

## REVIEW

# Consequences: The Impact of Law and Its Complexity

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W.A. Bogart, *Consequences: The Impact and Complexity of the law* (Toronto: University of Toronto Press, 2002).

It is a curious fact that while in western countries we turn more and more to the law as the forum and means for determining and carrying out social policy, we still know relatively little as to whether, when, or how law (legislation, decisions, legislative institutions) is an effective, or the most effective, instrument for our purposes.

The questions are not new and have been put in many different ways. Were murderers hanged because murder is such a terrible crime, or was murder thought so heinous because it was so awfully punished? What is the relation or interaction between law and morals in guiding human conduct and judgments? Can legislated values actually change attitudes? How much of what we do or not do is actually guided by the law; or how does the law cause us to choose or change our conduct? One thinks of the early Realists, studying the routes of cheques through banks and clearing houses or public reactions to traffic signals and parking signs.

In this thoughtful and deeply researched book, W.A. Bogart, professor in the University of Windsor Faculty of Law, demonstrates why this is such a difficult subject, and what we know, do not know, might come to know, and may never fully know about law's effectiveness and limits.

The law itself is complex in substance, technique and structure. Its principal means for guiding behaviour are deterrence of unwanted conduct, incentives to desired behaviour, and education or persuasion grounded in acceptance of the legitimacy of its authority. However, it exists in a social context in which there are many other institutional and attitudinal influences on our judgment and

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behaviour. Measuring the law's particular impact is very difficult. We may veer, as the author warns, from too narrow and rather mechanistic social science models for identifying cause and effect to too wide and elusive subjective or interpretive assessments of law's interaction with other factors.

Bogart identifies six possible accounts of law's impact: (1) it operates autonomously to produce direct consequences; (2) it is only semi-autonomous and is shaped by, and in turn may reform, social relations, reinforcing and perhaps partly modifying accepted norms; (3) it achieves intended impact only when it conforms to larger established norms and relationships in society; (4) it is ineffective to affect such established norms and relationships; (5) it is specific to particular cultures and its power to produce intended consequences will not be the same in all societies; and (6) the law works in various ways its wonders to perform—legislative, judicial, and administrative—and it is not to be expected that the consequences of each will be similar or can be similarly measured.

The discussion of all these matters, in the forepart of the book, is thorough and thoughtful, although one suspects that some theorists will think insufficient attention has been given to modern (or 'post-modern') thinking on language and responses to it, to aspects of choice theory in economics and political studies, or to the fairly substantial social science literature (almost exclusively American) on methods and theories for testing the impact of judicial decisions.

After this extensive introductory discussion, the author then presents five "case studies". The topics are well-chosen—criminal penalties (and particularly capital punishment), regulation or deterrence of smoking, environmental protective regulation, pornography laws, and racial discrimination. On each, he has useful and insightful observations, although sometimes his own values and preference may intrude, moving the discussion from the effects of law to what policies the law should pursue. Perhaps this is inevitable. If one concludes (rightly or wrongly) on the basis of the evidence that pornography has not been proved harmful or that no law can cope with its distribution by the Internet, then inevitably there is an issue whether the law should be employed against it.

It may be disappointing, or even annoying, to Canadian readers that almost all the studies and writings referred to are American (or, in some cases, European). However, presumably the author had to find his sources where they are. Not all the studies referred to may have the conceptual clarity and methodological reliability that the author desires in such research, but obviously he could not himself have undertaken the enormous tasks of revisiting these topics afresh and conducting vast new empirical studies. He must depend on work already done, much of it good and illuminating, but he is very conscious of the risks of overdependence on experience in the United States, which some see as excessively prone to rely on law, courts and lawyers for the resolution of social issues, and explains in some detail how he has sought to discount, in his conclusions, factors that may be 'exceptional' in American practice and attitudes.

(This explains, in part, points 5 and 6 in the list of initial hypotheses about law's impacts listed above).

Two points warrant special mention.

The first is the relatively slight attention given to judicial decisions as such. The emphasis is more on planned legislation and institutional arrangements, intended to achieve policy objectives. Indeed, the author suggests, the turn to the courts may reflect a troubling decline in confidence in political institutions and in shared civic values.

The other is the instructive discussion of law's possible unintended consequences. Of course, it is part of the task of the legislator to foresee and guard against these, but there may sometimes be disagreeable surprises. These unintended consequences, or unforeseen reactions, may be among the most important of law's effects, as has been historically demonstrated from devices to escape feudal duties to today's shaping of business transactions to minimize liability to taxation. These observations may prompt fresh consideration of legislative techniques, transparency and articulation of legislative intent, and judicial practices and theory in statutory interpretation.

Professor Bogart's conclusions are tentative, prudent and sensible. We make laws in conditions of uncertainty—sometimes as to our own objectives, often as to the possible consequences of changes in law and practice. In the circumstances, we should, he suggests, be pragmatic, prudent and flexible, considering whether change in conduct is necessary, what means are available to achieve such change, which means will be most effective, which will most likely have the fewest or least damaging costs or unintended consequences and so on. These may seem modest prescriptions, but they are well grounded in the rigorous research and analysis that precedes them.

One hopes that Professor Bogart's impressive survey will now encourage further and particular studies of the limits and efficacy of law to guide governments and citizens.

This is a timely, substantial, provocative, useful and important book. It merits the close attention of those who make public and legislative policy and those who study and teach legislation, administrative law, jurisprudence and legal systems and methods.

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