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Abstract:
Law has a long history of regulating vices, however perceived or defined. Regulation of gambling, consumption of alcohol, and smoking are some examples of vices where recourse to legal regulation has and continues to happen. Obesity, fatness, and external physical appearance of persons is a "vice" that is increasingly under social and regulatory scrutiny. Professor Bogart looks at the role and effectiveness of law in promoting, encouraging, and achieving positive health outcomes for individuals. In doing so, he tackles the simple but improper and ineffective foci of regulation - individuals body weight, body size, and outward appearance. The lessons and insights drawn from this study are informative for attempts to regulate other areas of complex human action.

In regulating a vice, we must be conscious of the way that the vice is defined and categorized. The shaping of the problem affects how the law may be employed in addressing the problem. Additionally, honesty about the propriety, limits, effectiveness, and unintended-consequences of the use of law must take a central position in the discussion. Bogart's approach in Regulating Obesity serves as a guide for legal scholars who engage with Law's role in addressing important and complex social and human problems. Real human lives and actual human experiences must take center-stage if legislators and legal scholars are to avoid the twin evils of common-sense reaction and ineffective/overzealous governmental interfere though law.

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Too Fat For Society? William Bogart and "Regulating Obesity? Government, Society and Questions of Health"

Regulating Obesity? Government, Society, and Questions of Health, by W.A. Bogart

Sas Ansari

Abstract

Law has a long history of regulating vices, however perceived or defined. Regulation of gambling, consumption of alcohol, and smoking are some examples of vices where recourse to legal regulation has and continues to happen. Obesity, fatness, and external physical appearance of persons is a "vice" that is increasingly under social and regulatory scrutiny. Professor Bogart looks at the role and effectiveness of law in promoting, encouraging, and achieving positive health outcomes for individuals. In doing so, he tackles the simple but improper and ineffective foci of regulation - individuals body weight, body size, and outward appearance. The lessons and insights drawn from this study are informative for attempts to regulate other areas of complex human action.

In regulating a vice, we must be conscious of the way that the vice is defined and categorized. The shaping of the problem affects how the law may be employed in addressing the problem. Additionally, honesty about the propriety, limits, effectiveness, and unintended-consequences of the use of law must take a central position in the discussion. Bogart's approach in Regulating Obesity serves as a guide for legal scholars who engage with Law's role in addressing important and complex social and human problems. Real human lives and actual human experiences must take center-stage if legislators and legal scholars are to avoid the twin evils of common-sense reaction and ineffective/overzealous governmental interfere though law.

Regulating Obesity?

Professor Bogart, in Regulating Obesity, investigates the role and effectiveness of law in promoting, encouraging, and achieving positive health outcomes for individuals.

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1 (New York: Oxford University Press, 2013) [Bogart, Regulating Obesity].  
3 William (Bill) A Bogart is a Professor of Law at the University of Windsor. His research considers the role and impact of law on society and complex social problems. He is the author of several books and journal articles, a frequent contributor to the media, and a consultant to governments and public bodies. See e.g. W A Bogart, Consequences: The Impact of Law and Its Complexity (Toronto: University
Bogart does not, and does not aim to, provide the reader with an exhaustive list of legal interventions that will be effective in achieving this goal, and this book is not concerned with the regulation of obesity per se. Bogart recognizes the need for "properly directed regulation in this area,"4 but his main purpose is to engage with the questions of "how to regulate"5 and "with what effects"6 so as to identify the boundaries of effective regulation of healthy eating and drinking. In other words, Bogart attempts to identify the proper role of law in regulating behaviour.7 Among the hundreds of books written about obesity, Regulating Obesity is the only sole authored book that considers these salient questions from a purely legal perspective.8

Regulating Obesity is concerned with the appropriate role of law in addressing the important and complex problems surrounding healthy eating and drinking, physical activity, and exercise.9 The book focuses on people, their actual (rather than perceived) health, and their lived experiences. Although Bogart concludes that law does have a role to play in tackling these personal and social problems, he makes the complexity of this role explicit by emphasizing the prevalence of unrealistic beliefs about law’s role in addressing problems related to human behaviour and human choices.10 In particular, Bogart emphasizes law’s complicated role in “regulat[ing] a variety of circumstances, using a range of legal interventions, in an effort to discourage harmful behaviours” and promote healthy ones.11 He questions the various approaches that have been proposed and adopted, challenges the emphasis placed on weight and related forms of measurement, and effectively outlines the major challenges faced by governments and organizations pursuing appropriate legal


4 Bogart, Regulating Obesity, supra note 1 at xiii.

5 Ibid.

6 Ibid.

7 Ibid.


9 Bogart, Regulating Obesity, supra note 1 at xiii.

10 This cautious recognition of law’s role in effectively modifying and directing human behaviour is a theme found in Bogart’s other books. See Bogart, Permit but Discourage, supra note 3; Bogart, Consequences, supra note 3.

11 Bogart, Regulating Obesity, supra note 1 at xiii.
interventions for a healthier society. Bogart focuses on clarifying the problem of obesity, identifying the goals and measurements of success, outlining the various ways to regulate health issues, and being sensitive to the intended and unintended effects of legal measures. By understanding the real-world effects of laws that are used to shape behaviour, and by breaking down the complexities of determining and evaluating outcomes of legal interventions, Bogart paves a path between common-sense reactionary approaches and ineffective (and overzealous) regulation.

Increasingly, studies show that permanent weight loss is unrealistic and unachievable, and that a child’s ‘excessive’ weight gain is more a function of his or her social matrix than of the child’s actions or the actions (or influences) of a parent or guardian. The way to address the apparently impossible goal of permanent weight loss is neither to retain the status quo nor to throw one’s hands up in frustration, but rather to change one’s perspective. This shift is away from a simplistic view of weight gain or loss towards a nuanced understanding of healthy eating and drinking, and appropriate physical activity and exercise. This alteration of perspective significantly affects the range of appropriate and available regulatory measures. It is a move away from easily visible and measured factors—external appearance and weight—toward factors that are difficult to observe and quantify—physical health and quality of life; from simple regulatory or market-based solutions to complex regulatory and non-regulatory mixes. At the same time, this change in focus brings to the fore the need to protect “fat” people from unjustified discrimination and stigmatization. From this perspective, Bogart in Regulating Obesity, challenges the assumptions and presumptions that inform attempts to regulate obesity. He shows obesity to be a proxy for real concerns about human health, challenging the reader to ignore the proxy and address the problem directly.

The seven chapters of this relatively short, easy to read book are organized into three parts. Part I, entitled “Obesity and the Regulation of Consumption,” consists of a single chapter (Chapter 1) that examines historic attempts to regulate excess consumption.

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13 Bogart, Regulating Obesity, supra note 1 at 31-69.

14 Ibid at xiii. Bogart uses the word “fat” when referring to individuals who are larger than others, whereas the word “obese” is used when referring to the medical definition of “obesity” as determined by a person’s body mass index.

This examination identifies the problems faced by, and lessons learned from, previous regulatory interventions. It draws heavily on the arguments and analysis in Bogart’s earlier *Permit but Discourage*. Part II, entitled “Being Fat,” focuses on how “being fat” has been and continues to be problematized, and how various ways of framing the problem affect aspects of regulatory interventions. Chapter 2 lays out different ways of problematizing “obesity”—first, by describing the complexity of and interaction among various internal and external factors that cause obesity; and second, by examining how the framing of the problem affects both the potential regulatory solutions and the manner in which regulatory success is measured. Chapter 3 concludes Part II by investigating the effects and challenges of appearance bias, the critiques and prescriptions of fat-rights advocates, and the considerations relevant to the determination of whether to regulate and how to design any legal interventions.

Part III, entitled “Healthy Consumption, Active Living, and the Regulatory State,” discusses the role of the state, through regulation, in promoting positive health outcomes of individuals. It begins in Chapter 4 with an assessment of the various “obesity” interventions attempted or proposed, the methods by which such interventions can be evaluated, and the circumstances in which legal interventions may be justified. Chapter 5 considers the role of regulation aimed at affecting information exchange, including restrictions on or requirements for advertising, marketing, labeling, and education. Bogart conducts this analysis with a special focus on children and the regulatory challenges posed by the internet. Chapter 6 looks at the effectiveness of various fiscal regulatory tools, including the role of taxes and subsidies in curbing harmful behaviours and promoting healthy ones. Part III ends with Chapter 7, wherein Bogart examines regulatory measures to promote physical activity and counteract sedentary lifestyles, particularly the effects of urban planning and municipal zoning on the promotion and facilitation of physical activity. The book’s conclusion, entitled “Not Fat But Health – and Health Equity,” draws together the insights of the book while emphasizing the complexity of the obesity problem, the limited role of law, and the interdependence of law and social norms.

Bogart is very alive to the need for a regulatory mix. He is also sensitive to the role of non-legal interventions and changing social norms. *Regulating Obesity* looks at new governance approaches and the need to consider law in its social context. Law’s context includes popular agreement for or against individual and government actions. It also includes societal expectations, which Bogart examines by drawing on the concept of “normativity” described by Eric Posner in *Law and Social Norms*. The link and interaction between law and norms is seen as providing the best hope of achieving a desirable and durable social outcome. Bogart’s focus on social norms,

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16 *Supra* note 3.
18 See Bogart, *Regulating Obesity*, supra note 1 at xvi-xvii (addressing the role of norms and institutions in considering a regulatory response, and highlighting the important role of economic inequality in designing an effective response). See also Avner Offer, Rachel Pechey & Stanley Ulijaszek, eds, *Insecurity, Inequality, and Obesity in Affluent Societies* (London, UK: Oxford University Press, 2012)
supported by his examination of other legal interventions aimed at perceived harms (for example, tobacco, alcohol, and gambling), is instructive for any person interested in affecting human behaviour through law. He recognizes the controversies surrounding the questions he examines, and effectively separates the potentially positive from the merely hopeful and the doomed-to-fail. In doing so, Bogart identifies a plethora of questions that need to be answered on the way to a viable solution—that is, a solution resulting from informed trial, error, and revision.

Regulating Obesity builds on Bogart's previous work, including Permit but Discourage.\textsuperscript{19} Bogart also pulls on the work of a number of other authors, including Sunstein and Thaler's Nudge.\textsuperscript{20} However, the support sought in the work of others may not be complete. For example, Bogart appears to presume that the “permit but discourage” approach is similar to the approach in Nudge.\textsuperscript{21} However, the foci of the two approaches appear to me to be different (though they can each be used to the same end). I contend that Nudge, in using behavioural research on predictable patterns of human decision-making, is more concerned with using regulation to counter human psychological weaknesses and predispositions, thereby allowing for true individual autonomy.\textsuperscript{22} On my reading, Nudge aims to free people to do what they think is best for them, and assumes that people desire to make choices that “make their lives longer, healthier, and better.”\textsuperscript{23} This approach differs from that of Permit but Discourage, in which the regulatory measures aim to actively promote some “better” choice and discourage some “inferior” choice independent of the individual's autonomous desires. Although the better choice may sometimes be the choice that an individual would make but for overriding or interfering factors, this need not always be the case. Thus, while both Nudge and Regulating Obesity are concerned with regulatory intervention in the face of biased and flawed decision-making by individuals and groups, the differences between the two approaches are significant insofar as they affect the choice of regulatory measures, the details of (observing that if obesity is driven by rigid norms and social institutions, it may be difficult for focused interventions to be effective in countering it).

\textsuperscript{19} Supra note 3; See also Bogart, Consequences, supra note 3. In both of these books, Bogart warns that we are not very good at predicting or anticipating the consequences of legal interventions, and therefore ought to be cautious in using law as a tool for social engineering. See also Herbert M Kritzer, “The impact of law: A view from north of the border”, Book Review of Bogart, Consequences, supra note 3, Judicature 88:1 (July-August 2004) 38.


\textsuperscript{22} Nudge, supra note 21 at 13. The authors explain that “nudges” are used to allow persons to act in their best interest without restricting their choices.

\textsuperscript{23} Ibid at 8.
regulation, and the relevant measures of success. I believe that the greater legal context is also important. It would be interesting, for example, to examine the difference between Nudge’s promotion of true freedom of choice (and including the ability to choose to be unhealthy) and Permit but Discourage’s promotion of good choices in the differing contexts of Canada’s public health insurance model and the (predominantly) private models of the United States.

Questions of distribution of resources and of the use of private and public resources loom large in Regulating Obesity. This is no surprise given that Professor Bogart’s animating perspective is “health equity”—the fair distribution of health determinants, health outcomes, and health resources. This equity-focused and equity-driven approach makes this book very successful in identifying what is at stake in this contentious area. In less dramatic fashion than Andrew Niccol’s In Time, Regulating Obesity shows that wealth often buys longer and healthier lives for some, while poverty robs many others of years and quality of life. However, Bogart could have further explored the link between low economic means and poor health outcomes. For example, it would have been interesting to consider the link between high sugar foods and negative feelings, depression, and self-esteem. High sugar intake has been linked to serotonin production and therefore increased feelings of wellbeing. Also, the effect of high sugar and high fat foods, being increased feelings of wellbeing and decreased levels of stress, may link higher consumption of such foods by low socio-economic status individuals to increased social, emotional, and economic pressures that low socio-economic status persons experience in a consumer society. If non-nutritious eating is a (necessary) coping mechanism, then the questions left unanswered in Regulating Obesity will need further exploration.

Bogart achieves what he set out to do—showing law to be “a powerful but limited tool for addressing behaviour” that achieves only some of what people expect of it. He strips away the false simplicity of the obesity problem and reveals its underlying complexity. The reader is left with a healthy awareness of the limits of legal interventions, the intricacy of intended and unintended outcomes, and the difficulty

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24 For a great companion to Regulating Obesity (supra note 1), but one that goes beyond the question of health equity, see Thomas Kleven, Equitable Sharing: Distributing the Benefits and Detriments of Democratic Society (Lanham: Lexington Books, 2014). Professor Kleven demonstrates the importance of equitable distribution of all manner of benefits and detriments in a society professed to operate on democratic principles recognizing equality of human worth.

25 In Time, 2011, DVD (Los Angeles, CA: 20th Century Fox Entertainment, 2011). In this science fiction thriller, everyone is engineered to have a limited lifespan, but one is able to purchase additional time. This leaves the many living on the brink of death while the rich are all but immortal.

26 See Julia Ross, The Mood Cure: the 4-Step Program to Rebalance your Emotional Chemistry and Rediscover your Natural Sense of Well-Being (New York: Penguin Group, 2004). Ross discusses studies that have shown that intake of high sugar foods and the resultant insulin effect allow for easier access to the brain by serotonin precursors (tryptophan).


28 Bogart, Regulating Obesity, supra note 1 at xxi.
in measuring and assessing success when the goal is to change complex human behaviours. However, the reader is also left with a wealth of unanswered questions.

The book ends on a cautiously optimistic note: the changes necessary for better health outcomes can occur, though “not easily and not quickly,” and success will require “[a] great deal of effort, debate, and trial and error.” Only time will tell whether regulation aimed at producing healthier individuals through promoting better ingestion and activity choices is “better than obsessing about calories, invoking extreme measures in the name of elusive weight loss, and beating up on the ‘fatties’.”

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29 Bogart, *Regulating Obesity*, supra note 1 at 214. The Canadian Government is proposing new rules for food labeling and recommended daily sugar intake levels. These changes are in response to pressures exerted by the medical community, community organizations, and the media due to reports of increased rates of obesity. See Eric Atkins, “Ottawa seeks overhaul of how food labels measure sugar intake” *The Globe and Mail* (14 July 2014), online: <http://www.theglobeandmail.com/life/health-and-fitness/health/ottawa-seeks-overhaul-of-how-food-labels-measure-sugar-intake/article19589209/>. These rules would, according to the findings of *Regulating Obesity*, not be effective.

30 Bogart, *Regulating Obesity*, supra note 1 at 214.