Course Outline & Syllabus

Professor Roger Magnusson

Course description:

This course is about legal responses to tobacco use, obesity, poor diet, harmful use of alcohol and sedentary lifestyle – the leading causes of preventable disease in the United States, in high-income countries generally, and increasingly, in developing economies. Cancer, heart disease, stroke, diabetes and tobacco-related diseases (known as “non-communicable diseases” or NCDs) are society’s greatest killers, but what can law do – and what should it be doing – to prevent and control them?

Unlike other global health threats, NCDs and their risk factors are partly caused by patterns of consumer choices and transactions lived out every day across the country. The challenge of creating healthier lifestyles cannot be separated, then, from the regulation of those businesses that all too frequently have a vested interest in unhealthy lifestyles.

Although the law’s relationship with the lifestyle-related risk factors for NCDs is complex and contested, governments around the world are experimenting with a wide range of legal strategies to prevent their impact and to create healthier societies. This course places U.S. developments in an international context, and offers frequent comparisons with legal strategies for encouraging healthier lifestyles in Australia and other countries.

During the course, we will confront some important over-arching questions. What are the global determinants of NCDs, and to what extent are global solutions needed? What do global solutions look like? To what extent should law intervene to influence the behavior of populations – as distinct from treating lifestyle-related risk factors as the personal responsibility of each individual? Does a regulatory approach to the prevention of NCDs imply coercion? Does it signal the emergence of the “nanny state”? Does progress necessarily depend on motivating people to consciously improve their habits and lifestyles? Is it possible to regulate business without micro-managing or dictating commercial decisions and “mandating the recipe for tomato ketchup?”
The overall aim of this course is to give students the conceptual skills to think powerfully about law’s role in the prevention of NCDs, and to participate effectively in debates about appropriate, workable, legal interventions.

Contact details:

- Professor Roger Magnusson, Sydney Law School, University of Sydney
- E-mail: [REDACTED]

Lecture Times

<table>
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<th>Week 1 of Spring Term (11-15 January 2016):</th>
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<td>Monday-Fri, 9.00am-12.00</td>
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Assessment

This course will be assessed by research paper. A range of topics for papers will be made available. Students may also propose their own topics.

Proposed word length is 3,000 words (3,500 words max), excluding footnotes.

Plagiarism and Academic Honesty

Georgetown University Law Center’s policies on plagiarism and academic honesty can be found at in the appendix to the student disciplinary code, at:
http://www.law.georgetown.edu/registrar/bulletin/conduct_policies/sdc.cfm#appendix

Books & Recommended Materials:

There are no prescribed texts for this course. A comprehensive set of materials will be made available. Students are expected to have these available during class, in either hard or soft copy.

The following texts are of general relevance:

• **Christopher Reynolds**, *Public and Environmental Health Law*, Federation Press, 2011 [Australia focus]
• **Robyn Martin & Linda Johnson (eds)**, *Law and the Public Dimension of Health*, Cavendish, 2001 [UK focus].

You may also find the following helpful:

• **World Health Organisation**, *Global Strategy on Diet, Physical Activity and Health*, WHA57.17 (22 May 2004) [http://www.who.int/chp/chronic_disease_report/en/]

Some useful websites:

• Public Health Law Program at CDC: [http://www2.cdc.gov/phlp/](http://www2.cdc.gov/phlp/)

**Course summary**

Module 1: Frameworks for thinking about law, and environments that support healthier lifestyles
Module 2: Global health governance and the prevention of non-communicable diseases
Module 3: Tobacco control: where to from here?
Module 4: Personal responsibility, risk factors, and regulation
Module 5: Obesity prevention, public health nutrition and active living
Module 1: (Day 1-2)

Frameworks for thinking about law, and environments that support healthier lifestyles

Aims of this module
In this module you will be:

- Encouraged to develop a framework to better understand the law’s potential role in the prevention and management of risk factors for disease.
- Locate and make sense of specific legal initiatives by relating them back to a broader framework for health protection, and disease prevention.

1. The age of chronic disease: healthy lifestyles and the challenge of public policy that addresses lifestyle risk factors


2. A conceptual framework for thinking about law & non-communicable diseases (NCDs)

Personal responsibility is an excellent change strategy for individuals, but is that the only way to improve the health of populations?

agree with the extent to which Leichter would assert that America is, as a whole, responsible for the state of its collective health?

**Q: FOCUS QUESTION:**

1. Why is a model which conceptualises of law’s role in terms of (1) seeking to inform individuals so that they can make healthier choices; or (2) constraining individual choices – an impoverished model when it comes to chronic, non-communicable diseases (NCDs) and their risk factors?

The determinants of health and disease:

- **Australian Institute of Health & Welfare (AIHW),** extracts from *Australia’s Health 2014* (Canberra: AIHW, 2014) pp 4-7 [WWW (scroll to pg 4 of the PDF)], and *Australia’s Health 2008* pp 42-51 [WWW (scroll to pg 42 of the PDF)]. This extract provides a nice outline of a “determinants of health” approach to thinking about public health, in which individuals (with their physical, psychological and genetic makeup) interact with a series of other systems and factors to create a dynamic health pathway for each individual, and for the population as a whole.

What are some of the implications of a “determinants of health” approach – for public health law?

The population health approach:


3. **What can governments – and what can law – do?**

Gostin, Perdue et al, and Magnusson (in the “further reading”) provide three somewhat different ways of categorising the strategies law can deploy in responding to risks for chronic disease:


Enhancing law’s role: look out for these important themes as we progress through the course:

*(i) An “all-of-government approach”?*


• Executive Order 13544 of June 10, 2010 establishing the National Prevention, Health Promotion, and Public Health Council (under §4001 of the Patient Protection and Affordable Care Act (PL 111-148). [WestlawNext]

• Executive Order S-04-10 of California Governor Arnold Schwartzenegger, 23 February 2010, establishing the Health in All Policies (HiAP) Task Force. [LexisAdvance] [WWW]

What are some examples of laws that facilitate a cross-sectoral (inter-departmental) or even an all-of-government approach?

(iii) Pre-emption


(iii) Performance-based regulation

More “command and control” regulation, or is it time for something completely different: performance-based regulation?

• Ø Stephen Sugarman, “No More Business as Usual: Enticing Companies to Sharply Lower the Health Costs of the Products they Sell” (2009) 123 Public Health 275-279. [ScienceDirect]

(iv) The role of local government


4. Applying the framework: time for you to get involved!

| Time for show & tell |

Students will be divided into small groups and asked to consider the document in the materials that contain this sign: Ø.

The aim of this exercise is to identify the relevance of the document in terms of the framework. Ask yourself questions like: what principle or legal initiative or issue does this document illustrate? What part of the legal framework does it relate to? How can I make sense of this document in the context of the challenges of chronic disease and the role of
law in seeking to prevent them?

Prepare to briefly describe the significance of each document to the class.


- Ø Mississippi Legislature, Senate Bill No. 2687 (2013). [WWW]

- Ø General Assembly of North Carolina, Session 2013; House Bill 683. [WWW]


- Ø Sharon Bernstein, “California Lawmaker Wants Warning Labels on Sugary Drinks”, Reuters, 13 February 2014. [WWW]


- Ø Food Standards Amendment (Truth in Labelling – Palm Oil) Bill 2009 (Cth), Second reading Speech, 23 November 2009. [WWW] [This Bill was not passed] AND Rachel Gordon, “Supes Back Posting of Cell Phone Emission Levels” San Francisco Chronicle 16 June 2010 [WWW]; AND Ordinance Amending the San Francisco Environment Code by Adding Chapter 11 (Sections 1100 through 1104) to Require Retailers to Disclose Specific Absorption Rate Values for Cell Phones (26 January 2010). [WWW] [Consider these three items together]

- Ø The Synar Amendment: 42 USC § 300x-26. [WWW] What kind of strategy does this provision illustrate?

- Ø Bill to establish the California Healthy Places Act of 2008. [LexisAdvance]

- Ø Quit Smoking Incentive and Opportunity Act of 2003 (Bill introduced into the House of Representatives, July 24, 2003 [HR 2876; never passed]. [WWW]


- Ø Extracts from the South Australian Public Health Act 2011. [WWW] What is the most significant and potentially broad provision extracted here?

- Ø United States v Philip Morris USA, U.S. Court of Appeals for the District of Columbia, 22 May 2009 [WestlawNext] (upholding virtually all of Judge Kessler’s judgment in the
DOJ case under the RICO Act). Selected extracts relate to the issuing of corrective statements to prevent future fraudulent conduct.

- Ø *Alcohol (Minimum Pricing) (Scotland) Act* 2012 [WWW]
[Additional references – relevant to research paper topics]

- Derek Yach, Samuel Calitz, “New Opportunities in the Changing Landscape of Prevention” (2014) *JAMA*, published online 17 July 2014. [JAMA]
- Kristin Madison, Harald Schmidt, Kevin Volpp, “Smoking, Obesity, Health Insurance and Health Incentives in the Affordable Care Act” (2013) 310 JAMA 143-144. [JAMA]
  - The Annual Status reports which the Council is required to publish can be found at: http://www.healthcare.gov/center/councils/nphp chc/index.html


• http://www.aph.gov.au/bill


• Center for Public Health and Tobacco Policy, Tobacco Retail Licensing: Local Regulation of the Number, Location and Type of Tobacco Retail Establishments in New York, October 2010, Bostin: The Center for Public Health & Tobacco Policy at New England Law www.tobaccopolicycenter.org


• AbdesslamBoutayeb, “The Double Burden of Communicable and Non-communicable Diseases in Developing Countries” (2006) 100 Transactions of the Royal Society of Tropical Medicine and Hygiene 191-199. [ScienceDirect]

• NCData: http://www.who.int/ncdnet/en/


Module 2: (Day 2-3)

Global health governance and the prevention of non-communicable diseases (NCDs)

— What are the global determinants of NCDs?
— What are the structures, processes & governance “architecture” for reducing and preventing NCDs at the global level?
— Who is providing leadership?

Aims of this module

In this module you will be:

• Introduced to the global processes that are driving changes in lifestyles and lifestyle risk factors
• Introduced to the major instruments that comprise the “global governance” of NCDs and their risk factors at the population level
• Introduced to some the key issues and debates about the global governance of NCDs

1. The evolving global governance of NCDs

A good summary of the global burden of NCDs can be found at:


• **Roger Magnusson, David Patterson**, “Role of Law in Global Response to Non-communicable Diseases” (2011) 378 *Lancet* 859-860. [ProQuest]

For noting:

• **Roger Magnusson, David Patterson**, “The Role of Law and Governance Reform in the Global Response to Non-communicable Diseases” *Globalization and Health* 2014; 10: 44: [http://www.globalizationandhealth.com/content/10/1/44](http://www.globalizationandhealth.com/content/10/1/44) (open access; not extracted in the materials).


Why is there a need for “global health governance” when it comes to chronic disease? Why is it not purely a domestic matter for national governments?

The global context of chronic disease:

“Today, noncommunicable diseases (NCDs), mainly cardiovascular diseases, cancers, chronic respiratory diseases and diabetes represent a leading threat to human health and development. These four diseases are the world’s biggest killers, causing an estimated 35 million deaths each year - 60% of all deaths globally - with 80% in low- and middle-income countries.

These diseases are preventable. Up to 80% of heart disease, stroke, and type 2 diabetes and over a third of cancers could be prevented by eliminating shared risk factors, mainly tobacco use, unhealthy diet, physical inactivity and the harmful use of alcohol.

Unless addressed, the mortality and disease burden from these health problems will continue to increase. WHO projects that, globally, NCD deaths will increase by 17% over the next ten years. The greatest increase will be seen in the African region (27%) and the Eastern Mediterranean region (25%). The highest absolute number of deaths will occur in the Western Pacific and South-East Asia regions.

We have the right vision and knowledge to address these problems. Proven cost-effective strategies exist to prevent and control this growing burden. However, high-level commitment and concrete action are often missing at the national level....in all low and middle-income countries and by any measure, NCDs account for a large enough share of the disease burden of the poor to merit a serious policy response.”

2. The trans-national determinants of disease and “global health governance”

The model of health determinants and of health law you have been introduced to in this course recognises the role of trans-national determinants and their impact on the health of national populations (and indeed on global health). Why is there a need for “global health governance” when it comes to NCDs? Why is it not purely a domestic matter for national governments?

Case study: food & nutrition:


Case study: tobacco:

• WHO, Guidelines for Implementation of Article 5.3 of the Framework Convention on Tobacco Control (Protection of public health policies with respect to tobacco control from commercial and other vested interests of the tobacco industry). [WWW]

Q: FOCUS QUESTION:

1. Review the WHO’s Global Action Plan for the Prevention and Control of Non-communicable Diseases 2013-2020 (A66/10, 26 May 2013) [WHO.int]. What are the key themes and messages from this document? What are the most important concepts in the action plan that are most critical to its success. Explain why.

2. In light of the Malone chapter (above), read the Guidelines for Implementation of Article 5.3 of the FCTC (above) and identify a particular issue or topic or question in them that interests you. Be prepared to present this to the class in 5 short sentences. Also, ask yourself whether there are any law reform implications that arise from the issue you have chosen.

“That a product that is so destructive and so expensive to society remains on the market, sold in every convenience store and, until recently, in almost all pharmacies and hospital gift shops, is due to the ability of the tobacco industry to adapt to challenges, constantly repositioning itself in order to feed upon the social body as mosquitoes feed upon their victims.” (Ruth Malone, “The Tobacco Industry” (citation above, p 159.)

[Not extracted in the materials, but for a sense of the rising burden of NCDs in transitional economies and priorities for action, see World Bank, Towards a Healthy and Harmonious Life in China: Stemming the Tide of Non-Communicable Disease, Washington DC: World Bank, 2011, pp 2-8, 10-15, 56 (in further reading)]. [WWW]
3. The Impact of WTO Rules and International Commercial Agreements on Global Governance of NCDs


WTO rules and bilateral investment treaties (BITs) impose obligations on WTO members states, and on parties to BITs, respectively.

**Case study: United States – Measures Affecting the Production and Sale of Clove Cigarettes**


[Additional references – relevant to research paper topics]

- **Helen Walls, Richard Smith**, “Rethinking Governance for Trade and Health” BMJ 2015; 351:h3652. [BMJ](http://www.bmj.com)
- **Benn McGrady**, “International Investment Law”, in Tania Voon, Andrew Mitchell and Jonathan Liberman (eds), Regulating Tobacco, Alcohol and Unhealthy Foods: The Legal Issues, London: Routledge; 2014 (pp 110-130) [discussing national health legislation and obligations under international investment agreements]
- **Andy Haines et al.**, “Towards a Comprehensive Global Approach to Prevention and Control of NCDs” Globalization and Health 2014; 10:74. [WWW](http://www.globalizationandhealth.org)
to diets through time and the factors influencing those changes; chapter 3 reviews policies to improve diet).


- **WHO**, *Global Action Plan for the Prevention and Control of Noncommunicable Diseases 2013-2020* (A66/9, 6 May 2013). This very useful document contains very useful appendices. Appendix 2 summarises the global monitoring framework for NCDs adopted by the WHA in May 2013. Appendix 3 sets out priority interventions for the prevention and treatment of the leading NCDs. Appendix 5 gives examples of cross-sectoral interventions, including legal interventions, to reduce the major risk factors for NCDs. [WHO.int]

- **UN**, *Note by the Secretary-General transmitting the report of the Director-General of the WHO on options for strengthening and facilitating multisectoral action for the prevention and control of noncommunicable diseases through effective partnership (A/67/373)*, pp 5-6. Note the role of law in implementing a “multi-sectoral” approach. [WWW]


- **S Kleiman, S Ng, B Popkin**, “Drinking to Our Health: Can Beverage Companies Cut Calories While Maintaining Profits” (2012) 13 *Obesity Reviews* 258-274 (beverage companies follow different strategies in different countries). [Wiley]


- **Deborah Gleeson, Sharon Friel**, “Emerging Threats to Public Health from Regional Trade Agreements” (2013) 381 *Lancet* 1507-1509. [ProQuest]


- **Barry Popkin, Linda Adair, Shu Wen Ng**, “Global Nutrition Transition and the Pandemic of Obesity in Developing Countries” *Nutrition Reviews* 2012; 70; 3-21. [Wiley]


• Roger Magnusson, “Global Health Governance and the Challenge of Chronic, Non-communicable Disease” (2010) 38 *Journal of Law, Medicine & Ethics* 490-507. [HEIN]


• Derek Yach, “Nutritional Change is Not a Simple Answer to Non-communicable Disease” (2011) 343 *British Medical Journal* d5097. [BMJ]


• Ronald Labonte, Katia Mohindra, Raphael Lencucha, “Framing International Trade and Chronic Disease” *Globalization & Health* 2011; 7:21 (online, open source). [WWW]


• Robert Beaglehole et al., “UN High-Level Meeting on Non-communicable Disease: Addressing Four Questions” (2011) published online 13 June 2011. [ProQuest]


• George Alleyne, David Stuckler, Ala Alwan, “The Hope and the Promise of the UN Resolution on Non-communicable Diseases” *Globalization and Health* 2010; 6:15. [WWW]


• Roger Magnusson, “Rethinking Global Health Challenges: Towards a ‘Global Compact’ For Reducing the Burden of Chronic Disease” (2009) 123 *Public Health* 265-274. [ScienceDirect]

• Framework Convention on Tobacco Control (FCTC) website: http://www.who.int/fctc/en/
• Food Secure Pacific website: http://www.foodsecurepacific.org/
Module 3: (Day 3-4)

Tobacco control: where to from here?

Aims of this module
There is not sufficient space in this course for anything resembling a coherent review of tobacco control law – in any jurisdiction. The module will begin, however, with a brief review of federal tobacco regulation in the US. This provides the general background for the focus of this module:

In this module you will be:

• Given the opportunity to analyse, discuss and debate specific legal strategies for tobacco control.
• Be encouraged to critically evaluate “harm reduction”, as applied to tobacco, and the public health significance of snus, e-cigarettes and other products delivering nicotine.
• Encouraged to think about the kind of laws that would separate a country (such as the USA) where around 20% of the population smoke daily, from one where less than 5% of the population smoke.
• Be encouraged to think about the tension between civil rights, economic rights, and public health in the context of tobacco control law.

You may find the following website on global tobacco laws helpful:
http://www.tobaccocontrollaws.org/

“Manufacturers’ worldwide profits of about $50 billion in 2012 (approximately $10,000 per tobacco-attributable death) yield enormous political influence.....a substantial increase in specific excise taxes on tobacco [are] the single most important intervention against noncommunicable diseases...”

1. Law & tobacco control: where are we now?

- Center for Tobacco Free Kids, Designed for addiction: how the tobacco industry has made cigarettes more addictive, more attractive to kids, and even more deadly (23 June 2014: http://www.tobaccofreekids.org/press_releases/post/2014_06_23_report
- Table summarising selected aspects of federal tobacco control law in the United States
- You are expected to browse the Family Smoking Prevention and Tobacco Control Act (FSPTCA), Public Law No. 111-31: http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_public_laws&docid=f:publ031.111.pdf
- Discount Tobacco City & Lottery Inc. V United States, United States Court of Appeals for the Sixth Circuit, 19 March 2012 (edited extract). [WestlawNext] This case dismissed challenges to the FDA’s new graphic health warnings, but upheld the challenge to the provision that would have restricted tobacco advertising to “black text on a white background.
- R.J. Reynolds Tobacco Co. v Food & Drug Administration, U.S. Court of Appeals for the District of Columbia, 24 August 2012 (No 11-5332) [extracts – upholding challenges to the FDA’s new graphic health warnings] [WestlawNext]
- You are expected to browse §102 of the FSPTCA, as well as the Final Rule restricting the sale, distribution and use of cigarettes and smokeless tobacco issued by the FDA, at: http://www.fda.gov/TobaccoProducts/ProtectingKidsfromTobacco/RegsRestrictingSale/default.htm

“...without branding, future generations will grow up never having seen category A carcinogens packaged in attractive packs... (Simon Chapman, “Why the tobacco Industry Fears Plan Packaging” (2011) 195(5) Medical Journal of Australia 255.)

“Short of some currently unanticipated development, the annual smoking-produced death toll in the United States alone will continue to number in the hundreds of thousands for decades to come....[W]e must find novel means of rejuvenating the spirit and creativity that have made tobacco control a sparkling jewel in the crown of public health”. (Kenneth Warner et al., “Impact of Tobacco Control on Adult per Capita Cigarette Consumption in the United States” (2014) 104 American Journal of Public Health 83-89, 89 [ProQuest]

Q: FOCUS QUESTIONS
1. What is the “Final Rule” and what are its most important provisions?
2. What actions are the FDA prevented from taking under the FSPTCA? (There are at least 8 significant restrictions).
3. Read the perspectives of Neal Benowitz and Jonathan Samet (two members of the Tobacco Products Scientific Advisory Committee), and Michael Siegel, a Professor from Boston University. Was the report of the TPSAC a cop-out? Should the TPSAC have called for menthol to be banned? What has happened to the regulation of menthol cigarettes more recently?
4. What criteria does the Act instruct the Secretary to apply in: (1) adopting tobacco product standards; (2) assessing applications for approval to market a “new tobacco product”; and (3) making an order approving the commercial marketing of “modified risk tobacco products”?

2. Regulation, corporate social responsibility and the global tobacco business

What does the tobacco industry most want from government?

- World Health Organization, Guidelines for Implementation of Article 5.3 of the WHO Framework Convention on Tobacco Control [WHO.int] – on the protection of public health policies with respect to tobacco control from commercial and other vested interests of the tobacco industry (Decision FCTC/COP3(7) (November 2008) [Module 2 above]

“...we are convinced that the remaining policy differences can be resolved through mutually respectful discussions that seek resolution rather than vilification. I hope very much that, together, we can bridge the divide and achieve our common goal”


“I think it’s fair to say that there is some number of people who are and will continue to smoke, and want to buy cigarettes. And the question I think people have to ask themselves is who do you want selling those cigarettes? Do you want companies that are unwilling to listen to their critics, or do you want people who do it who are trying very hard to meet or exceed expectations and change the way they’ve done business in the past?”

(William S. Ohlemeyer, Vice President and Associate General Counsel, Altria Group Inc, speech entitled “Litigation: An Inefficient Means of Changing Corporate Behavior”, 18 July 2003, from the Altria website).
3. E-cigarettes, snus, and other tobacco products

- **Deeming Tobacco Products to be Subject to the Federal Food, Drug and Cosmetics Act, as amended by the Family Smoking Prevention and Tobacco Control Act**... 21 CFR Parts 1100, 1140 and 1143 (25 April 2014): [http://www.fda.gov/TobaccoProducts/GuidanceComplianceRegulatoryInformation/ucm394909.htm](http://www.fda.gov/TobaccoProducts/GuidanceComplianceRegulatoryInformation/ucm394909.htm) [not extracted but will be briefly discussed]

Should smoke-free regulations include e-cigarettes?

- **CDC**, “State Laws Prohibiting Sales to Minors and Indoor Use of Electronic Nicotine Delivery Systems – United States, November 2014” *Morbidity and Mortality Weekly Review* 2014; 63(49):1145-1150 (for noting only; not extracted): [http://www.cdc.gov/mmwr/preview/mmwrhtml/mm6349a1.htm](http://www.cdc.gov/mmwr/preview/mmwrhtml/mm6349a1.htm)

**Q:** FOCUS QUESTIONS on tobacco harm reduction

1. What is the status of the FDA’s attempts to regulate electronic cigarettes?
2. What do your instincts, and what does current research tell you about the promotion of smokeless, and e-cigarettes, as a harm reduction strategy? Consider the Gartner (*Lancet*) and Mejia (*Lancet*) articles.

- **Adrienne Mejia, Pamela Ling, Stanton Glantz**, “Quantifying the Effects of Promoting Smokeless Tobacco as a Harm Reduction Strategy in the USA” (2010) 19 *Tobacco Control* 297-305. [BMJ]

4. Other opportunities for tobacco control

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In identifying future opportunities and frontiers for tobacco control in the United States, a comparative approach is useful:

- Ø Table summarising tobacco control laws in Australia.
- Ø Selected extracts from the Public Health (Tobacco) Act (NSW). Are any of these approaches applicable to the United States?

Smoke-free laws: how far should they go?

- Ø George Thomson et al., “Should Smoking in Outside Public Spaces Be Banned?” (2009) 338 British Medical Journal 76-77 [yes and no cases, respectively] [BMJ]
Additional references – relevant to research paper topics

- Nancy Rigotti, “e-Cigarette Use and Subsequent Tobacco Use by Adolescents” JAMA 2015; 314:673-674. [JAMA]
- Andrew Chang, Michelle Berry, “The Global Health Implications of e-Cigarettes” JAMA 2015; 314:663-664. [JAMA]


• Shanta Dube et al., “Pro-Tobacco Influences and Susceptibility to Smoking Cigarettes Among Middle and High School Students – United States, 2011” *Journal of Adolescent Health* 2013; 52:S45-S51. [ScienceDirect]


• Jonathan Winickoff et al., “Retail Impact of Raising Tobacco Sales Age to 21 Years” *American Journal of Public Health* 2014; 104:E18-E21. [ProQuest]

• Jennifer Duke et al., “Exposure to Electronic Cigarette Television Advertisements Among Youth and Young Adults” *Pediatrics* 2014; 134:e29-e36. [WWW]


• Adrian Dowd, “Doctors criticize new advertising rules that allow celebrities to endorse e-cigarettes”, *BMJ* 2014; 349:g6180. [BMJ]


• **Simon Chapman**, “E-cigarettes: the best and worst case scenarios for public health” *BMJ* 2014; 349:g5512. [BMJ]

• *Smoking Everywhere Inc v U.S. Food and Drug Administration*, United States District Court for the District of Columbia, 14 January 2010 (opinion of Judge Richard Leon; this case is relevant to FDA jurisdiction to regulate e-cigarettes). [WestlawNext]


• **Frank Chaloupka**, “Tobacco Control Policy and Electronic Cigarettes” *JAMA Pediatrics* 2014; 168(7): 601-602. [JAMA]


• **C Bullen, C Howe, M Laugesen et al.**, “Electronic Cigarettes for Smoking Cessation: A Randomised Controlled Trial” (2013) 382 *Lancet* 1629-1637. [ScienceDirect]

• R Grana, L Popova, P Ling, “A Longitudinal Analysis of Electronic Cigarette Use and Smoking Cessation” (2014) 174(S) JAMA Internal Medicine 812-813. [JAMA]


• CDC, “Teen Smokers Turn to Flavored Cigars” (2014) 311(3) JAMA 236. [JAMA]

• M McCarthy, “New York City Considers Raising Legal Age for Buying Tobacco to 21” British Medical Journal 2013; 346: f2698. [BMJ]


• Kristin Madison, Harald Schmidt, Kevin Volpp, “Smoking, Obesity, Health Insurance and Health Incentives in the Affordable Care Act” (2013) 310 JAMA 143-144. [JAMA]

• Tobacco Control 2013; vol. 22(3) contains a special issue on tobacco endgame scenarios. [BMJ]


• Nasser BinDihm, Becky Freeman, Lyndal Trevena , “Pro-Smoking Aps for Smartphones: the Latest Vehicle for the Tobacco Industry?” Tobacco Control, 22 October 2012: http://tobaccocontrol.bmj.com/content/early/2012/10/01/tobaccocontrol-2012-050598


• Vol 125 (issue 12) December 2011 of Public Health (Journal of the Royal Society for Public Health, UK), is a special issue entitled: Can law improve prevention and treatment of cancer? This symposium includes a number of articles on tobacco control [ScienceDirect](http://www.tobaccocontrol.com)


• Andrew Mitchell, David Studdert, “Plain Packaging of Tobacco Products in Australia: A Novel Regulation Faces Legal Challenge” (2012) 307 JAMA 261-262. [JAMA](http://www.jama.com)

• Ron Borland, “Electronic Cigarettes as a Method of Tobacco Control” (2011) 343 British Medical Journal d6269. [BMJ](http://www.bmj.com)


• Andrew Waylen et al., “Cross-sectional Association Between Smoking Depiction in Films and Adolescent Tobacco Use Nested in a British Cohort Study” (2011) 66 Thorax 856-861. [BMJ](http://thorax.bmj.com)

• Simon Chapman, Matthew Farrelly, “Four Arguments Against the Adult-Rating of Movies with Smoking Scenes” (2011) PLoS Medicine, vol 8, issue 8, e1001078. [WWW](http://www.plos.org)


• Sorrell v IMS Health Inc., United States Supreme Court, April 26, 2011 [recent commercial free speech case]. [WestlawNext](http://www.westlaw.com)


• Center for Public Health and Tobacco Policy, Tobacco Retail Licensing: Local Regulation of the Number, Location and Type of Tobacco Retail Establishments in New York, October 2010, Bostin: The Center for Public Health & Tobacco Policy at New England Law [www.tobaccoPolicyCenter.org](http://www.tobaccoPolicyCenter.org)

• **Physicians for a Smoke-Free Canada**, “Future Options for Tobacco Control: Performance-Based Regulation of Tobacco, June 2010, at: http://www.smoke-free.ca/eng_research/pscresearch_papers.htm


• **Dorothy Hatsukami, Kenneth Perkins, Mark LeSage et al.**, “Nicotine Reduction Revisited: Science and Future Directions” (2010) 19 *Tobacco Control* e1-e10. [BMJ]


• **Jonathan Samet**, “Smoking in Movies; When will the Saga End?” (2010) 19 *Tobacco Control* 173-174. [BMJ]


• **W. Hall, C. Gartner**, “Supping with the devil? The role of law in promoting tobacco harm reduction using low nitrosamine smokeless tobacco products” (2009) 123 *Public Health* 287-291. [ScienceDirect]


• **Joe Nocera**, “If it’s good for Philip Morris, Can it also be Good for Public Health?” *New York Times Magazine*, 18 June 2006. [ProQuest]
• **Norbert Nirschhorn**, “Corporate Social Responsibility and the Tobacco Industry: Hope or Hype?” (2004) 13 *Tobacco Control* 447-453. [BMJ (scroll to page 447 of the PDF)]

• **David Lazarus**, “Strange Tobacco Reaction” *San Francisco Chronicle*, 17 October 2004. [WestlawNext]


Module 4: (Day 4)

Personal responsibility, risk factors, and regulation

Aims of this module

In this module you will be:

• Encouraged to think deeply and critically about the extent to which assumptions about personal responsibility and the role of the state interact with our understanding of law’s role in public health.
• Encouraged to think critically about the extent to which law should hold individuals responsible for their behaviours, habits and choices, and for their state of health, and whether this should limit the role of the State in responding to behavioural risk factors
• Encouraged to recognise that law can influence and improve population health without those improvements being mediated through the conscious efforts of individuals

1. What are the limits of my responsibility for my health?

“Which (nanny) State are you from?”

• Christopher Hitchens, “I Fought the Law”, Vanity Fair, February 2004, pp74-9. [ProQuest] No need to read in great detail; you get the idea: US-based, British journalist Christopher Hitchens goes on a one-man crime spree in NY City, breaking as many laws as he can. In an era where “personal responsibility” has come back with a vengeance, are public health advocates (and legislators) thrust into the role of nannies?
• Roger Magnusson, “Bloomberg, Hitchins, and the Libertarian Critique” (2014) 44(1) Hastings Center Reports 3-4 [WWW] (and see pp 4-8 for other perspectives on Bloomberg’s legacy) [pp 4-6] [pp 6-7] [pp 7] [pp 8].
• AAP, “Hitchens Hit with Throat Cancer” Sydney Morning Herald, 1 July 2010. [WWW]

Ruth Limbaugh explains...
• Rush Limbaugh, “Food Marketing and Advertising is None of Michelle Obama’s Business” (18 September 2013):
2. Case studies


**SMALL GROUP WORK:**

- **Group 1 question**: Give a brutally succinct summary of the argument that Mark Hall is making in his article. Does he have a point, or does he undermine the goals of public health? In what circumstances does Gostin argue that paternalism may be justified?

- **Group 2 question**: Write a highly condensed summary of either the majority and/or minority judgments in *Cole v South Tweed Heads Rugby League Football Club*. Be sure to take account of the reasoning and key reasons given for the majority and minority decisions. Gleeson CJ, Gummow & Hayne JJ were in the majority; McHugh and Kirby JJ were in the minority.

- **Group 3 question**: Based on the 1) article by Mello et al. and 2) the Perlman case as extracted, do obesity lawsuits have a future? What was the Cheeseburger Bill?

3. Regulation, freedom, and public health
In this section, we consider two issues. First, we consider the question: Is regulation possible without being coercive or overly intrusive on individuals, and businesses?

Secondly, we consider the benefits of a population health approach, as applied to regulation. The focus of a population health approach is not individuals, but factors that are responsible for changes or trends in behaviour at the population level. In many cases, by focusing on the broader environment (frequently, on business activity), regulation can avoid targeting individuals. However, this raises debate about the “nanny state”, and ultimately, the idea that the state should defer to the market and be agnostic about the health of the population.

- **Nuffield Council on Bioethics, Public Health: Ethical Issues, 2007, pp 41-42 (the intervention ladder).**

4. For Debate: Check your instincts

(a) “Personal responsibility” and clinical care:
- Sophie Borland, “Four in Five NHS Trusts are Restricting Surgery for Obese Patients – and One Has Banned All Ops for Those Deemed Too Fat” Daily Mail (UK), 7 March 2015. [LexisAdvance] [WWW]

Issue for debate: Do obese people deserve expensive government-funded operations in circumstances where clinical outcomes may be prejudiced by their excess weight? [Yes/No]

(b) “Personal responsibility/autonomy and public health policy”
- Ben Bland, “Smokers to be Excluded from Jakarta’s Free Healthcare Schemes” (2010) 340 British Medical Journal c1152 [BMJ] [BMJ PDF (scroll to page 500)] [going too far?]
[Additional references – relevant to research paper topics]

- **Roger Magnusson,** “Case Studies in Nanny-State Name-Calling: What can we Learn?” *Public Health* 2015; 129: 1074-1082. [ScienceDirect]
- **Jonathan Gornall,** “Under the Influence: Scotland’s Battle Over Alcohol Pricing” *British Medical Journal* 2014; g1274. [BMJ]
Module 5: (Day 5)

Obesity prevention, public health nutrition and active living:

**Aims of this module**

In this module you will be:

- Introduced to the epidemiological context of the obesity epidemic;
- Introduced to some legal responses to obesity;
- Encouraged to evaluate arguments about law and obesity and to think creatively about how law can control and prevent obesity at the population level;
- Encouraged to draw your learning in this unit together and to identify priorities for law in responding to NCDs and their behavioral risk factors.

1. Population weight gain: how did we get this way?


2. Frameworks for understanding opportunities for law & regulation in improving the food and physical activity environments

  [http://www.anzhealthpolicy.com/content/5/1/10](http://www.anzhealthpolicy.com/content/5/1/10)


**Q: FOCUS QUESTION**

1. What is performance-based regulation? How might it be applied to regulatory approach to obesity prevention and/or public health nutrition?

2. What is your reaction to the article by Derek Yach et al?

**3. Case studies of legal strategies for improving nutrition and reducing obesity**

**Backgrounder:** Duff Wilson, Janet Roberts, “How Washington Went Soft on Childhood Obesity”, Reuters, 27 April 2012:  

**Case-study 1: U.S. federal spending and how it influences children’s nutrition**

  [WWW]

• United States Department of Agriculture, Food and Nutrition Service, National School Lunch Program, Program Fact Sheet, at:  

• **Healthy, Hunger-Free Kids Act of 2010** (P.L. 111-296) ss. 201-204, 208, 243.  
  [HEIN]

• Department of Agriculture, Nutrition Standards in the National School Lunch and School Breakfast Programs, 7 CFR (Code of Federal Regulations) Parts 210 and 220 (as amended, 26 January 2012; not included in the materials; be aware of their existence only;  
  [http://www.fns.usda.gov/cnd/governance/regulations.htm](http://www.fns.usda.gov/cnd/governance/regulations.htm)).

• Harvard School of Public Health Nutrition Service, “Congress Scraps Limits on French Fries, Keeps Pizza a Vegetable”, undated, at:  

• Extracts from the Consolidated and Further Continuing Appropriations Act, 2012 (PL 112-055).  
  [HEIN]

• Letter from the National School Boards Association to the Hon. Tom Visack, Secretary, U.S. Department of Agriculture, 24 February 2011.  
  [WWW]

• **Patrick McGeehan**, “U.S. Rejects Mayor’s Plan to Ban Use of Food Stamps to Buy Soda”  
  [ProQuest]
Case study 2: New York City’s soda ban

- Department of Health and Mental Hygiene, Board of Health. Notice of adoption of an amendment to §81.53 of the New York City Health Code.
- New York Statewide Coalition of Hispanic Chambers of Commerce v New York City Department of Health and Mental Hygiene, New York Court of Appeals, No 134, 26 June 2004 (upholding the decisions of the NY State Supreme Court, Appellate Division (30 July 2013) [WestlawNext], and of trial judge (Milton Tingling JSC, 11 March 2013). Not extracted but will be briefly discussed.

Case study 3: front-of-pack nutrition labelling in Australia, the UK and USA

- FDA, Proposed Changes to the Nutrition Fats Label: http://www.fda.gov/food/guidanceregulation/guidancedocumentsregulatoryinformation/labelingnutrition/ucm385663.htm
- Letter from FDA to General Manager, Smart Choices Program, August 19, 2009 (from the FDA website): http://www.fda.gov/Food/LabelingNutrition/LabelClaims/ucm180146.htm
- Extracts from blog, http://nourishedkitchen.com/smart-choices-program

Case study 4: advertising of energy-dense, non-core foods to children:

- Interagency Working Group on Food Marketing to Children, Food for Thought (Preliminary Proposed Nutrition Principles for Marketing Foods to Children Ages 2-17), April 2011. [WWW]
• What did industry lobbying do to the Interagency Working Group’s voluntary principles?
• Bob Roehr, “US Efforts to Limit Marketing of Unhealthy Food to Children are Delayed” British Medical Journal 2012; 344: e3340. [BMJ]

“Conditions that are highly prevalent and broadly reaching within a population may appear less like a crisis requiring legal interventions and deserving legal analysis. Neither the common cold nor breast cancer is the subject of coercive police power regulations. Consequently, there are no books, nor any law school classes, on the law surrounding these diseases. But both diseases cause significant, widespread morbidity. And in both cases, we do not know the role that law has played in shaping the disease’s epidemiology or the role that law might play in reducing the disease’s incidence. The relationship of law to nonstigmatized, or “normalized” conditions, remains largely unexplored” (Parmet, in further reading, Module 1, at 608).

4. Time for you to get involved!

Time for show & tell

Every student is asked to come to class prepared to briefly present one concrete legal intervention that could be implemented at either federal, state or city/local level to improve diet, increase physical activity, or to prevent and reduce obesity.

You are welcome to choose examples or initiatives mentioned in the reading materials (including those in the list directly below), or from the list of further reading. It doesn’t have to be an American example: every country can learn from a comparative approach. You should also be able to briefly explain the mechanism or process through which the intervention would improve diet (or achieve its other aims).

What are the items below examples of? Can you relate them to a broader model for understanding how law could contribute to the prevention of population weight gain?
• Ø Lydia O’Connor, “Nation’s First Soda Tax Passes in Berkeley, Fails in San Francisco” The Huffington Post, 5 November 2014. [WWW]

• Ø Sam Frizell, “Big Soda Sues San Francisco Over Beverage Warnings” Time 27 July 2015 [WWW]

• Ø Food, Environmental and Economic Development in the District of Columbia Act of 2010 (D.C. Code § 2-1212.01 ff [LexisAdvance]; § 47-3801ff [LexisAdvance]).


• Ø Benjamin Mueller, Michael Grynbaum, “New York City Health Board Backs Warning on Menu Items with High Salt” New York Times, 9 September 2015. [ProQuest] [WWW]

• Ø Patient Protection and Affordable Care Act (P.L. 111-148) §4202. [HEIN]

• Ø San Francisco County, California, Resolution No. 95-25A6 (the Commercial Free Schools Act). [WWW]

• Ø Public Health and Wellbeing Act 2008 (Vic) ss 26-27 [this Act from the State of Victoria, in Australia, requires local councils to prepare municipal public health and wellbeing plans]. [WWW]

• The Nutritional Requirements for Food and Drink in Schools (Scotland) Regulations 2008. [WWW] Schools are a critical setting for improving nutrition. Although many States in the US have used law to improve school nutrition, this example is from Scotland. NB also The Education (Nutritional Standards and Requirements for School Food) (England) Regulations 2007 (England): http://www.legislation.gov.uk/uksi/2007/2359/contents/made


• Ø Stephanie Strom, “Toys Stay in San Francisco Happy Meals, for a Charge”, New York Times, 30 November 2011. [ProQuest] [WWW]

• Ø State of New York, Senate Bill No. 3597, 2011-2012 session, introduced 28 February 2011, Senator Adams. [WWW]


[Additional references – relevant to research paper topics]

Broad reviews, including reviews of legal strategies for responding to obesity and NCDs:


- **Christina Roberto et. al.,** “Patchy Progress on Obesity Prevention: Emerging Examples, Entrenched Barriers, and New Thinking” *Lancet* 2015; published online 18 February 2015 [first in Lancet’s 2nd Obesity series] [ProQuest]

- **Boyd Swinburn et. al.,** “Strengthening of Accountability Systems to Create Healthy Food Environments and Reduce Global Obesity” *Lancet* 2015; published online 18 February 2015 [6th paper in Lancet’s 2nd Obesity series] [ProQuest]

- **Lawrence Gostin,** “Why Healthy Behavior is the Hard Choice” *The Milbank Quarterly* 2015; 92(2): 242-246. [Schol. Commons]


• JT Winkler, “Brutal Pragmatism on Food” *British Medical Journal* 2013; 346:f3728. [BMJ]
• Vol 125 (issue 12) December 2011 of *Public Health* (Journal of the Royal Society for Public Health, UK), is a special issue entitled: *Can law improve prevention and treatment of cancer?* Includes a number of articles on obesity prevention [ScienceDirect]
• Roger Magnusson, “Using a Legal and Regulatory Framework to Identify and Evaluate Priorities for Cancer Prevention” (2011) 125(12) *Public Health* 854-875. [ScienceDirect]
• Jennifer Pomeranz, Stephen Teret, Stephen Sugarman, Lainie Rutkow, Kelly Brownell, “Innovative Legal Approaches to Address Obesity” (2009) 87 *The Milbank Quarterly* 185-213. [JSTOR]
• The *Australian and New Zealand Health Policy* published a special issue called “Obesity: should there be a law against it?” at http://www.anzhealthpolicy.com/series/1743-8462-Aso
• Volume 37, Supplement 1 of the *Journal of Law, Medicine & Ethics* contains a symposium on obesity prevention & control. [HEIN]
Other resources on food, diet, obesity; papers on specific legal interventions:

- **Ian Simpson**, “District of Columbia Approves ‘Yoga Tax’ as Part of Budget” Reuters, 24 June 2014. [WWW]
- **Caitlin Caspi et al.**, “The Local Food Environment and Diet: A Systematic Review” (2012) 18 Health & Place 1172-1187. [ScienceDirect]
- **Michael Grynaubm**, “New York’s Ban on Big Sodas is Rejected by Final Court” *New York Times*, 26 June 2014. [ProQuest] [WWW]
- **Simon Capewell**, “Sugar Sweetened Drinks Should Carry Obesity Warnings” *British Medical Journal* 2014; 348:g3428. [BMJ]
• Lisa Powell, Jennifer Harris, Tracy Fox, “Food Marketing Expenditures Aimed at Youth: Putting the Numbers into Context” (2013) 45(4) American Journal of Preventive Medicine 453-461. [ScienceDirect]

• C. Mitchell, G. Cowburn, C. Foster, “Assessing the Options for Local Government to Use Legal Approaches to Combat Obesity in the UK: Putting Theory into Practice” (2011) 12 Obesity Reviews 660-667. [Wiley]


• Stephen Sugarman, ‘Enticing Business to Create a Healthier American Diet: Performance-Based Regulation of Food and Beverage Retailers’ (2013) 36 Law & Policy 91-112. [Wiley]

• C. Mitchell, G. Cowburn, C. Foster, “Assessing the Options for Local Government to Use Legal Approaches to Combat Obesity in the UK: Putting Theory into Practice” (2011) 12 Obesity Reviews 660-667. [Wiley]

• Anne Barnhill, Katherine King, “Ethical Agreement and Disagreement About Obesity Prevention Policy in the United States” International Journal of Health Policy and Management 2013; 1: 117-120. [IJHPM]

• S Kleiman, S Ng, B Popkin, “Drinking to Our Health: Can Beverage Companies Cut Calories While Maintaining Profits” (2012) 13 Obesity Reviews 258-274. [Wiley]


• John Cawley, “The Economics of Child Obesity” (2010) 29 Health Affairs 364-371. [Health Affairs]


• Derek Yach, Mehmoond Khan, Dondeena Bradley, Rob Hargrove, Stephen Kehoe, George Mensah, “The Role and Challenges of the Food Industry in Addressing Chronic Disease” (2010) Globalization and Health 6:10: http://www.globalizationandhealth.com/content/6/1/10


• Marlene Schwartz, Amy Usjanauskas, “Food Marketing to Youth: Current Threats and Opportunities” (2012) 8(2) Childhood Obesity 85-88. [ProQuest]
• Oliver Mytton, Dushy Clarke, Mike Rayner, “Taxing Unhealthy Food and Drinks to Improve Health”, British Medical Journal 2012; 344:e2931. [BMJ]
• Corinna Hawkes, Jennifer Harris, “An Analysis of the Content of Food Industry Pledges on Marketing to Children” (2011) 14 Public Health Nutrition 1403-1414. [Cambridge]
• L Murtagh, D Ludwig, “State Intervention in Life-Threatening Childhood Obesity” (2011) 306 JAMA 206-207. [JAMA]
• **Institute of Medicine**, *Local Government Actions to Prevent Childhood Obesity*, Report Brief, September 2009. [WWW]

• **Shadi Chamany, Lynn Silver, Mary Bassett, Cynthia Driver et al.**, “Tracking Diabetes: New York City’s A1C Registry” (2009) 87 *The Milbank Quarterly* 547-570. [JSTOR]


• **Laura Bond, Mike Daube, Tanya Chikritzhs**, “Selling Addictions: Similarities in Approaches Between Big Tobacco and Big Booze” (2010) 3(6) *Australasian Medical Journal* 325-332. [WWW]


• **Gary Sacks, Boyd Swinburn, Mark Lawrence**, “A Systematic Policy Approach to Changing the Food System and Physical Activity Environments to Prevent Obesity” *Australia and New Zealand Health Policy* 2008; 5:13: at: [http://www.anzhealthpolicy.com/content/5/1/13](http://www.anzhealthpolicy.com/content/5/1/13)

