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The boundaries and goals of legal scholarship within health of the public research

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ABSTRACT

This article explains, maps, and critically explores the tasks and aims of legal scholarship within, to use the phrase of the Academy of Medical Sciences, transdisciplinary 'health of the public' research. It does so with a view to explaining what legal scholarship can bring to, and also how it may be shaped by, such research. The article considers developments in understandings and focus of public health law scholarship, especially as these have gained renewed force with *The Lancet*–O'Neill Commission on the legal determinants of health. It presents roles for legal analysis in relation to questions of law as a practice, as well as a discipline that works through social sciences and humanities methods and approaches. In evaluating legal scholarship's place within health of the public research, the article leads to an argument that greater attention should be given to the incorporation of questions concerning values and social justice. These are important – and more widely acknowledged – issues, and ones that are key to the rigour of research agendas that aim directly to promote goals of creating healthier, fairer societies.

Keywords: legal determinants of health; legal scholarship approaches; public health; public health law; transdisciplinary research.

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INTRODUCTION

This article's purpose is to explain and account for the places and roles of legal scholarship within broad, transdisciplinary research agendas that are focused on the health of the public. In so doing, it aims in turn to argue how we should best envisage academic law's place within organised efforts to create socio-structural conditions that are conducive to better, fairer health opportunities and outcomes. In other words, I am not looking centrally here at any and all legal scholarship that addresses questions concerning (public) health. Rather, I am focused primarily on the contribution of, and effect on, legal studies when they are incorporated within research agendas that are designed with both of these two characteristics: first, transdisciplinary research goals; and secondly, practical aims to generate better, fairer health outcomes at societal levels.

I take the article's framing of 'health of the public' research from the agenda-setting report of the Academy of Medical Sciences (AMS), *Improving the Health of the Public by 2040: Optimising the Research Environment for a Healthier, Fairer Future*.[1] I explain what that entails in the next section of this article. I note here, though, how its nature is reflected in the large, transdisciplinary research project from which the current article is an output: *Tackling Root Causes Upstream of Unhealthy Urban Development* (TRUUD).[2] In that project, which is funded by the United Kingdom Prevention Research Partnership (UKPRP),[3] we have engaged legal analysis as just one part of a vast suite of research and applied disciplinary expertise. The span of that expertise includes (but is not exhausted by reference to) economics, engineering, government, health sciences, management, policy studies, real estate, spatial planning, and urban development. The work has incorporated expertise in public engagement and co-production, and both university-based and embedded researchers. It has sought to generate understanding of, and promote better practical outcomes from, the complex systems that shape England's cities (taking Bristol and Greater Manchester as case studies). At the same time, it has also generated reflective and research-led discourses on the *doing* of impact-oriented, transdisciplinary health-focused research.[4] The current article may be seen as a contribution to that latter aspect.

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1 Academy of Medical Sciences, Improving the Health of the Public by 2040: Optimising the Research Environment for a Healthier, Fairer Future (AMS 2016).

2 See TRUUD website for further details.

3 See UKPRP website for further details.

4 See eg Daniel Black et al, 'Operationalising a large research programme tackling complex urban and planetary health problems: a case study approach to critical reflection' (2023) 18 Sustainability Science 2373–2389.

The article may also be viewed as a focused advancement of the applied agendas set in *The Lancet*–O'Neill Institute report, 'The legal determinants of health: harnessing the power of law for global health and sustainable development'[5] (which I describe more fully below). The discussion builds through four sections, which together aim to provide depth in understanding of the tasks of and for law, and some critical challenges that I argue need to be examined in relation to them. In the next section, I briefly outline key points from the AMS report. In the third section, I go on to explain how a focus has developed on the idea of 'legal determinants of health' within broader, longer-established research discourses concerning the social determinants of health. In particular, that section argues that the central conceptual drivers within such research are governance (broadly conceived) and responsibility (conceived by reference to causality, agency/power, and ethical obligation). The fourth section then provides a 'map' of legal scholarship within health of the public research. This highlights how law may be conceived as a practical discipline, social sciences, and humanities, eliciting doctrinal understandings, empirical or 'lived' understandings, and critical and philosophical understandings. These all contribute to what may be known about or by reference to law, including in the framing of practical agendas for change. And they both give to and take from their being embedded within health of the public research programmes. Finally, given this, the fifth section draws from that discussion observations regarding subordinations of law and laws: specifically, a practical subordination to empirical rather than formal concepts of governance; and, more philosophically, a normative subordination of legal justice and principles to broader-reaching claims regarding specific concerns in social justice. It advances this discussion in the spirit of constructive criticism. In particular, I argue how legal scholarship's contribution needs in part (and continually) to address and scrutinise the normative concepts and underpinnings to health of the public research, as well as values relating to health and health inequalities as societal and political goals, and the means of promoting them as such.

In closing this introduction, I note that the article has been developed as part of TRUUD, but also as a part of a celebration of the career of Professor Chris Newdick. Chris has been a pioneer in health law scholarship; one whose contributions' significance has been defined in part by its disruption of 'mainstream', individualistic areas of focus in studies of law and health. His work consistently demands that attention to ethical values be made against appreciation of social,

5 Lawrence O Gostin et al, 'The legal determinants of health: harnessing the power of law for global health and sustainable development' (2019) 393(10183) *The Lancet* 1857–1910.

economic, and political realities. He is one of the field's long-standing and pre-eminent critics of a theoretically impoverished and practically inequitable preoccupation with what amounts, in its generalised essence, to the safeguarding only of civil and political rights. In place of that, he has argued for a focus on broader social and institutional structures and systems, within and far beyond the healthcare sector. He has a keen concern for realisable social justice, looking at power dynamics, and identifying socially (including legally) created inequalities, disempowerments, and disadvantage. I note the influence of papers such as Chris's 2017 essay 'Health equality, social justice and the poverty of autonomy',[6] which I visit in the below analysis. That work exemplifies well many of the ideas concerning legal scholarship that I advance in this article: it provides a model that conveys qualities and aims that I will argue are essential to legal research within transdisciplinary 'health of the public' research agendas.

TRANSDISCIPLINARY 'HEALTH OF THE PUBLIC RESEARCH' AND APPROACHING THE PLACE OF LAW WITHIN IT

In *Improving the Health of the Public by 2040*, the AMS explains what it means by 'health of the public' research, and why it is oriented around novel paradigms:

> Public health research has provided fundamental insights into human health and how it can be improved. …
>
> Yet there remains much we do not know about the complex array of interlinking factors that influence the health of the public, and about how to prevent and solve the many health challenges we face as a population, including obesity, diabetes, dementia, depression, cancer and persisting emerging infections. …
>
> Biomedical research as currently conducted does not have the capacity to address these increasingly diverse and complex issues that transcend disciplinary, sectoral and geographical boundaries. We need to move towards a 'health of the public' approach, involving disciplines that would not usually be considered to be within the public health field; an approach integrating aspects of natural, social and health sciences, alongside the arts and humanities, which directly or indirectly influence the health of the public. We must drive forward an ambitious research agenda to realise the aspirations of successive policymakers and leaders of health and social care—aspirations to shift our focus to prevention and early intervention at scale, and to thereby optimise the use of resources.[7]

6 Christopher Newdick, 'Health equality, social justice and the poverty of autonomy' (2017) 12 Health Economics, Policy and Law 411–433.

7 AMS (n 1 above) 4–5.

As indicated in this article's introduction, there are two aspects to the AMS's framing that are of particular interest. First is the commitment to transdisciplinarity, and the second is its having a view to particular sorts of demonstrable, real-world impact. Regarding transdisciplinarity, the AMS urges, for instance, that health of the public research 'should draw on the skills and expertise of a wide range of disciplines outside the traditional sphere of public health research, from environmental sciences to law to ethics to engineering.'[8] In clarifying understanding of transdisciplinary research, the report's glossary explains how we might contrast, respectively, multidisciplinarity, interdisciplinarity, and transdisciplinarity:

- Multidisciplinarity: An 'additive' approach; uses knowledge from different disciplines but remains within their boundaries.
- Interdisciplinarity: An 'interactive' approach; analyses, synthesises and brings together links between disciplines into a coordinated whole.
- Transdisciplinarity: A 'holistic' approach; integrates the natural, social and health sciences in a humanities context, working across traditional discipline boundaries.[9]

As regards societal impact, we see even within the title of the report the aim: better and fairer health outcomes. Emphatically, these are value-driven goals, demanding assumptions both about political priorities (ie that health itself is a political value, and so is addressing unfair health inequalities) and practical epistemological understandings (ie that influences on health, for better and worse, exist within a distal causal framework of socially generated and amendable systems and structures). Finally, it should be noted that as a paradigm-shifting, agenda-setting work, the AMS report is not a merely hopeful statement of ambition. It is a transformative document. Part of its subsequent realisation is found in the establishment of the UKPRP; an ambitious, multi-funder scheme that supports large-scale development of impactful, transdisciplinary, health of the public research.[10]

The aims of generating health of the public research programmes is revolutionary. But this is not to deny the pre- or concurrent existence of a vast web of research on the public's health from 'non-public health' disciplines. Nor is it to deny the reality of more diffuse and (as it were) independently organic and gradually emerging scholarly

8 Ibid 56.

9 Ibid 116. In advancing these characterisations, the AMS report cites Bernard C K Choi and Anita W P Pak, 'Multidisciplinarity, interdisciplinarity and transdisciplinarity in health research, services, education and policy: 1. Definitions, objectives, and evidence of effectiveness' (2006) 29(6) Clinical and Investigative Medicine 351–364.

10 See UKPRP website.

developments that were and would anyway have been in train. Some matters, methods, and approaches that are new within 'public health research' are not new to the 'not usually considered' disciplines that are drawn in. Similarly, it is just plain that more traditional 'public health research' has not held an exclusive grip on questions concerning the public's health: even if underplayed within perceptions of public health research, sustained and long-standing scholarly attention has been given to the health of the public from across academic disciplines.[11]

My focus in this article is on the 'shaping' done to and by legal scholarship within concerted, health of the public research agendas as presented in these opening paragraphs. In approaching the idea of shaping to and by legal scholarship, I am influenced by the framing of Mathias Siems and Daithí Mac Síthigh, who present legal research as overall covering three domains: law, respectively, considered as a practical discipline, as social sciences, and as humanities.[12] In this sense, when taking an *intra*disciplinary view of legal scholarship, I envisage law as an area of study that implicates methods and approaches from distinct and – when looking across the piece – radically diverse non-legal disciplines; with that radical diversity extending to understandings of evidence or data, and thus the foundation of epistemological claims that lie across quite distinct planes.[13] And I envisage law as a discipline that evidences selectivity – whether this is concerted or not – in relation to *which* practical matters get looked at, and what gets ignored.

More antagonistically, against this framing, law is an area of study within which tussles for predominance between different methods, approaches, and topics of practical concern play out. This includes tussles over understandings and characterisations of the idea of law and the meanings and import of laws themselves. It also includes tussles over which extra-legal framings and understandings might be brought to bear; for instance, different commitments regarding questions of political morality or social justice, or different points of empirical focus, such as on differential impacts of laws amongst different groups and communities. Perhaps more benignly, the framing that I am giving also presents law as an area of study within which different scholarly zeitgeists and wider socio-political

11 Cf Sridhar Venkatapuram and Jo Bibby (eds), A Recipe for Action: Using Wider Evidence for a Healthier UK—A Collection of Essays Exploring Why We Need Trans-disciplinary Approaches to Improve the Public's Health (Health Foundation 2018).

12 Mathias Siems and Daithí Mac Síthigh, 'Mapping legal research' (2012) 71(3) Cambridge Law Journal 651–676.

13 Cf John Coggon, 'Legal, moral and political determinants with the social determinants of health: approaching transdisciplinary challenges through intradisciplinary reflection' (2020) 13(1) Public Health Ethics 41–47.

circumstances themselves can capture and direct programmes of research. Such may certainly be said of the space that 'health law' occupies. In topic, it has predominantly seen a focus on individual-level questions within health*care*, and primarily there in narrower relation to medical practice.[14] In methods and approaches, a privileged place has been given to framings and assumptions from moral philosophy; particularly as found in biomedical ethics. And that, in turn, has presented presumptive prominence to negative rights (ie rights of non-interference), has stimulated commitments to formal equality of opportunity over a focus on inequalities in substantive experiences and outcomes, and has accordingly galvanised conflations of 'empowerment' with an absence of imposed legal obligations and constraint.[15]

In short, I see legal studies writ large, and scholarship within health law more specifically, as radically diverse, but also subject both to internal trends and extrinsic forces that come to define its aims, ambitions, approaches, and understandings. And, as indicated, it is applied across a vast but never exhaustive practical domain. Legal scholarship is its own social phenomenon, And it plays out within structures of political economy inside the university sector and more broadly. It is shaped by the more and less visible hands that all that implies. My analysis of its engagement with health of the public research should be considered against that outlook.

'LEGAL DETERMINANTS' WITHIN HEALTH OF THE PUBLIC RESEARCH THAT CENTRES ON RESPONSIBILITY AND GOVERNANCE

Our natural and socially generated (including built) environments all influence our health outcomes and opportunities, both in the immediate and across longer-term time frames. The importance of health as an individual but also a collective value prompts questions of when and how potential or amendable influences on health give rise to political imperatives. It invites analysis of the philosophical question 'what makes health public?',[16] and in more concrete terms

14 See further Anne-Maree Farrell et al, *Health Law: Frameworks and Context* (Cambridge University Press 2017).

15 John Coggon and Beth Kamunge-Kpodo, 'The legal determinants of health (in)justice' (2022) 30(4) Medical Law Review 705–723; John Coggon and Beth Kamunge-Kpodo, 'Health inequalities, law, and society' in Chloe Romanis, Sabrina Germain and Jonathan Herring (eds), *Diverse Voices in Health Law and Ethics: Important Perspectives* (Bristol University Press 2025).

16 John Coggon, *What Makes Health Public? A Critical Evaluation of Moral, Legal, and Political Claims in Public Health* (Cambridge University Press 2012).

a scheme of explaining what is needed practically in 'making health public'.[17] Insofar as we are focused on how social structures, norms, and institutions are implicated in the exploration of these questions, a key concern is directed at the actors, embedded within systems and structures, that determine 'upstream causes' or the 'causes of causes' of better and worse health. Within this domain, we see an urgency in focusing on 'primary preventive' measures; namely, measures that would forestall or limit the onset of ill health in the first place.[18]

It should be noted that understanding and recognition of the import of avoidable, upstream determinants of ill health are long established in national and global policy discourses.[19] By taking 'population approaches' in health sciences research, causal factors are discernible that are invisible at individual levels; for instance, the health effects of smoking tobacco or higher-level consumption of salt.[20] Works in social epidemiology, furthermore, allow such population-level research to track the incidence of disease across different *axes* of social positionality: historically, with a view especially to relative health opportunities and outcomes by reference to socio-economic position, but with increasing focus over time on other factors and characteristics,

17 John Coggon and Lawrence O Gostin, 'The two most important questions for ethical public health' (2020) 42(1) Journal of Public Health 198–202; Peter Littlejohns et al, *Making Health Public* (Bristol University Press 2023).

18 Primary prevention is contrasted in the health sciences literatures with secondary and tertiary prevention. The AMS report (n 1 above) 117 provides the following definitions: 'In terms of health, prevention involves a range of interventions aimed at reducing risks or threats to health. Primary prevention aims to prevent disease or injury before it occurs, for example by immunisation, health education and preventing exposure to hazards. Secondary prevention aims to reduce the impact of a disease or injury which has already occurred, for example by detecting, diagnosing and treating as soon as possible as well as taking steps to prevent reoccurrence. Regular screening programs, such as mammograms for detecting breast cancer, are an example. Tertiary prevention aims to reduce the impact of a disease or illness which is ongoing and has long-term effects, by helping people to manage often complex health problems and injuries to maximise their quality of life and life expectancy. Rehabilitation programs and support programs are forms of tertiary prevention.'

19 See eg *Inequalities in Health: Report of a Research Working Group* (Department of Health and Social Security 1980); Commission on Social Determinants of Health, *Closing the Gap in a Generation: Health Equity through Action on the Social Determinants of Health – Commission on Social Determinants of Health Final Report* (World Health Organization 2008); Michael Marmot et al, *Fair Society, Healthy Lives: The Marmot Review* (The Marmot Review 2010); Michael Marmot et al, *Health Equity in England: The Marmot Review 10 Years On* (Institute of Health Equity 2010).

20 Geoffrey Rose, 'Sick individuals and sick populations' (1985) 14(1) International Journal of Epidemiology 32–38; Marcel Verweij and Angus Dawson, 'The meaning of "public" in "public health"' in Angus Dawson and Marcel Verweij (eds), *Ethics, Prevention, and Public Health* (Oxford University Press 2007).

such as geographical positioning,[21] age, disability, ethnicity, gender, and race (giving rise in turn to questions then of intersectionality and compounded inequity).[22] As may perhaps be implicit in this, developments in relation to research on social determinants of health have come with a broad expansion to its disciplinary inclusiveness.[23] In its sum, scholarship in this area allows a vision and well-established understanding of the social determinants of health as a question for (amongst many others) researchers in fields as ostensibly diverse as population health sciences, policy studies, and social justice.[24]

With the social determinants of health as an overarching idea, research efforts have in turn emerged that focus in on more specified strands or 'sub-strata' determinants, defined by reference to particular sectors, systems, and institutions, or different sorts of social actors, agencies, and organisations.[25] Across the different disciplinary approaches and perspectives that are taken, we do well to envisage all of these exercises as spanning – and interweaving – *three central ideas of responsibility*, as represented in Table 1. They cover, respectively: *causal responsibility*, looking to practical forms of evidence regarding the generation of different health outcomes (eg by demonstrating that higher consumption of salt across a population leads to a higher incidence of cardiac disease); *agentic responsibility*, looking to establish questions of which actors hold, or lack, (degrees of) control

21 Beth W Kamunge, *Place and Health Inequalities: An Ethical Framework for Evaluating and Developing Policy* (UK Pandemic Ethics Accelerator 2022).

22 Sarah Hill, 'Axes of health inequalities and intersectionality' in Katherine E Smith, Clare Bambra and Sarah E Hill (eds), *Health Inequalities: Critical Perspectives* (Oxford University Press 2015); Beth Wangarĩ Kamunge, *Which Inequalities Should We Focus on in Evaluating Health Policy Before, During, and Following Covid-19?* (UK Pandemic Ethics Accelerator 2021).

23 As well as the AMS report (n 1 above) and Venkatapuram and Bibby (eds) (n 11 above), see Richard Horton, 'Offline: apostasy against the public health elites' (2018) 391(10121) *The Lancet* 643; Ted Schrecker, 'What is critical about critical public health? Focus on health inequalities' (2022) 32(2) Critical Public Health 139–144; Michelle Kelly-Irving et al, 'Falling down the rabbit hole? Methodological, conceptual and policy issues in current health inequalities research' (2023) 33(1) Critical Public Health 37–47.

24 See further the works cited in the previous footnote. See also how this plays out in ranging styles of general introductions to public health, but each with broad disciplinary reach, as eg Smith et al (n 22 above) or Ichiro Kawachi, Iain Lang and Walter Ricciardi (eds), *Oxford Handbook of Public Health Practice* 4th edn (Oxford University Press 2020). See also John Coggon, *What is Public Health?* (Faculty of Public Health 2023).

25 Cf Jennifer Karas Montez, Mark D Hayward and Anna Zajacova, 'Trends in US population health: the central role of policies, politics, and profits' (2021) 62(3) Journal of Health and Social Behavior 286–301; Haik Nikogosian, 'The interface of multisectoral and multilateral dimensions of public health policy: what's new in the 21st century' (2022) 44(2) Journal of Public Health 349–355.

Complementary understandings of responsibility at the heart of health of the public research	
Causal responsibility	A question for health and social sciences, asking how we establish causal factors regarding better or worse health, and the continuation, worsening, or lessening of health inequalities.
Agentic responsibility	A question for social and political sciences, seeking to establish who (potentially) has power/influence over those causes, and what forms that power takes.
Ethical responsibility	A question focused on arguments regarding moral responsibility, but demanding consideration of associated questions of social, political, and legal responsibility; questions both of who holds rights and duties in relation to health, and of accountability, scrutiny, and who has responsibilities to oversee or ensure the vindication of such rights and enforcement of such duties.

Table 1: Understanding responsibility in health of the public research[26]

and power as regards the frameworks of causal responsibility (eg by identifying who can influence the levels of salt that people eat, whether individual consumers, producers or sellers of food products, those who (might) regulate the sector, and so on); and *ethical responsibility*, looking to establish questions of what different actors should do, and whether and how they may be subject to distinct forms of scrutiny, accountability, and enforceability (eg by asking, as a question of social justice or political morality, whether legislators, governments, or commercial actors ought to use their influence to lessen the use of salt, and if so through what permissible means).[27]

Amongst substrata studies within health of the public research on the social determinants of health, of especial note for the current article are those regarding the *political*[28] and *commercial*[29] determinants. Within such substrata, a careful balance is required between identifying particular sources of responsibility (as indicated by the respective designations) whilst avoiding a problematic (and ironic) generation of silos through the inadvertent understatement of other causal factors and actors. Such balancing is key in an area that

26 Adapted from John Coggon, 'Global Health' in Tuija Takala and Matti Häyry (eds), *Concise Encyclopedia of Applied Ethics in the Social Sciences* (Edward Elgar 2024) 116.

27 For the general framing, see ibid. For an excellent example of a work that combines these approaches, see Anne Barnhill and Matteo Bonotti, *Health Eating Policy and Political Philosophy: A Public Reason Approach* (Oxford University Press 2022).

28 See, especially, Ole Petter Ottersen et al, 'The political origins of health inequity: prospects for change' (2014) 383(9917) *The Lancet* 630–667.

29 See, especially, Anna B Gilmore et al, 'Defining and conceptualising the commercial determinants of health' (2023) 401(10383) *The Lancet* 1194–1213.

is defined by a focus on complex, distal causal sources and structures, and which espouses a practical and disciplinary breadth of embrace. *The Lancet*–Oslo Commission on Global Governance for Health report on *The Political Origins of Health Inequity* demonstrates well how such balance works.[30] As the report's title suggests, it has government and public actors as a core concern (ie its ostensible focus is on 'political determinants'). However, its pivotal conceptual apparatus comes not, I would argue, in the sectoral boundaries of 'public sector' or 'government', but rather in the practically directive boundaries encapsulated through the idea of *governance*; as indicated in the Commission's name. And as regards governance, the Commission employs a definition of global governance, initially advanced by Ramesh Thakur and Thomas Weiss, that captures the influence of market forces, private citizens, and organisations that are not 'public' in the sense of governmental. They conceive of global governance as:

> The complex of formal and informal institutions, mechanisms, relationships, and processes between and among states, markets, citizens, and organisations, both intergovernmental and non-governmental, through which collective interests on the global plan are articulated, rights and obligations are established, and differences are mediated.[31]

In relation to questions regarding (global) health, *The Lancet*–Oslo report goes on to explain that such a governance focus, combined with aims to account for the sweep of influences on health, requires looking beyond actors whose primary sector or agenda concerns health: namely, actors involved in what is widely labelled 'global health governance'. Instead, *The Lancet*–Oslo Commission looks at governance across the piece and its effects on health: a contrast it captures by employing the alternative term 'governance for global health'.[32] To emphasise again, this is all very open-textured and broad in reach:

> The Commission builds on existing work in defining the global political determinants of health as the transnational norms, policies, and practices that arise from political interaction across all sectors that affect health. *This definition can include all rules that guide behaviour, from broad social norms to specific policies* (eg, trade agreements) *and practices* (eg unregulated activities of transnational corporations).[33]

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30 Ottersen et al (n 28 above).

31 Ibid 632, quoting words cited as originally from Ramesh Thakur and Thomas G Weiss, *The UN and Global Governance: An Idea and its Prospects* (Indiana University Press 2006).

32 Ibid. See also Lawrence O Gostin, *Global Health Law* (Harvard University Press 2014).

33 Ottersen et al (n 28 above) 633 (emphases added).

The key point for current purposes is that the salience of *governance* arrives as a result of stipulating definitions that are characterised more by studying responsibility for outcome effects than by line-drawing between (say) private and public sector actors; specifically, governance is more fundamentally about practical effect than a specific form or source of governance.[34]

In relation to the specifics, we thus in *The Lancet*–Oslo report (quite appropriately, I would suggest) come to see an intertwining of political determinants and commercial determinants research *within* political determinants research, rather than anything approaching an outright separation (or 'siloing') of them. This observation can as easily be made if we come (as it were) from the other direction. Research regarding the commercial determinants of health is not simply – or even primarily – focused on the population health impacts of (say) cheap foods with high salt, fat, or sugar content that may be found on the open market. Rather, it looks to matters such as the advertising of such products, the absolute and relative ease of their availability to consumers (thinking economically, geographically, and otherwise practically), political lobbying by industry actors, engagement in litigation processes to challenge regulation, and overall looking to the exercise of influence by commercial organisations over social actors and political decision-makers.[35]

It is only with the above points made that I would introduce the legal determinants of health as a research area that has found its own discrete but connected space within research on the social determinants of health. Again, the centrepiece publication here is a globally oriented work: *The Lancet*–O'Neill Commission's 2019 report, led by Lawrence Gostin and noted in the introduction of this article, 'The legal determinants of health: harnessing the power of law for global health and sustainable development'.[36] Building on the discussion in this section, legal determinants scholarship should be seen as intertwined with wider analyses regarding social determinants, rather than siloed or considered wholly separable. Laws and legal institutions of course reflect their own (broadly) distinct type of normative system (or more

34 We find this underscored in efforts to define and redefine 'public health'; notably when that means advancing definitions that assign alternative labels such as planetary health, One Health, or EcoHealth: see Coggon, *What is Public Health?* (n 24 above) 19–24. See also John Coggon, 'Defining global health law' (2024) 1(2) Journal of Global Health Law 150–176.

35 See eg Martin McKee and David Stuckler, 'Revisiting the corporate and commercial determinants of health' (2018) 108(9) American Journal of Public Health 1167–1170; Nason Maain et al, 'Corporate Practice and the Health of Populations: A Research and Translational Agenda' (2020) 5(2) Lancet Public Health e80–e81.

36 Gostin et al (n 5 above).

accurately, types of systems). But importantly, *The Lancet*–O'Neill Commission itself represents legal normativity within the broader concept of governance found in the earlier *Lancet*–Oslo report.[37] This is significant for how it relates law more narrowly to governance more widely, but also for the *empirical*, outcome-focused manifestations of 'law' that it thereby brings into analysis because of a concern to account for outcome effects. Law is not treated as some sort of purely positivist or exclusively specialist phenomenon. Instead, *The Lancet*–O'Neill Commission presents law as mutable both in how it is viewed and in its effects: it is something that can change over time even when formally it remains the same, and that at any one point in time may be subject to plural, simultaneously effective, mutually contradictory understandings. Taking 'law' in this way, legal determinants research is in part about explanation of how 'the legal' intertwines with other determinants of health that also serve ultimately to centre questions of responsibility and governance.

However, consistent with social determinants literatures more widely, *The Lancet*–O'Neill report does not simply look to legal determinants descriptively. It is also agenda driven: it looks to change the world; to 'make the case for better, more strategic linkages between health and law'.[38] The report explains its approach in the following terms:

> The term law throughout is used to mean legal instruments such as statutes, treaties and regulations that express public policy, as well as the public institutions (e.g., courts, legislatures, and agencies) responsible for creating, implementing, and interpreting the law. By establishing the rules and frameworks that shape social and economic interactions, laws exert a powerful force on all the social determinants of health. Well-designed laws can help build strong health systems, ensure safe workplaces, and improve the built and natural environments. However, laws that are poorly designed, implemented, or enforced can harm marginalised populations and entrench stigma and discrimination.[39]

It is, of course, plain that such an approach is not one to which all public health-focused legal scholars would or do subscribe.[40] It assumes normative commitments regarding health as a political value, as well as particular and instrumental conceptions of the idea of law itself.[41] However, it is a clear consolidation of growing bodies of scholarship

37 Ibid 1859.

38 Ibid 1857.

39 Ibid 1857.

40 See eg Richard A Epstein, 'In defense of the "old" public health: the legal framework for the regulation of public health' (2004) 69 (4)Brooklyn Law Review 1421–1470. See also Coggon, *What Makes Health Public?* (n 16 above) ch 8.

41 Coggon, 'Legal, moral and political determinants' (n 13 above).

within public health law across the past decades. In particular, beyond Gostin's own marked contributions, the synergies with agendas set by Scott Burris and colleagues are evident. This includes the move beyond 'law on the books', through methodologies in socio-legal studies, to appreciating the 'salience of law as it is implemented in practice and experienced by those it targets'.[42] At a conceptual level, this (to reaffirm the point) firmly engages ideas of governance more widely, and invites scholarship that looks to empirical questions both about how things are and how they could be made to be.

To be clear, insofar as I have touched on questions of governance and responsibility in the above discussion, the key conceptual anchors might be observed to have been in literatures on *global* health. However, governance – conceived in the same way – is no less pertinent in relation to national and sub-national public health law.[43] It should be stated first of all that *The Lancet* reports that I have cited engage with their subject matter at national and sub-national levels too.[44] And to make the point more concretely, within the TRUUD project, our focus is on the upstream systems and structures that lead to the creation and form of urban environments in England. This has included looking to the place of law and laws. In that regard, our research and analysis have focused on applied ideas in ways that are very much consistent with the agenda set by *The Lancet*–O'Neill report. We have incorporated a focus on broad, empirical understandings of governance that neither assume that legal governance manifests as some sort of singular and coherent phenomenon, nor that legal governance can be understood without looking to governance more widely. Our inquiry has looked at the interweaving of legal, commercial, and political forms of power.[45] Notably, a key frame that coincided with our work on legal determinants, as it developed, was a paper by Scott Burris and Vivian Lin, which even in its title puts law and governance together within the context of (sub-)national public health concerns regarding cities.[46] In that paper, Burris and Lin say:

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42 Scott Burris et al, 'Making the case for laws that improve health: a framework for public health law research' (2010) 88(2) Milbank Quarterly 169–210.

43 John Coggon, Keith Syrett and A M Viens, *Public Health Law: Ethics, Governance, and Regulation* (Routledge 2017) ch 4.

44 See also Coggon, 'Defining global health law' (n 34 above).

45 See, especially, Lisa Montel, '"Harnessing the power of the law": a qualitative analysis of the legal determinants of health in English urban planning and recommendations for fairer and healthier decision-making' (2023) 23 BMC Public Health 310.

46 Scott Burris and Vivian Lin, 'Law and urban governance for health in times of rapid change' (2021) 36(S1) Health Promotion International i4–i12.

> 'Governance' encompasses both the formal organization of management capacity, responsibility and authority within local government and the broader networks of influencers—NGOs, businesses, informal citizen groups—that shape policy decisions and implementation.[47]

As regards the idea of law itself, they stipulate that it:

> [I]ncludes legal texts like constitutions and statutes, but also the formal policies of public and private institutions, the implementation/enforcement practices of legal agents and the *beliefs about the law prevailing among those subject to it*.[48]

In consistent vein, within the legal team on TRUUD we have focused (*inter alia*) on 'law' as it featured (or did not) within the decision-making and actions of different actors within the overall systems of urban planning.[49] This meant adopting, in essence, a legal consciousness approach:[50] namely, one that would allow us to see what law is taken to mean in its real-world points of practical application, and in turn to generate understandings of how the 'legal' in legal determinants itself was subject (or not) in different ways to the influence of political and commercial consolidations of power. This approach accords with Lynette Chua's and David Engel's representation of legal consciousness, which is defined by a central concern with 'the ways in which people experience, understand, and act in relation to law'.[51] Rather than focus just on 'legal awareness', it entails too eliciting understanding of 'the absence as well as the presence of law in people's understanding of the social world and their place in it'.[52] Methodologically, this works in concert with approaches advocated for in the context of public health law research by Burris and colleagues.[53] Or in the words of Gostin and colleagues' overarching mission, it allows an understanding first of who best 'harnesses the power of law',[54] whether through positive assertion of what law demands, or by assuring that legal concerns are ignored.

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47 Ibid i4–i5.

48 Ibid i5 (emphasis added).

49 For an overall description of what this has entailed within our empirical research, see Montel (n 45 above).

50 Patricia Ewick and Susan S Silbey, *The Common Place of Law: Stories from Everyday Life* (University of Chicago Press 1998); Dave Cowan, 'Legal consciousness: some observations' (2004) 67(6) Modern Law Review 928–958; Lynette J Chua and David M Engel, 'Legal consciousness reconsidered' (2019) 15 Annual Review of Law and Social Science 335–353.

51 Chua and Engel (n 50 above) 336.

52 Ibid.

53 Burris et al, 'Making the case for laws that improve health' (n 42 above). See also Scott Burris et al, *The New Public Health Law* 2nd edn (Oxford University Press 2022).

54 Gostin et al (n 5 above).

To conclude this section, I have above sought to present a picture of legal determinants research and to explain how this fits within wider studies on the social determinants of health; which in turn may be seen as core to the shape, impetus, and impact-orientation of 'health of the public' research. Necessarily, this is a partial picture, and readers who are unfamiliar with it are encouraged to visit and make their own appraisal of the systematised representations and recommendations of *The Lancet*–O'Neill report, as well as critical responses to it. They may also consider practical initiatives that have sought directly to 'harness the power of law': for instance, through the creation of partnerships between legal services and healthcare better to address law itself as a determinant of (ill) health.[55] For present purposes, I have elected to describe the analytical context in the above terms to highlight some peculiar aspects of legal scholarship in this area. Amongst these are the mission-driven nature and framings of scholarship. This is not hidden: a political commitment to health is a value-based commitment (as, of course, would be shunning health as a political value); and it is a political, value-based commitment that assigns responsibility to socio-political and legal institutions and actors to address health inequalities.

Nevertheless, as explored in the following two sections of the article, these points give rise to particular questions that legal scholarship is apt to address but which may also make it in some senses vulnerable. In relation to those, as within health of the public research writ large, it would be mistaken to allow the 'scientific' or empirically oriented research to speak over or minimise regard for critically oriented and philosophical research in relation to the values-questions themselves.[56] Put more bluntly, we cannot coherently obfuscate that research on values is its own essential part of the picture here, and such research incorporates methods, evidence, and reasoning that are distinct but no less important. Such a point is not lost within works such as *The Lancet*–O'Neill report, and is all the more prominent, for instance, in Gostin's independent work.[57] It does, however, become under-scrutinised to the extent, within health of the public research, that the values-questions become treated as self-evident in nature, or

55 Hazel Genn, 'When law is good for your health: mitigating the social determinants of health through access to justice' (2019) 72(1) Current Legal Problems 159–202.

56 As well as the long-established field of critical public health, note contributions in the philosophy of public health: eg Ruth Faden, Justin Bernstein and Sirine Shebaya, 'Public health ethics' in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Stanford University Press spring 2022); Sridhar Venkatapuram and Alex Broadbent (eds), *The Routledge Handbook of Philosophy of Public Health* (Routledge 2023).

57 See eg Lawrence O Gostin and Lindsay F Wiley, *Public Health Law: Power, Duty, Restraint* 3rd edn (University of California Press 2016) ch 1.

arguments in their favour are treated as already well enough made.[58] The following section of the article accordingly aims to present a vision of the overall expert contributions that legal scholarship can make, with an equal view to analysis regarding ethics, equity, and social justice in relation to responsibility and governance as to the empirical effects and potential of law and laws.

AN OVERARCHING REPRESENTATION OF LEGAL SCHOLARSHIP AND ITS 'FIT' WITH HEALTH OF THE PUBLIC RESEARCH

In this section I give an overview of four threads of scholarly inquiry that I see as necessarily interwoven in the conduct of the practical and analytical goals of legal scholarship within health of the public research. In a way that I hope can help structure and guide future research, I aim to provide a map of applicable legal expertise. I would add, in setting this up, that although the practical examples in this article primarily concern non-communicable diseases (NCDs), what follows speaks as well to legal scholarship that focuses on other areas concerning the public's health, such as health security (ie protection from threats such as contagious disease or chemical threats), prevention of injury (eg within the domain of occupational health), or healthcare public health (ie looking to population-level questions concerning the healthcare system). A visual representation of the mapping exercise is provided in Table 2.

As per the discussion in the preceding section, to be part of health of the public research agendas – meaning that it can both inform and be informed by them – we find two overarching contextual domains that ought to feature within legal scholarship (if in places inchoately).[59] First, and more obviously, such scholarship should apply to questions that are well defined with a 'health of the public' focus. Here, we are interested in health as a practical phenomenon and particular value to feature within analysis, and its situation and dynamics when viewed at a population level. Secondly, and perhaps less obviously in the abstract, but as explained in the previous section of this article, we are interested in governance. In line with the quite general characterisations of governance given above, suffice to say that

58 Cf Sridhar Venkatapuram, 'Global health without justice or ethics' (2021) 43(1) Journal of Public Health 178–179.

59 It may seem bizarre to suggest that the first of these may feature only inchoately. The reason I cast the point as I do is because we can and do find public health law scholarship that looks eg at 'big-picture' philosophical questions or systems-structures without in terms speaking to specific applied questions. Nevertheless, to serve as analysis in this area, it should be possible that it could find application.

<table>
<tr><th colspan="5">The practical and critical landscape of public health law scholarship</th></tr>
<tr><th colspan="2">Broad contexts</th><th colspan="2">Analytical approaches defined by tasks for legal studies</th><th></th></tr>
<tr><td rowspan="4">A. Health of the public focus
Prevention of ill health and injury, provision of healthcare, cross-sector promotion of good health and well-being</td><td rowspan="4">B. Focus on sources and systems of governance
Social coordination and influence through e.g. politico-administrative, socio-structural, and commercial systems</td><td rowspan="2">Practical inquiry</td><td>1. Description and explanation
What effects do (perceptions of) law and laws have on the public's health and why/how; both in terms of constraint and limits on, and the advancement of, the provision of favourable conditions for health?</td><td rowspan="4">⬅ Each area able to inform the others ➡</td></tr>
<tr><td>2. Strategy and impact
How might law and laws be used to improve the public's health and address health inequities?</td></tr>
<tr><td rowspan="2">Critical inquiry</td><td>3. Evaluation and critique given basic legal values, principles, and norms
How might basic legal values, principles, and norms – e.g. the rule of law, respect for human rights, legality – inform critical analysis of health of the public activities and agendas?</td></tr>
<tr><td>4. Evaluation and critique beyond law as a contained normative system
How do wholesale theories of ethics and social justice inform understanding of the place and use of law in health of the public activities and agendas?</td></tr>
<tr><td colspan="5">Combining the outcome-oriented aims, methods, and insights of health of the public research with law as a discipline embedded in practice, social sciences, and humanities</td></tr>
</table>

Table 2: The practical and critical landscape of public health law scholarship

as a basic idea this term draws attention to wide-ranging sources and systems of action-guidance. These may be created by design, or arise as unplanned, systemic realities. And across their totality, they may emanate from multiple actors; governmental and otherwise. When reflecting on governance conceptually, we do well to keep in mind specifically as regards *legal* governance that laws themselves do not function within a single, contained, or impervious system. But more fundamentally, anyway, a practical and critical appreciation of law in the context of health of the public research requires understanding as well of non-legal forms of governance.

Within the broad reach of these two pervasive contextual domains, we may imagine a fourfold scheme of 'tasks' for legal studies. The first two are defined by *practical* analytical aims and are more straightforwardly identified from legal determinants scholarship as outlined in the

previous section. The latter two centre on *critical* analytical aims. As indicated above, their existence is accounted for in works such as *The Lancet*–O'Neill report, but invite more sustained attention insofar as health of the public research is concerned. In outlining these four 'tasks', I should be clear that, whilst each can be conceived discretely, they must each be able (at least in principle) to inform and relate to analysis from the others. Importantly, the tasks identified as practical should not be taken as impliedly untouched by values-based questions; and those presented as critical are still to be brought to bear on real-world phenomena. As such, the scheme is presented to exemplify the overall analytical scope within a given piece of health of the public legal scholarship. Some will do it all, while others will do just one, two, or three parts of it. All of these, I have noted, are represented within *The Lancet*–O'Neill report. However, the third and especially the fourth invite and demand greater emphasis and attention, both from legal scholars and from those with whom they collaborate in health of the public agendas.[60]

In line with the preceding summary, regarding practical tasks, we may observe two functions for legal scholarship. First, it seeks to generate understanding of how law and laws in practice influence health opportunities and outcomes. Although multiple methods may be employed within this, the field of *legal epidemiology* might (with due qualifications)[61] be seen as the 'gold standard'.[62] This combines doctrinal legal understanding ('law as practice') with methods drawn from health and social sciences to adduce observations about the effects of law and laws. However, legal epidemiology is not exhaustive here. As well as other forms of social science methods that may also be applied (borrowing eg from studies in criminology),[63] there is clear scope for looking at the effects of law against methods from humanities disciplines such as history[64] or philosophy.[65] Secondly, the practical

60 See also Coggon, 'Legal, moral and political determinants' (n 13 above).

61 Cf Horton (n 23 above).

62 Scott Burris et al, 'A transdisciplinary approach to public health law: the emerging practice of legal epidemiology' (2016) 37 Annual Review of Public Health 135–148; Scott Burris, Lindsay K Cloud and Matthew Penn, 'The growing field of legal epidemiology' (2020) 26 Journal of Public Health Management and Practice S4–S9.

63 See eg Naomi Finch et al, 'Undermining loyalty to legality? An empirical analysis of perceptions of "lockdown" law and guidance during COVID-19' (2022) 85(6) Modern Law Review 1419–1439.

64 See eg Janet Weston, 'Paternalism in historical context: helmet and seatbelt legislation in the UK' (2023) 16(1) Public Health Ethics 64–76.

65 See eg John Coggon, 'Smoke free? Public health policy, coercive paternalism, and the ethics of long-game regulation' (2020) 47(1) Journal of Law and Society 121–148.

application of legal scholarship on public health can move from describing and explaining to having a role in the generation of strategy. In the phrase employed by Gostin and colleagues, as suggested above, we find here a focus on law and public health that includes seeing law as 'a tool'[66] – that is, a form of power to be used instrumentally – to 'achieve better health with justice'.[67] This can span questions informed by law as practice: for instance, to lend experience-based understanding to methods of instrumentalising law such as may be done through strategic litigation.[68] It can draw too on ranging methods, against commensurately ranging evidence bases, in the development of legal regulatory tools.[69] But more subtly, it can involve as well developments in understandings of the practical scope and effect of legal obligations; for instance in the formulation of understandings and use of health impact assessments in administrative decision-making.[70] And even more subtly still, drawing from methods captured under the idea of legal consciousness, strategic efforts can be about mobilising understandings of law as they play out far away from questions of litigation or law-making; that is, through finding how 'law in action' – for instance as applied by, or operating as perceived constraint by, actors within public authorities – may better serve public health aims and agendas.[71]

Regarding critical inquiry, again I suggest two frames for tasks of legal scholarship. These draw more centrally from the domain of law as humanities, and thus far have been more muted in the article's discussion. Nevertheless, their work is essential. As we have seen, insofar as health of the public research (including on legal determinants) is about practical agendas, these are driven by normative ideas and ideals: most strikingly concerning political obligations to protect and promote good health, and to respond to unfair, structurally determined

66 Gostin et al (n 5 above).

67 Ibid.

68 See eg David Patterson and Farhang Tahzib, From Analysis to Action: Climate Change Litigation – A Guide for Public Health Professionals (Faculty of Public Health 2023).

69 We might think here of the generation of regulations under powers provided in the Public Health (Control of Disease) Act 1984, as well as the consolidation of evidence bases and their presentation in support of the development of primary legislation: eg Department of Health and Social Care, *Tackling Obesity: Empowering Adults and Children to Live Healthier Lives* (DHSC 2020). For critical analysis of how evidence might 'translate' or otherwise into legislation, see John Coggon and Jean Adams, '"Let them choose not to eat cake …" Public health ethics, effectiveness and equity in government obesity strategy' (2021) 8(1) Future Healthcare Journal 49–52.

70 See eg Edward Kirton-Darling, 'Law, health and planning: using health impact assessments to improve urban health' (TRUUD Intervention Briefing 2023).

71 Montel (n 45 above).

health inequalities. Yet there is work to do in exploring and explaining the relevant questions concerning values and justice. And these are key applied areas for (amongst others) legal scholars.

First of all, within these, we may look, as it were, at the 'internal' values and norms of law itself. We appeal here to the wisdom and application of normative legal concepts, considering them at both formal or procedural levels as well as substantive levels. Three examples will suffice for present purposes. First, we may look to principles for the legitimacy that they lend in and of themselves; for instance, public law concepts of legality in relation to executive public health powers. Secondly, we may look to legal principles for the indication of legitimacy that consistency with them implies; for instance, compliance with conditions of the rule of law. Or thirdly, we may look to higher-level, substantively 'thicker' normative values, such as are entrenched in more foundational or fundamental legal instruments, such as instruments that enumerate constitutional rights or enshrine human rights through international law.

Such ideas find prominence within *The Lancet*–O'Neill report. However, as we move to the fourth task for legal scholars, we find attention at a headline level that enjoys relatively less detail on specifics. Here, we are concerned with measures of normative validity that are extrinsic to (positive) law itself: to questions of what justifies assertion of political obligation and of claims in social justice. In other words, we are concerned to know, fundamentally and in practical detail, what 'with justice' actually means. Within works in legal philosophy, we may (if only heuristically) imagine here the legal domain as presented by scholars such as Joseph Raz, and the contrasts he then provides for extra-legal evaluation and practical understanding when legal normativity is cast against non-legal measures of understanding and critiquing socio-political norms, structures, and institutions.[72] Both as regards the missions and agendas of health of the public scholarship, and evaluation and reflection against critical concerns of social justice, there is a vital role here: for wider framing, conceptual development, and analytical theorising; and for explication of how laws, legal institutions, and laws in practice may and should feature with reference to the matters raised.

To make these representations a little less abstract, having presented these four 'tasks' of legal scholarship, we can consider Newdick's 2017 paper on NCDs, law, governance, and social justice. Although that was not written (to my knowledge) as a direct part of a health of the public research programme, it clearly addresses its aims and analysis in a way that is consistent with the ideas as I have presented them

72 See eg Joseph Raz, *The Authority of Law: Essays on Law and Morality* 2nd edn (Oxford University Press 2009).

in this section. It combines structural and causal considerations with normative critiques that ultimately are underwritten by non-legal approaches to understanding social justice and equity. These apply at the level of individual freedom, commercial responsibility, and the role of government, with ideas of population health and governance at the centre. Within Newdick's framing, this means challenging questions of responsibility and governance by reference to the normative burdens that may be ascribed to individuals, while also not exceptionalising or presumptively privileging the power and influence of private corporate actors. And it involves evaluations of the application and justification of different methods of governance. In his words:

> The point of reappraising [personal] autonomy is not to impose the burden of non-communicable diseases upon those least able to shoulder it. It is to encourage the development of systems of governance, nationally and internationally, to promote equality of people's capabilities. For example, if paternalism is to limit public policy to merely 'nudging' us towards healthier lives, it should be equally concerned to engage with the private, commercial forces nudging us towards ill health. Accepting behavourial psychologists' findings that we are constantly nudged from all directions, the question is not simply how governments should behave, it is which 'nanny' do we prefer – publicly accountable government or self-interested private corporations? Yet, by permitting the 'nanny industry' to dominate the debate, we impose vast personal and social cost on the community.[73]

In short terms, we find an example here of legal scholarship that seeks to ask and answer, in the same spirit, the matters set out in Table 2 and the discussion in this section of the article. In the following section, I consider what doing so means when it is taken as a contributing part of the broad and guiding health of the public research agenda.

LAW'S PLACE IN HEALTH OF THE PUBLIC RESEARCH: SUBORDINATION TO GOVERNANCE AND SOCIAL JUSTICE?

As the ideas have emerged over the previous sections' analysis, we have seen the mapping of a scholarly agenda – 'health of the public research' – with specific regard to its inclusion of law. Within that agenda, I would suggest that there comes a double subordination of ideas of 'law' and 'the legal'. Although I present these 'subordinations' under two headings, they are fundamentally intertwined. First, as a practical method of governance defined by source and form, we see distinct limitations in the recognition of any special attributes of law and the legal. Secondly, insofar as we may wish to engage law in more

73 Newdick (n 6 above) 427.

philosophical senses, especially through appeal to legal concepts of justice and 'virtues' of ('good') law, such as rule-of-law ideas, these may be characterised as valued instrumentally, insofar as they are consistent with or serve some much broader, extra-legal idea(s) of social justice. In this final substantive section of the article, I will reflect on this double subordination and its significance for legal scholarship.

First, then, health of the public research pushes back against any practical presumptive pre-eminence being given to law and legal regulation as a distinct form of governance. It disrupts – perhaps even denies – law's special significance as a consolidation of coercive power. This contrasts with what we might call 'standard' or 'mainstream' representations, which place law as the 'highest' or most firmly directive method of governance on a linear spectrum of regulatory interventions (or, in a different metaphor, a last resort to be invoked when 'softer' methods of governance fail).[74] Notably within these, governance overall, and degrees of coerciveness, are defined by reference to form and source rather than effect. Notably too, such perspectives found (clumsy and reductive) echoes in the much-vaunted, simplistic, binary framing of 'freedom day', when 'lockdown' regulations were discontinued during the Covid-19 pandemic; an idea that suggested, as regards questions of governance, normative analysis, and justification, that an exhaustive account of responsibility and governance was provided by legal responsibility *versus* no legal obligation.[75] But even within the more subtle, linear framings that permit for distinct methods of directing behaviour (eg through public information campaigns, the imposition of structural amendments to economic (dis)incentives, and so on), we find a 'liberal' presumption that straightforwardly, along that linear pathway, holds that the 'heavier' the *form* of obligation, the heavier the burden of normative justification.

Yet, the practical and analytical reality within health of the public research, and the policy and practice that follow from it, is that law's place is subordinated both analytically and practically to outcome-focused, empirically oriented concepts of governance. The measure of these is determined by reference to effect and effectiveness; a graded and defined-as-experienced concept of coercion rather than a binary one or – more importantly – one that looks to form and source.[76] A practical goal (say, to reduce rates of smoking) is approached strategically; with

74 This may be seen as reflected, for instance, in the influential idea of the 'intervention ladder' and its surrounding rationalisation in Nuffield Council on Bioethics, *Public Health – Ethical Issues* (Nuffield Council on Bioethics 2007).

75 John Coggon, 'Personal responsibility versus legal obligation? Why simplistic binaries make for bad pandemic responses' (*Nuffield Council on Bioethics Blog* 12 July 2021).

76 Cf Cass Sunstein, *Why Nudge?* (Yale University Press 2014) 57.

considered reference to a structured array of governance methods, including but not limited to legal regulation. And it is tempered by considerations of effectiveness and acceptability, rather than any normative understanding that is informed by a liberal philosophical interest in law and its distinct normative authority (such as that may be). This simultaneously calls into question special justificatory demands for the imposition of legal obligations, and – more urgently – the putatively less (and in reality no less) demanding task of justifying non-legal methods of governance.[77]

Secondly, any pre-eminence to normative values within or 'of' law – legal principles such as legality, the rule of law, or human rights – become potentially subordinated to political values-commitments that arise from a 'public health perspective'. As with social determinants research generally, it is hard (perhaps impossible) to imagine measures and analyses that do not rest on the engagement of contestable values at some juncture.[78] But this is not just about potentially *hidden* values: the 'public health perspective' I refer to here rests firmly on *expressly stated* (if also incompletely stated) political commitments: mandates, through social architecture, to generate conditions of better, fairer health. The perspective demands its own normative steers and constraints. So beyond it being a mistake to assume that unstated values means an absence of values, we find a steer in health of the public research agendas that is directly oriented towards particular political commitments: specifically, the importance of protecting and promoting health as a socio-politically shared endeavour; and concurrently, (more or less clearly specified) conceptions of social justice that prioritise the amelioration of unequal health outcomes and opportunities. This results in a situation where legal inquiry and advocacy are not (which of course perhaps they never were) simply about finding 'the' legal answer, but rather about best shaping law as a 'tool' that can advance (non-legal) agendas of social justice. This may be exemplified, for instance, by having regard to climate change litigation under international human rights law.[79]

When presented within the pages of a law journal, these apparent subordinations of law might seem striking for being unremarkable. There are well-established literatures that look to effective regulation or governance, both analytically and as methods of achieving and assuring social coordination, which clearly subordinate law, or purport to circumvent moral demands that are taken as read for the formal

77 Coggon, 'Smoke free?' (n 65 above).

78 Sam Harper et al, 'Implicit value judgments in the measurement of health inequalities' (2010) 88(1) Milbank Quarterly 4–29.

79 Contrast eg the majority and minority reasoning in *Verein Klimaseniorinnen Schweiz and Others v Switzerland* App no 53600/20 (ECtHR, 9 April 2024).

imposition of legal coercion.[80] The place of behavioural sciences and the regulatory effects of our environments demonstrably create redundancies and irrelevancies for legal norms and law as practical phenomena conceived as being at the heart of social coordination.[81] And all the more, there must be very few – if any – legal scholars who would assume that all positive laws should be unquestionably followed no matter what, even should they hold a more abstract position that people should obey 'the law'. But of course, it does not follow from any of these observations that specifically 'public health values' should provide the normative bottom line instead. Indeed, we might here take the example of former Supreme Court Justice Lord Sumption, who spoke expressly against the practically binding authority of public health laws during the Covid-19 crisis against – as he saw it – more fundamental moral and practical considerations.[82]

So it is precisely the *non-sequitur* in a claim that 'public health values' are properly foundational that opens up the two subordinations as more remarkable observations after all. It invites the question not of whether legal obligation may be lesser (whether generally or in a specific instance) than (say) moral obligation. Rather, and much more directedly, it demands scrutiny of how much discordance – or equivocation or silence – there can be on the normative aspects of health of the public research with regard to the pre-eminence of the values it represents to be meaningful and workable. How non-specific can we be about the meanings of health and equity, or about the health costs themselves of a health policy, and questions more widely about value trade-offs that emerge?

With these sorts of questions in mind, we see a vital place for legal scholarship *within* health of the public research in articulating, challenging, refining, and *justifying* the questions of applied values. I hope, given even the *intra*disciplinary reach of legal scholarship that I have outlined above, it is clear that this scholarship is not the exclusive preserve of people whose primary discipline is law. As a reviewer of this article noted, the scholarship that I discuss here may be done, for instance and in different parts, by criminologists or political philosophers or sociologists with interests in law. The rigour comes through the quality of the scholarship measured against the different

80 Most notably, perhaps, Richard H Thaler and Cass R Sunstein, *Nudge: Improving Decisions about Health, Wealth and Happiness* (Penguin 2008).

81 Cf William Lucy, 'The death of law: another obituary' (2022) 81(1) Cambridge Law Journal 109–138.

82 For a critical and more widely contextualised account of Lord Sumption's doing of this, see John Coggon, 'Lord Sumption and the values of life, liberty, and security: before and since the Covid-19 outbreak' 48(10) Journal of Medical Ethics (2022) 779–784.

'tasks' that I have outlined. And to enjoy the rigour that they require, health of the public research agendas need to allow for this. This is not to suggest that there should be, or that we should act is if there were, a single, knock-down theory of (health) justice. It is rather to acknowledge and engage with the political realities of values-disagreements even within teams of transdisciplinary researchers. Strikingly, against the framings above, independent (ie independent of health of the public research) research in public health law talks in clear and direct terms to these matters. We see explorations of the relationships between law and governance and these questions of subordination: practical and normative.[83] Such normative analysis sits shoulder-to-shoulder with wider, policy and practice-focused works in critical public health, the philosophy of public health, and public health ethics. And it is part of what *The Lancet*–O'Neill report is about. But – without coming at the cost of the descriptive and strategic analyses – it needs to have a surer and more robust place. Exploring and explaining the reasons in support of the agendas is key to their intellectual and moral integrity. And it cannot just be about big picture battles as pitched (say) between 'libertarians *versus* paternalists'. Rather, it means looking to the more subtle reasons and disagreements *within* a more general accord on the position that governments should protect and promote health, and reduce health inequalities, as a matter of social justice.

Within health of the public research agendas, we need to talk about the contestable meaning of health, and about health/health trade-offs.[84] We need to talk about the *axes* across which we measure (or do not measure) health inequalities.[85] We need to clarify what values beyond health matter, and why (or explain how and why health is *the* basic value of concern).[86] We need to talk about what sorts of

83 For a good example of a standalone analysis of law's relationship with governance for public health more widely, and an account of law's proper standing in that context, see Mark Flear, *Governing Public Health: EU Law, Regulation and Biopolitics* (Hart 2018). For an overview of how public health law scholarship has addressed and incorporated governance, see Coggon et al, *Public Health Law* (n 43 above) ch 4.

84 Consider eg the conceptual and analytical questions and challenges, and consequent practical policy implications, raised in Cass R Sunstein, 'Health–health tradeoffs' (1996) 63(4) University of Chicago Law Review 1533–1571.

85 Consider eg the conceptual and analytical questions and challenges, and consequent practical policy implications, raised in Jasmine N Olivera et al, 'Conceptualisation of health inequalities by local healthcare systems: a document analysis' (2022) 30(6) Health and Social Care in the Community e3977–e3984.

86 Contrast the approaches and reasoning of eg Madison Powers and Ruth Faden, *Social Justice: The Moral Foundations of Public Health and Health Policy* (Oxford University Press 2006); Jennifer Prah Ruger, *Health and Social Justice* (Oxford University Press 2009).

interventions – what methods of governance – are justified, and why.[87] We need to ask whether we are focused on opportunities, or outcomes, or both; about how these are measured; and across what time frames.[88] We need to talk about the meaning of assigning responsibility, and applying methods of scrutiny and accountability, to different sorts of actors within the diffuse structures that define the social determinants of health.[89]

In short, we need to be ready to articulate and defend substantive positions on justice, if we are to engage openly in research agendas that aim to provide for better, fairer health with justice. There already exist good literatures on this. They can and should develop. The very nature of their subject matter means there will never be a last word. And health of the public research will be depleted if it fails to account for and contribute to these discourses; to speak to questions of ethics and justice as regards the aims of law and policy, as regards the procedures of determining law and policy, and as regards the methods of governance – including legal governance – in effecting health policy.

CONCLUSIONS

This article has presented a view to understanding and steering the direction of a sub-domain of legal scholarship, *and* to understanding and steering the wider agendas of health of the public research. I regard these two as necessarily developing in symbiotic connection: as public health law scholarship moves forward, it adds to and draws from health of the public research, each informing and enriching the other. Against the framings in the opening section of the article, I am particularly interested in how this impacts on the (necessarily impinged) autonomy of legal scholarship; in the place and engagement of methods, respectively, from law as practice, as social sciences, and as humanities, and their further embedding with insights and even methods from the health and natural sciences.

With a view to ensuring that attention to legal determinants of health is not an exercise in problematic siloing, I have provided above a 'map' of the tasks of legal scholarship in this area. That has enabled me, in turn, to orient the ideas against considerations concerning social justice. And, in the end, that is where I envisage the most

87 Consider eg the conceptual and analytical questions and challenges, and consequent practical policy implications, raised in Nuffield Council on Bioethics (n 74 above).

88 Consider eg the conceptual and analytical questions and challenges, and consequent practical policy implications, as advanced in Jonathan Wolff and Avner de-Shalit, *Disadvantage* (Oxford University Press 2007).

89 As eg in Newdick (n 6 above).

heavily understated area of health of the public research, and call for the expertise of legal scholars (amongst others) to bring more to the table. None of that is to deny or displace a predominant focus on broad concepts of governance and structured concepts of responsibility. Nor is it a challenge to the specific aspects that legal scholarship can bring to these; in descriptive analysis, and in the development of strategy. But, as *per* the questions listed at the end of the previous section, it is a challenge to agendas that rest too easily on under-theorised, vague, or very thin accounts of the political values and claims in social justice that ultimately provide the impetus for their existence in the first place. To be founded on solid evidence bases, health of the public research needs firmly to incorporate ongoing analysis of fundamental questions of the meaning and import of moral values and social justice.