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## Book Review

### REGULATING OBESITY? GOVERNMENT, SOCIETY, AND QUESTIONS OF HEALTH, by W.A. Bogart<sup>1</sup>

SAS ANSARI\*

PROFESSOR BOGART,<sup>2</sup> IN *REGULATING OBESITY*, investigates the role and effectiveness of law in promoting, encouraging, and achieving positive health outcomes for individuals. 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,”<sup>3</sup> but his main purpose is to engage with the questions of “how to regulate”<sup>4</sup> and “with what effects”<sup>5</sup> 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.<sup>6</sup> Among the hundreds of books written about obesity,

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1. (New York: Oxford University Press, 2013) [Bogart, *Regulating Obesity*].
  2. 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.* WA Bogart, *Consequences: The Impact of Law and Its Complexity* (Toronto: University of Toronto Press, 2002) [Bogart, *Consequences*]; WA Bogart, *Permit but Discourage: Regulating Excessive Consumption* (New York: Oxford University Press, 2011) [Bogart, *Permit but Discourage*].
  3. Bogart, *Regulating Obesity*, *supra* note 1 at xiii.
  4. *Ibid.*
  5. *Ibid.*
  6. *Ibid.*

*Regulating Obesity* is the only sole-authored book that considers these salient questions from a purely legal perspective.<sup>7</sup>

*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.<sup>8</sup> 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.<sup>9</sup> 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.<sup>10</sup> 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 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

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7. See e.g. Robert H Lusting, *Fat Chance: Beating the Odds Against Sugar, Processed Food, Obesity, and Disease* (New York: Hudson Street Press, 2013) (authored by a medical doctor); Sarah Varney, *XL Love: How the Obesity Crisis Is Complicating America's Love Life* (New York: Rodale, 2014) (authored by a journalist); Carl J Lavie, *The Obesity Paradox: When Thinner Means Sicker and Heavier Means Healthier* (New York: Hudson Street Press, 2014) (authored by a medical doctor); Adam Masters, *Health Disclosure: The Sequence to Obesity and Disease* (Bloomington: Balboa Press, 2013) (authored by a former patient); H James Holroyd, *Stop Obesity* (Bloomington: Authorhouse, 2008) (authored by a medical doctor); J Eric Oliver, *Fat Politics: The Real Story behind America's Obesity Epidemic* (New York: Oxford University Press, 2006) (authored by a political scientist); Megan B McCollough & Jessica A Hardin, eds, *Reconstructing Obesity: The Meaning of Measures and the Measure of Meanings* (New York: Berghahn Books, 2013) (authored by anthropological experts); Susan Powter, *The Politics of Stupid: The Cure for Obesity* (New York: Altria Books, 2002) (authored by a health expert). For a collection of essays, including some by legal scholars, see also John Cawley, ed, *The Oxford Handbook of the Social Science of Obesity* (New York: Oxford University Press, 2011).
  8. Bogart, *Regulating Obesity*, *supra* note 1 at xiii.
  9. 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.
  10. Bogart, *Regulating Obesity*, *supra* note 1 at xiii.

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.<sup>11</sup> 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.<sup>12</sup> 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—towards factors that are difficult to observe and quantify—physical health and quality of life; and it is a move away 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”<sup>13</sup> people from unjustified discrimination and stigmatization. From this perspective, Bogart in *Regulating Obesity*, challenges the assumptions and presumptions that inform attempts to regulate obesity.<sup>14</sup> 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 one) that examines historic attempts to

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11. *Ibid* at 35-62. This reality has been confirmed in more recent studies and is now being reflected in popular news coverage. See *e.g.* Kelly Crowe, “Obesity research confirms long-term weight loss almost impossible” *CBC News* (4 June 2014), online: <<http://www.cbc.ca/news/health/obesity-research-confirms-long-term-weight-loss-almost-impossible-1.2663585>>; Ali Zentner, “The Truth Behind Common Weight Loss Concepts” *CBC News* (13 January 2014), online: <<http://www.cbc.ca/stevenandchris/articles/print/the-truth-behind-common-weight-loss-concepts>>.
  12. Bogart, *Regulating Obesity*, *supra* note 1 at 31-69.
  13. *Ibid* at xiii. Bogart uses the word “fat” when referring to individuals who are larger than others, whereas he uses the word “obese” when referring to individuals who fall under the medical definition of “obesity” as determined by a person's body mass index.
  14. This re-examination of the foundations of legal approaches to regulating obesity, particularly their underlying assumptions and presumptions, is similar to the self-critical approach called for by William Twining. See William Twining, *Globalisation and Legal Scholarship* (Nijmegen, the Netherlands: Wolf Legal Publishers, 2009). For a synopsis of Twining's self-critical prescription, see Sas Ansari, “Globalisation and Legal Scholarship: William Twining's Call for Revolutionary Jurisprudence” (2013) 4:4 *Transnat'l Legal Theory* 660 at 662-65.

regulate excess consumption. 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*.<sup>15</sup> 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 two 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 three 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 four 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 five considers the role of regulation aimed at affecting information exchange, including restrictions on or requirements for advertising, marketing, labelling, and education. Bogart conducts this analysis with a special focus on children and the regulatory challenges posed by the Internet. Chapter six 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 seven, 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 social 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

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15. *Supra* note 3.

*Law and Social Norms*.<sup>16</sup> The link and interaction between law and norms is seen as providing the best hope of achieving a desirable and durable social outcome.<sup>17</sup> Bogart's focus on social norms, supported by his examination of other legal interventions aimed at perceived harms (*e.g.*, 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 legal interventions 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*.<sup>18</sup> Bogart also draws on the work of a number of other authors, including Richard H. Thaler and Cass R. Sunstein's *Nudge*.<sup>19</sup> 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*,<sup>20</sup> yet 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.<sup>21</sup> On my reading,

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16. (Cambridge, Mass: Harvard University Press, 2000).

17. 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) (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).

18. *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 *Consequences: The Impact of Law and Its Complexity* by WA Bogart (2004) 88:1 *Judicature* 38.

19. *Nudge: Improving Decisions About Health, Wealth, and Happiness* (New York: Penguin Group, 2008) [*Nudge*]. See also Dan Ariely, *Predictably Irrational: The Hidden Forces That Shape Our Decisions* (New York: HarperCollins, 2008); Cass R Sunstein, *Why Nudge? The Politics of Libertarian Paternalism* (New Haven: Yale University Press, 2014) (further developing and defending the idea of Libertarian Paternalism, first developed in *Nudge*).

20. Thaler & Sunstein, *supra* note 20.

21. *Ibid* at 13. The authors explain that “nudges” are used to allow persons to act in their best interests without restricting their choices.

*Nudge* aims to free people to do what they think is best for them, and assumes that people wish to make choices that “make their lives longer, healthier, and better.”<sup>22</sup> 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 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 (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.<sup>23</sup> 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*,<sup>24</sup> *Regulating Obesity* shows that wealth 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.

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22. *Ibid* at 8.

23. 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, MD: 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.

24. *In Time*, 2011, DVD (Los Angeles: 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.

High sugar intake has been linked to serotonin production and therefore increased feelings of wellbeing.<sup>25</sup> Also, the effect of high-sugar and high-fat foods, particularly increased feelings of wellbeing and decreased levels of stress,<sup>26</sup> 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.<sup>27</sup> 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 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.”<sup>28</sup> 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’.”<sup>29</sup>

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25. 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 of serotonin precursors (tryptophan).

26. See Edward Leigh Gibson, “Emotional influences of food choice: Sensory, physiological and psychological pathways” (2006) 89:1 *Physiology & Behavior* 53.

27. Bogart, *Regulating Obesity*, *supra* note 1 at xxi.

28. *Ibid* at 214. The Canadian government is proposing new rules for food labelling 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, according to the findings of *Regulating Obesity*, would not be effective.

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



