centre for Accounting, Governance and Taxation Research, Victoria University of Wellington, 2007).

⁹⁰ See, Stacey Kirk, 'Problem Gambling Foundation Loses Govt Funding', *The Dominion Post* (online), 21 March 2014) <<http://www.stuff.co.nz/national/politics/9853344/Problem-Gambling-Foundation-loses-Govt-funding>>.

⁹¹ See, the *Charities Act* and the *Gambling Act* respectively.

⁹² See, generally, the *Gaming Duties Act*.

⁹³ Charities, such as the Gambling Helpline and the Problem Gambling Foundation, may receive funding from the problem gambling levy. It is not suggested that there is any moral ambiguity in such organisations receiving such funding — that is what a hypothecated tax is designed to do. On the related issue of the moral dilemma for researchers who receive funding from gambling industry sources, see Peter J Adams, 'Ways in which Gambling Researchers Receive Funding from Gambling Industry Sources' (2011) 11(2) *International Gambling Studies* 145, 145–52; Peter J Adams, 'Should Addiction Researchers Accept Funding Derived from the Profits of Addictive Consumptions?' in Audrey R Chapman (ed), *Genetic Research on Addiction: Ethics, the Law and Public Health* (Cambridge University Press, 2012) 122, 122–38.

⁹⁴ *Gambling Act* s 9 provides that gambling is illegal unless permitted by that Act.

⁹⁵ Before the *Poor Law Act 1601*, 43 Eliz I, c 2, the burden of poverty relief in the English-speaking world lay with ecclesiastical charities. Since then, the welfare burden has been shared by government and civil society. Broadly, charities played a significant welfare role in colonial New Zealand; a lesser role under the condition of the mid-twentieth century Welfare State; and an increased role under the conditions of neoliberalism: see, generally, Kerry O'Halloran, *Charity Law and Social Inclusion: An International Study* (Routledge, 2007).

⁹⁶ We know the types of harm that gambling can cause: thus the Ministry of Building, Innovation and Employment (MBIE) observes that 'the cost of intervention services is ... only a fraction of the costs (harms) associated with problem gambling (such as suicide; family violence; children inadequately clothed and fed, and other examples of deprivation and poor parenting)': see MBIE, *Regulatory Impact Statement: New Zealand International Convention Centre* (2013) [93] <<http://www.treasury.govt.nz/publications/informationreleases/ris/pdfs/ris-mbie-nzic-jul13.pdf>>. However, the extent of the social misery is less certain. According to the Problem Gambling Foundation of New Zealand, '[a]s many as 500 000 are affected by the significant economic, health, personal, and social costs that gambling problems cause in New Zealand'. Graeme Ramsey, 'Pokies Main Cause of Problem Gambling Misery', *The New Zealand Herald* (online), 21 March 2012 <http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10872604>. Ramsey is the chief executive officer of the foundation.

⁹⁷ All charities are NFPs, but not all NFPs are charities. Like charities, the NFP sporting bodies which benefit most from EGM distributions promote various public goods but not public goods that are

What happens when charities as moral institutions and amoral government interact with immoral EGM operators? Certainly, EGM operators may be pressurised into behaving in less harmful, if not more virtuous, ways.⁹⁸ However, a more likely outcome is non-virtuous creep such that other institutions become tainted by immorality. Thus government may become reliant on gaming taxes as an 'invisible' source of revenue⁹⁹ and on EGM distributions as substitute allocations. Broadly, for every dollar an EGM trust takes for itself, government takes a dollar. And every dollar distributed to community groups (in total, a quarter of a billion dollars annually) is a dollar which government (local and national) is relieved of the expectation that it might otherwise fund through taxes. It is not suggested that moral absolutes are possible in practical governance but dependence on tainted sources of revenue is morally suspect. Furthermore, government may engage in Faustian bargains whereby the certainty of misery related to problem gambling is traded-off against the promise of construction and casino-related jobs.¹⁰⁰ Or, more generally, the vast amounts of money involved in the gambling industry and the pressure of lobbyists may simply corrupt government.¹⁰¹

When charities apply for contestable funds distributed by EGM trusts, they must, it seems, suspend their disbelief about the source of the funds.¹⁰² Furthermore, they may be required to withhold public criticism of gambling. Thus Jolyon White observes, 'the gaming trusts have been operating as a pro-pokie lobby and treating grant money as hush money against harming the pokie cause'.¹⁰³ White led the move for Anglican Church-related charities to desist from applying for EGM trust funding and thereby to present an example of a moral organisation quarantining itself from non-virtuous creep. But not all charities can, or are willing to, take a similar moral stance. Without an alternative funding mechanism, many would cease to function, with a consequent loss to society. Sports charities typically adopt a crude consequentialism or otherwise manifest

recognised under the *Charities Act*. Nevertheless, for convenience sake, this article will refer to NFPs as though they were charities.

⁹⁸ For example, SkyCity Casino has agreed to introduce various harm-reduction mechanisms in exchange for being permitted to operate more EGMs: see MBIE, above n 95 [91].

⁹⁹ Compare with Jean Baptiste Colbert's aphorism: 'The Art of Taxation consists in so plucking the goose as to obtain the largest possible amount of feathers with the smallest possible amount of hissing.' Cited by Cedric Sandford, 'Introduction', in Cedric Sandford (ed), *Successful Tax Reform* (Fiscal Publications, 1993) 5 n 2.

¹⁰⁰ See Roger Dunstan, *Gambling in California*, California Research Bureau (1997) <<http://www.library.ca.gov/crb/97/03/crb97003.html#toc>>.

¹⁰¹ Julie Smith, 'Gambling Taxation: Public Equity in the Gambling Business' (2000) 33(2) *Australian Economic Review* 120, abstract. For a critical discussion of the National-led government's deal with the SkyCity Casino, see Jonathan Barrett and John Veal, 'Pokie Machines Ruined My Brother': Gambling Associated Harm from a New Zealand Policy Perspective' (2013) *Journal of Applied Law and Policy* <http://business.curtin.edu.au/local/docs/Barrett_Veal_Gambling-Associated_Harm.pdf>. See also Peter Adams, 'Remember Who Really Pays in SkyCity Deal', *The New Zealand Herald* (online), 5 March 2013 <http://www.nzherald.co.nz/business/news/article.cfm?c_id=3&objectid=10869158>.

¹⁰² Charities do not receive unsolicited cheques in the post from EGM trusts — they must submit applications and compete with other causes, notably sports clubs, for scarce funds.

¹⁰³ Tess McClure, 'Church Says No to "Hush Money"', *The Press* (online), 12 September 2013 <<http://www.stuff.co.nz/the-press/news/9154713/Church-says-no-to-hush-money>>.

a moral disconnection from the source of the funds. Thus *The New Zealand Herald* reports:¹⁰⁴

Sports bodies argue that while gambling may cause harm it does not follow that accepting [EGM trust] grants causes harm. So long as pokie machines are permitted, they point out, the revenue generated will be used for something. The more of it that has to be distributed for good purposes the better, and participation in sport is as worthy a purpose as any.

David Grant observes that 'from the 1970s constraints on gambling dissipated ... Moreover, as evangelical tides weakened, gambling profits that satisfied a public philanthropic need prevailed over moral and social objections'.¹⁰⁵ Certainly Christian groups, particularly Protestant churches, were prominent among the anti-gambling lobby but secular women's movements, whose 'concerns were primarily social rather than morally doctrinaire' also played a prominent role in the anti-gambling movement.¹⁰⁶ Any suggestion, then, that opposition to EGMs is a relic of religious intolerance or 'wowserism'¹⁰⁷ is misplaced. Other-centred justice — the idea that we should not do or permit harm to be done to others — is a universal value, and it characterises the equitable society.

V CONCLUSION

This article has argued that adherence to fundamental moral values is largely incompatible with both the moral disinterestedness of neoliberal government in relation to EGMs and charities' benefiting from EGM trust distributions. EGM trusts are immoral and should, as a transitional measure towards elimination, be replaced by democratically accountable bodies.¹⁰⁸ This may appear to be an absolute and idealist proposal and yet EGMs and the EGM trust distribution may already be in inexorable decline. Thus an editorial in *The New Zealand Herald* opined 'the sinking lid on pokies means the sun is slowly setting on this source of social revenue. Sports know it, they are using grants to build facilities while the good times last. When eventually the flow of funding has ceased their conscience will be clear.'¹⁰⁹

¹⁰⁴ 'Editorial: Sport's Moral Dilemma Will Solve Itself', *The New Zealand Herald* (online), 29 August 2013. <http://www.nzherald.co.nz/sport/news/article.cfm?c_id=4&objectid=11116495>.

¹⁰⁵ Grant, above n 9, 287.

¹⁰⁶ Ibid, 79.

¹⁰⁷ See ibid, 56–98 on the politics of wowserism.

¹⁰⁸ See Flavell's original Gambling (Gambling Harm Reduction) Amendment Bill Member's Bill (209–2). Its provisions on local democratic control were rejected at the Committee stage.

¹⁰⁹ 'Editorial: Sport's Moral Dilemma Will Solve Itself', above n 104.