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WHAT IS A PUBLIC HEALTH LAWYER TODAY? ACTING FOR, AGAINST, AND BEYOND PUBLIC HEALTH

SCOTT BURRIS*

ABSTRACT

Health in America is not looking good. Unique among countries in the Organization for Economic Co-operation and Development, the basic measure of national health—life expectancy—was declining even before COVID-19. Public health, both as a system of institutions and as a profession working to promote longer and healthier lives, is also struggling. The normal insularity of the field's professional culture—including a lack of legal competency—helped undermine the response to COVID-19, which was dismal by any measure. At this difficult time, this Article considers three different ways public health lawyers can make a contribution to public health as a goal and as a government function. Public health lawyers today can work for *public health, doing research, developing interventions, providing technical assistance, organizing and acting politically, and writing briefs, articles, and books. Lawyers can also help, perhaps paradoxically, by working* against *public health, pushing public health professionals and their agencies to overcome chronic problems including ongoing failure to truly integrate law into training and practice; insufficient investment in empirical research on the health effects of laws and legal practices, and a concomitant disregard of the importance of this kind of feedback to the effectiveness and accountability of public health agencies; and limited success in putting data and discussion on social determinants of health, health equity and anti-racism into effective practice. Finally, public health lawyers can work* beyond *the political and institutional confines of conventional public health to find new allies, legal targets, and strategies for promoting a fair, just (and thereby much healthier) society.*

* Professor of Law and Public Health, and Director, Center for Public Health Law Research, Temple University. I would like to thank my colleagues at the Center for Public Health Law Research, the Public Health Law Partnership and Act for Public Health for their comments and suggestions at various stages of my work on this piece. These colleagues and their work are an ongoing source of inspiration and hope for public health law.

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I. INTRODUCTION

Health in America is not looking good. Unique among countries in the Organization for Economic Co-operation and Development, the basic measure of national health—life expectancy—was declining even before COVID-19.[1] Public health, both as a system of institutions and as a profession working to promote longer and healthier lives, is also struggling. The normal insularity of professional culture—including a lack of legal competency[2]—helped undermine the response to COVID-19, which was dismal by any measure.[3] And the public health system has been producing sub-par results for some time in life and death matters like obesity[4] and opioid overdose.[5]

The public health system and the people who work in it are not entirely—indeed, not chiefly—to blame for this dismal situation. Health departments have not been cutting their own budgets; they did not tout ivermectin for COVID-19 treatment nor trash talk vaccination,[6] nor are they writing the legislation and judicial opinions that are limiting their authority.[7] Just as low COVID-19 vaccination rates and high death rates can fairly be attributed to reckless politicians who harnessed pandemic populism to serve their own ambitions and stilted social visions,[8] research has shown that the long-term decline in U.S. life

1. Jonas Schöley et al., *Life Expectancy Changes Since COVID-19*, 6 NATURE HUM. BEHAV. 1649, 1649 (2022); Shameek Rakshit et al., *How Does U.S. Life Expectancy Compare to Other Countries?*, PETERSON-KFF (Dec. 6, 2022), https://www.healthsystemtracker.org/chart-collection/u-s-life-expectancy-compare-countries/#Life%20expectancy%20at%20birth%20in%20years,%201980-2021 (explaining that U.S. life expectancy fell by 2.7 years from 2019 to 2021).

2. Scott Burris et al., *The "Legal Epidemiology" of Pandemic Control* 384 NEW ENG. J. MED. 1973, 1974 (2021).

3. Evan Anderson & Scott Burris, *Imagining a Better Public Health (Law) Response to COVID-19*, 56 U. RICHMOND L. REV. 955, 974 (2022).

4. Prevalence of obesity has been on the rise for decades. Craig M. Hales et al., *Prevalence of Obesity and Severe Obesity Among Adults: United States, 2017–2018*, NAT'L CTR. FOR HEALTH STATS. Data Brief No. 360, Feb. 2020, https://www.cdc.gov/nchs/products/databriefs/db360.htm.

5. Fatal overdoses have increased more than six-fold times since 1999. *Opioid Data Analysis and Resources*, CTRS. FOR DISEASE CONTROL AND PREVENTION (Mar. 10, 2021), https://www.cdc.gov/opioids/data/analysis-resources.html.

6. Well, *most* health departments didn't trash talk vaccination, but then there was Florida. Owen Dyer, *Covid-19: Florida's Surgeon General Used "Careless" Research Practice in Recommending Against Vaccination, His University Finds,* 380 BMJ 110, 110 (2023).

7. Wendy E. Parmet & Faith Khalik, *Judicial Review of Public Health Powers Since the Start of the COVID-19 Pandemic: Trends and Implications*, 113 AM. J. PUB. HEALTH 280, 280 (2023); Elizabeth Platt et al., *Trends in US State Public Health Emergency Laws, 2021–2022*, 113 AM. J. PUB. HEALTH 288, 289–90 (2023); Xue Zhang et al., *Factors Limiting US Public Health Emergency Authority During COVID-19*, 38 INT'L J. HEALTH & GMT. PLANNING & MANAGEMENT 1569, 1577 (2023).

8. The evidence starts with the robust association between living in a red state, being unvaccinated, and dying of COVID-19. *March (& Likely FINAL) Update: COVID Death Rates By Partisan Lean & Vaccination Rate (W/Bivalent Booster Data)*, ACASIGNUPS.NET, https://acasign

expectancy is actually confined to the states with the most punitive and least humane public policies, while more progressive states continue to see increasing life spans.[9] Public health professionals did not create a fractured and financialized America of gross economic and racial inequality in which zip code of residence is the best predictor of life expectancy fractured America, and they work against its consequences every day.

It is equally important to acknowledge that COVID-19 came at a moment of decisive change in our legal system. The Supreme Court, and some lower and state courts, are now dominated by a Republican jurisprudential faction introducing stunning and dramatically problematic new doctrines that limit the discretion of legislatures and executive agencies to act for public health. Much of this new law happened to emerge from COVID-19 related decisions but reflects a more sweeping effort to remake U.S. law.[10] The effects of new doctrine on public health, however, are no less important for being coincidental.[11]

At this difficult time, I am looking back on thirty years in the field and asking myself what it means to be a public health lawyer. Lawyers who identify themselves with this field are doing research, developing interventions, providing technical assistance, organizing and acting politically, and writing briefs, and articles, and books full of pertinent warnings and good ideas.[12] We are actively working *for* public health, defined both as the *system* of agencies that are meant to promote it and as the *goal* of deep, broad, and equitable wellness in the United States and abroad. Yet we also have to see public health's deficiencies. These include an ongoing failure, despite real progress, to truly integrate law into training and practice; insufficient investment in empirical research on the health effects of laws and legal practices, and a concomitant disregard of the importance of this kind of feedback to the effectiveness and accountability of public health agencies; and chronic challenges in putting data and discussion on social determinants of health, health equity and anti-racism into effective practice.

Consequently, researchers and advocates who care about health equity and improving population health also have work to do *against* public health

ups.net/23/04/04/march-likely-final-update-covid-death-rates-partisan-lean-vaccination-rate-wbi valent (Mar. 6, 2023, 10:27 AM).

9. *See* Jennifer Kara Montez et al., *U.S. State Policy Contexts and Mortality of Working-Age Adults*, 17 PLOS ONE, Oct. 26, 2022, at 1, 8; Jennifer Karas Montez et al., *US State Policies, Politics, and Life Expectancy*, 98 MILBANK Q. 668, 688 (2020); Benjamin K. Couillard et al., *Rising Geographic Disparities in US Mortality*, 35 J. ECON. PERSPS., Fall 2021, at 123, 138. *See also* Jeremy Ney, *Life Expectancy and Inequality*, AMERICAN INEQUALITY (Feb. 2, 2021), https://americaninequality.substack.com/p/life-expectancy-and-inequality.

10. *See generally* STEVEN M. TELES, THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW (Ira Katznelson et al. eds., 2008).

11. *See* Parmet & Khalik, *supra* note 7, at 286.

12. *See, e.g.*, WENDY E. PARMET, CONSTITUTIONAL CONTAGION: COVID, THE COURTS, AND PUBLIC HEALTH 1, at 1–2 (2023).

institutions and some of the ways they do business today. But even maintaining a critical view of public health agencies is not enough to invigorate our field. Facing major changes in constitutional and administrative law, and well-organized corporate legal campaigns against legal action for social equity and against economic inequality, we also need to work *beyond* the political and institutional confines of conventional public health to find new allies, legal targets, and strategies for promoting a fair, just (and thereby much healthier) society. In spite of all these challenges, the sheer potential for law to do good should be inspiring, provided we as lawyers are willing to take a fresh look at our goals, methods, and allies.

In this Article, I consider three complementary lines of legal work in relation to public health. There is much public health lawyers can do to support public health institutions and professionals through legal work, but it is also crucial that non-lawyers in public health take ownership of—and get proper training and support in—the legal work they do every day when no lawyers are around. Because public health professionals mostly do not get the support and training they need to own their legal work, and because public health as a profession has lost too much of its original social reform muscle, I will offer some thoughts on how public health lawyers can usefully act *against* public health to push it to be better as a discipline and set of institutions. Perhaps most importantly, given the strong connection between social justice and good public health, and the crucial role of law in structuring fair, healthy societies, I will talk about things public health lawyers can do *beyond* public health to bring equity and well-being to our country.

II. ACTING *FOR* PUBLIC HEALTH

Public health lawyers have no shortage of opportunities to support the public health system in the U.S. and worldwide.[13] To fulfill the mission of creating the conditions in which people can be healthy, government agencies working for the public's health need the legal authority and governance structures that enable them to respond adequately and equitably to health threats, pandemic and otherwise, and to carry out the day-to-day work of disease prevention and health promotion in a way that responds to community priorities and needs and makes progress on addressing the social determinants of health. Public health work requires legal infrastructure, but also the human capacities and organizational resources to do legal work competently and assess whether legal efforts are

13. This Article focuses on the United States, but the need for law to support public health is just as great at the international level. *E.g.*, Katherine F. Ginsbach et al., *Beyond COVID-19: Reimagining the Role of International Health Regulations in the Global Health Law Landscape*, HEALTH AFFAIRS (Nov. 1, 2021), https://www.healthaffairs.org/content/forefront/beyond-covid-19-reimagining-role-international-health-regulations-global-health-law#:~:text=Moving%20forward%2C%20we%20recommend%20reimagining,from%20all%20corners%20of%20society.

having positive and equitable effects. Legal capacity is not just a matter of having lawyers in place, because most public health workers do "legal" tasks in their jobs[14]—tasks they and their organizations must "own" and learn to do well.

A. The Work of Lawyers in Public Health Law Practice

Recent legislation and court rulings have dramatically changed government health authority at all levels. The Supreme Court's new doctrines in administrative law (chiefly the "major questions doctrine") and its generous First and Second Amendment immunities from health regulation have changed what health agencies can do and how they can do it.[15] Meanwhile, the COVID-19 pandemic, like those before it, has prompted "reconsideration" of emergency law.[16] The question of which changes are helpful and which are harmful should, in a rational world, be a matter for legal epidemiological research.[17] In the meantime, public health lawyers have produced another "model public health law"[18] and are working for—and against—other legislation (re)defining the powers and duties of health agencies. They continue a struggle to defend local

14. *See infra* Section II.B.

15. *Id*.

16. Michelle M. Mello *et al., Legal infrastructure for pandemic response: lessons not learnt in the US*, 384 BMJ e076269, Feb. 12, 2024, at 2; Platt et al., *supra* note 7, at 289–90. "Reconsideration" gets its scare quotes because unlike our experience with recent prior shocks like SARS, 9/11 and the anthrax attacks, the reaction to COVID has been more of a knee-jerk than a careful review of the evidence and experience. For examples of the research and debate concerning earlier post-shock reforms, see, e.g., L. O. Gostin et al., *The Model State Emergency Health Powers Act: Planning for and Response to Bioterrorism and Naturally Occurring Infectious Diseases*, 288 JAMA 622 (2002); Hasan Guclu et al., *State-Level Legal Preparedness for Nuclear and Radiological Emergencies in the U.S.: A Network Analysis of State Laws and Regulations*, 129 PUB. HEALTH REPS. 154 (2014); , U. LOUISVILLE INST. FOR BIOETHICS, HEALTH POLICY, & L., QUARANTINE AND ISOLATION: LESSONS LEARNED FROM SARS: A REPORT TO THE CENTERS FOR DISEASE CONTROL AND PREVENTION (2003); Lawrence O. Gostin et al., *SARS and international legal preparedness*, 77 TEMPLE L. REV. 155 (2004); Frederic E. Shaw et al., *Legal Tools for Preparedness and Response: Variation in Quarantine Powers Among the 10 Most Populous U.S. States in 2004*, 97 AM. J. PUB. HEALTH S38 (Supp. 2007).

17. For a discussion of the nature, need and state of this research, *see* Scott Burris et al., *Law in Public Health Systems and Services Research*, *in* LEGAL EPIDEMIOLOGY: THEORY AND METHODS 23 (Alexander C. Wagenaar et al. eds., 2023).

18. MODEL PUBLIC-HEALTH EMERGENCY AUTHORITY ACT (UNIF. L. COMM'N, Draft July 21–26, 2023).

health authority from industry-driven state preemption,[19] and taking up new battles over basic vaccination law.[20]

It is as important as ever for public health lawyers to define an evidence-informed *positive* agenda for public health law, and not simply react to bad ideas. [21] To that end, public health lawyers have set out sensible suggestions for emergency law reform that deal with matters such as legislative oversight of executive emergency actions during extended emergencies, clearer and more explicit grounds for authorizing emergency actions, and enhancing local authority to act in a manner more protective than the state.[22] Meanwhile, several public health law organizations have banded together under the banner of Act for Public Health to support health departments and oppose legal changes that

19. Jennifer L. Pomeranz et al., *State Paid Sick Leave and Paid Sick-Leave Preemption Laws Across 50 U.S. States, 2009-2020*, 62 AM. J. PREV. MED. 688, 689, 693 (2022); Kim Haddow et al., *Preemption, Public Health, and Equity in the Time of COVID-19*, *in* COVID-19 POLICY PLAYBOOK: LEGAL RECOMMENDATIONS FOR A SAFER, MORE EQUITABLE FUTURE 76, 76 (S. Burris et al. eds., 2021); Kim Haddow et al., *Preemption, Public Health, and Equity in the Time of COVID-19*, *in* COVID-19 POLICY PLAYBOOK: LEGAL RECOMMENDATIONS FOR A SAFER, MORE EQUITABLE FUTURE 76, 76 (S. Burris et al. eds., 2021); Molly Jackman, *ALEC's Influence over Lawmaking in State Legislatures*, BROOKINGS INST. (Dec. 6, 2013), https://www.brookings.edu /articles/alecs-influence-over-lawmaking-in-state-legislatures/; Jennifer L. Pomeranz & Mark Pertschuk, *State Preemption: A Significant and Quiet Threat to Public Health in the United States*, 107 AM. J.. PUB. HEALTH 900, 900 (2017).

20. COVID-19 seems to have sparked some greater level of resistance to traditional school vaccine mandates. *See* Lunna Lopes et al., *KFF COVID-19 Vaccine Monitor: December 2022*, KFF (Dec. 16, 2022), https://www.kff.org/coronavirus-covid-19/poll-finding/kff-covid-19-vaccine-monitor-december-2022/.

21. The fight over preemption is a cautionary example. It was a well-recognized tactical factor in tobacco control from early days of clean indoor air restrictions. *See, e.g.*, Dana M. Shelton et al., *State laws on tobacco control—United States, 1995*, CDC 1–2 (1995), https://www.cdc.gov /mmwr/preview/mmwrhtml/00039528.htm. By 2011, there was enough interest for it to figure as a cross-cutting issue in an IOM report on law. *See* INST. OF MED., FOR THE PUBLIC'S HEALTH: REVITALIZING LAW AND POLICY TO MEET NEW CHALLENGES 23 (2011). ("The committee recommends that when the federal government regulates state authority, and the states regulate local authority in the area of public health, their actions, wherever appropriate, should set minimum standards (floor preemption) allowing states and localities to further protect the health and safety of their inhabitants. Preemption should avoid language that hinders public health action."). Yet it was only towards the end of the last decade that public health was focusing on the fact that "multiple industries are working on a 50-state strategy to enact state laws preempting local regulation" in a deliberate strategy to stifle the vital local effort to enact new protective health laws. *See* Pomeranz & Pertschuk, *supra* note 19, at 900. Only in the past few years has public health been articulating and beginning to act on a positive vision of local health powers. *See Support and Resources for Strengthening Public Health Protections*, ACT FOR PUB. HEALTH, https://actforpublichealth.org/ (2023).

22. *See, e.g.*, Michelle M. Mello & Lawrence O. Gostin, *Public Health Law Modernization 2.0: Rebalancing Public Health Powers And Individual Liberty In The Age Of COVID-19*, 42 HEALTH AFFS. 318, 321–22, 325 (2023).

weaken their necessary authority.[23] As part of that effort, lawyers at the Network for Public Health Law have made a list of legislative options to strengthen public health across six domains: funding (e.g. developing stable funding mechanisms), infrastructure (e.g., data modernization appropriations and legislation), workforce (e.g., loan forgiveness programs and hazard pay), public health interventions and emergency orders (e.g., paid sick leave and eviction moratoria), health equity (e.g., declarations of racism as a public health emergency), and governance (e.g., laws affirming local control in key health matters).[24] All of this can improve our public health system.

A positive agenda for public health law must include a greater capacity to build support for and enact good legal ideas. A recent analysis from the Network for Public Health Law identified six areas of advocacy work for public health:

1. Develop and advocate for "pro-public and community health" policies;
2. Cultivate "friends of public health" at all levels and across aisles;
3. Strengthen and build state-level public health advocacy organizations;
4. Develop and disseminate messages to equip friends of public health;
5. Train the current and future public health workforce to engage in advocacy; and
6. Unlock funding to do this work.[25]

Public health forces are not just building a political agenda, but working to create a new national advocacy organization and to strengthen existing advocacy networks acting for public health.[26] Such a broad effort can only succeed if it is informed and guided by sophisticated legal thinking. In the United States, public health law continues to grow as a field of practice in teaching and research. Anecdotally, we see at least stable, if not slowly growing, capacity within health agencies.[27] Organizations like the American Public Health Association (APHA),

23. Act for Public Health is an initiative of the Public Health Law Partnership, a coalition dedicated to pushing back against legislative attempts to block public health officials' ability to do their jobs. ACT FOR PUBLIC HEALTH, *supra* note 21.

24. For an important summary and analysis of the state of public health authority today, *see Innovative Laws and Policies for a Post-Pandemic Public Health System,* NETWORK FOR PUB. HEALTH L. 3, 4 (2023), https://www.networkforphl.org/wp-content/uploads/2023/06/Innovative-Laws-and-Policies-for-a-Post-Pandemic-Public-Health-System.pdf.

25. *Fighting for Public Health: Findings, Opportunities, and Next Steps from a Feasibility Study to Strengthen Public Health Advocacy,* NETWORK FOR PUB. HEALTH L. 2 (2022), https://www.networkforphl.org/wp-content/uploads/2022/11/Fighting-for-PublicHealth.pdf.

26. *Id.*

27. How many lawyers are working in health agencies? Thirty-one state health departments responded to this question in a survey fielded in 2021 by ASTHO and CPHLR. Twenty-eight reported "any" lawyers on staff and three reported none. The highest specific number of lawyers offered was fifty-two, with eleven states reporting fewer than ten attorneys. Several states reported drawing on lawyers in the Attorney General's office, or having lawyers serving in administrative

the National Network of Public Health Instituted (NNPHI), the Association of State, and Territorial Health Officials (ASTHO), and the National Association of County and City Officials (NACCHO) have lawyers on staff serving their members and working together to improve legal work and advocacy in public health. Other organizations, such as the Local Solutions Support Center (LCS) and the National League of Cities (NLC), are focusing on protecting local governments' capacity use law to protect and promote public health.

Academia is also an important locus of action for public health law. Data on the growth of public health law as an academic specialty is limited and needs updating. In 2012, James Hodge counted 159 individuals who self-reported as teaching a course related to public health law.[28] I am not aware of a subsequent count,[29] but if supply is evidence of demand, the increase in the number of textbooks for public health law suggests growth.[30] In the same impressionistic fashion, academics who attend the annual American Society of Law, Medicine and Ethics (ASLME) Health Law Teacher's meetings will likely agree that public health law has become a much bigger part of the work presented. Public health lawyers working in academia are making significant contributions in public policy matters. The work of Georgetown University's O'Neill Institute provides an example of high-profile influence, particularly at the international level.[31] Also impressive was the long contributor list on two rapid COVID-19 assessments organized by Northeastern University's Public Health Law Watch

judge or enforcement roles rather than policy development. CPHLR and ASTHO*, How Many Lawyers are Working in Health Agencies?* (2021) (unpublished data) (on file with author).

28. James G. Hodge, *Public Health and the Law: A Modern Survey on Teaching Public Health Law in the United States*, 40 J.L. MED. & ETHICS 1034, 1034 (2012).

29. A mailing list prepared by Micah Berman has 103 entries, mostly instructors at law schools, (42) or public health schools, (39), with the remainder at medical, undergraduate or other unspecified locations (on file with author).

30. For a couple of decades, Ken Wing's was the sole resource. *See* KENNETH R. WING, THE LAW AND THE PUBLIC'S HEALTH (Health Administration Press 1984). The classic treatise, Lawrence Gostin and Lindsay Wiley's *Public Health Law: Power, Duty, Restraint*, first appeared in 2000 and is now in its third edition. *See* LAWRENCE O. GOSTIN & LINDSAY F. WILEY, PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT (University of California Press 3d ed. 2016). For more recent entrants, *see* RICHARD A. GOODMAN, LAW IN PUBLIC HEALTH PRACTICE (Oxford University Press 2d ed. 2007); KENNETH R. WING ET AL., PUBLIC HEALTH LAW (LexisNexis 2014); SCOTT BURRIS ET AL., THE NEW PUBLIC HEALTH LAW: A TRANSDISCIPLINARY APPROACH TO PRACTICE AND ADVOCACY (Oxford University Press 2d ed. 2023); MONTRECE M. RANSOM ET AL., PUBLIC HEALTH LAW (Springer Publishing Company, LLC 2022). If one takes the view that nothing validates a field more than putting it in a Nutshell, then public health law has been in the club since 2013. *See* JAMES HODGE, PUBLIC HEALTH IN A NUTSHELL (West Academic Publishing 3d ed. 2017).

31. *See* O'NEIL INST. FOR NAT'L AND GLOBAL HEALTH L., *About* Us, https://oneill.law.georgetown.edu/ (last visited Feb. 26, 2024).

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and partners during the first year of the pandemic.[32] The George Consortium, a group of public health law teachers convened by Public Health Law Watch, regularly writes and contributes to amicus briefs in important public health cases.[33]

B. The Crucial Public Health Law Work of Non-Lawyers

So far, I have described "acting for public health" in terms of broad legal principles, key legislative and court battles, and broad advocacy goals. Legal work for public health certainly requires a sufficient number of competent lawyers within health agencies, in advocacy and technical assistance organizations, and in academia. Lawyers, however, are not enough. Effective legal work in public health depends upon everyone in the workforce having the capacity to recognize and be able to perform the "legal" tasks in their jobs. In a powerful recognition of the importance of law to public health, the newest version of the Centers for Disease Control (CDC)'s 10 Essential Public Health Services ("10 Essential Services") includes two services that explicitly evoke the law: "[c]reate, champion, and implement policies, plans, and laws that impact health", and "[u]tilize legal and regulatory actions designed to improve and protect the public's health."[34] These services in turn are reflected in the Public Health Accreditation Board (PHAB)'s standards, which require health departments to demonstrate the capacity to "[s]erve as a primary and expert resource for establishing and maintaining health policies and laws."[35]

Proponents of a transdisciplinary model of public health law argue that effective public health law action requires a wide range of perspectives and professional skills,[36] and have identified the core capacities required for effective legal work in the form of five essential public health law services.[37] The five services model defines the range of steps required for effective legal action to support public health: (1) optimally designing policies; (2) putting them into strong legal form; (3) educating and advocating for their enactment; (4)

32. Scott Burris et al., *COVID-19 Policy Playbook: Legal Recommendations for a Safer, More Equitable Future,* PUB. HEALTH L. WATCH II (2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3807502; Scott Burris et al., *Assessing Legal Responses to COVID-19*, PUB. HEALTH L. WATCH II (2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3675884.

33. *See The George Consortium*, PUB. HEALTH L. WATCH, https://www.publichealthlawwatch.org/about-gc/ (last visited Sept. 15, 2023).

34. *10 Essential Public Health Services*, CDC, https://www.cdc.gov/publichealthgateway/publichealthservices/essentialhealthservices.html (Sept. 18, 2023).

35. *Standards & Measures for Initial Accreditation*, PUB. HEALTH ACCREDITATION BD. 147 (2022), https://phaboard.org/wp-content/uploads/Standards-Measures-Initial-Accreditation-Version-2022.pdf.

36. Scott Burris et al., *A Transdisciplinary Approach to Public Health Law: The Emerging Practice of Legal Epidemiology*, 37 ANN. REV. PUB. HEALTH 135, 138 (2016).

37. Scott Burris et al., *Better Health Faster: The 5 Essential Public Health Law Services*, 131 PUB. HEALTH REPS. 747, 748 (2016).

implementing them and defending them against legal challenges; and (5) monitoring and evaluating their diffusion and impact.[38] Lawyers are the ones to write legal instruments, gauge their legal risks, take on formal legal enforcement actions, litigate in defense of challenges to laws, and conduct policy surveillance. The rest of these services, however, are typically carried out by non-lawyers: selecting problems to address, designing policies, making political judgments, doing advocacy, conducting enforcement, and evaluating impact. While these tasks do not require formal legal training, they do require an understanding of how laws and legal systems work, why people obey laws, how to enforce rules, and how to evaluate the effects of laws. Using law for public health requires expertise in epidemiology to understand the problem, sociolegal expertise to understand how law might work to change behavior or environments, legal expertise to select the optimum form for legal action, political acumen to the chances of adoption and guide strategy, advocacy and organizing skills, strong enforcement capacity, and specialized skills in policy surveillance and evaluation. Ideally, those who work in public health are integrating these skills in a transdisciplinary manner.[39] This approach demands a commitment to legal training in public health, medicine, and related fields that produce effective public health workers and leaders.[40]

Over the past two decades, there has been real progress toward reaching the ideal of making public health law a strong transdisciplinary field of practice. Capacity in public health law technical assistance and support organizations has grown substantially. Funded to a crucial extent by the Robert Wood Johnson Foundation, key organizations including the Network for Public Health Law, the Public Health Law Center, the Center for Public Health Law Research, and ChangeLab Solutions provide a wide range of technical assistance, training and legal tools to non-layers working in the field.[41] Both the Center for Public Health Law Research and ChangeLab Solutions have also served as legal collaborating centers with the CDC to support legal work in state, local, territorial, and tribal health agencies and developing an online "public health law academy" to train students and public health professionals in the basics of public health law, ethics,

38. *Id.*

39. Burris et al., *supra* note 36, at 141.

40. *See* COMM. ON PUB. HEALTH STRATEGIES TO IMPROVE HEALTH & INST. OF MED., FOR THE PUBLIC'S HEALTH: INVESTING IN A HEALTHIER FUTURE 275 (National Academic Press 2012); INST. OF MED., THE FUTURE OF THE PUBLIC'S HEALTH IN THE 21ST CENTURY 363–67 (The National Academies Press 2002).

41. *See What We Do*, NETWORK FOR PUB. HEALTH L. https://www.networkforphl.org/about-us/what-we-do/ (last visited Jan. 19, 2024); *see also Health Equity and Policy*, PUB. HEALTH L. CTR., https://www.publichealthlawcenter.org/health-equity-and-policy (last visited Feb. 26, 2024); *About*, TEMPLE UNIV. CTR. FOR PUB. HEALTH L. RSCH., https://phlr.org/about (last visited Feb. 26, 2024); *Our Work*, CHANGELAB SOLS., https://www.changelabsolutions.org/our-work.

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and legal epidemiology, among other tools.[42] The de Beaumont Foundation has supported successful direct advocacy work through its CityHealth project[43] and its support of a variety of efforts to improve how advocates talk about public health.[44] The Campaign for Tobacco Free Kids,[45] Vital Strategies,[46] and other organizations in specific fields also provide legal and policy support. Although the resources available for pro-public health advocacy are trivial compared to the treasure chests of anti-regulatory advocates like the American Legislative Exchange Counsel (ALEC),[47] nonetheless, public health persists.

At the heart of the transdisciplinary model is the idea that legal epidemiology—the scientific study and deployment of law as a factor in the cause, distribution, and prevention of disease and injury in a population—should be considered a co-equal part of public health law with public health law.[48] The enunciation of this field was meant to advance two primary goals: promoting more and better empirical research on the health effects of laws and legal practices, and countering the neglect of the important legal roles and work of non-lawyers in the health system.[49] Work in legal epidemiology has

42. *Public Health Law Academy*, CHANGELAB SOLS., https://www.changelabsolutions.org/good-governance/phla (last visited Jan. 19, 2024).

43. *See About Us, CITYHEALTH*, https://www.cityhealth.org/ (last visited Sept. 15, 2023).

44. *See, e.g.*, MARK MILLER ET AL., TALKING HEALTH: A NEW WAY TO COMMUNICATE ABOUT PUBLIC HEALTH (Oxford University Press 2022); Scott Burris et al., *Becoming Better Messengers: The Public Health Advantage*, 25 J. PUB. HEALTH MGMT. PRACT. 404 (2019). The Berkeley Media Studies Group has also contributed important guidance for public health (law) advocacy. *See* BERKELEY MEDIA STUD. GRP., CHAMPIONING PUBLIC HEALTH AMID LEGAL AND LEGISLATIVE THREATS: FRAMING AND LANGUAGE RECOMMENDATIONS 3 (2022), https://www.bmsg.org/wp-content/uploads/2022/09/bmsg_act_for_public_health.pdf.

45. *See About Us*, CAMPAIGN FOR TOBACCO-FREE KIDS, https://www.tobaccofreekids.org/about/ (last visited Jan. 19, 2024).

46. *See Our Work*, VITAL STRATEGIES, https://www.vitalstrategies.org/programs/ (last visited Jan. 19, 2024).

47. For more on the antiregulatory work of industry and ideological interest groups, s*ee e.g.,* Molly Jackman, *ALEC's Influence over Lawmaking in State Legislatures*, BROOKINGS INST. (2013), *available at* https://www.brookings.edu/articles/alecs-influence-over-lawmaking-in-state-legislatures/; David Armiak, *ALEC's Funding Revealed*, EXPOSEDBYCMD (July 25, 2023), https://www.exposedbycmd.org/2023/07/25/alecs-funding-revealed/; Holly Chung et al., *Mapping the Lobbying Footprint of Harmful Industries: 23 Years of Data From OpenSecrets*, 102 MILBANK Q. 212 (2024). On the broader place of commercial activity in the structural drivers of public health, *see generally* Jennifer Lacy-Nichols et al., *Conceptualising commercial entities in public health: beyond unhealthy commodities and transnational corporation*s, 401 THE LANCET 1214 (2023); Anna B. Gilmore et al., *Defining and conceptualising the commercial determinants of health*, 401 THE LANCET 1194 (2023); Sharon Friel et al., *Commercial determinants of health: future directions*, 401 THE LANCET 1229 (2023).

48. Burris et al., *supra* note 36., at 139.

49. *See* Scott Burris et al., *The Growing Field of Legal Epidemiology*, 26 J. PUB. HEALTH MGMT. PRAC. S5 (2020). For other important discussions of the "how" and "why" of the field, *see* THE LEGAL EPIDEMIOLOGY COMPETENCY MODEL VERSION 1.0, CDC (Mar. 2018),

encompassed research methods,[50] a comprehensive text book,[51] and the development of "policy surveillance" software, tools and open-source legal datasets to support and disseminate the products of scientific legal mapping.[52] While the field is still emerging, a variety of indicators suggest it is producing significant policy guidance.[53]

I have so far described a broad public health enterprise in which lawyers are well integrated. Implicitly, that description puts lawyers "inside" the field, suggesting that we have reached a point where law is well-understood and appropriately addressed in practice, research, and training. That vision of an effective transdisciplinary pursuit of public health has gotten closer to reality in recent decades, but there is still a gap. Even as we continue to work from within toward a stronger and more effective public health system, a commitment to

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https://www.cdc.gov/phlp/docs/menu-legalepimodel.pdf; Tara Ramanathan et al., *Legal Epidemiology: The Science of Law*, 45 COMPETENCY J. L. MED. & ETHICS 69, 69 (2017); Tara Ramanathan & Matthew Penn, *Legal Epidemiology in Practice: The Example of Healthcare-Associated Infections,* CDC (2015), https://www.cdc.gov/phlp/docs/legalepi-hai.pdf; Scott Burris & Evan Anderson, *Making the Case for Laws that Improve Health: The Work of the Public Health Law Research National Program Office*, 39 J. L. MED. & ETHICS (SUPPLEMENT) 15, 16 (2011); Scott Burris et al., *Making the Case for Laws That Improve Health: A Framework for Public Health Law Research*, 88 MILBANK Q. 169, 176 (2010).

50. *See, e.g.,* Scott Burris, *Theory and Methods in Comparative Drug Policy Research: Response to a Review of the Literature*, 41 INT'L J. DRUG POL'Y 126, 127 (2017); Mathieu J. P. Poirier et al., *Principles and Methods of Global Legal Epidemiology*, 76 INT'L J. EPIDEMIOLOGY CMTY. HEALTH 828, 829 (2022); Jules Netherland et al., *Principles and Metrics for Evaluating Oregon's Innovative Drug Decriminalization Measure*, 99 J. URB. HEALTH 328, 329 (2022); Scott Burris et al., *Identifying Data for the Empirical Assessment of Law (IDEAL): A Realist Approach to Research Gaps on the Health Effects of Abortion Law*, 6 BMJ URB. GLOB HEALTH, 2021, at 2. Megan S. Schuler et al., *Methodological Challenges and Proposed Solutions for Evaluating Opioid Policy Effectiveness*, 21 HEALTH SERV. OUTCOMES RSCH. METHODOLOGY 22, 23 (2021); Charles Tremper et al., *Measuring Law for Public Health Research*, 34 EVALUATION REV. 242, 247 (2009).

51. *See* ALEXANDER WAGENAAR ET AL., LEGAL EPIDEMIOLOGY: THEORY AND METHODS (Wiley 2d ed. 2023).

52. Scott Burris et al., *Policy Surveillance: A Vital Public Health Practice Comes of Age*, 41 REV. J. HEALTH POL'Y & L. 1162, 1154–55 (2016). Important work has also been done to expand policy surveillance globally, including a long-needed system for tracking HIV/AIDS policies built by the O'Neill Center. *HIV Policy Lab*, O'NEILL INST. FOR NAT'L AND GLOB. HEALTH L. (2023), https://oneill.law.georgetown.edu/projects/hiv-policy-lab/.

53. *See* Dawn Pepin et al., *A Narrative Review of Literature Examining Studies Researching the Impact of Law on Health and Economic Outcomes*, 30 J. PUB. HEALTH MGMT. & PRAC., Jan.–Feb. 2024. Over 300 papers have used APIS data, or cited APIS, between 2004 and 2022. Alcohol Policy Information System, *Peer-Reviewed Publications Using APIS Data* (2017), https://alcoholpolicy.niaaa.nih.gov/resource/peer-reviewed-publications-using-apis-data/22. *See also* Leila Martini et al., *A Scan of CDC-Authored Articles on Legal Epidemiology, 2011-2015*, 131 PUB. HEALTH REP. 809, 811 (2016) (finding 158 CDC-authored articles on legal epidemiology were published from 2011-2015). At least 156 peer reviewed papers have used PDAPS data or cited it between 2015 and 2022. *Papers in Peer-Reviewed Publications Citing PDAPS - 2022*, PRESCRIPTION DRUG ABUSE POL'Y SYS., https://pdaps.org/resources (last visited Feb. 26, 2024).

effective and fair public health law requires us as public health lawyers to, on occasion, work *against* public health. This means stepping back and seeing the deficiencies in the field and its culture, the limitations of health agencies, the broader lack of government accountability for both the intended and side effects of legal action, and the failure to do enough about social determinants of health and structural inequities.

III. ACTING *AGAINST* PUBLIC HEALTH

Career public health lawyers typically have a great reservoir of respect and goodwill for public health professionals. We believe it is a fundamental purpose of government to create the conditions in which people can be healthy, so there could hardly be a more noble calling.[54] We see the work getting harder, with the decline of civility and the brutish example set by Donald Trump[55]—and we support public health professionals in their struggles. We know that public health challenges like COVID-19, obesity, and substance use disorder are incredibly difficult to solve, let alone address. For all that, we have also to acknowledge and fight real problems internal to public health.

Too many people in public health seem to believe that their expertise in epidemiology and public health practice also qualifies them as policymakers, advocates, communicators, regulators, and evaluators.[56] In particular, they drastically underestimate the complexity of law, treating law making and regulatory implementation as simple ministerial processes that will just naturally follow once they have defined and explained the rules they have devised. Public health officials typically claim to make and defend policy as "following the science"—by which they mean the epidemiology—and naively expect that a policy's roots in evidence or theory should compel compliance.[57] "When public health leaders 'prescribe' those science-based interventions to the public in the

54. WENDY PARMET, POPULATIONS, PUBLIC HEALTH, AND THE LAW 1–2 (Georgetown University Press 2009); *see also* Burris et al., *supra* note 44, at 404 (extolling the moral commitment of public health work).

55. *See* Grace Sparks et al., *KFF COVID-19 Vaccine Monitor: MAGA Republicans' Relationship with COVID-19 Vaccines*, KFF (Dec. 14, 2023), https://www.kff.org/coronavirus-covid-19/poll-finding/kff-covid-19-vaccine-monitor-maga-republicans-relationship-with-covid-19-vaccines/; Gina Kolata & Roni Caryn Rabin, *'Don't Be Afraid of Covid,' Trump Says, Undermining Public Health Messages*, NEW YORK TIMES (Oct. 5, 2020), https://www.nytimes.com/2020/10/05/health/trump-covid-public-health.html; Dylan Scott, *Why America's public health system can't withstand Trump*, VOX (July 20, 2020), https://www.vox.com/2020/7/20/21331702/trump-coronavirus-health-care-america.

56. For an extended discussion highlighting these problems as they played out during COVID-19, *see* Anderson & Burris, *supra* note 3, at 1001–02.

57. Burris et al., *supra* note 2, at 1974.

form of rules, regulations, and guidance, they are surprised to encounter widespread noncompliance and even resistance."[58]

The explanation for their difficulties should be obvious: law is hard. To effectively address a problem through law requires a proponent to satisfy a number of strict conditions:

- The legal action has to have at least a plausible chance of addressing the problem; that is, there must be explicit causal mechanisms through which a new rule will change behaviors or environments to prevent or interrupt the pathological process.
- The action has to be legally sound; that is, it must not be unconstitutional or *ultra vires*; it must be drafted to be both implementable and defensible against challenge; and it must be supported by sufficient evidence to overcome such challenges.
- The measure has to pass, which means it must have a political case that can win the approval of policymakers and voters and overcome opposition of powerful ideological or industry advocates.
- The rule has to be effectively implemented, ideally so that voluntary compliance is high, and enforcement is feasible (and provided for), and with a close eye to the possibilities that laws neutral on paper will be applied inequitably or have inequitable effects; and
- To maintain or improve effectiveness over time, to diffuse effective interventions, and to maintain popular support, the legal action must be evaluated and its diffusion across jurisdictions monitored.[59]

Current public health professional training is not sufficient to equip health workers to do their part in satisfying these criteria, nor to instill in them a proper recognition of the disciplinary diversity required in the field to do so. Devising a policy certainly requires epidemiological expertise about the problem, but that is not enough to make good policy. Political, legal, and community knowledge about the processes through which a law might have an influence, and the acceptability and legality of any rule, is crucial. Developing good policy also requires a broader range of scientific knowledge and evidence. Epidemiology may suggest the behavior or standard that is needed, but crafting a policy that people and society will support and comply with must draw on social and behavioral science, economics, and sociolegal science.[60]

58. Evan Anderson & Scott Burris, *Which Skills Are Key to Public Health Leaders' Success in Crisis Management?,* 25 AMA J. ETHICS 219, 220 (2023).

59. *Five Essential Public Health Law Services,* NETWORK FOR PUB. HEALTH L., https://www.networkforphl.org/resources/topics/trainings/five-essential-public-health-law-services/ (last visited Nov. 23, 2023); *see also* Burris et al., *supra* note 37.

60. *See* Evan Anderson & Scott Burris, *Educated Guessing: Researchers and Research Knowledge in Evidence-Informed Policy Innovation,* in REGULATING TOBACCO, ALCOHOL AND

Drafting a sound rule may be a primarily legal function, but lawyers need help to write rules that embody the policies that health officials envision, set out realistic implementation plans, and reflect consideration of political or community opposition. Public health officials are part of the advocacy process, even if they are politically neutral, and there is much more to that role than simply framing messages. Enforcement—getting people to comply—is a neglected art and science,[61] a main driver of inequities,[62] and a primary function of health agencies, albeit one that public health workers rarely are trained to perform. Finally, evaluating health effects of laws and legal practices, including the subsidiary science of policy surveillance, is a recognized element of public health research, but one that remains underemphasized in research training and underfunded in the field.

Some of the problems with how public health executes its legal functions simply have to do with the fact that control measures are instituted by fallible humans in difficult political circumstances. Sometimes people, no matter how well advised or well-trained, just make mistakes in the fog of a health crisis. But at a time when it should be clear that the deeper drivers of population health are at least as much social as genetic or medical, some of our policy setbacks can be traced to a system that reserves the top jobs for doctors and other health-trained individuals.

In this section, I identify three important ways in which public health lawyers should be working "against" public health in its professional or governmental character. First, professional training has to incorporate the skills required to properly deliver essential public health law services. Second, external pressure remains necessary to diversify leadership in public health, demographically, and professionally. Third, there will always be a need for lawyers to check public health agencies in court, in legislation, and in advocacy when they fail to promote equity or act within the limits of the law. These efforts are, of course, only "against" public health in the way that professional critics are "against" movies or plays or music; the aim is to promote better performance.

A. Better Legal Training for Better Legal Performance

Public health law is not a required course at many—or even any—training programs in for people embarking on careers in public health.[63] It may be an

UNHEALTHY FOODS: THE LEGAL ISSUES 7 (Routledge 2014); BENJAMIN VAN ROOIJ & ADAM FINE, THE BEHAVIORAL CODE: THE HIDDEN WAYS THE LAW MAKES US BETTER . . . OR WORSE 10 (Beacon Press 2021).

61. PETER DRAHOS, REGULATORY THEORY: FOUNDATIONS AND APPLICATIONS 87 (ANU Press 2017).

62. *See, e.g.,* Watts et al., *Equitable Enforcement of Pandemic-Related Public Health Laws: Strategies for Achieving Racial and Health Justice*, 111 AM. J. PUB. HEALTH 395, 395 (2021).

63. There is no single training path for public health. The MPH, which was originally conceived of as a supplemental degree for medical doctors, and has become a stand-alone

elective, but to the extent law gets mandatory coverage it is normally in "policy" courses light on the law.[64] The problem is not a lack of appreciation of the importance of law to health. As already discussed, the public health establishment recognizes the centrality of law: it is now built into the 10 Essential Services and the Public Health Accreditation Board (PHAB) standards for accreditation.[65] Rather, it seems to be an insufficient appreciation of the specific technical skills and range of knowledge needed for health professionals to carry out those operations.

Accreditation standards for Master's of Public Health (MPH) degrees set by the Council on Education for Public Health (CEPH) capture the whole problem:

> Policy in Public Health
>
> 12. Discuss the policy-making process, including the roles of ethics and evidence[;]
> 13. Propose strategies to identify stakeholders and build coalitions and partnerships for influencing public health outcomes[;]
> 14. Advocate for political, social, or economic policies and programs that will improve health in diverse populations[; and]
> 15. Evaluate policies for their impact on public health and health equity[.][66]

The standards are explicit about *policy* as a required competency, but the word "law" is missing—as are "regulation," "statute," "enforcement," "implementation," and, for that matter, "policy design." Alas, because law is the main instrument society uses to do the work of policy, studying "policy" without law is like studying the circulatory system but not blood.[67] CEPH training might

professional degree, is a common credential, but past research has found that most people who work in public health agencies do not have an MPH, and most people who get MPH degrees do not work in public health agencies. *See* COMM. ON EDUCATING PUB. HEALTH PROS. FOR THE 21ST CENTURY, WHO WILL KEEP THE PUBLIC HEALTHY? EDUCATING PUBLIC HEALTH PROFESSIONALS FOR THE 21ST CENTURY 109–10(National Academies Press 2003).

64. See *e.g. M.P.H. Curriculum Guides*, HARVARD T. H. CHAN SCH. PUB. HEALTH, https://www.hsph.harvard.edu/office-of-educational-programs/master-of-public-health/mph-program-competencies/mph-curriculum-guides/ (last visited Feb. 28, 2024).

65. *See* CDC, *supra* note 34; *Standards & Measures for Initial Accreditation*, PUB. HEALTH ACCREDITATION BD., STANDARDS & MEASURES FOR INITIAL ACCREDITATION 7 (2022), https://phaboard.org/wp-content/uploads/Standards-Measures-Initial-Accreditation-Version-2022.pdf.

66. COUNCIL ON EDUC. FOR PUB. HEALTH, ACCREDITATION CRITERIA: SCHOOLS OF PUB. HEALTH & PUB. HEALTH PROGRAMS 18 (Aug. 2021), https://media.ceph.org/documents/2021.Criteria.pdf.

67. For a discussion of the distinction between "law" and "policy" and some of the reasons it matters, *see* Masry Vititoe, *The Distinction Between Health Law And Health Policy,* https://www.masryvititoe.com/the-distinction-between-health-law-and-health-policy.shtml (last visited Feb. 26, 2024). For a broader survey of measurement problems in drug policy evaluation, *see* Jennifer J. Carroll et al., *A discussion of critical errors in a longitudinal study on the deterrent*

at best prepare graduates to do two of the five essential law services—advocacy and policy surveillance and evaluation. This is just not enough. Advocacy is important and indeed has been getting a big boost in public health training,[68] but advocates are stuck with whatever policy ideas and legal instruments that policy designers and lawyers present them. There are significant opportunities for improving policy design, as well as the opportunity costs of insufficient investment in getting policy design and legal drafting right.[69] There is so much more we could teach if we took law and the legal process more seriously.

The neglect of training in regulatory enforcement also speaks volumes. Whether it is getting a major industry to make its products safer or convincing hundreds of millions of people to change their behavior, the work of putting laws into practice is difficult, but also a set of skills that can be taught and deployed. In the United States, "compliance" has become a field in itself, meeting a demand from the side of industry for expertise in how to obey (creatively or otherwise) the many rules government makes; how ironic that those who will be enforcing public health regulations get no training in the matter whatsoever.

None of this is to say that the nation lacks public health leaders and staffers who have achieved excellence in their law-related work and have modeled a broad, transdisciplinary, and cooperative approach to their work. It is through their examples that we can readily articulate the kind of performance we would like to see everywhere. One thing is for sure, though: great public health leaders are made by experience, internal motivation, and reflection. No one is taught how to do this during their professional training.

Research on the effects of laws and legal practices also needs more attention. It is not just important to guide rational policymaking—it is crucial to maintaining and enhancing public trust in government. What could be more toxic to society's glue of civic capital than a system that places policymakers—who make the rules and solve the problems—firmly at the center of action, but lacks any robust or systematic evaluation of the effects of the solutions those problem solvers provide? The average citizen is told again and again what the problem is and how the law is going to solve it, but sees no change. They are left to conclude that their government leaders are mendacious, incapable, or both.

As with other areas of practice, we know what legal epidemiology excellence looks like because researchers have been producing first-class,

effect of drug-induced homicide laws on opioid-related mortality across 92 counties and the District of Columbia in the United States, 15 WORLD MED. & HEALTH POL'Y 587, 603 (2023).

68. Policy education has been a bright spot in recent years, with both academic institutions and foundations investing in new tools and programs. *See, e.g.*, SHELLEY HEARNE ET AL., POLICY ENGAGEMENT (2023); JOHNS HOPKINS UNIVERSITY LEARNING CENTER FOR PUBLIC HEALTH ADVOCACY https://publichealth.jhu.edu/lerner-center/about (last visited Sept. 19, 2023) (describing the substantial new program at Johns Hopkins).

69. Scott Burris, *Taking Opportunity Costs Seriously in Public Health Law*, 133 PUB. HEALTH REPS. 726, 727–28 (2018).

rigorous research for fifty years.[70] Unfortunately, there is also a good deal of very poor work done, in which basic problems in legal measurement and a failure to understand implementation leads to spurious results.[71] Integrating legal epidemiology tools and methods into policy evaluation research is a minor lift, since, fundamentally, law is just another set of institutions, norms, and behaviors influencing individuals and environments. But that easy lift still has to be lifted. At the moment, my Center for Public Health Law Research at Temple University offers a non-matriculating online certificate,[72] as does the CDC's public health law academy,[73] but as far as I know only the University of Texas at Houston has a credit-bearing certificate program in public health law research and policy surveillance.[74]

Including legal epidemiology in graduate research training highlights the need for action from the National Institute of Health (NIH). Research has shown that despite some bright spots like road safety, the NIH largely neglects funding for studies on law and policy.[75] This not only has an effect on the volume and quality of research produced, but directly on the decisions of young researchers to include legal epidemiology in their career plans. NIH's sequence of awards help budding researchers build careers from post-doctoral research through early career support to their own primary grants as principal investigators.

In promoting law within the field, public health lawyers have generally pursued a "supply side" approach. All the textbooks and trainings and competency frameworks that have marked progress in public health law, the idea of the transdisciplinary model, and the whole field of legal epidemiology have all been aimed at getting accrediting bodies for health agencies and health education to realize that it was both necessary and feasible to significantly

70. Scott Burris & Evan Anderson, *Legal Regulation of Health-Related Behavior: A Half Century of Public Health Law Research*, 9 ANN. REV. OF L. & SOC. SCI. 95, 96 (2013).

71. *See* Pepin *et al., supra* note 53 (reporting widespread failures of transparency in legal methods in published studies of the health effects of laws); *see also* Scott Burris, *Legal Epidemiology: Growth, and Growing Pains*, 30 J. PUB. HEALTH MGMT. & PRAC. 1 (2024) (discussing Pepin et al. findings). For a truly horrific cautionary tale, *see* Carroll et al., *supra* note 67.

72. *Global Certificate in Legal Epidemiology*, TEMPLE UNIV., https://phlr.org/resource/non-credit-certificate-legal-epidemiology (last visited Sept. 19, 2023).

73. CHANGE LAB SOLS., *supra* note 42.

74. *Graduate Certificate Planner*, UT HEALTH HOUSTON SCH. OF PUB. HEALTH, https://web.sph.uth.edu/student-forms/Academic_Requirements/Certificate%20Planners/Planner.Certificate.Public_Health_Research_and_Policy_Surveillance.docx (last visited Sept. 19, 2023) (example of a graduate checklist).

75. Jennifer K. Ibrahim et al., *Supporting a Culture of Evidence-Based Policy: Federal Funding for Public Health Law Evaluation Research, 1985-2014*, 23 J. PUB. HEALTH MANAG. PRAC. 658, 665 (2017); Jonathan Purtle et al., *A Review of Policy Dissemination and Implementation Research Funded by the National Institutes of Health, 2007–2014*, 11 IMPLEMENTATION SCI. 1, 6 (2016).

strengthen curricula in public health law. It has not happened—or at least is not fast enough. The current state of this training in schools of public health, social work, public policy, and medicine is simply unacceptable. It is time for public health lawyers to be less facilitative and more demanding, stepping outside the tent and acting against public health until a dose of shame and criticism induce dramatic change.

B. Greater Professional and Demographic Diversity in Public Health Leadership

Better training in legal functions is a medium to long-term strategy. Meanwhile, public health lawyers can join in an ongoing effort to promote greater professional and demographic diversity in public health leadership. Greater professional diversity is a good way to directly address the need for competency in the law and the large-scale management of social behavior. Greater demographic diversity is an imperative throughout society, and in public health leadership may have benefits both in improved community engagement and a more robust effort to address social determinants of health.

Public health can no longer be described as a white male bastion. A 2021 study reported that" the governmental public health workforce is predominantly white, female, and over the age of [forty]."[76] Women comprise 79% of the workforce.[77] Fifty-four percent of public health workers identify as White, with 18% identifying as Hispanic or Latino, 15% as Black or African American, 7% as Asian, 1% as American Indian or Alaska Native, and 0.4% as Native Hawaiian or other Pacific Islander.[78] Still, sixty-six percent of public health executives identify as White.[79] Academia does not do even this well. In 2017, almost three-quarters of the faculty at schools of public health were white.[80] People of Asian ethnicity made up 13.6%, Black people 5.7%, people of Hispanic heritage 5.9%, and indigenous Americans 0.3% of faculty.[81] While the proportion of non-White students in these schools is slowly going up, it still trails the profession.[82] Here, as elsewhere, there is an imperative to promote

76. *New Data and Dashboards: PH WINS Survey of Public Health Workers*, DE BEAUMONT (Aug. 3, 2022), https://debeaumont.org/news/2022/new-data-and-dashboards/ (providing demographic figures).

77. *Id.*

78. *Id*.

79. *2021 Findings*, DE BEAUMONT FOUNDATION, https://debeaumont.org/phwins/2021-findings/ (last accessed Jan. 19, 2024).

80. *See* Melody S. Goodman et al., *Racial/Ethnic Diversity in Academic Public Health: 20-Year Update*, 135 PUB. HEALTH REPS. 74, 77 (2020).

81. *Id.* These numbers were better, but not substantially better, than they were twenty years earlier. *Id.*

82. *Id.* at 79.

opportunities for people who do not look like the faculty or the majority of the students—whatever the Supreme Court may say.[83]

From the public health law perspective, professional diversity is also important. Jobs in public health leadership have always come with broad legal authority, and public health law and legal epidemiology have made great strides in raising awareness of the many challenges of using law effectively, and the array of skills needed to maximize chances of success. Epidemiology is vital to defining problems and understanding the pathways along which risk, exposure, and vulnerability become morbidity and mortality. But so are economics and social science—and law. The notable implementation failures in COVID-19 responses reflect, in part, a lack of attention to these complexities and a lack of staff and leadership capacity to anticipate and address them.[84]

Statistics on the professional training of health agency leaders are telling. "Every director of the CDC since 1953 has been a physician, as have all but one U.S. Food and Drug Administration commissioner since 1980. Over two-thirds of state health officers have medical training; the last 32 commissioners of health in New York City have been physicians."[85] A 2016 study of "public health leadership"—defined as school of public health deans and state health directors—painted a similarly monochrome picture.[86] The most common degree, held by 47% of the leaders, was an M.D.; 21% had PhDs.[87] Only one state health director had a J.D. as their highest level of education, and two were J.D./M.D.s.[88] No deans had a J.D.[89] Getting rid of M.D. requirements for public health agency leadership may broaden the demographics of the top brass, but in what can be called a "post-affirmative action" age, much will again depend on consciousness and external pressure for greater diversity in the selections political leaders make. Broad change will have to deal with antiquated legal requirements for health agency leadership,[90] but cultural change can accelerate starting today.

83. Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U. S. 181, 230–31 (2023).

84. *See* Burris et al., *supra* note 2, at 1002–03.

85. Anderson & Burris, *supra* note 58, at 222 (citations omitted).

86. Ruth Gaskins Little et al., *Profile of Public Health Leadership*, 22 J. PUB. HEALTH MGMT. PRAC. 479, 480 (2016).

87. *Id.*

88. *Id.*

89. *Id.*

90. *See* Eric Coles, *The US Deserves the Best Public Health Doctors. They Needn't be Medical Doctors*, STAT (Oct. 13. 2021), https://www.statnews.com/2021/10/13/improve-public-health-remove-medical-doctor-requirement/.

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C. Legal Advocacy to Prevent Abuse and Promote Equity

Finally, public health lawyers work productively "against" public health when they act to protect people from discrimination and violation of their civil rights by health agencies, as independent legal advocates for important actions untaken, and when they advocate broadly for health justice and equity in governmental public health action.

The first role requires no elaboration. Health agencies have powers and duties, but they are also subject to restraints. The law allows lawyers to act when health actions are rooted in prejudice, in "myths and fears" about people with diseases, or when health actions are not justified by the facts of the case.[91] Whether these actions are coming from health professionals themselves, or are driven by political leaders, lawyers provide the "guardrails" that confine public health to the right path. Indeed, these legal options—and independent judicial review—are important even when public health is getting things right; they provide a means to address public concerns and, even when all goes well, to educate the public.

Although health agencies have few legally enforceable duties, lawyers can work through legislative and legal advocacy to promote laws and legal practices that promote public health. Examples are many. Lawyers have consistently pushed for action on HIV prevention, harm reduction, gun control, tobacco control, and obesity, to name just a few. It bears mention that external pressure from lawyers working "against" public health is often welcomed and taken advantage of by public health officials chaffing at political restraints.[92]

Finally, lawyers can continue to press health agencies and other government entities to address the past and current mindsets and practices that produce severe and chronic health disparities and inequities. The pervasive and continuing inequitable application of law and other tools of public health, whether intentional or inadvertent, requires explicit, self-conscious action by both advocates and policymakers. Realistically, health agencies, as creatures of the executive branch, subject to political oversight and more or less harebrained[93] attacks from both sides of the political spectrum, are rarely going to be the leaders in anti-racism and health equity efforts.

Along with considering the evidence about how law causes harm and how changing law can create healthier conditions, public health lawyers must also

91. Scott Burris, *Fear Itself: AIDS, Herpes and Public Health Decisions*, 3(2) YALE L. & POL'Y REV. 479, 496–516 (1985) (describing how stereotypes about herpes and anti-gay sentiment during the AIDS epidemic impacted judicial responses to public health orders); *see also* Scott Burris, *Rationality Review and the Politics of Public Health*, 34 VILLANOVA L. REV. 933, 951 (1989).

92. For one part of the story, *see* Scott Burris & Lawrence O. Gostin, *The Impact of HIV/AIDS on the Development of Public Health Law*, *in* DAWNING ANSWERS: HOW THE HIV/AIDS EPIDEMIC HAS HELPED TO STRENGTHEN PUBLIC HEALTH 96 (Ronald O. Valdiserri ed. 2003).

93. Apologies to hares and the entire bunny family.

systematically explore how both problems and solutions may be operating inequitably. A guide for changemakers developed by ChangeLab Solutions succinctly sets out some best practices.[94] These include recognizing fundamental drivers of health inequity (including structural discrimination, income inequality and poverty, disparities in opportunity, disparities in political power, and governance that limit meaningful participation), learning from the past, and using that broad focus to guide all action for change.[95] The health justice movement is an excellent model of work that is rooted in health and the role of government and law in promoting it, yet situated outside (and to some degree against) the status quo. Health justice[96] scholars are pushing governments to move from recognition to action on structural discrimination.[97] They are pushing for research and intervention that integrates "the economic, cultural, and political spheres of redistribution, recognition, and representation."[98] They have looked inward at how legal academics can better contribute to health justice advocacy[99] and pressed strongly for more attention to and action to address inequitable enforcement of public health laws.[100] Health justice and other legal work from a critical, outsider perspective[101] is an important way for lawyers to help public health, whether public health likes it or not.

IV. ACTING *BEYOND* PUBLIC HEALTH

Public health is a great idea. The concept provides a good way to talk about human thriving and the kind of society that makes it possible. Its tools of measurement and analysis produce good indicators of needs, progress, and what works.[102] Public health agencies can use the law to make real improvements in

94. *Blueprint for Changemakers: Achieving Health Equity Through Law & Policy*, CHANGELAB SOLS. 3 (Apr. 2019), https://www.changelabsolutions.org/product/blueprint-changemakers.

95. *Id.*

96. For a detailed definition of health justice, *see* Lindsay F. Wiley et al., *Introduction: What is Health Justice*?, 50(4) J.L. MED. & ETHICS 636, 636 (2022).

97. *See, e.g.* Ruqaiijah Yearby, *The Social Determinants of Health, Health Disparities, and Health Justice*, 50(4) J.L. MED. & ETHICS 641, 646–47 (2022).

98. Arnel M. Borras, *Toward an Intersectional Approach to Health Justice*, 51(2) INT'L J. HEALTH SERVS. 206, 206 (2021).

99. *See* Emily Benfer et al., *Setting the Health Justice Agenda: Addressing Health Inequity & Injustice in the Post-pandemic Clinic,* 28(1) CLINICAL L. REV. 45, 84 (2021).

100. Maya Hazarika Watts et al., *Equitable Enforcement of Pandemic-Related Public Health Laws: Strategies for Achieving Racial and Health Justice*, 111(1) AM. J. PUB. HEALTH 395, 395 (2021).

101. Another recent example was the ambitious project that engaged dozens of legal scholars to produce critical guidance for COVID-19 policy across a range of areas, from basic public health measures, through IP law to the care of incarcerated people. *See* Scott Burris et al., *supra* note 32.

102. *See* Scott Burris & Evan Anderson, *A Framework Convention on Global Health: Social Justice Lite, or a Light on Social Justice?*, 38 J.L. MED. & ETHICS 580, 581 (2010).

the lives of individuals and communities. By recognizing that population health is substantially determined by the social conditions and positions in which we live, public health discourse provides ample normative and empirical support for just, humane, and equitable social policies.

Yet public health, both in its academic and government forms, talks a lot more about social determinants of health than it actually does. Many historians and scholars argue that the field has lost its way by abandoning its roots in social justice.[103] There is some truth in that, but even the many public health officials who are keenly aware of the importance of social factors—and there are many—can only work with the tools at their disposal and within the limits set by their political bosses. Moreover, the legacy of conceiving public health work primarily in terms of specific causes of disease and death is everywhere in the field. The NIH and CDC reflect this,[104] and specific proximal causes of harm get the bulk of attention in the concerns of the public, the decisions of policy makers, and the work of academic researchers and local health departments. However well we understand social determinants of health[105] and "actual causes of death"[106] in upstream terms, day-to-day work is pushed to focus on the pathologies listed on death certificates and their proximate behavioral and environmental risk factors: heart disease, cancer, infectious diseases, accidents (including opioid overdose), and so on.[107] These are compelling threats, so convincing people to behave more safely and regulating products or environments to reduce harm is important work: disease-specific measures that are equitably administered will make a great difference to the millions of individuals whose health trajectory is altered for the better.[108] At the population

103. For a quick overview of the argument, *see* Ed Yong, *How Public Health Took Part in Its Own Downfall*, THE ATLANTIC (Oct. 23, 2021), https://www.theatlantic.com/health/archive/2021/10/how-public-health-took-part-its-own-downfall/620457/.

104. *See* NAT'L INST. OF HEALTH, *Mission and Goals*, https://www.nih.gov/about-nih/what-we-do/mission-goals (last visited Jan. 19, 2024); *see* also CTRS. FOR DISEASE CONTROL, *Mission, Role and Pledge,* https://www.cdc.gov/about/organization/mission.htm (last visited Jan. 19, 2024) (describing their missions as "conducting and supporting research…in the causes, diagnosis, prevention, and cure of human disease," "fight[ing] disease," and "protect[ing] people from health threats.")

105. *See Closing the Gap in Generation: Health Equity through Action on the Social Determinants of Health*, WHO (Aug. 27, 2008), https://www.who.int/publications/i/item/WHO-IER-CSDH-08.1.

106. *See* J. M. McGinnis & W. H. Foege, *Actual Causes of Death in the United States*, 270 JAMA 2207 (1993).

107. *Leading Causes of Death*, NAT'L CTR. FOR HEALTH STATS. (Jan. 18, 2023), https://www.cdc.gov/nchs/fastats/leading-causes-of-death.htm. For the definitive discussion of the epidemiological distinction between the causes of disease at the individual and population levels, *see* Geoffrey Rose, *Sick Individuals and Sick Populations*, 14 INT'L J. EPIDEMIOLOGY 32 (1985).

108. For an extensive analysis and discussion of the effects of individual health care, *see* John Lynch et al., *Is Income Inequality a Determinant of Population Health? Part 1. A Systematic Review*, 82 MILBANK Q. 5 (2004); *see also* John Lynch et al., *Is Income Inequality a Determinant*

level, however, that burden-of-disease rock is going to roll right back down to the bottom of the hill every night unless our work also addresses social determinants. Lawyers may well feel moral discomfort with the possibility that by working palliatively on proximal causes, we may be complicit in maintaining unjust conditions.[109]

Government public health and the health research establishment may for many reasons be "stuck" working on proximal causes of morbidity and mortality, but public health lawyers working on the outside do not have to be. In fact, I suggest that lawyers are the ideal professionals to show that the social drivers of unhappiness, poor health, and inequity are not distant, abstract, untouchable verities: they are vulnerabilities and exposures—and immunities and advantages—that happen to people every day. These social determinants of health work through lack of access to the resources and amenities that help people maintain their health.[110] They have their effect on health and well-being in the quotidian experiences that grind people down or lift them up. Laws and their enforcement influence who is poor and who is not, and the experience of being rich or poor—and that means that policy change can lead to substantial and rapid improvement.[111] In this Part, I offer a list of examples of law reform targets that address social determinants of health. They also have the potential to build bridges between public health work and advocacy and a broader range of campaigns for democracy, social justice, and equity. By aligning with people who do not think primarily in terms of health, we public health lawyers may glean insights and identify reform targets we might not have seen while wearing our health lenses. What follows is not an exhaustive list or detailed guide to new legal strategies, but only a demonstration that there are plenty of opportunities to be pursued.

of Population Health? Part 2. U.S. National and Regional Trends in Income Inequality and Age- and Cause-Specific Mortality, 82 MILBANK Q. 355 (2004).

109. See Anthony DiMario, *To Punish, Parent, or Palliate: Governing Urban Poverty through Institutional Failure*, 87 AM. SOCIO. REV. 860, 861–62 (2022) (describing "palliative governance").

110. B.G. Link & Jo Phelan, *Social conditions as fundamental causes of disease*, Spec No J. HEALTH & SOC. BEHAVIOR 80(1 Supp.) S28, S31–32 (1995).

111. The things that matter in a social epidemiological pursuit of health—the equitable distribution of the resources necessary for health, personal security, economic opportunity, and so on—are the same things that would be on the wish list of an advocate for human rights, or racial justice or economic reform. This broader vision is already guiding public health law work, as illustrated by this "blueprint" for health equity produced by ChangeLab Solutions, which identifies five drivers of health inequity, including poverty, structural discrimination and power—but not one of which includes the word "health." *See* CHANGELAB SOLS., *supra* note 94, at 9. Similarly, one of the largest funders of health (and public health law) work, the Robert Wood Johnson Foundation, is now guided by a comprehensive vision of a "culture of health" that addresses the many roots of thriving. *See Why Build a Culture of Health?,* RWJF, https://www.rwjf.org/en/building-a-culture-of-health/why-health-equity.html (last visited Sept. 16, 2023).

A. Fighting Poverty

A recent experiment with a $500 per month guaranteed income in Stockton, CA explored how economic security improves quality of life. Compared to the control group, people receiving the guaranteed income "reported lower rates of income volatility […], lower mental distress, better energy and physical functioning, greater agency to explore new opportunities related to employment and caregiving, and better ability to weather pandemic-related financial volatility."[112] This is consistent with growing evidence that income support mechanisms that put more money into the pockets of lower-income people can reduce poverty and its ill effects. Research has shown, for example, that Temporary Assistance for Needy Families (TANF) is associated with a reduction in child maltreatment;[113] that minimum wage increases reduce suicides,[114] sexually transmitted infections (STIs),[115] HIV,[116] heart disease,[117] infant mortality, and low birth weight;[118] that the earned income tax credit (EITC) improves birth outcomes with more generous EITCs having an even greater effect;[119] and that expanding the Child Tax Credit (CTC) during the COVID-19 pandemic increased food sufficiency and improved mental health

112. Stacia West & Amy Castro, *Impact of Guaranteed Income on Health, Finances, and Agency: Findings from the Stockton Randomized Controlled Trial*, 100(2) J. URB. HEALTH 227, 227 (2023). These are the typical stress-related phenomena that wear people down and drive deaths of despair, and health research illustrates what should be obvious: if economic distress causes a wide variety of harms, its absence should be associated with the absence of those harms. ARLINE T. GERONIMUS, WEATHERING: THE EXTRAORDINARY STRESS OF ORDINARY LIFE IN AN UNJUST SOCIETY 55, 254 (Little, Brown Spark. 2023). It is important to remember that poverty is not just hard on the poor—it hurts the whole society, including the rich. *See, e.g.*, David Brady et al., *Novel Estimates of Mortality Associated with Poverty in the US*, 183(6) JAMA INTERNAL MED. 618, 619 (2023); *see also* WHO, *supra* note 105.

113. Rachael A. Spencer et al., *Association Between Temporary Assistance for Needy Families (TANF) and Child Maltreatment Among a Cohort of Fragile Families*, 120 CHILD ABUSE & NEGLECT, Oct. 2021, at 7.

114. John A. Kaufman et al., *Effects of Increased Minimum Wages by Unemployment Rate on Suicide in the USA*, 74(3) J. EPIDEMIOLOGY CMTY. HEALTH 219, 220 (2020).

115. Umedjon Ibragimov et al., *States with Higher Minimum Wages Have Lower STI Rates Among Women: Results of an Ecological Study Of 66 US Metropolitan Areas, 2003-2015*, 14 PLOS ONE, Oct. 2019, at 12, https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0223579.

116. David H. Cloud et al., *State Minimum Wage Laws and Newly Diagnosed Cases of HIV Among Heterosexual Black Residents of US Metropolitan Areas*, 7 SSM – POPULATION HEALTH, Apr. 2019, at 1, 5, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6287056/pdf/main.pdf.

117. Miriam E. Van Dyke et al., *State-Level Minimum Wage And Heart Disease Death Rates in the United States, 1980–2015: A Novel Application Of Marginal Structural Modeling*, 112 PREVENTION MED., July 2018, at 97, 99.

118. Kelli A. Komro et al., The Effect of an Increased Minimum Wage on Infant Mortality and Birth Weight, 106(8) AM. J. PUB. HEALTH 1514, 1515 (2016).

119. Sara Markowitz et al., *Effects of State-Level Earned Income Tax Credit laws in the U.S. on Maternal Health Behaviors and Infant Health Outcomes*, 194 SOC. SCI. & MED., Dec. 2017, at 67, 74.

among adults with children, finding the effect was strongest among the most marginalized groups.[120]

Anti-poverty programs have proven themselves not only beneficial but feasible. The COVID-19 era expanded the CTC and provided a natural test of government's capacity to rapidly provide economic assistance at a large scale. The CTC expanded eligibility to families with little or no income, benefiting the poorest families,[121] and making its distribution more racially equitable. The program was unrolled rapidly, using tax records to determine eligibility and directly deposit the credit.[122] In its first six months, nearly $90 billion went to millions of households, lifting 5.3 million people out of poverty, including 2.9 million children.[123] Despite its effectiveness, the effort to make this highly effective program permanent ran into dubious assertions that it would reduce the incentive for people to work,[124] and histrionic shock at the estimated $12 billion cost of making the regular $2,000 tax credit fully refundable to people with low or no incomes.[125] (I return to how to pay for anti-poverty schemes below.)

There are several reasons why living in poverty is detrimental to health outcomes. One of the reasons that it is better not to be poor is that being poor in America exposes people to near-constant risk of some business or agency taking away the little they have. On this view, anti-poverty work must include focusing much greater effort on protecting what poorer people have from extraction. It must put consumer protection law—including credit rules, criminal justice reform, rent control, and other immediate mechanisms for preserving what is in the wallet—alongside measures like EITC and higher minimum wage that put more money in.[126]

120. Paul R. Shafer et al., *Association of the Implementation of Child Tax Credit Advance Payments With Food Insufficiency in US Households*, 5(1) JAMA NETWORK OPEN 1, 4; Akansha Batra et al., *Effects of the 2021 Expanded Child Tax Credit On Adults' Mental Health: A Quasi-Experimental Study*, 42 HEALTH AFFAIRS 74, 75–80 (2023).

121. *Child Tax Credit*, IRS, https://www.irs.gov/credits-deductions/individuals/child-tax-credit#:~:text=To%20be%20a%20qualifying%20child,a%20grandchild%2C%20niece%20or%20nephew (last updated Jan. 10, 2024).

122. *Id.*

123. Kaylee Buren & Liana Fox, *The Impact of the 2021 Expanded Child Tax Credit on Child Poverty* 2, 7 (U.S. Census Bureau, Working Paper No. 2022–24), https://www.census.gov/library/working-papers/2022/demo/SEHSD-wp2022-24.html.

124. Jason DeParle, *The Expanded Child Tax Credit is Gone. The Battle Over It Remains.*, N.Y. TIMES (Nov. 25, 2022), https://www.nytimes.com/2022/11/25/us/politics/child-tax-credit.html.

125. Kris Cox et al., *Top Tax Priority: Expanding the Child Tax Credit in Upcoming Economic Legislation*, CTR. ON BUDGET AND POLICY PRIORITIES (June 12, 2023), https://www.cbpp.org/research/federal-tax/top-tax-priority-expanding-the-child-tax-credit-in-upcoming-economic.

126. *See* MATTHEW DESMOND, POVERTY, BY AMERICA 57–79 (Crown 2023).

Poorer people need credit as much or more than the better off, but face predatory lending:[127] a variety of lending devices and practices, including making loans to borrowers that they probably cannot afford to repay; inducing a borrower to repeatedly refinance a loan in order to charge additional fees; and concealing the true nature or terms of a loan.[128] Payday loans are a frequently used form of short-term credit, with twelve million borrowers every year.[129] Payday loans are expensive, so borrowers often end up spending more in interest and fees than they borrowed in principal.[130] States can protect consumers from exaggerated interest rates and unfair terms, and some have.[131] The same goes for bank overdraft fees as a routine resort for short-term credit,[132] which tend to be even more expensive than payday loans, but can be regulated by states.[133]

Being poor, especially a poor person of color, means that too often financial deprivation comes in the form of an encounter with a government authority. The imposition of legal financial obligations, which include fees, fines, and bail in connection with criminal justice charges or civil offenses, has become a widespread phenomenon in the U.S.[134] Fines for municipal offenses like traffic and "quality of life" violations have become crucial sources of funding for city operations that, properly, should be funded by general taxes.[135] In 2015, the Justice Department found that in Ferguson, Missouri, "revenue generation is stressed heavily within the police department, and that the message comes from

127. Predatory lending refers to a variety of lending devices and practices, including making loans to borrowers that probably cannot afford to repay. *See* Amrita Jayakumar & Jackie Veling, *What Is Predatory Lending?*, NERDWALLET (May 11, 2023), https://www.nerdwallet.com/article/loans/personal-loans/what-is-predatory-lending.

128. *Id.*; *see also How to Reform State Payday Loan Laws*, PEW CHARITABLE TRS. (June 8, 2023), https://www.pewtrusts.org/en/research-and-analysis/articles/2023/06/08/how-to-reform-state-payday-loan-laws.

129. PAYDAY LENDING IN AMERICA: POLICY SOLUTIONS, PEW CHARITABLE TRS. 1 (Oct. 2013), https://www.pewtrusts.org/-/media/legacy/uploadedfiles/pcs_assets/2013/pewpayday policysolutionsoct2013pdf.pdf.

130. Bill Fay, *What Is Predatory Lending?*, DEBT.ORG, https://www.debt.org/credit/predatory-lending/#:~:text=Types%20of%20Predatory%20Loans&text=Interest%20rates%20are%20typically%20%2415,%2C%20which%20is%20around%2021%25 (last visited Jan. 19, 2024).

131. *See* PEW CHARITABLE TRS., *supra* note 128.

132. Aluma Zernik, *Overdrafts: When Markets, Consumers, and Regulators Collide*, 26 GEORGETOWN J. POVERTY L. & POL'Y 1, 9, 13, 21–23 (2018).

133. *See, e,g.*, N.Y. COMP. CODES R. & REGS. TIT. 3 §§ 32.1–32.2 (2019). This list of consumer protections just scratches the surface. There is also much to be done in the realm of housing finance, especially in regulating the variety of rent-to-own schemes that people without access to mortgages are vulnerable to. *See, e.g.*, Haesun Burris-Lee, *Protection in the Home: Reforming the Modern Contract for Deed of Sale*, 93(1) TEMP. L. REV. 211, 234–241 (2020).

134. Karin D. Martin et al., *Monetary Sanctions: Legal Financial Obligations in US Systems of Justice*, ANNUAL REV. CRIMINOLOGY, Jan. 2018, at 471, 472–474, 477.

135. Nick Sibilla, *Nearly 600 Towns Get 10% Of Their Budgets (Or More) From Court Fines*, FORBES (Aug. 29, 2019), https://www.forbes.com/sites/nicksibilla/2019/08/29/nearly-600-towns-get-10-of-their-budgets-or-more-from-court-fines/?sh=481c89914c99.

City leadership."[136] Using poor people as municipal ATMs is unjust (and, it seems, fiscally unwise.)[137] States can stop these practices through legislation, and some have.[138]

A wide range of reforms can make judicial and administrative processes fairer and less harmful to lower-income people. Some of these laws include provisions capping fine amounts;[139] prohibiting court costs for indigent defendants;[140] requiring drivers licenses that were suspended for failure to pay certain fees or fines to be reinstated;[141] allowing waivers or reduced fees or costs for low-income individuals;[142] allowing participation in community service as an alternative to paying fees or fines;[143] and allowing installment plans for paying fees.[144] Some states have already put some of these laws into place. Rhode Island eliminated costs, assessments, and fees for people serving thirty or more days in prison, along with waiving or reducing court costs based on indigency.[145] Although two cities experimented with the idea several decades ago, as far as we can determine, no U.S. jurisdictions have adopted the European model of "day fines," in which monetary penalties are set in terms of a number of days of the offender's annual income.[146]

B. Reforming the Tax System

Tax policy is at the center of any effort to relieve poverty and invest in broad social well-being. Local governments are strapped, and in many state governments, "fiscal hawks" committed to smaller government and lower taxes hold significant political sway.[147] Thanks to them and their philosophy, we not only have too much misery but also cannot have a range of nice things common

136. U.S. DEP'T OF JUST., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 2 (2015).

137. *See* MATTHEW MENENDEZ ET AL., THE STEEP COSTS OF CRIMINAL JUSTICE FEES AND FINES, BRENNAN CTR. FOR JUST. 9 (Nov. 21, 2019), https://www.brennancenter.org/our-work/research-reports/steep-costs-criminal-justice-fees-and-fines?limit=all.

138. *The Clearinghouse*, FINES AND FEES JUSTICE CTR., https://finesandfeesjusticecenter.org/clearinghouse/?sortByDate=true (last visited Feb. 26, 2024).

139. *E.g.,* MO. ANN. STAT. § 479.353 (West 2019).

140. *E.g.,* CAL. PENAL CODE § 688.5 (West 2019).

141. *E.g.,* D.C. CODE ANN. § 50-2302.08 (West 2018).

142. *E.g.,* WASH. REV. CODE ANN. § 10.01.160 (West 2023).

143. *E.g.,* TEX. CODE CRIM. PROC. ANN. art. 45.049 (West 2019).

144. *E.g.,* TENN. CODE ANN. § 55-50-502(d) (West 2022).

145. 12 R.I. GEN. LAWS ANN. 18-1-3(b), (d) (West 2022).

146. Elena Kantorowicz-Reznichenko, *Day Fines: Reviving the Idea and Reversing the (Costly) Punitive Trend*, 55(2) AM. CRIM. L. REV. 333, 338, 346 (2018).

147. *Local Tax Limitations Can Hamper Fiscal Stability of Cities and Counties*, PEW CHARITABLE TRS. (July 8, 2021), https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2021/07/local-tax-limitations-can-hamper-fiscal-stability-of-cities-and-counties#:~:text=Fundamentally%2C%20limitations%20are%20meant%20to,government%20services%20their%20residents%20expect.

in peer countries—efficient, quality public transportation, well-maintained (and free) parks, affordable higher education, and universal health care, to name a few.[148] As a result, our health and social service systems are coping with ever-larger problems with smaller and smaller budgets. Proven mechanisms for reducing poverty and its many perils for people and communities—let alone supporting the middle class with investments in education, housing, and transportation—stagnate because current revenue cannot support them. But the fact that money is not in agency budgets or legislative coffers does not mean that the United States is too poor to end poverty and severe financial hardship, and to make life easier for working and middle class people wanting to move up the social ladder. On the contrary.

Matthew Desmond offers a concise but telling list of how tax reform could bring an actual end to poverty in America.[149] He starts with the cost: about $177 billion per year.[150] He then he lays out what we would get in return for such a large investment, which would include: more generous funding for the sort of income transfer programs we already know work, real progress towards ending homelessness and eviction, schools that were not preoccupied with caring for traumatized and needy children, and more stable and safe neighborhoods.[151]

And finally, the question of where to find the money. Nearly $200 billion sounds like a lot, but the Internal Revenue Service (IRS) "estimates that the United States [now] loses more than $1 trillion a year in unpaid taxes, most of it owing to tax avoidance by multinational corporations and wealthy families."[152] Over the past sixty years, the progressivity of our income tax has narrowed dramatically; the tax rates of the poor have gone up and the taxes paid by the rich have gone down.[153] Just uncapping the amount of income liable to the Social Security tax would produce $64 billion.[154] Twenty-five billion could come from ending the home mortgage interest deduction.[155] Eliminating many of the tax breaks favored by corporations today also stands to raise a great deal of revenue.[156] The Center on Budget and Policy Priorities has identified several corporate tax changes that would generate billions in new annual tax revenue: ending or trimming breaks for research and development ($15 billion),

148. One way to measure this is to look at how people evaluate their quality of life. In the most recent *World Happiness Report*, the United States ranked a dismal fifteenth behind a list of countries we have the wealth to be beating. HELLIWELL ET AL., WORLD HAPPINESS REPORT 34 (2023), https://happiness-report.s3.amazonaws.com/2023/WHR+23_Ch2.pdf.149.DESMOND, *supra* note 126, at 124–25.

149. DESMOND, *supra* note 126, at 124–25.

150. *Id.* at 124.

151. *Id* at 125.

152. *Id.*

153. *Id.* at 126.

154. DESMOND, *supra* note 126, at 128.

155. *Id.*

156. *Id.* at 126.

expensing of equipment ($33 billion), and interest payments ($20 billion).[157] Before readers write this off as hopelessly idealistic and unrealistic, just recall the expanded Child Tax Credit, which effectively spent over $80 billion in less than a year,[158] and made an immediate difference in millions of people's lives.[159] It can be done, and it makes everyone—even those who pay higher taxes—better off.

Tax policy is not just about redistribution after wealth and income accrue. Indeed, one of the benefits of looking beyond health to improve our public health system is to free ourselves of a habitual focus on post-tax redistribution[160] and instead look at how our tax system allows inequality to prosper at the wealth creation stage. Katharina Pistor's work digs into ways that law "codes" capital by bestowing certain attributes on particular kinds of assets to give those who own them valuable advantages, including priority over other assets, durability (extending priority claims over time), universality, and convertibility.[161] Her book masterfully documents how the manipulation of this legal code has given patently unfair legal advantages to the financial sector. Her work shows how the rules can be changed and made fairer and more pro-social, but she laments that "most observers treat law as a sideshow when in fact it is the very cloth from which capital is cut."[162]

C. Fighting for Humane, Equitable, and Supportive Policies Across the Board

Along with the strong evidence that inequality is bad for health,[163] we have seen growing evidence that policies focused on broadly supporting social welfare—surprise—seem to be associated with higher levels of generalized social welfare.[164] In the United States, new research has brought strong support

157. Cox et al., *supra* note 125.

158. Jeff Stein, *The child tax credit may expand. Here's what it means for you*, WASHINGTON POST (Jan. 31, 2024), https://www.washingtonpost.com/business/2024/01/31/child-tax-credit-expand-congress/#.

159. Cory Turner, *The expanded child tax credit briefly slashed child poverty. Here's what else it did*, NPR (Jan. 27, 2022), https://www.npr.org/2022/01/27/1075299510/the-expanded-child-tax-credit-briefly-slashed-child-poverty-heres-what-else-it-d (explaining that the first payment in July 2021 "'kept 3 million children out of poverty[.]'").

160. *See, e.g.*, CHANGELAB SOLS., *supra* note 94, at 24.

161. KATHARINA PISTOR, THE CODE OF CAPITAL: HOW THE LAW CREATES WEALTH AND INEQUITY 2–3 (2019).

162. *Id.* at 4.

163. RICHARD WILKINSON & KATE PICKETT, THE SPIRIT LEVEL: WHY GREATER EQUALITY MAKES SOCIETIES STRONGER 75 (2009).

164. Haejoo Chung & Carles Muntaner, *Political and Welfare State Determinants of Infant and Child Health Indicators: An Analysis of Wealthy Countries*, 63(3) SOC. SCI. & MED. 829, 838–39 (2006); Vicente Navarro et al., *Politics and Health Outcomes*, 368(9540) LANCET 1033, 1037 (2006).

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to a rather simple and obvious idea: if you want your community to thrive, then use law and policy to protect residents from unhealthy exposures, support them in times of trouble, and smooth the path to education, work, and stable housing in communities equipped with parks, transportation, shops, and the other basic amenities of comfortable life. A recent series of studies led by Jennifer Karas Montez has shown the drastic differences in health between the places where government maintains a broader set of welfare-supporting policies and the places that have veered towards passive government and commercial deregulation.[165] This research starts with the fact that the dramatic declines in life expectancy in the U.S. do not reflect a nationwide decline: states with more supportive social policies have continued to see their life expectancies increase, while declining life expectancy is concentrated in places that are tougher to live in.[166] Since 1984, the gap between the best and worst states for life expectancy has increased from less than five years to seven years (in 2017).[167] And there is a pattern: generally speaking, states that have become more conservative across a wide range of policies have seen life expectancy stagnate or decline, while those that have moved or remained on the more progressive side have seen their life expectancies improve.[168] Just compare the difference between Connecticut and Oklahoma, which had the same life expectancy in 1959 (71.1 years), but by 2017 were five years apart (80.7 in Connecticut versus 75.8 in Oklahoma).[169]

The list of policies included in the analysis is long and broad. It includes abortion, criminal justice, gun control, "health and welfare" (such as CHIP

165. *See* Jennifer Karas Montez, *Deregulation, Devolution, and State Preemption Laws' Impact on US Mortality Trends*, 107(11) AM. J. PUB. HEALTH 1749, 1749–50 (2017); Jennifer Karas Montez et al., *Do U.S. States' Socioeconomic and Policy Contexts Shape Adult Disability?*, 178 SOC. SCI. & MEDICINE 115, 124 (2017); Jennifer Karas Montez et al., *Educational Disparities in Adult Health: U.S. States as Institutional Actors on the Association*, SOCIUS, Jan.–Dec. 2019, at 1, 10; Jennifer Karas Montez et al., *Educational Disparities in Adult Mortality Across U.S. States: How Do They Differ, and Have They Changed Since the Mid-1980s?*, 56 DEMOGRAPHY 621, 639 (2019); Douglas A. Wolf et al., *Effects of U.S. State Preemption Laws on Infant Mortality*, PREVENTIVE MED., Apr. 2021, at 1, 5; Jennifer Karas Montez et al., *Trends in U.S. Population Health: The Central Role of Policies, Politics, and Profits*, 62(3) J. HEALTH & SOC. BEHAV. 286 (2021); Jennifer Karas Montez et al., *U.S. State Policy Contexts and Mortality of Working-Age Adults*, PLOS ONE, Oct. 2022, at 1, 19–20; Douglas A. Wolf et al., *U.S. State Preemption Laws and Working-Age Mortality*, 63(5) AM. J. PREVENTIVE MED. 681, 686 (2022); Jennifer Karas Montez et al., *supra* note 9, at 688.

166. *American Life Expectancy by State*, USC KECK SCHOOL OF MED. (Nov. 8, 2023), https://mphdegree.usc.edu/blog/american-life-expectancy-by-state#.

167. Montez et al., *supra* note 9, at 671.

168. Paola Scommenga et al., *Life Expectancy Is Increasingly Tied to a State's Policy Leanings*, POPULATION REFERENCE BUREAU (Jan. 12, 2023), https://www.prb.org/resources/liberal-u-s-state-policies-linked-to-longer-lives/#:~:text=States%20that%20enacted%20more%20conservative,studied%20(see%20Figure%201).

169. Montez et al., *U.S. State Policies, Politics, and Life Expectancy*, *supra* note 167, at 671–72.

access and Medicaid expansion), education spending and school choice, public and private labor laws (e.g., paid leave, minimum wage, and right to work), civil rights protections, environment (including state NEPAs and solar tax credits), tax laws (progressivity and credits), housing and transportation, and a miscellany of protective measures like smoking controls and motorcycle helmet requirements.[170] Across the board, being more protective or supportive is tied to longer lives.[171] People are healthier when it is harder to get guns, easier to get an abortion, taxes are more steeply progressive, tobacco controls are more protective, minimum wages are higher, workers have more rights, and people are better protected against discrimination based on race, sexual orientation, and other traits.

The bottom line is the same as the top line: as a general matter, legislators at any government level looking to improve overall health in the community should aim to use law and policy to protect residents from unhealthy exposures, support them in times of trouble, and smooth the path to education, work, and stable housing in communities equipped with parks, transportation, shops, and the other basic amenities of a comfortable life. These are immediately actionable policy steps that can make the country not just healthier, but happier and more equitable.

D. Democracy and Good Government

As lawyers, we understand the importance of process to substance. Most if not all of the specific substantive legal actions I have described have broad popular support, yet support does not translate into enactment. This is where democracy and good government matter. It is no secret that the American constitutional system is somewhat less than perfectly democratic. Citizens of tiny states have as many votes in the senate as the most populous. Presidents are now routinely elected with less than a majority of the popular vote.[172] Unrestricted gerrymandering and barely restrained racial line drawing has entrenched legislative majorities, both Republican and Democratic, that would not persist in randomly drawn districts. *Citizens United*[173] validates and perpetuates a system of campaign finance that, at best, requires lawmakers to spend most of their days begging for money, and, at worst, amounts to legalized bribery, assuring that policies never bother the rich and corporate entities.

170. *Id.* at 676.

171. *Id.* at 688; Jennifer Karas Montez, et al., *U.S. state policy contexts and mortality of working-age adults, supra* note 166, at 20.

172. *See* Jerry Schwartz, *EXPLAINER: They lost the popular vote but won the elections*, AP NEWS (Oct. 31, 2020), https://apnews.com/article/ap-explains-elections-popular-vote-743f5cb6c70fce9489c9926a907855eb.

173. *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).

It is not crazy to hope that reforms creating publicly funded campaigns in districts that, on average, allow every vote to count would open up space for better laws on everything from climate change and gun control to housing and tax reform. Some research indicates that places that have enacted policies better suited overall to help people thrive also tend to be places where people feel they have a real say in the workings of government.[174] It is harder, though, to include these reforms in a list of things that (as I suggested at the beginning of this Part) could happen today. Absent reform in the Supreme Court (which is beyond the scope of this essay), changes in campaign finance, federal constitutional restrictions on gerrymandering, and gun control are off the table. That said, public health lawyers have no shortage of immediate democracy-supporting reforms to support.

Public health law has already embraced state preemption of local regulations as an important issue of democratic decision-making.[175] There are active campaigns in many states to convince legislators to break their dependence on gerrymandering.[176] State and federal constitutions, for all their structural defects, leave room for a wide range of electoral reforms that could make election results a better reflection of the popular will.[177] Moreover, electoral reform is only part of the story. The taint of money and structurally induced partisan extremism has itself promoted disenchantment and disillusionment, as have sustained campaigns aimed at shrinking government until it can be drowned in a bathtub.

It is problematic to blame government for poor performance if it has been deliberately starved, but governments cannot blame their critics for everything. There are things that we can do now to make government work better with the resources it has. Consider the work of Nic Bagley on how all those government

174. Jennifer Karas Montez et al., *Electoral Democracy and Working-Age Mortality*, 101(3) MILBANK Q. 700, 718 (2023).

175. *See, e.g.*, Page D. Dobbs et al., *Preemption in State Tobacco Minimum Legal Sales Age Laws in the U.S., 2022: A Policy Analysis of State Statutes and Case Laws*, INT'L J. ENV'T RSCH. & PUB. HEALTH, June 2023, at 1, 2; Jennifer L. Pomeranz et al., *supra* note 19, at 691; Jennifer L. Pomeranz & Diana Silver, *State Legislative Strategies to Pass, Enhance, and Obscure Preemption of Local Public Health Policy-Making*, 59(3) AM. J. PREVENTIVE MED. 333, 341 (2020); Derek Carr et al., *Equity First: Conceptualizing a Normative Framework to Assess the Role of Preemption in Public Health*, 98(1) MILBANK Q. 131, 133 (2020); *see also* Kathleen Morris, *Rebel Cities, Bully States: A New Preemption Doctrine for an Anti-Racist, Pro-Democracy Localism*, 65 HOWARD L. J. 225, 225 (2021) (analyzing preemption from an anti-racist perspective); *cf. State Preemption Laws*, LAWATLAS (Nov. 1, 2022), https://lawatlas.org/datasets/preemption-project (discussing policy surveillance of state health-related preemption).

176. Christopher Lamar, *Do Independent Redistricting Commissions Really Prevent Gerrymandering? Yes, They Do*, CAMPAIGN LEGAL CTR. (Nov. 1, 2021), https://campaignlegal .org/update/do-independent-redistricting-commissions-really-prevent-gerrymandering-yes-they-do.

177. Alex Tausanovitch, *It's Time to Talk About Electoral Reform*, AM. PROGRESS (Jan. 31, 2023), https://www.americanprogress.org/article/its-time-to-talk-about-electoral-reform/.

procedures liberals love are also a huge drain on the liberal agenda—mandatory equity assessments anyone?[178] He writes, "A positive vision of the administrative state—one in which its legitimacy is measured not by the stringency of the constraints under which it labors, but by how well it advances our collective goals—has been shoved to the side."[179] Following on Bagley, we could be talking about regulatory frictions that impede health action, starting with the federal contracting processes, continuing through human subject research regulations, and then getting to broader procedural requirements of environmental review that can raise costs of vital services like housing, better transportation options, and walkability. Thinking in this way should point us to reconsidering consultation or community participation processes in policymaking and implementation.[180]

In all matters of government performance, we public health lawyers should demand effectiveness and avoid defending failure. After all, the social contract—our shared system of laws and institutions of governance—must produce the collective conditions, institutions, and practices that foster individual thriving. If the system is not delivering, its legitimacy, its very rationale, is compromised, and the contract that binds us is weakened—and lawyers should criticize, not defend, institutions that fail. There is a huge premium for government public health in being as smart and strategic as we possibly can be as we do this legal work in and around public health. That makes it more likely that what we propose and carry out will actually make a difference for people. That effectiveness, in turn, is crucial to winning political battles about government programs, taxes, and social investment.

V. CONCLUSION

The field and practice of public health needs lawyers badly. Public health needs lawyers inside, doing the work of using legal action to promote and protect population health within the scope of government action. The field also needs lawyers outside, acting as supportive critics, as checks on ill-advised measures, and as links to law reform movements that get to the root causes of poor public health beyond the jurisdiction of public health agencies. In every one of these roles, there is important legal work to be done. In so doing, we can bring to bear the commitment of public health to evidence and critical scientific reasoning, which can help us select and advocate for our legal goals. As lawyers, though,

178. Nicholas Bagley, *The Procedure Fetish*, 118 MICHIGAN L. REV. 345, 346 (2019).

179. *Id.* at 350.

180. This is not a reconsideration of goal of equity, nor of the values of diversity or democratic participation. Rather, the suggestion would be not to just assume that *processes of consultation* actually advance those goals or impede them, and what alternatives (from informal processes of equity reflection, collaboration or consultation to actually engaging community's as or even senior partners in advocacy) might work better.

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we can also draw on our prior commitments to a system that can deliver justice, fairness, and equity, and our professional faith that our experiment in democracy can succeed, that our fractious polity can cooperate, and that we are smart enough, altruistic enough, and tough enough to solve the problems we face and deliver a healthy, happy, and equitable society.

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