NUDGE...FAT...DRUGS:
PERMIT BUT DISCOURAGE - THE REGULATION OF EXCESSIVE CONSUMPTION

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I. INTRODUCTION

Law tells many stories. Of violence. Think of all those sordid trials over gangland shootings. Of Olympian ideals. Think of all those bills of rights meant to protect individuals' freedoms in fundamental ways. Of betrayal: the legal proceedings swirling around Bernard Madoff and his Ponzi scheme. Of happiness: those couples (straight and, now, gay) marrying; legalizing a commitment of love.

Of excess consumption. On this topic think whatever, since legal interventions to address intemperate appetites have given rise to a multitude of tales. Law has long been fascinated by what people eat, drink, smoke, snort, and their many games of chance. Legal intervention has rolled out a riveting narrative these many decades about undue use: what it is; why it is wrong; the damage that it does; and, how it might be suppressed. The tale is awash in judgments; some of them very wrong. Any number of strategies have been tried: some of them with a respectable measure of success; some with very little positive results; some that have clearly done much more harm than good.

Why, as a society, are we so taken with this lack of moderation and, even more fascinating, why do we think law should be invoked to suppress it? There have been good reasons for societal concern regarding excessive consumption: the slaughter, especially of young people, caused by drinking and driving; the slow and agonizing deaths that can come from enslavement to tobacco; the dysfunctions wrought on families and others by those who cannot control their fascination with the slots; the many health issues that can arise from non-nutritious eating and sedentary ways.

But there have also been crushingly censorious attitudes towards what are taken to be undue appetites. The drunk, the smoker, the fatty, the problem gambler, and the drug fiend, have long been objects of derision. Those deemed to be out of control have been viewed as needing to be brought back into line. If they, themselves, did not have the willpower to conform then society would have to take charge and do the job for them. Even more darkly, such societal pieties too often cloaked deep prejudices against this or that minority. Thus was the way paved for the invoking of law on many occasions and the ensuing, complicated saga of the regulation of excessive consumption.

But how to regulate? Almost everything has been tried: from the softest entreaties of educational campaigns extolling the virtues of a healthy lifestyle to the spectacle of a constitutional amendment in the United States prohibiting

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alcohol. The works under review in the essay also run a gamut: from “nudges” in the direction of improving decisions about health (and, for good measure, wealth and happiness) to the invocation of rights to protect the overweight to the misery wrought by the heaviest machinery of the state, the criminal law, and its relentless pursuit of those hapless enough to indulge in recreational drugs.¹ Legal intervention, in this context, does reveal an overarching theme: *permit but discourage*.² (Substance abuse is a conspicuous exception; we will come to why this is so momentarily). But the “how” of *discouraging* is a goal by no means easily attained, with law playing a tricky role in the enterprise.

II. NUDGE...FAT...DRUGS

The three books under review address very different aspects of the regulation of excessive consumption and in very different ways. They also reveal very different conceptions of law and its role in the construction of contemporary society. At the same time they all offer important, if controversial, insights about legal intervention regarding excessive consumption and concerning regulation in general.

Thaler and Sunstein’s goal in *Nudge* is to help people make better choices in a variety of areas without removing their right to choose. Thaler is an economist. Sunstein, a law professor and prolific author. He is also, at the time of writing, a senior administrator in the Obama administration; a position from which he may put some of his many ideas to work.³ Already there is talk in the media of Obamaites’ fascination with the role of “nudges” in achieving policy goals.⁴

A core claim of Thaler and Sunstein is that individuals select more wisely when provided with a clear set of options that respond to various human idiosyncrasies. Thus they emphasize the larger contexts in which individuals make decisions. “Choice architects” organize such broader circumstances.⁵ Such inquiries lead them to focus on the central idea of the “nudge”: “A nudge...is any aspect of the choice architecture that alters people’s behaviour in a predictable way without forbidding any options or significantly changing their economic incentives.”⁶ *Nudge*, with its emphasis on placing regulation in the broad context of choice theory, is part of the “new governance” literature; a body of work analyzing shifts away from the “command and control” paradigm that was often central to traditional notions of public policy and the administrative state to

1 Richard H. Thaler and Cass R. Sunstein, *Nudge: Improving Decisions About Health, Wealth and Happiness* (New Haven: Yale University Press, 2008) [*Nudge*]; Anna Kirkland, *Fat Rights: Dilemmas of Difference and Personhood* (New York: New York University Press, 2008) [*Fat Rights*]; Doris Marie Provine, *Unequal Under Law: Race in the War on Drugs* (Chicago: University of Chicago Press, 2007) [*Unequal under Law*].

2 See Part III, below.

3 He is the Administrator, Office of Information and Regulatory Affairs.

4 “The View from West Virginia: What will health reform do for the unhealthiest Americans?” *The Economist* (6 March 2009) 37 at 38.

5 Thaler and Sunstein *Nudge*, *supra* note 1 at 3.

6 *Ibid.* at 6.

more consensual, multi-dimensional ordering.⁷

Part of what prompts the Thaler/Sunstein message is to refute the classical economic position that "...each of us thinks and chooses unflinchingly well."⁸ Such idealized individuals they refer to as "Econs." Instead, the authors focus their efforts on "Humans(!)" and four decades of research on how people actually choose. Results of such studies demonstrate that we often do not act on rational judgments, relying instead on flawed bases – idiosyncrasies – for decision-making regarding a range of activities. Two examples of such erroneous premises are: "status quo bias" which prompts individuals to go along with the default option when they are provided with various choices and the "planning fallacy" which is the systematic tendency toward unrealistic optimism about the time it takes to complete projects.⁹

Thaler and Sunstein illustrate the potential of nudges in a variety of circumstances in which people make choices. The subtitle of the book is: *Improving Decisions About Health, Wealth, and Happiness* and the work is eager to demonstrate the power of nudges in all these dimensions. One illustration concerns a study of the use of energy by three hundred households in California. Information about such use by those in similar circumstances and how those facts were provided proved crucial to efforts promoting conservation. When households were given information regarding the amount of energy, consumed by themselves and by neighbours, those who exceeded the average, thereafter, consumed significantly less. When, for some households, the energy reports included a frowning face their subsequent energy consumption decreased even further. Those who consumed less than the average and who received a smiling face tended to continue to use less.¹⁰

Nudge also has lots to say about consumption and how to address issues of impaired control. It has suggestions for the suppression of smoking, intemperate drinking, and problem gambling.¹¹ Consider one example: cigarettes and bank deposits. In one program an individual trying to stop smoking opens a bank account. For six months she deposits the amount of money she would otherwise spend on cigarettes into the account. After six months she takes a test that determines whether she has been smoking. If she hasn't she gets to keep the money in the account; if she has the account is closed and the money is donated to charity. There is evidence that participating in this bank program increases chance of quitting by over 50 percent, a much higher success rate than many other cessation efforts.¹²

7 W.A. Bogart, "The Tools of the Administrative State and the Regulatory Mix" in Colleen Flood and Lorne Sossin, eds., *Administrative Law in Context* (Toronto: Emond-Montgomery, 2008), 25 ["Tools"]. On Amir and Orly Lobel, "Stumble, Predict, Nudge: How Behavioral Economics Informs Law and Policy" (2008) 108 Colum.L. Rev. 2098, 2127 and following.

8 Thaler and Sunstein, *Nudge*, *supra* note 1 at 6.

9 *Ibid.* at 7-8.

10 *Ibid.* at 68-69.

11 *Ibid.* note 1: smoking at 33, 47, 232; intemperate drinking at 67; problem gambling at 42, 233.

12 *Ibid.* at 232.

The authors claim that *Nudge* and its ideas are animated by a particular philosophical stance: "libertarian paternalism." "The libertarian aspect...lies in the straightforward insistence that, in general, people should be free to do what they like...The paternalistic aspect lies in the claim that it is legitimate for choice architects to try to influence people's behaviour in order to make their lives, longer, healthier, and better."¹³ Sunstein and Thaler are confident that the two seemingly contradictory aspects of this oxymoron are, nevertheless, compatible and that they should be embraced across the political spectrum. Such pan-party enthusiasm will occur for several reasons, including a "central" one: "...[M]any of these policies cost little or nothing; they impose no burden on the taxpayers at all." And, then, the following flourish appears in italics: "*we are not for bigger government; just for better governance.*"¹⁴ Catchy. But what does it mean?

How should human rights laws treat obese people? Is there such a thing as "fat rights?" If so, what are they? What is the capacity of and the limits to "rights," as a legal intervention, in responding to issues arising from obesity? Anna Kirkland has attempted to answer these questions in *Fat Rights: Dilemmas of Difference and Personhood*.¹⁵ In tackling these issues she provides a brilliant tour of fundamental ideas regarding human rights. Or, as she calls them: "...logics of personhood that link together identity, personal traits, moral responsibility, governmental response, and legal protections."¹⁶ Her analysis does much to help us understand how we justify legal protections (or their withholding) for various human rights claims. Or, as she describes the process: "...this...bumping about, realizing what our premises really are, and seeing the dilemmas they produce."¹⁷

At this point there needs to be a brief note on terminology. "Fat" rather than "obese" is the preferred term for those who resist what they regard as a judgemental overreaction by health professionals, specifically, and society, generally, to weight issues.¹⁸ "Obesity" is objectionable as a "medical and pejorative view" of large persons.¹⁹ Still others, including this reviewer, tend to refer to "excessive non-nutritious eating and sedentary lifestyle" as the actual conditions that endanger well-being; ones which may, or may not, lead to obesity which may, or may not, be associated with health problems in specific individuals.²⁰ In this conception it is junk food and drink, on the one hand, and lack of physical activity, on the other, that should be the target of any regulatory efforts aimed at health improvements. All that said, to reflect the diversity and complexity of views on the subject of (excessive) weight all such terms will be employed at various appropriate points in this essay.

13 *Ibid.* at 5.

14 *Ibid.* at 14.

15 Kirkland, *Fat Rights*, *supra* note 1.

16 *Ibid.* at 3.

17 *Ibid.* at 5.

18 See e.g. J. Eric Oliver, *Fat Politics: The Real Story Behind America's Obesity Epidemic* (New York: Oxford University Press, 2006) and Paul Campos, *The Obesity Myth: Why America's Obsession with Weight Is Hazardous to Your Health* (New York: Gotham Books, 2004)

19 Kirkland, *Fat Rights*, *supra* note 1 at ix.

20 Abigail C. Saguy and Kevin W. Riley, "Weighing Both Sides: Morality, Mortality, and Framing Contest Over Obesity" (2005) 30 J. Health Pol. 869, 895-898 and the authorities cited therein.

In crucial ways Kirkland's book is subtle. Her stated purpose is not so much to write a primer on "fat rights" as it is to use claims about protection of overweight people as an opportunity to examine the underlying premises of anti-discrimination law.²¹ Her sympathies are clearly with the overweight and the barriers faced in the workplace and elsewhere. However, she is not oblivious to the difficulties, both theoretical and practical, of translating such sympathy into legal protections.

In particular, she is especially good at laying out the complexities of arguing that obesity is a disability that needs to be accommodated in the workplace and elsewhere.²² Generally, her thinking about obesity becomes an opportunity for reflecting on human rights: "Perhaps the unique status of fat as an identity – changeable but only with great difficulty, linked to behaviours sometimes but sometimes not, heritable in most cases but not all, the subject of moral panic as well as scientific study, sexualized and racialized in contingent ways – could help us to revisit other categories of antidiscrimination law that we presume we already understand."²³

Recreational drugs are outliers. This form of excessive consumption has long been subject to criminal sanctions as a prime means of suppressing use. Such criminalization is far removed from the aforementioned *permit but discourage* approach to legal interventions regarding other forms of excessive consumption (elaborated below).²⁴ Why is substance abuse treated so differently? And to what effect?

Drugs as targets of the criminal law is a phenomenon clearly evident in the United States. The last decades saw increasingly punitive measures written into law and enforced. For Provine, in her *Unequal Under Law: Race in the War on Drugs*, there is an especially dark explanation for this turning to criminal sanctions. She sees racism writ large in the way that drug consumption has been and is addressed in the United States.

Provine traces the history of reaction to recreational drugs in the United States in the twentieth century. Up to the latter part of the nineteenth century, they were largely unregulated substances freely available and taken for both medicinal and recreational use in America and elsewhere.²⁵ Laudanum, opium dissolved in alcohol, was an everyday pick-me-up. The Sears Roebuck catalogue marketed hypodermic kits designed for injecting morphine. But in the late nineteenth century "the yellow peril," the hysteria over what the Chinese and the drug trade were supposedly doing to decent societies, ignited the first wave of prohibition.²⁶

Every initiative to suppress, thereafter, was promoted by fear of an underclass, of blacks and other minorities, and its capacity to cause turmoil. The United

21 Kirkland, *Fat Rights*, *supra* note 1 at x.

22 *Ibid.* Ch. 5 "Accommodating Fatness."

23 *Ibid.* at 158.

24 See Part III, below.

25 Provine, *Unequal under Law*, *supra* note 1 at 65 and following. Mariana Valverde, *Diseases of the Will: Alcohol and the Dilemmas of Freedom* (Cambridge: Cambridge University Press, 1998) at 5.

26 *Ibid.* at 68 and following.

States was not alone in witnessing moral entrepreneurs invoking racism to promote an agenda of drug prohibition.²⁷ Still, in America, irrational fears regarding threats posed by blacks were especially pernicious. That overreaction cleared the way for the invocation of criminal sanctions; a strategy for addressing substance abuse from which the Republic has never recovered.

Each “war” in the United States “...associated dangerous drugs with dangerous minorities bent on corrupting white, law-abiding youth.”²⁸ Those capable of molding opinion shifted norms away from viewing drug abuse as a relatively private activity with addicts being viewed with sympathy to seeing such substances as a prime source of social disintegration and violence: “Punitive policies like the contemporary war on drugs (and its predecessor drug wars) are the typical result of moral panics. Racial minorities and those perceived to be socially deviant are typical targets for such policies and the negative media attention that accompanies them.”²⁹

The result, over time, has been imprisonment rates that have skyrocketed. By the end of 2005 the US had reached a high by imprisoning 2.2 million individuals even as rates of violent crime mostly fell in the years leading up to that record. Most of these sentences have been for nonviolent crime, particularly drug related; most who are imprisoned are poor and minorities. Along with such high rates of incarceration has come a prison building boom: more than half of the prisons (as of 2007) were built within the last twenty years.³⁰ In short: “the drug control complex – the many interlocking police, military, and drug enforcement agencies at all levels of government.”³¹

Provine is by no means alone in making such charges.³² *The New York Times*, in a number of editorials and articles in 2008, repeatedly indicted America’s justice system in much the same way: “[There are] large disparities in the rate at which blacks and whites are arrested and imprisoned for drug offences, despite roughly equal rates of illegal drug use.”³³

Provine decries such starkly punitive responses. To her such rates of incarceration, driven in large measure by a reaction to drug abuse, is a sorry comment on the state of the Republic and its rampant inequality: “[I]mprisonment of so many of our most vulnerable citizens [is] ... a symptom of more serious social disequilibria in the availability of education, housing, health care, and economic

27 Catherine Carstairs, *Jailed For Possession: Illegal Drug Use, Regulation, and Power in Canada, 1920-1961* (Toronto: University of Toronto Press, 2006), especially Ch.1 “The Drug Panic of the 1920s and the Drive for Chinese Exclusion.”

28 Provine, *Unequal under Law*, *supra* note 1 at 13.

29 *Ibid.* at 8.

30 *Ibid.* at 162.

31 *Ibid.* at 163 quoting Craig Reinerman and Harry Gene Levine, eds., *Crack in America: Demon Drugs and Social Justice* (Berkeley: University of California Press, 1997) at 329.

32 See e.g. Glenn Loury, *Race, Incarceration and American Values* (Cambridge: MIT Press, 2008).

33 Editorial, “Racial Inequality and Drug Arrests” *The New York Times* (10 May 2008) A26. See also: Editorial, “Prison Nation” *The New York Times* (10 March 2008) A20; Erik Eckholm, “Reports Find Persistent Racial Gaps in Drug Arrests” *The New York Times* (6 May 2008) A21. Adam Liptak, “Inmate Count in US Dwarfs Other Nations” *The New York Times* (23 April 2008) A1, A14; Editorial, “Not Winning the War on Drugs” *The New York Times* (2 July 2008) A18.

opportunity.”³⁴ Her characterization may be largely right. Moreover, there are some hopeful signs that America’s singular love affair with incarceration may be cooling.³⁵ Still, any calls for change run up against not only America’s steadfast belief in the need to unqualifiedly prohibit drug use but, more generally, its abiding faith in the capacity of criminal law to deter all manner of behavior adjudged to be wrong.³⁶

III. THE LIMITS OF “NUDGES”, THE OVERREACHING OF RIGHTS, AND THE BRUTALITY OF THE CRIMINAL LAW

The overriding theme that has emerged in many countries, including Canada and the United States, over the last decades regarding the regulation of excessive consumption is: *permit but discourage*. Tobacco, alcohol, non-nutritious food, and the playing of games of chance are legal. However, harmful effects are sought to be minimized through various legal interventions that are intended to support social norms that encourage moderation, safe practices, and so forth (alcohol: “don’t drink and drive;” gambling: “know your limit – play within it;” smoking: the ever more explicit, and legally required, warnings on cigarette packages; obesity – “eat less, move more”).

Society has judged that, whatever benefits would accrue from banning a particular form of consumption, such advantages are outweighed by the costs that would be imposed. Prohibition (through criminalization, etc) is employed sparingly; for instance, banning alcohol, tobacco, and gambling in the case of children and the sanctioning of impaired driving. Instead, most regulatory efforts are aimed not at forbidding consumption but at suppressing excessive aspects. Up to about forty years ago the criminal law, in Canada, was invoked to prohibit most forms of gambling. But in the intervening years the criminal law has receded and gaming has become a highly regulated, government dominated, cash-producing industry. Only recreational drugs remain steadfastly on the criminal side of the policy ledger as clear outliers in terms of the regulation of excessive consumption. Subject to this stark exception, whatever issues those struggling with undue appetites may have to face they at least do not have to live a demi-mode existence in the dark shadow cast by sanctions. That said, interventions to discourage undue appetites have been as complicated as they have been patchy. What do the works under review tell us about law’s complex and shifting encounter with excessive consumption?

Nudge has been rightly hailed for its fresh approach to issues of choice architecture and for striving for better results in terms of individuals’ well-being.³⁷ At

³⁴ Provine, *Unequal under Law*, *supra* note 1 at 162.

³⁵ Editorial, “Sen. Webb’s Call for Prison Reform” *The New York Times*, 1 January 2009, A20; Jeremy W. Peters, “New York Is Set To End Drug Law Requiring Prison” *The New York Times* (26 March 2009) A1, A21; Jennifer Steinhauer, “To Trim Costs, State Relax Hard Line on Prisons” *The New York Times* (25 March 2009) A1, A16; Jim Dwyer, “Letting Judges Have A Say In Sentencing” *The New York Times* (25 March 2009) A22.

³⁶ W.A. Bogart, *Consequences: The Impact of Law and its Complexity* (Toronto: University of Toronto Press, 2002) “Compliance with Law – Deterrence and Its Alternatives.”

³⁷ For example. Amir and Lobel, *supra* note 7; Thomas Leonard, (2008) 19 Constitutional Political

the same time there is something both derivative and incomplete about Thaler's and Sunstein's prescriptions. Their arguments are derivative because governments have been using "nudges," without the catchy term, for decades as part of the regulatory mix in a host of areas. Educational campaigns in areas such as the environment, smoking, and human rights have promoted various policies by emphasizing the benefits of one course of action as opposed to another and by trying to persuade people to change their attitudes and behaviour. "Nudging" is thus not novel but, rather, builds on a longstanding but evolving set of regulatory strategies.

Their prescriptions are incomplete because they do little to forge the essential link between "nudges" and other forms of legal and policy interventions. Take examples from the environment, smoking, and human rights. Of course, it is better (and cheaper) to persuade individuals and corporations that fostering the environment, respecting human rights, and stopping smoking (and the productions of tobacco products) are actions to be embraced. The fact remains that pollution, violation of human rights, and smoking still occur. What legal tools, *in conjunction with* "nudges," are philosophically justified and effective in addressing these unfortunate facts of life? That's the hard question and coining nifty phrases like "libertarian paternalism" and citing comforting pieties like "not... bigger government...better governance" don't provide answers.

One example cited by Thaler and Sunstein illustrates the inadequacy of "nudges." Their discussion of credit markets has a section on mortgages that is chilling to read in light of the October 2008 market meltdown. After setting out the hazards of the subprime market they are content to offer as a solution a version of what they refer to, in a number of places, as RECAP (Record, Evaluate, and Compare Alternate Prices).³⁸ The events shortly after the publication of the book demonstrated how inadequate any "nudge" was in addressing the subprime fiasco. Even those generally sceptical of intervention in markets were quick to acknowledge that a main reason for the meltdown was the weakening of regulatory mechanisms and lax enforcements of any standards over several years preceding the excesses of subprime mortgages.³⁹ There may well be a role for RECAP in this context but the record reveals that there was an urgent need for much stronger regulatory intervention, duly enforced, to avoid this situation.⁴⁰ *Nudge* is steadfastly silent concerning such measures.

Nor does *Nudge* have anything to say about recreational drugs and their consequences, surely a major impediment for the ambitions of the book's *Health, Wealth and Happiness* subtitle. This is not surprising. The punitive paradigm is deeply entrenched in the Republic. The Thaler/Sunstein prescriptions taking on the criminal law's dominance of drugs would be a David and Goliath encounter with the little guy pulverized in the battle: the slingshot of "nudges" is to no avail

Economy 356; Ike Brannon (2008) 28 *Cato Journal* 562; Peter King (2009) 38 *Journal of Social Policy* at 726.

38 Thaler and Sunstein, *Nudge*, *supra* note 1 at 93, 132-138.

39 George Soros, "The Financial Mess and What to do About It" *The New York Review of Books* (4 December 2008) at 63.

40 Peter S. Goodman and Gretchen Morgenson, "Saying Yes to Anyone, Wa Mu Built Empire on Shaky Loans" *The New York Times* (28 December 2008) A1, 21.

against the huge, lumbering giant of prohibition.

All that said, *Nudge* is an important and engagingly written contribution to discussions that encourage nuanced approaches to society's problems. Passing laws telling people what to do and throwing money at a situation are often not enough and may, sometimes, even do more harm than good. Nudging people along is, indeed, part of a more multifaceted strategy for fashioning a specific response that fits the particular problem. The real trick is selecting the right components in the most effective combination.⁴¹

Kirkland does great service in mapping out the issues that will need to be addressed in terms of protecting fat people from discrimination. As she, herself, acknowledges, how much protection there will be and its effectiveness remain to be determined. The weakness of the book is that it is so focused on rights. Efforts at prevention, including in terms of the law's role, are largely ignored. Indeed, such attempts approach being derided.

Consider just Marion Nestle's *Food Politics*.⁴² That book is an extensively researched study, written by someone sympathetic to those struggling with issues of weight, and published by a renowned academic press. It does not target the obese but, rather, an industry that peddles all manner of junk food and beverages and whose activities are driven by the need for profits and with a reckless disregard for health consequences. Nestle forcefully demonstrates that industries not only respond to consumer demand for food and drink of dubious nutritional value but also create that very demand, most perniciously among children, through a variety of sophisticated and persistent promotional strategies.⁴³ Kirkland all but ignores the wealth of information and the vigour of argument in *Food Politics*. She cites it only once dismissing the book and some others as "...some widely publicized anti-fat books marketed to a mainstream audience."⁴⁴

Kirkland is right to insist that there is hyperbole, even "moral panic" around weight in many societies, particularly America. There are many reasons for this overreaction. One is the angst created by pharmaceutical companies as part of their peddling of diet pills that can do much harm even as they are touted as a much needed solution to obesity.⁴⁵ She correctly derides outlandish statements such as the one from the US Surgeon General Richard Carmona who apparently has opined that rising weights would "dwarf" the attacks of 9/11 as the "terror within."⁴⁶ What is more, she effectively condemns scolding attitudes to those struggling with weight issues: "...[M]ost people think that getting fat is primarily caused by bad behaviors like eating too much and failing to exercise. It is considered a garden-variety character flaw, like getting into too much credit card debt."⁴⁷

41 Bogart, "Tools," *supra* note 7.

42 Marion Nestle, *Food Politics: How the Food Industry Influences Nutrition and Health* (Berkeley and Los Angeles: University of California Press, 2007 edition).

43 *Ibid.*, for example, Ch.8 "Starting Early – Underage Consumers."

44 Kirkland, *Fat Rights*, *supra* note 1 at 30.

45 Oliver, *supra* note 18 at 51-57.

46 *Ibid.* at ix.

47 *Ibid.* at 110.

However, all this does not justify pushing aside calm efforts to help people eat better and be more physically active. Nor should efforts be blunted that confront the excesses of corporate America that aggressively promote non-nutritious food and drink so as to enrich its coffers. There are two main points to be made in this regard. First, interventions to suppress the rates of obesity and protection of the rights of fat people should be complementary, not opposed, strategies. We should discourage consumption of non nutritious food and drink and sedentary lifestyles even as we should be vigilant in protecting fat people from the sting of prejudice. Second, insisting that overweight individuals are often genetically predestined to obesity and that there is little to consider in terms of diet and physical activity overreaches. Genetics can play a role in some instances of obesity. At the same time, nutritious food and exercise can help to prevent weight gain for many individuals and can boost the well-being of almost all of us.⁴⁸

In any event, supposing it could be established that, contrary to Kirkland's position, certain individuals' obesity is attributed exclusively to their overeating and to their sedentary lifestyles (as opposed to genetic predeterminism). Why should that be a justification, in itself, for prejudicial attitudes? For not grappling with issues regarding the extent to which the obese should be reasonably accommodated, Kirkland's insistence that obesity is mainly caused by genetics leaves her in the unpalatable position of seeming to suggest that human rights should only ever be accorded on a "no fault" basis. This is a standard that few of us could meet and one that lets corporate greed and its merchandising of bad health off the hook.

Kirkland says many insightful things in *Fat Rights*. At one point she observes: "The crux of the debate is whether fat per se deserves so much attention, or whether the real concern should be with the poor eating habits and sedentary lifestyles..."⁴⁹ This is a wise observation. One that should inspire both fat rights and a range of other interventions that promote nutritious eating and regular physical exercise.⁵⁰

The United States' adherence to the criminalization of drug use as a means of deterring addiction is one of the most far-reaching in the world. Provine's *Unequal under Law* is a stark reminder of the harshness of the criminal law in that country as a response to substance abuse. Yet other countries also steadfastly treat drug consumption in vastly different ways than other forms of excessive appetites. Canada criminalizes the use of most recreational drugs. Our response to those who are in the thrall of substance abuse is no cause for pride.

That said, in the last decades this country has cautiously moved away from the most punitive aspects of such laws. For reasons that will become clear in a moment, it is an exaggeration to characterize its attitude to drug use as "primarily a health issue."⁵¹ Nonetheless, generally, the police and courts treat simple use of marijuana more leniently than in many other countries. Canada has also begun

48 Nestle, *supra* note 42.

49 Kirkland, *Fat Rights*, *supra* note 1 at 111.

50 See Nestle, *supra* note 42 at 367, Table 37 and the following pages and "Afterward – Food Politics: Five Years Later and Beyond" at 375 and following regarding an agenda for interventions.

51 Timothy Egan, "Fresh Ideas For a Tired Crusade" *The New York Times* (1 April 2008) A23.

to experiment with treatment and other programs as alternatives to incarceration in the case of drugs, such as heroin, where the user agrees to enter a rehabilitation program and to abide by its protocols. In addition, there has been an experiment, the first in North America, with medically prescribed heroin in which hard core addicts were given the drug, in carefully controlled circumstances, as a path away from the illicit drug trade and all its hideous consequences.⁵²

One of these experimental initiatives became very controversial in 2008. Canada has for some time adopted a Four Pillars approach to drug use: prevention, treatment, harm reduction, and enforcement.⁵³ The former federal Liberal government set up a safe injection site in Vancouver in the early 2000s as part of the harm reduction pillar. The drugs consumed at the site are otherwise prohibited under the *Criminal Code*. However, the federal government has the authority to grant exemptions from the relevant sections of the *Code* in limited circumstances. The site received a five year exemption upon its opening in 2003.⁵⁴ In early 2008 it became clear that a renewal of the exemption by the Conservative government had become an issue.

Soon a debate raged over the merits of the site and whether it should remain open. Matters came to a head when the federal Minister of Health charged the Canadian medical profession (who mostly supported the site) with “undercut[ting] the ethic of medical practice.”⁵⁵ He went on to allege that, in supporting the site, the profession was not providing medical assistance but, rather, preventing it since allowing addicts to shoot up was enabling their addictions not treating them. Litigation ensued. A trial judge held, bravely but dubiously, that addicts have a constitutional right to access such treatment. Therefore, the site needed to remain open.⁵⁶ As of October 2009 the case was under appeal.

Opponents of the site claim that it de-emphasizes treatment and that its cost siphons off scarce resources from other, more valuable programs for prevention, enforcement etc. Critics also point to a government report evaluating the site which, although largely positive, concluded that the program, itself, actually saved only one life a year.⁵⁷ Proponents deny that the site deflects from other strategies such as treatment and, indeed, underscore that personnel at the site work very hard to support users and to urge them to accept help to break their addictions. They also challenge the “one life saved a year” assessment pointing to the number of overdoses the site has prevented and the positive outcomes

52 Justine Hunter, “Medicinal heroin project winding down” *The Globe and Mail* (26 May 2008) A7.

53 Margaret Went, “Legalization in disguise” *The Globe and Mail* (19 July 2008) A17 [Wente, “Legalization in disguise”]. Chantel Collin, *Substance Abuse Issues and Public Policy of Canada: I. Canada’s Federal Drug Strategy* (Ottawa: Parliamentary Information and Research Service, 2006).

54 *Controlled Drug and Substance Act*, S.C. 1996, c.19 s.4(1) and s.56.

55 Andre Picard, “Supporting Insite unethical, Clement tells doctors” *The Globe and Mail*, (19 August 2008), A1, A15.

56 *PHS Community Services Society v. Canada (Attorney General)* (2008) BCSC 661; L. Murphy, *Positive and Negative Rights in the Context of s.7: The case of PHS Community Services Society v. Canada (Attorney General)* (2009, unpublished; copy on file with author).

57 Margaret Went, “They’re sick of watching young people die: Just ask the police and doctors on the front line – harm reduction doesn’t work” *The Globe and Mail* (12 July 2008) A15.

when overdoses have occurred at the site because of the capacity of health care professionals to quickly intervene.⁵⁸ The editorial page of *The Globe and Mail* (not a source of clarion calls for radical change) condemned the federal health minister, quoted earlier regarding his critical stance in terms of the site, for "...rigid adherence to the principles of the failed war-on-drugs approach" and for "...impos[ing] that ideology upon everyone else."⁵⁹

The saga of the Vancouver safe injection site is instructive in several ways regarding Canadian attitudes towards recreational drugs. As indicated earlier, Canada has not yet arrived at a point where it can be said that drug use is "primarily a health issue." The debate around the site was driven by the extent to which its deviation from the criminal paradigm was to be tolerated as an experiment. The heavy hand of prohibition and its sanctions always remains close at hand.

That said, it is also the case that even the site's most vociferous critics do not see incarceration of drug users as any kind of solution. Instead their emphasis is on treatment (and withdrawal) and invoking the threat of a jail sentence to persuade any resisting users that this is the best response. One of the fiercest opponents of the site is Margaret Wenté, a prominent Canadian journalist. In a series of columns she laid out what she believed are weaknesses in the way Canada addresses drug abuse, generally, and the frailties of the Vancouver experiment in particular.⁶⁰ (In fairness it also needs to be noted that she has explicitly indicated that: "...any city that wants a safe-injection site should be allowed to have one."⁶¹).

At one point, Ms. Wenté opined: "Insite's proponents believe we need to stop moralizing and de-stigmatize addiction...But they ignore a highly inconvenient fact: *Stigmatization* works."⁶² She then offered the examples of shifting attitudes towards disapproval of cigarette smoking and condemnation of drunk driving. Ms. Wenté is right to remind everyone in this debate of the power of stigmatization and its capacity to change attitudes and behavior. The critical question is: does the threat of criminal sanctions have to be present for stigmatization to have an effect?

The instance of smoking (increasing negative attitudes towards tobacco; downward trends in consumption) indicates that it does not. In the case of drunk driving the possibility of criminal sanctions is present. But, in that regard, that case is different than drug abuse. When an intoxicated individual gets behind the wheel there is a distinct possibility that another person will be injured by the impaired driving. We, mostly, do not subject alcoholics to the force of

58 Raymond Kendall and Norine MacDonald, "Mr. Harper: Don't let Insite Close" *The Globe and Mail* (26 May 2008); Gabor Mate, "To help, or at least do no harm" *The Globe and Mail* (4 June 2008) A17.

59 Editorial, "For the community to decide" *The Globe and Mail* (31 May 2008) A20.

60 Wenté, "Legalization in disguise", *supra* note 57; Margaret Wenté, "We still await the scientific proof of harm reduction's success" *The Globe and Mail* (15 July 2008) A12; Margaret Wenté, "Europe's approach to drugs is more enlightened...it's tougher" *The Globe and Mail* (17 July 2008) A17; Margaret Wenté, "Legalization in dispute" *The Globe and Mail* (19 July 2008) A17.

61 Margaret Wenté, "Shooting Up Is A Charter Right?" *The Globe and Mail* (3 June 2008) A19.

62 *Ibid.* emphasis in original.

criminal law just because they are alcoholics.

Drug abuse is mostly victimless except for the grave harm abusers can inflict upon themselves. (If they are under the influence and drive that is another matter.) At the same time decriminalization of drugs should not undercut the operation of attitudes of condemnation against their use. Indeed it might increase. Public education campaigns might become more effective by involving actual addicts and the details of the horrors that drugs have wreaked on their lives. Gambling was significantly de-criminalized in several countries during the last part of the twentieth century. That retreat by the criminal law did not prevent stigmatizing attitudes towards problem gambling; such attitudes appear to have intensified.⁶³

Stigmatization may, indeed, have force in moving individuals to change their behaviour in some instances.⁶⁴ The question is: what are the circumstances under which it can be most effective? Some such as Ms. Wentz and the federal Minister of Health appear to believe that a necessary pre-condition is the cudgel of criminal sanctions. Yet another body of opinion holds to the idea that the real issue is the same as with other forms of consumption: harmful use should be discouraged in every way, including, when effective, through stigmatization. At the same time, as with other forms of consumption, the criminal law is too often a blunt instrument: one that does more harm than good.

IV. CONCLUSION: PERMIT BUT DISCOURAGE AND NORMATIVITY

Permit but discourage may be the overarching theme regarding law's encounter with excessive consumption but it is unlikely to be applied to drug abuse any time soon. *The Economist* in March 2009, once again, called for the legalization of drugs. In making many of the same points that appear in this essay it asserted: "...[T]he war on drugs has been a disaster, creating failed states in the developing world even as addiction has flourished in the rich world. By any sensible measure, this 100 year struggle has been illiberal, murderous, and pointless... [T]he least bad policy is to legalise drugs."⁶⁵ That publication clearly acknowledges the negatives that will accompany rolling back the criminal law, including possibly higher overall rates of use.⁶⁶ But such costs would be clearly outweighed by the benefits and by the elimination of much of the misery imposed by the present situation. All that said, drugs and the criminal law remain deeply entwined. Their separation, should it occur, is likely to be a long and difficult

63 For a very recent mapping of the regulatory terrain of gambling and problem gambling see: James Cosgrove and Thomas Klassen eds., *Casino State: Legalized Gambling in Canada* (Toronto: University of Toronto Press, 2009). On attitudes towards gambling and those with impaired control see, for e.g. Jason Azmier, *Canadian Gambling Behavior and Attitudes: Main Report* (Calgary: Canada West Foundation, 2000).

64 See Part IV, below.

65 "How to Stop the drug wars" *The Economist* (7-13th March 2009) 15.

66 Though the experience in Portugal and its decriminalization efforts suggest that the incidence of usage might not increase: "Treating, not punishing" *The Economist* (29 August- 04 September 2009) at 43.

process.

Permit but discourage does underscore the limits of Kirkland's response. Rights are noble. If we need proof that ideas do matter to a society the ascendance of rights is surely evidence. Rights consciousness can claim a good portion of the credit for the increasing inclusiveness and tolerance of the last decades. But we cannot build a vibrant civic society on rights alone.⁶⁷ Nor can we have a healthy one on such a limited foundation. *Fat Rights* has many important and eloquent things to say about people who are already obese and their cruel treatment by those ready to pass judgment on their struggles with everyday life.⁶⁸ Its essential indifference to campaigns encouraging people to eat well and be physically active while confronting the excesses of the food and beverage industries is disappointing. Shielding fat people from scorn and promoting exercise, championing nutritious eating, and decrying corporate greed should all be complementary strategies.

Nudge is most closely associated with the philosophical thrust of *permit but discourage*. But, as asked earlier, how do policy makers fold the insights of *Nudge* into the larger regulatory terrain where a wide variety of tools - taxes, restrictions on advertising, industry codes, litigation, educational campaigns, licensing regimes, prosecutorial powers, to name but a few - are available but there is no template for the "mix" in which they are to be used? How the "mix" of tools is to be constituted to achieve a policy goal is a central question for architects of regulatory intervention in any particular context.

Take smoking. In four decades or so smoking has gone from a glamorous, sophisticated pastime to a filthy, dangerous addiction in the minds of most of the public.

Legal intervention to suppress smoking is an excellent illustration of the regulatory "mix" as governments resorted to a range of tools in order to achieve the policy goal of curtailing the use of tobacco.⁶⁹ The full spectrum of tools was employed: from educating the public regarding the dangers of smoking, to prohibitions in terms of the sale of cigarettes to children and smoking in public places. In addition there were legislative restrictions placed upon the advertising of cigarettes, legislative requirements mandating ever more graphic and explicit warnings regarding the dangers of smoking on packaging, increased taxation of cigarettes, and various attempts to use litigation to compensate for the harm done by tobacco and to deter cigarette companies from peddling their poisons.

But smoking also illustrates that the "mix" often proceeds by a process of trial and error. It is by no means the case that all legal strategies produced the effects hoped for. The tax hikes on tobacco imposed by the federal government in the late 1980s and 1990s essentially backfired. These increases resulted in the unintended consequence of promoting smuggling of cigarettes from American states with relatively low taxes on tobacco. Estimates suggest that, at its height, black-market traffic in cigarettes constituted 20 percent of the market. After sev-

67 W.A. Bogart, *Good Government? Good Citizens?: Courts, Politics, and Markets in a Changing Canada* (Vancouver: University of British Columbia Press, 2005).

68 See also, Oliver, *supra* note 18, Ch. 3 "Why We Hate Fat People"

69 Bogart, "Tools," *supra* note 7.

eral maneuvers, the Canadian government decided that it had no other choice and substantially lowered taxes to undercut sales on the black market.⁷⁰ What is more, the overall effect of the various interventions yielded only partial success. True, rates of smoking fell sharply over several decades. But about twenty percent of the population still smokes.

Nonetheless, the interaction of regulation and public attitudes regarding tobacco is instructive. Changing social norms about smoking were both cause of and effect of legal intervention: as more people came to view smoking as unhealthy, expensive and disgusting, support grew for regulation aimed at further curtailment; as such efforts intensified more people accepted, in terms of their own views and behavior, the obnoxiousness of cigarettes. This relationship between norms and legal intervention - "normativity" - can yield important insights regarding the effectiveness of regulation including in terms of excessive consumption. Normativity can also help to link *nudges* to other regulatory strategies.

A central assertion of normativity is that law makers, while acknowledging norms, have mostly treated them as uninteresting givens in terms of policy formation and implementation.⁷¹ By contrast, what is common among normativists is skepticism about the capacity of law to alter behaviour directly. As a result, there is an emphasis in shaping conduct on the vital role of norms which we could think of in this context as social attitudes of approval or disapproval, indicating desirable (and undesirable) behaviour in particular situations. Policy goals will more likely be achieved if norms, existing or altered, support those ambitions. In this depiction, law becomes subsumed. It becomes merely a means, albeit an extremely important one, to assist in creating or changing norms.

There has been important work focused on normativity.⁷² But its potential in providing insights about the workings of regulation, especially the actual outcomes that are produced, has not yet been fully exploited.⁷³ Much work remains to be done, particularly with regard to its relevance for excessive consumption. *Permit but discourage* offers a promising outline: holding back the criminal law, promoting suppression of harmful consumption while still respecting choices people make in navigating day to day life. But for this approach to be truly effective, many more details must become clearer. Better understanding of *discouraging* and its effectiveness can come by looking more closely at the boundaries of law and at its limits: a meeting place of the regulatory state and larger social

70 Bogart, *Consequences*, *supra* note 36 at 195-96 and 213-214.

71 *Ibid.* at 135-138.

72 Christopher Fennell, *Sources on Social Norms and Law*, online: University of Illinois <<http://www.anthro.uiuc.edu/faculty/cfennell/syllabus/normbib.htm>>

73 The following is a mere sampling of the literature: Robert Ellickson, *Order Without Law: How Neighbors Settle Disputes* (Cambridge: Harvard University Press, 1991); Cass Sunstein, "Social Norms and Social Roles" (1996), 96 Columbia Law Review 903; Richard McAdams, "The Origin, Development, and Regulation of Norms" (1997), 96 Michigan Law Review 338; Amitai Etzioni, "Social Norms: Internalization, Persuasion, and History" (2000), 34 Law and Society Review 157; Eric Posner, *Law and Social Norms* (Cambridge, MA: Harvard University Press, 2000); Neil Duxbury, "Signalling and Social Norms" (2001), 21 Oxford Journal of Legal Studies 719; Dan Kahan, "Signalling or Reciprocity? A Response to Eric Posner's Law and Social Norms" (2002), 36 University of Richmond Law Review 367.

forces. For such analysis normativity holds much potential.

Modern market economies are predicated on consumption. Mass marketing and advertising send a multitude of signals to individuals urging them to shop and to use. In the wake of the market meltdown such exhortations have taken on a patriotic fervor: spend in the name of resuscitating the economy! Ideas of the citizen and of the consumer have longed danced around each other – a duality that has been invoked for a variety of ends.⁷⁴ In all of this it is little surprise that a substantial number of individuals are prone not only to consumption but also to its extravagant aspects.

Law is heralded, perhaps especially by lawyers, as the solution to many of society's problems. Advocates of law frequently espouse legal intervention as a forceful means of reshaping behaviour and of achieving a wide variety of policy goals: think of all those claims by progressives regarding the transformative capacity of the *Charter*. But law's ability to bring about change can be partial, yield unintended consequences and, in any event, its effects can be difficult to actually establish in any particular context. Its role frequently is and should be at the margins. Excessive consumption becomes a place to look at the interaction of law and of everyday life; to study law's possibilities even as we come to grips with its boundaries.

⁷⁴ That story is brilliantly told in the United States' context in: Lizabeth Cohen, *A Consumers' Republic: The Politics of Mass Consumption in Postwar America* (New York: Vintage Books, 2004).