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Toward Justice Epidemiology: Outlining an Approach for Person-Centred Access to Justice

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The COVID-19 pandemic has brought widespread public attention to the fields of epidemiology and public health. These fields share a common commitment to the systematic study of disease across populations, with goals of better understanding, preventing, and treating adverse health events. They are empirical, evidence-based, and person-centred. This paper draws on the histories, norms, and methodologies of public health and epidemiology to construct a novel field of study: justice epidemiology. In recent years, a growing body of unmet legal needs research in Canada and elsewhere has demonstrated that justiciable events are likely ubiquitous, but also that these events tend to cluster for some, and that resources to effectively deal with legal problems are unevenly distributed. And while access to justice has been described as the most significant problem facing Canada's legal system, there has been surprisingly little work done to outline a systematic path forward. Despite projects and initiatives to improve access to justice, we lack a map of what we need to know and how we could begin to understand access to justice problems and solutions. Specifically, there are knowledge gaps regarding the effects of access to justice problems on people's lives over the long term and on whether interventions to improve access to justice are effective in doing so. Building on some nascent work connecting the fields of justice research and public health, this paper argues for the creation of a person-centred, empirical, interdisciplinary field of study that can help guide efforts to understand, prevent, and respond effectively to justice problems over the next 50 years and beyond.

La pandémie de COVID-19 a attiré l'attention du public sur les domaines de l'épidémiologie et de la santé publique. Ces domaines partagent un engagement commun en faveur de l'étude systématique des maladies au sein des populations, dans le but de mieux comprendre, prévenir et traiter les événements sanitaires indésirables. Ils sont empiriques, fondés sur des données probantes et centrés sur la personne. Cet article s'appuie sur l'histoire, les normes et les méthodologies de la santé publique et de l'épidémiologie pour construire un nouveau champ d'étude : l'épidémiologie de la justice. Ces dernières années, un nombre croissant de recherches sur les besoins juridiques non satisfaits au Canada et ailleurs ont démontré que les événements justiciables sont probablement omniprésents, mais aussi que ces événements ont tendance à se regrouper pour certains, et que les ressources permettant de traiter efficacement les problèmes juridiques sont inégalement réparties. Alors que l'accès à la justice a été décrit comme le problème le plus important auquel est confronté le système juridique canadien, il est surprenant de constater que peu de travaux ont été réalisés pour tracer une voie systématique vers l'avenir. Malgré les projets et les initiatives visant à améliorer l'accès à la justice, nous ne disposons pas d'une carte de ce que nous devons savoir et de la manière dont nous pourrions commencer à comprendre les problèmes et les solutions en matière d'accès à la justice. Plus précisément, nous manquons de connaissances sur les effets des problèmes d'accès à la justice sur la vie des gens à long terme et sur l'efficacité des interventions visant à améliorer l'accès à la justice. S'appuyant sur des travaux naissants reliant les domaines de la recherche sur la justice et de la santé publique, cet article plaide en faveur de la création d'un champ d'étude interdisciplinaire, empirique et centré sur la personne, qui puisse contribuer à orienter les efforts visant à comprendre, prévenir et répondre efficacement aux problèmes de justice au cours des cinquante prochaines années et au-delà.

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Introduction

Before March 2020, probably few members of the public paid much attention to the worlds of "public health" and "epidemiology." But since the World Health Organization declared the COVID-19 pandemic on March 11, 2020, people around the world have likely become increasingly familiar with the mechanisms and effects of public health orders, disease modelling, vaccine development, and much more.[1]

This paper is not about the COVID-19 pandemic. But it takes its starting point from the realization that public prominence of public health and epidemiology has climbed dramatically in recent years. The meta-

1. For research on sources of information about COVID-19, see e.g. Emily E Levitt et al, "Public Health Guideline Compliance and Perceived Government Effectiveness During the COVID-19 Pandemic in Canada: Findings from a Longitudinal Cohort Study" (2022) 9 Lancet Regional Health —Americas 100185; Jeanna Parsons Leigh et al, "Public Perceptions During the First Wave of the COVID-19 Pandemic in Canada: A Demographic Analysis of Self-Reported Beliefs, Behaviors, and Information Acquisition" (2022) 22 BMC Public Health 699; "The Public's Perspective on the United States Public Health System" (Robert Wood Johnson Foundation and Harvard TH Chan School of Public Health, May 2021); Regi Jose et al, "Public Perception and Preparedness for the Pandemic COVID 19: A Health Belief Model Approach" (2021) 9 Clinical Epidemiology & Global Health 41. This is not to suggest, however, that increased public prominence of public health has necessarily led to increased public appreciation for or understanding of public health concepts.

disciplines of public health and epidemiology have been indispensable in efforts to respond to problems that have literally plagued the lives of billions of people around the world.[2] Accordingly, this is an opportune time to assess whether the norms and tools of public health and epidemiology can be applied to the legal community.

This inquiry is not just rooted in idle curiosity. For years, the topic of access to justice has been a significant one in Canada. Research indicates that access to justice problems are widespread, that they tend to cluster for many people, that most people do not make use of legal services in responding to these problems, and that access to justice problems can lead to adverse outcomes for those affected.[3] Access to justice problems are also markers of societal inequality.[4] Yet in spite of wise words, reports, and some action, it is difficult to assess whether access to justice is improving, staying static, or getting worse.

One reason for the lack of positive movement on access to justice issues is the absence of robust empirical study of access to justice problems, who is affected, how they are affected, and how adverse effects can be mitigated or eliminated. Calls for improved research on access to justice issues are not new.[5] Rebecca Sandefur has written that "[a]ccess is equal when the probability of lawful resolution is the same for all groups in the population: for example, men, women, and transgender; rich and

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2. A "metadiscipline" has been described as follows: "Like a meta-analysis in statistics, a metadisciplinary study can combine the information from multiple lines of inquiry to yield insights and perspectives not achievable with any one alone. The prefix meta refers to 'after' and 'beyond,' thus, a metadiscipline is a higher-level discipline. In the future, the metadisciplinary approach provides a systematic set of methods and procedures for bringing together the knowledge from the traditional, more mature fields…" See James R Mihelcic et al, "Sustainability Science and Engineering: The Emergence of a New Metadiscipline" (2003) 37:23 Environmental Science & Technology 5314 at 5318.

3. See Canada, Department of Justice, "The Legal Problems of Everyday Life: The Nature, Extent and Consequences of Justiciable Problems Experienced by Canadians" (Ottawa: Department of Justice, 2007) (Ab Currie) at 10, online (pdf): *Department of Justice* <www.justice.gc.ca/eng/rp-pr/csj-sjc/jsp-sjp/rr07_la1-rr07_aj1/rr07_la1.pdf> [perma.cc/525U-VDU4] [DOJ, "Legal Problems"]; Trevor C W Farrow et al, "Everyday Legal Problems and the Cost of Justice in Canada: Overview Report" (2016) at 6, online (pdf): *Canadian Forum on Civil Justice* <www.cfcj-fcjc.org/sites/default/files/Everyday%20Legal%20Problems%20and%20the%20Cost%20of%20Justice%20in%20Canada%20-%20Overview%20Report.pdf> [perma.cc/JB5T-9R63].

4. See generally DOJ, "Legal Problems," *supra* note 3.

5. See Canadian Bar Association, "Reaching Equal Justice: An Invitation to Envision and Act, Report of the CBA Access to Justice Committee" (2013), online (pdf): *Canadian Bar Association* <www.cba.org/CBAMediaLibrary/cba_na/images/Equal%20Justice%20-%20Microsite/PDFs/EqualJusticeFinalReport-eng.pdf > [perma.cc/5ADK-XJBS]; Gillian K Hadfield, *Rules for a Flat World* (New York: Oxford University Press, 2017); Action Committee on Access to Justice in Civil and Family Matters, *Access to Civil and Family Justice: A Roadmap for Change* (13 October 2013), online (pdf): *Canadian Forum on Civil Justice* <www.cfcj-fcjc.org/sites/default/files/docs/2013/AC_Report_English_Final.pdf> [perma.cc/UR38-MY7W] [CFCJ, "Access to Civil and Family Justice"].

poor; every race and ethnicity; each religion and those with none."[6] At present, we lack the institutional infrastructure to assess this. If we really care about access to justice, the focus should be on measuring and tracking access to justice problems and solutions in a thoughtful and effective way. D James Greiner has called for efforts to transform the "legal profession into an evidence-based field."[7] This requires more than simply tinkering with existing practices. Rather, it requires an entirely new set of tools, approaches, and institutions.

This paper argues that the justice community is missing certain key institutional structures and approaches that are necessary precursors for efforts to meaningfully improve access to justice in a sustainable way over the long term. It suggests that public health and epidemiology offer promising approaches that can and should be transposed into thinking about access to justice problems. This transposition gives rise to "justice epidemiology."

While there are existing connections between the fields of law and public health, justice epidemiology represents a new connection between these domains.

Justice epidemiology envisions the study of how legal problems—also known as justiciable problems in access to justice research—arise and are distributed in the population, understanding how people respond to these problems, what types of interventions help people to respond more effectively to these problems, and how these problems and response pathways affect people across the life course. As discussed in more detail in Part Three of this paper, this study could include things like population-level monitoring of who experiences access to justice problems, the steps they take to respond to those problems, and the effects of those problems over the course of their lives.

Justice epidemiology should not be confused with work on "legal epidemiology" which has emerged in recent years.[8] Although there is some overlap between these two concepts, and despite the similarities of the terms, these are two quite distinct undertakings. Legal epidemiology has been described as "the scientific study and deployment of law as a factor in the cause, distribution, and prevention of disease and injury in a population."[9] Legal epidemiology can therefore be understood as a sub-

6. Rebecca L Sandefur, "Access to What?" (2019) 148:1 Daedalus 49 at 51.
7. D James Greiner, "The New Legal Empiricism & Its Application to Access-to-Justice Inquiries" (2019) 148:1 Daedalus 64 at 65.
8. See e.g. Scott Burris, Lindsay K Cloud & Matthew Penn, "The Growing Field of Legal Epidemiology" (2020) 26:2 (supp) J Public Health Management & Practice S4.
9. Betsy L Thompson, Lindsay K Cloud & Lance Gable, "Advancing Legal Epidemiology: An

field of public health, which "reflects the indispensability of law to modern public health practice."[10] While legal epidemiology seeks to trace how law is a factor in health outcomes, and in so doing treats law as an independent variable, justice epidemiology sets access to justice problems themselves as the dependent variable. This approach does not denigrate the project of legal epidemiology, but rather does orthogonal work by trying to isolate and understand justice problems as themselves worthy of sustained and systemic study.

The paper proceeds as follows. Part One briefly elaborates why the current institutional structures and epistemological approaches within the legal system are insufficient to address access to justice problems. Part Two then explores public health and epidemiology. This includes sections which sketch a history of public health and epidemiology, examine the norms underlying the contemporary versions of those fields, and set out some of their key methodological approaches and tools. Building on this understanding, Part Three sets out a case for justice epidemiology. In the course of doing so, this paper will explore what justice epidemiology is (and what it is not), some possible tools and approaches that it could entail, and the norms that should ground justice epidemiology.

I. *The need for new approaches*

Despite increased attention to and discussion of access to justice problems in Canada in recent years, it remains difficult, if not impossible, to assess whether access to justice is improving, staying static, or getting worse. This is due both to unclear normative judgments about what amounts to an access to justice problem and to the relative absence of robust, systemic research on access to justice topics.[11] In 2013, the *Roadmap for Change* report of the National Action Committee on Access to Justice in Civil and Family Matters identified "research and funding" as one of three main areas for reform.[12] The report further called for "access to justice research to promote evidence-based policy making,"[13] and noted that research on access to justice barriers and on the effectiveness of efforts to address those barriers "will all be important aspects of building innovation capacity" within the justice sector.[14]

Introduction" (2020) 26:2 (supp) J Public Health Management & Practice S1 at S1.

10. Burris, Cloud & Penn, *supra* note 8 at S4.

11. See Rebecca L Sandefur, "What We Know and Need to Know About the Legal Needs of the Public" (2016) 67 SCL Rev 443.

12. CFCJ, "Access to Civil and Family Justice," *supra* note 5 at iv, 10, 23.

13. *Ibid* at 10.

14. *Ibid* at 22.

In the years since the report's publication in 2013, there have been several efforts to respond to these calls. Perhaps most notably, the National Action Committee has created a series of "Justice Development Goals" and has cultivated a national reporting network to try to track programs that advance these goals.[15] In addition, there are ongoing conversations about access to justice metrics throughout Canada. For example, the National Action Committee convened a "metrics working group" to "work toward inter-jurisdictional cooperation and coordination in the development of justice metrics." The Committee's objective was to make more useful data available to empirical researchers to better assess and enhance access to justice. Additionally, British Columbia's access to justice roundtable, A2JBC, has adopted an "A2J triple aim measurement framework," which seeks to "encourage the justice sector shift to becoming evidence-based."[16]

These are positive developments. But this paper argues that much more is needed. As useful as they are, we need more than coordinated metrics to address access to justice in Canada. We need coherent, normatively and methodologically sophisticated efforts to understand what improves access to justice. We need sustained change at the systems level. This requires new ways of thinking about access to justice problems, methods of understanding the impact of access to justice problems on the lives of those they affect, and ways of assessing what helps to improve or eliminate these access to justice problems.

In short, this calls for a new discipline or sub-discipline closely related to the fields of law and justice studies. The development of the fields of public health and epidemiology offers an example of what this type of sustained change at the systems level can look like.[17]

There are several reasons why such a broad change is needed: (1) the pervasive nature of access to justice problems, (2) the inequity in how those problems are experienced and resolved, and (3) the legal system's manifest incapacity to perceive or respond to these problems.

Regarding the first reason, we live in an increasingly law-encumbered society, and access to justice problems are likely ubiquitous. As Gillian Hadfield has noted, we live in a "law-thick world," meaning that laws interact with and constrain social and economic life in myriad ways.[18]

15. *Ibid* at iv.

16. Access to Justice BC, "The A2J Triple Aim" (last visited 16 March 2022), online: *Access to Justice BC* <www.accesstojusticebc.ca/the-a2j-triple-aim/> [perma.cc/FU4M-BC53].

17. This is not to suggest that public health and epidemiology are the only meta-disciplinary fields that could serve as models. Other existing fields, such as criminology, could also provide valuable models and merit further discussion.

18. Gillian Hadfield, "Higher Demand, Lower Supply? A Comparative Assessment of the Legal Resource Landscape for Ordinary Americans" (2010) 37:1 Fordham Urb LJ 129 at 133.

Recent unmet legal needs research has demonstrated that justiciable problems, those significant problems that people experience that have a legal dimension, affect approximately half of the adult population in Canada over a three year period.[19] Yet that research also demonstrates that only a small minority turn to legal service providers to resolve their problems.[20] This may be evidence of access to justice problems, but it may not be. As Ab Currie and others have noted, legal services and legal solutions may not always be necessary or desirable to resolve problems, from the perspective of the person experiencing the problem.[21]

A second reason to call for systemic changes is that existing research suggests significant inequalities in who experiences access to justice problems.[22] In his 2009 study of unmet legal needs for the Department of Justice, Currie found that of those who experienced at least one justiciable problem over the preceding three years, the average number of such problems was three.[23] Further, significantly higher rates of justiciable problems were experienced by Indigenous peoples, people born outside Canada, racialized people, people with self-reported disabilities, and people receiving social assistance.[24] For the range of different types of justiciable problems addressed in that survey, Currie found that "being disabled [was] a significant predictor of all 15 problem types."[25] This suggestion that access to justice problems and their solutions reflect other systemic inequalities is shared by other researchers.[26] Despite this, there remains a relatively poor understanding of the scope and effects of these likely inequalities.

A third reason to call for new approaches is connected to this second reason. As Hadfield has also noted, legal systems remain largely insular and insulated from feedback from those who are affected by law:

> [legal] complexity is created in a closed system that gives providers of law very little feedback on how well they are doing in fulfilling the needs of those who use the system… In such a closed environment, the legal rules and procedures these lawyers and judges develop are produced with essentially zero feedback from the people affected by those rules:

19. See DOJ, "Legal Problems," *supra* note 3; Farrow et al, *supra* note 3.
20. *Ibid*.
21. *Ibid*.
22. *Ibid*. See also Robert H Frank, "How Rising Income Inequality Threatens Access to the Legal System" (2019) 148:1 Daedalus 10.
23. See DOJ, "Legal Problems," *supra* note 3.
24. *Ibid*.
25. *Ibid* at 26.
26. See e.g. Sandefur, *supra* note 6.

people, businesses, and organizations.[27]

Legal systems lack the institutional and epistemological capacity to transcend this closed nature. It is possible that this closed nature and lack of capacity is not a defect of these systems, but rather is an intentional feature of these systems.[28] Indeed, there is a long pedigree of critique of law and legality which argues that, despite law's claims to promote justice in an impartial and equitable way, law and legal institutions do "not represent the compromise of the diverse interests in society, but [support] some interests at the expense of others."[29] The insights of critical legal studies and the panoply of other critical perspectives on law and legality are important and necessary for any further elaboration of justice epidemiology to be more than a restatement of banal exhortations to gather better metrics about how the legal system functions. While this is necessary work, it lies beyond the scope of this paper. For the purposes of this paper, I will proceed assuming that the closed nature of the legal system and the lack of capacity to transcend this can and should be overcome in order to improve access to justice. But I recognize that this assumption requires much further discussion and elaboration, and that this further discussion should necessarily be part of any continued movement toward justice epidemiology.

The organization of courts and the common law process does a relatively good job of ensuring that new information in the form of cases is accreted into a largely consistent body of knowledge. But this system is only sensitive to information that makes it to courts in the form of cases; it fails to address concerns about the situation of the legal system in society generally.

Figure 1 provides a graphic representation of this, focussing solely on personal justice problems as they intersect with legal professionals and superior courts. The degrees of data and institutional artifacts generated increases as people move from being situated outside the legal system, through interacting with legal service providers, to potential resolution

27. Gillian Hadfield, "More Markets, More Justice" (2019) 148:1 Daedalus 37 at 39-40.
28. Thanks to an unnamed peer reviewer who noted this possibility.
29. Richard Quinney, "Toward a Sociology of Criminal Law" in Richard Quinney, ed, *Crime and Justice in Society* (Boston: Little Brown, 1969) at 25. A full discussion of the intellectual history of critical legal studies, critical race studies, and other critical perspectives on law and legality is beyond the scope of this paper. For an overarching discussion of critical legal studies, see Roberto Mangabeira Unger, *The Critical Legal Studies Movement: Another Time, a Greater Task* (London: Verso, 2015). For discussion of the constructed and often intentional nature of institutional systems and burdens, see Pamela Herd & Donald P Moynihan, *Administrative Burden: Policymaking by Other Means* (New York: Russell Sage Foundation, 2018).

in court. While the legal system has processes and relatively coherent internal logics to respond to cases (which appear at the pinnacle of the triangle in this representation), it has very little capacity to assess whether people bring their problems or concerns to law in the first place, or where those problems or concerns are addressed.

In designing this graphic representation, I have deliberately focussed on superior court-related processes and have excluded other courts, alternative dispute resolution processes, and administrative tribunals and bodies. The reason for this selective focus is primarily to increase clarity. Indeed, non-court dispute resolution and administrative tribunals are very significant aspects of the justice landscape, and often are the most pertinent institutions for those seeking justice. Accordingly, exploring the process of artifact creation in these sites is likely as important or more important than doing so with reference to courts alone. Unfortunately, due to the hugely varied nature of dispute resolution processes, administrative bodies and tribunals, to say nothing of how similar entities differ between provinces and at the federal level, any effort to capture non-court and administrative systems would have to be vastly complex and multi-faceted. Engaging in such analysis is beyond the scope of this paper. Yet since courts have often been regarded as the paradigmatic example of tribunals in common law systems and since there is a relatively high level of institutional commonality among courts of inherent jurisdiction in Canada, focussing on superior courts provides a concise way of conveying the core idea about institutional artifact generation.

All of these reasons suggest that legal systems need significant, systemic approaches to help understand and address access to justice problems. The following Part explores the history, tools, and norms of public health and epidemiology as a potential example for law.

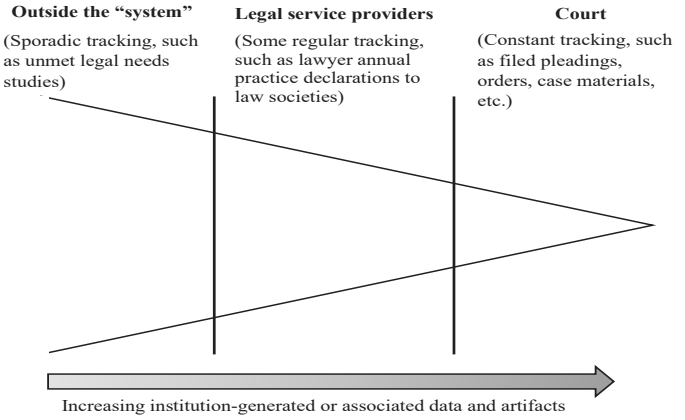
There have been times when public health has borrowed from law, and connections between the fields of law and public health are certainly not new. As Dorothy Porter has written in reference to precursors of public health in the mid-19th century, "[a]dvocates of 'social medicine' at this time invented the physician as an attorney to the poor and encouraged him to take up his duty to participate in the political planning of society."[30] Indeed, the sub-field of public health law has been well-established for decades.[31] But, as discussed in more detail in Part Three, despite this long

30. Dorothy Porter, Health, *Civilization and the State*, 1st ed (New York: Routledge, 1999) at 63.

31. See e.g. James A Tobey, *Public Health Law*, 3rd ed (New York: Commonwealth Fund, 1947). Previous editions preceded in 1926 and 1939. For more recent texts on public health law in the United States and Canada, respectively, see Lawrence O Gostin, Lindsay F Wiley & Thomas R Frieden, *Public Health Law: Power, Duty, Restraint*, 3rd ed (Oakland, CA: University of California Press,

history of engagement between public health and law, the application of epidemiological and public health concepts and methods to access to justice problems as proposed in this paper appears to be novel, in spite of some approaches which are similar in name or may overlap with justice epidemiology.[32]

Figure 1 – Diagram of data and artifact generation related to personal justice problems in superior court-related proceedings



II. *Public health and epidemiology*

During the COVID-19 pandemic, "public health" has often been used as a synecdoche for the public health agency, office, or chief public health officer of a particular jurisdiction.[33] But public health refers to an interdisciplinary field that is broadly concerned with "'the science and the art of preventing disease, prolonging life', and improving quality of life through organized efforts and informed choices of society, organizations (public and private), communities and individuals."[34] One significant aspect of public health is its focus on population-level health. It has been suggested that while the

2016); Tracey M Bailey, C Tess Sheldon & Jacob J Shelley, *Public Health Law and Policy in Canada*, 4th ed (Toronto: LexisNexis Canada, 2019).

32. See e.g. Betsy L Thompson, Linsday K Cloud & Lance Gable, "Advancing Legal Epidemiology: An Introduction" (2020) 26:2 J Public Health Management & Practice S1.

33. See "Who's at the greatest risk of being hospitalized by COVID-19? New public health data breaks it down" (8 March 2022), online: <www.cbc.ca/news/canada/newfoundland-labrador/omicron-hospitalizations-death-data-1.6375968> [perma.cc/BY72-K69C]; Nick Boisvert, "Public health officials welcome move to ease restrictions as COVID-19 metrics improve" (4 March 2022), online: <www.cbc.ca/news/politics/phac-march4-update-1.6373321> [perma.cc/K3G8-RF29]; Laura Thomson, "Public health mandates could return in the fall, Tam warns" (25 February 2022), online: <www.theglobeandmail.com/canada/article-public-health-mandates-could-return-in-the-fall-tam-warns/> [perma.cc/BA6Q-J9AU].

34. C E Winslow, "The Untilled Fields of Public Health" (1920) 51:1306 Science 23 at 30.

practice of medicine often focuses on the health of an individual patient, in public health "the 'patient' is the community."[35]

While definitions differ, public health is often described as including five core disciplines: epidemiology, biostatistics, environmental health science, health policy and management, and social and behavioural sciences.[36] This paper focuses on epidemiology as the most obvious sub-discipline of public health that could be transposed to the legal sector and will use the terms "public health" and "epidemiology" interchangeably.

The Oxford English Dictionary defines epidemiology simply as "[t]hat branch of medical science which treats of epidemics."[37] Derived from ancient Greek, "epidemic" is itself defined, in part as an adjective, as a disease "[p]revalent among a people or a community at a special time, and produced by some special causes not generally present in the affected locality."[38]

Specialists in public health and epidemiology have developed more detailed and nuanced definitions. Ray Merrill defines public health as "concerned with preventing health problems, promoting health, and extending life," with epidemiology as a "foundation" of public health.[39] Merrill defines epidemiology as "the study of the distribution and determinants of health-related states or events in human populations and the application of this study to the prevention and control of health problems."[40]

In order to better understand both public health and epidemiology, the following sub-sections explore the history, tools, and norms, respectively, of these fields.

1. *A brief history of epidemiology and public health*

In setting out a brief history of epidemiology and public health, it is important at the outset to note the limitations of doing so in a short paper. Indeed, histories and historiographies of these fields can (and do) occupy whole sections of libraries. Further, in presenting this thumbnail sketch of some historical milestones, it is incumbent upon me to note the

35. Angus Dawson, *The Philosophy of Public Health* (New York: Routledge, 2016) at 2. See also Jonathan Michael Kaplan & Sean A Valles, "Reflecting on What Philosophy of Epidemiology is and Does, as The Field Comes into its Own: Introduction to the Special Issue on Philosophy of Epidemiology" (2019) 198:S10 Philosophy Epidemiology S2384.
36. See generally Kate Winskell et al, "Incorporating Global Health Competencies into the Public Health Curriculum" (2014) 129:2 Public Health Rep 203.
37. *Oxford English Dictionary* (Oxford: Oxford University Press, 2000) sub verbo "epidemiology."
38. *Ibid*.
39. Ray M Merrill, *Introduction to Epidemiology*, 8th ed (Burlington, MA: Jones & Bartlett Learning, 2019) at 2.
40. *Ibid* at 4.

contested ground upon which histories of these fields are built.[41] Many histories of public health and epidemiology have been either blind to, or critical of, the classist, genderist, Eurocentric, and often Anglocentric, nature of epidemiology and public health.[42] While this section prioritizes brevity over complexity, some of the critical approaches to histories of epidemiology and public health inform the discussion of norms later in this paper. Further, I am aware that the brief history I have compiled in this paper focusses on a few select individuals, all of whom are white British men. This highlights the need for future work on justice epidemiology to engage in a deeper, more critical social history of both epidemiology and law in order to properly situate the field at the outset. But for the purposes of this paper, this preliminary historical sketch at least provides some footing with which to further discuss justice epidemiology.

Some popular and scholarly histories of public health and epidemiology have rightly celebrated the importance of John Snow's efforts to understand and trace the source of cholera outbreaks in the mid-19th century and their impact on the development of public health and epidemiology.[43] Snow was an English physician, often considered a founder of modern epidemiology because of his efforts to understand and end a cholera outbreak in South London in 1854. Snow was involved in mapping where cases appeared, tracing the source of the outbreak to a public water pump, and limiting public access to the pump. Nevertheless, the history of the development of these fields is, of course, significantly more complex than the (often apocryphal or overstated) stories about John Snow and the Broad Street Pump.

Medical historian Alfredo Morabia traces the origin of epidemiology to *exactly* 1662 and the work of John Graunt.[44] Morabia argues that implicit in epidemiology is that "its mode of knowledge acquisition requires the prior existence of a concept of 'population.'"[45] In 1662 Graunt, an English haberdasher by trade, published a book entitled *Natural and Political Observations Made Upon the Bills of Mortality.* This book was the first

41. See Porter, *supra* note 30 at 3-4.
42. *Ibid* at 8.
43. See Sandra Hempel, *The Strange Case of the Broad Street Pump: John Snow and the Mystery of Cholera*, 1st ed, (Berkley: University of California Press, 2007); Steven Johnson, *The Ghost Map: The Story of London's Most Terrifying Epidemic—And How It Changed Science, Cities, and the Modern World* (London, UK: Penguin Group, 2006); Peter Vinten-Johansen et al, *Cholera, Chloroform, and the Science of Medicine: A Life of John Snow* (Oxford: Oxford University Press, 2003).
44. See Alfred Morabia, "Epidemiology's 350th Anniversary: 1662–2012" (2013) 24:2 Epidemiology 179 at 180.
45. *Ibid* at 179.

application of the concept of population to health data.[46] Graunt synthesized and analyzed mortality data gathered in London's Bills of Mortality over a 50-year period to create the first known analysis of causes of death within a population over time.

The history of epidemiology is bound up with the development of the modern state.[47] Histories of epidemiology often note the creation of the General Register Office for England and Wales in 1837 as the first national system of civil registration in England and Wales.[48] Though the Office was not specifically intended to track population statistics, many of its early employees, such as William Farr, brought expertise in emerging statistical methods that informed the Office's work. Accordingly, the General Register Office can therefore be thought of as a forebear to modern census and state statistics offices.[49] Farr is an important figure in the development of epidemiology since he was one of the first recorded individuals to bring statistical methods to bear on the newly collected population data that was becoming available.[50] Shortly after the creation of the General Register Office, the UK government passed the *Public Health Act 1848*, which established a Central Board of Health in the United Kingdom, and was an important step on the path toward the later creation of the office of the Chief Medical Officer.[51]

Dorothy Porter has noted that in the late 19th century, "in the United States public health intervention was driven, designed and dominated by local and voluntaristic initiatives," while public health initiatives in the United Kingdom were driven by the actions of central government.[52]

Between the examples of Graunt in the 17th century and Farr in the 19th century, a common thread is that their analyses were made possible by recent data collection efforts. In Graunt's case, this was his examination of the London Bills of Mortality, which were collected from 1603 onward; in Farr's case, it was the emergence of national registration of births and

46. *Ibid* at 180-181.
47. See Porter, *supra* note 30 at 5.
48. See Kenneth J Rothman, "The Rise and Fall of Epidemiology, 1950–2000 A.D." (2007) 36:4 Intl J Epidemiology 708; *Births and Deaths Registration Act*, Hansard 1836, vol 35, cc79-89.
49. See Edward Higgs, "The Early Development of the General Register Office" (last visited 16 March 2022), online: *Online Historical Population Reports* <www.histpop.org/ohpr/servlet/View?path=Browse/Essays%20%28by%20kind%29&active=yes&mno=2002> [perma.cc/JNR9-XSG3].
50. See William Farr, "Causes of Death in England and Wales" (1840) 3 Annual Report of the Registrar General of Births, Deaths and Marriages in England 69.
51. "The 1848 Public Health Act" (last visited 16 March 2022), online: *UK Parliament* <www.parliament.uk/about/living-heritage/transformingsociety/towncountry/towns/tyne-and-wear-case-study/about-the-group/public-administration/the-1848-public-health-act/> [perma.cc/4FEE-KTSZ].
52. Porter, *supra* note 30 at 111.

deaths in England and Wales. In a similar vein, in Massachusetts in 1850, Lemuel Shattuck published a *Report of a General Plan for the Promotion of General and Public Health.* This report set out the need for improved vital statistics registration in Massachusetts in order to permit the kinds of analyses that Farr had undertaken in Great Britain.[53] Shattuck's intervention is also notable because it marked the integration of public health efforts by legislation in the United States, and because of his earlier work on a census in the Boston area, which was explicitly used as a model for the US census after 1850.[54]

By the late 1800s and early 1900s, public health and epidemiology started to coalesce into a field of study and practice. Notable events in the development of public health and epidemiology during this time include the formation of national and international public health organizations, such as the founding of the American Public Health Association in 1873.[55] The World Health Organization, though formally created in 1948, traces its roots to "the development in the mid-19th century of international health as a systematic area of regulation and action."[56] A series of international health conferences, which began in Western Europe in 1851, have been described as having created the institutional structure and international relationships which ultimately gave rise to the WHO.[57]

These organizational and institutional developments were accompanied by significant changes and advancements in ideologies, disciplines, and methods within the burgeoning fields of epidemiology and public health.[58] We now turn to a brief description of some notable tools employed in contemporary epidemiology and public health.

2. *Tools of contemporary epidemiology and public health*

Since the mid-20th century, the fields of epidemiology and public health have matured to the point that it is possible to describe some of the key tools of these disciplines. Of course, these fields are dynamic—meaning that tools and methods continue to evolve, and ideologies behind the fields remain sites of possible or actual contestation. This section seeks to set out, at a high level of abstraction, some of the key tools of contemporary

53. See "Lemuel Shattuck (1793–1859): Prophet of American Public Health" (1959) 49:5 American J Public Health 676.
54. For a discussion of developments in Europe, focussing on France, see Porter, *supra* note 30, ch 4 at 65-68.
55. See W Winkelstein J, "Epidemiologic Highlights of the Past with a Look Towards the Future" (2001) 22:1 J Public Health Policy 5.
56. Marcos Cueto, Theodore M Brown & Elizabeth Fee, *The World Health Organization: A History* (Cambridge, UK: Cambridge University Press, 2019) at 10.
57. *Ibid* at 10-24.
58. See generally Porter, *supra* note 30, ch 4-9, 11.

epidemiology and public health in order to advance discussion about potential similarities and differences when compared to justice epidemiology.

Some of the key methodological approaches in public health research include disease outbreak investigations, population surveillance, and research on intervention and prevention efficacy.[59] Within these methodological approaches, various tools and study designs are often employed, including randomized control trials ("RCTs"), observational studies, and qualitative studies.[60] Epidemiology, in turn, involves "descriptive and analytic methods that draw on statistical techniques for describing data and evaluating hypotheses, biological principles, and causal theory."[61]

Disease outbreak investigations are initiated in response to unexpected increases in disease incidence within a population or geographic area. Often, these investigations seek to identify the source of the disease, its mode of transmission within the population, and to outline risk factors for transmission that can help guide efforts to minimize or mitigate spread.[62]

Public health surveillance includes "the ongoing systematic collection, analysis, interpretation, and dissemination of health data."[63] This collection and analysis can inform and help direct action to respond to epidemics, to initiate vaccination programs, and to respond to health disparities among sub-populations.[64]

Research on intervention and prevention efficacy aims to establish whether, to what extent, and under what conditions a specific treatment or preventative program has an effect on health. These studies can include randomized control trials, in which participants are assigned—often unbeknownst to them or to the researchers—to either a treatment or control group, and then the effects of the treatment or control are evaluated. RCTs are often described as the "gold standard" in establishing treatment efficacy.[65] Where RCTs are not possible or desirable, other techniques and study designs, such as observational studies or realist models may be used.[66]

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59. See Donna F Stroup, C Kay Smith & Benedict I Truman, "Reporting the Methods Used in Public Health Research and Practice" (2017) 1:89 J Public Health Emergency 1 at 3-8.
60. *Ibid* at 5-6.
61. Merrill, *supra* note 39 at 4.
62. *Supra* note 59 at 3.
63. Merrill, s*upra* note 39 at 11-12.
64. *Ibid.*
65. See Deborah Lai et al, "Assessing the Quality of Randomization Methods in Randomized Control Trials" (2021) 9 Healthcare at 2.
66. See Stroup, Smith & Truman, *supra* note 49 at 4-6.

Within and in addition to all of these approaches, there are other important types of studies that may straddle or blur between these methods. For example, cohort studies, which track a group of participants who share some important characteristic over time, play an important role in epidemiology, but may be conducted as prospective or retrospective studies.[67] Twin studies have also provided significant insights by allowing researchers to discern differences in trait expression between siblings with identical or nearly identical genetic material.[68] In recent decades, systematic reviews or meta-analyses have played an increasingly important role in public health research by collecting and evaluating the quality of existing studies.[69]

3. *Normative commitments of contemporary epidemiology and public health*

Underlying the fields of epidemiology and public health are a series of normative commitments about what the goals of these disciplines are and how these goals should be achieved. In recent years, explicit attention to the normative commitments of epidemiology and public health has grown.[70]

The principles of beneficence, nonmaleficence, respect for autonomy, and justice have been identified as important norms of biomedicine that are relevant to public health.[71] Beneficence "requires that potential benefits to individuals and society be maximized and that potential harms be minimized."[72] Nonmaleficence "requires that harmful acts be avoided."[73] Respect for autonomy "focuses on the right of self-determination" and "entails freedom from external constraint and the presence of mental capacities needed for understanding and voluntary decision-making."[74] Principles of justice may include utilitarian approaches, which "emphasize

67. See Miquel Porta, *A Dictionary of Epidemiology* (New York: Oxford University Press, 2008) at 50.

68. See Robert Plomin & Denise Daniels, "Why Are Children in the Same Family So Different from One Another?" (2011) 40:3 Intl J Epidemiology 563.

69. See Hriday M Shah & Kevin C Chung, "Archie Cochrane and His Vision for Evidence-Based Medicine" (2009) 124:3 Plastic Reconstruction Surgery 982.

70. For example, the journal *Public Health Ethics*, which describes itself as "the first peer-reviewed international journal to focus on a systematic analysis of the moral problems in public health and preventive medicine" was founded in 2008: "Public Health Ethics: About the Journal" (last visited 16 March 2022), online: *Oxford Academic* <academic.oup.com/phe/pages/About> [perma.cc/P9H7-GAF6]. See also Dawson, *supra* note 35 at 2-4.

71. See Steven S Coughlin, "How Many Principles for Public Health Ethics?" (2008) 1 Open Public Health J 8 at 10.

72. *Ibid* at 5.

73. *Ibid* at 5.

74. *Ibid* at 5.

a mixture of criteria so that public utility is maximized," or egalitarian approaches which hold "that each person should share equally in the distribution of the potential benefits of public services," among others.[75]

The norms of public health are not settled and remain open to discussion and challenge. The list of possible principles, rules, and values that have been claimed to inhere in public health is long, and includes norms of public participation, procedural justice, confidentiality and protection of privacy, honesty, fidelity, transparency, effectiveness, efficiency, proportionality, social solidarity, necessity, and the precautionary principle.[76]

The scope and ambitions of justice epidemiology are where we now turn our attention.

III. *Justice epidemiology*

This background speaks to the importance of clearly outlining the normative commitments of a field like justice epidemiology. Before turning to examine the norms that should inform justice epidemiology, it is necessary to explain the concept of justice epidemiology.

1. *What is justice epidemiology?*

As noted in Part One, the history of engagement between law and public health stretches back at least one hundred years. In 1926, James A Tobey described public health law as "that branch of jurisprudence which treats of the application of common and statutory law to the principles of hygiene and sanitary science."[77] Although the field of public health law is difficult to precisely define, a leading description of the field identifies the core idea "that law is an essential tool for creating conditions to enable people to lead healthier and safer lives."[78] In this framing, law and legal tools are instrumental in serving the goals of public health. This framework has given rise to a growing set of approaches, studies, and academic literature which has contributed valuable insights into the relationship between legal institutions and public health. Yet this is a different framework than what I propose for justice epidemiology. After briefly describing some recent public health law concepts, I will distinguish these from the concept of justice epidemiology that I seek to advance in this paper.

Scott Burris and colleagues have described an emerging transdisciplinary approach in law and public health that they have named "legal epidemiology."[79] They describe this developing field as "the

75. *Ibid* at 11.
76. *Ibid* at 13-15.
77. Quoted in Gostin, Wiley & Frieden, *supra* note 31 at 3.
78. *Ibid* at 4.
79. See Scott Burris et al, "A Transdisciplinary Approach to Public Health Law: The Emerging

scientific study and deployment of law as a factor in the cause, distribution, and prevention of disease and injury in a population."[80]

Legal epidemiology has three components, which Burris and colleagues describe as "legal prevention and control," "legal etiology," and "policy surveillance."[81] The first of these describes efforts to understand and apply laws and legal practices to improve public health, while the second describes the study of laws and legal practices which cause disease and injury.[82] Policy surveillance refers to "the ongoing, systematic collection, analysis, and dissemination of information about laws and other policies of importance to health."[83]

Another noteworthy approach is Wendy Parmet's "population-based legal analysis."[84] Parmet has described this as "an approach to legal reasoning, analysis, and decision making that is inspired by the vision of *salus populi* [the well-being of the community]."[85] This is a thick conception of interdisciplinarity which "situates public health's norms, perspectives, and methodologies within law and uses that approach to describe and critique the law, as it relates both to matters that proximally affect public health and those that do not."[86] There is much to admire in Parmet's detailed attention to how to engage in interdisciplinary study well, by being attentive to and working through the normative commitments of each discipline when working in an interdisciplinary way. Further, Parmet's suggestion that "the protection of population health [is] a goal or value that is embedded within the legal system" is a compelling and vital impetus for creative expansion of further interdisciplinary work between law and public health.[87]

Yet another notable call for integration of access to justice and public health is that of Hazel Genn.[88] Genn has argued that legal services can play an important role in mitigating "many of the socio-economic determinants that disproportionately impact the health of low income and vulnerable

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Practice of Legal Epidemiology" (2016) 37 Annual Rev Public Health 135.

80. *Ibid* at 139.

81. *Ibid.*

82. *Ibid.*

83. *Ibid*.

84. See Wendy E Parmet, "Population-Based Legal Analysis: Bridging the Interdisciplinary Chasm Through Public Health in Law" (2016) 66:1 J Legal Education 100 [Parmet, "Population-Based Legal Analysis"].

85. Wendy E Parmet, *Populations, Public Health & the Law* (Washington, DC: Georgetown University Press, 2009) at 267.

86. Parmet, "Population-Based Legal Analysis," *supra* note 84 at 104.

87. *Ibid* at 105.

88. See Hazel Genn, "When Law Is Good for Your Health: Mitigating the Social Determinants of Health Through Access to Justice" (2019) 71:1 Current Leg Probs 159.

groups."[89] This "bidirectional link" between law and health, between access to justice and public health equity, calls for increased use of "health justice partnerships" or "medical-legal partnerships."[90] Genn describes these partnerships as forms of grass roots service innovation that "broadly describes collaboration between legal and health professionals in which access to free legal support is provided in health settings to disadvantaged and vulnerable patients to address legal needs that can create and exacerbate mental and physical health problems."[91] Genn further calls for increased high-quality research on health justice partnerships in order to better understand "the most effective models of partnership and integration, and the impact of integrated services on a wide range of outcomes."[92]

There is much to admire in the proposals by Burris and colleagues, Parmet, and Genn. But the aim of this paper differs slightly from these proposals. I conceive of justice epidemiology as a broad, interdisciplinary effort to understand the incidence and distribution of *justice problems* in the population, and to understand and improve resources and practices to respond to those problems.

This perspective differs from Burris and colleagues, Parmet, and Genn in that the analysis of law and legal services does not depend on health outcomes. While there is growing evidence that access to justice problems are deeply connected to adverse health outcomes, I argue that access to justice should be understood as valuable in its own right, notwithstanding health outcomes.[93] In this conception, justice epidemiology looks to public health and epidemiology for ideas and inspiration to understand things like population-level outcomes, causation, and how to evaluate policy changes. But justice epidemiology seeks to develop a new field similar to public health and epidemiology; one that emerges from the substrate of law and justice norms and practices.

This requires some definition of what justice problems entail. Here, I use a broad definition. I consider a justice problem to be any situation where a person could use a legal tool (including legal information, a legal concept, or a court case) to improve their subjective well-being but does not do so for reasons including being unaware of those legal tools, being unable to afford those legal tools, or being uncomfortable using those legal tools.

89. *Ibid* at 161.
90. *Ibid* at 184.
91. *Ibid* at 186.
92. *Ibid* at 192.
93. *Ibid*. For discussion of the connection between law and health, see 162-164.

What this conception of justice epidemiology offers is a coherent way to think about understanding and tracking justice problems across the population over time. Developing this field will require exploring ways of thinking about justice problems that are different from current models. Just as early public health research contributed to the germ theory of disease, justice epidemiology research may give rise to novel ways of thinking about justice problems, causation, and other facets of justice and the legal system.[94]

This is admittedly a bold and significant challenge for future research endeavours. As Burris et al have noted, speaking about their concept of legal etiology, "…moving the evidence base from association to causation, and from the proximal to the upstream, is a huge challenge."[95] Though this in itself is no reason to discount the value of the endeavour. Further, as the following section details, many of the tools of justice epidemiology either already exist or could be accomplished with current knowledge.

2. *Tools of justice epidemiology*

How could a field of justice epidemiology accomplish the goals of understanding the incidence and distribution of justice problems in the population, and understanding and improving resources and practices to respond to those problems? The methods employed in public health and epidemiology offer a plausible framework within which to conceptualize how this could be done. Further, many of these tools of justice epidemiology already exist and are in use to varying degrees. What is needed is a coherent structure under which to unite them. This is what justice epidemiology offers.

Population surveillance is one of the tools already in existence. As noted above, surveillance is an indispensable part of public health and epidemiology. Imagining why surveillance is important in a legal epidemiology context, Burris et al argue that "[i]f law matters to health, policy makers, officials, and the public need basic information about what law requires and where it applies, a process known as policy surveillance."[96] While there are some examples of surveillance methods applied in a legal context, these are relatively few. British Columbia's Provincial Court provides a positive example of a court which gathers and reports comparatively comprehensive information about things like

94. For a discussion of public health and germ theory of disease, see Theordore H Tulchinsky & Elena A Varavikova, "A History of Public Health" (2014) New Public Health 1.
95. Burris et al, *supra* note 79 at 140-141.
96. *Ibid* at 141.

self-represented appearances in court.[97] Another positive example is British Columbia's Civil Resolution Tribunal, which tracks and reports data on how its processes are being used with a much higher degree of granularity and transparency than most other courts or tribunals.[98] While most courts and tribunals in Canada have developed some means of tracking court-related data, the methods and goals of those efforts remain largely uncoordinated, and the data generated is largely inaccessible to those outside of the court or tribunal itself.[99] Moreover, the purposes of those data-gathering efforts are often directed at process improvement and funding justification for existing systems, rather than assessing whether new systems may be helpful.

What justice epidemiology needs is more than simply system-focused surveillance—it needs regular collection of information about how people throughout the population are affected by and respond to justice problems. This type of research has been conducted in recent years by several unmet legal needs surveys that have been carried out in Canada.[100] However, as sophisticated as they have been, these surveillance efforts have been carried out without a commitment to regularly revisit the field work using a consistent methodology. In addition, this data has not always been readily available for other researchers to conduct further analysis. This may soon change, since Statistics Canada has, for the first time, begun to include unmet legal needs surveillance among its research products.[101] Further, some international examples have begun to emerge of ongoing population-level surveillance initiatives.[102]

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97. "Court Reports" (last visited 16 March 2022), online: *Provincial Court of British Columbia* <www.provincialcourt.bc.ca/news-reports/court-reports> [perma.cc/GH9J-HSDM].

98. See Shannon Salter & Darin Thompson, "Public-Centered Civil Justice Redesign: A Case Study of the British Columbia Civil Resolution Tribunal" (2016–2017) 3 McGill J Dispute Resolution 113 at 135; Civil Resolution Tribunal, "2020/2021 Annual Report" (2021), online (pdf): *Civil Resolution Tribunal* < civilresolutionbc.ca> [perma.cc/ZS7R-YLLZ].

99. See e.g. Margaret Hagan, Jameson Dempsey & Jorge Gabriel Jimenez, "A Data Commons for Law, Part 1" (1 April 2019), online (blog): *Medium* <www.medium.com/legal-design-and-innovation/a-data-commons-for-law-60e4c4ad9340> [perma.cc/YNB8-A5LY]; "Justice Metrics Colloquium" (2020) at 4, online (pdf): *Justice Metrics Colloquium* <www.static1.squarespace.com/static/5532e526e4b097f30807e54d/t/5ef4067dafc08b727c334378/1593050753689/Data+Colloquium+2020+-+Final+Report.pdf> [perma.cc/6L7J-89QK]; Measurement Working Group, "Access to Justice Measurement Framework" (2018), online (pdf): *Access to Justice BC* <www.ajrndotco.files.wordpress.com/2018/03/a2jbc-measurementframework.pdf> [perma.cc/SQ4R-937F].

100. See e.g. DOJ, "Legal Problems," *supra* note 3; Farrow et al, *supra* note 3.

101. Statistics Canada, *Experiences of Serious Problems of Disputes in the Canadian Provinces, 2021*, by Laura Savage & Susan McDonald, Catalogue No 85-002-X (Ottawa: Statistics Canada, 18 January 2022).

102. See e.g. "Global Insights on Access to Justice: Findings from the World Justice Project General Population Poll in 101 Countries" (2019), online (pdf): *World Justice Project* <www.

The importance of ongoing, high-quality population surveillance for justice epidemiology and evidence-based policy development is hard to overstate. Further, this has important implications for issues of justice and equity. The current absence of demographic data about, for example, who uses court processes and who does not, presents a barrier to understanding and responding to access to justice problems. As the British Columbia Human Rights Commissioner has noted, there are "many examples of how the failure to collect disaggregated data perpetuated systemic inequality."[103]

Another important tool of justice epidemiology is the assessment of intervention efficacy. This involves prospective studies of whether different types of interventions affect specific outcomes. While there are relatively few examples of these types of studies in legal matters, they do exist.[104] Further, the Harvard Access to Justice Lab has, in recent years, pioneered randomized control trial studies in justice matters.[105]

There has also been some research which tracks the effects of innovative models of providing legal services on those who engage with those models.[106] This work is valuable and could be complemented by other techniques commonly used in public health and epidemiology, such as cohort studies, to understand the longer-term outcomes of justice problems and of different types of responses to justice problems.

While these examples suggest that the tools of justice epidemiology already exist, it is important not to underestimate the magnitude of change necessary to properly give effect to justice epidemiology. As Burris et al have noted in the context of legal epidemiology, this requires changes in how lawyers, researchers, and institutions approach their work.[107] This also requires investment from research funders, since this type of research

worldjusticeproject.org/sites/default/files/documents/WJP-A2J-2019.pdf> [perma.cc/MQE2-HV6K].

103. *Disaggregated Demographic Data Collection in British Columbia: The Grandmother Perspective* (Vancouver: British Columbia's Office of the Human Rights Commissioner, September 2020) [BCHRC, *The Grandmother Perspective*] at 28.

104. See e.g. D James Greiner & Cassandra Wolos Pattanayak, "Randomized Evaluation in Legal Assistance: What Difference Does Representation (Offer and Actual Use) Make?" (2011) 121 Yale LJ 2118; D James Greiner, Cassandra Wolos Pattanayak & Jonathan Philip Hennessy, "The Limits of Unbundled Legal Assistance: A Randomized Study in a Massachusetts District Court and Prospects for the Future" (2013) 126:4 Harv L Rev 901; Seron et al, "The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City's Housing Court: Results of a Randomized Experiment" (2001) 35:2 Law & Soc'y Rev 419.

105. "A2J Lab: About" (last visited 16 March 2022), online: *A2J Lab* <www.a2jlab.org/about/> [perma.cc/PDS6-9EEA].

106. See Ab Currie & Brandon D Steward, "The Unintended Benefits of Innovation: The Legal Health Check-Up Revisited" (2020), online (pdf): *Canadian Forum on Civil Justice* <cfcj-fcjc.org/wp-content/uploads/The-Unintended-Benefits-of-Innovation-Ab-Currie-and-Brandon-Stewart.pdf> [perma.cc/X5RQ-AN8P].

107. Burris et al, *supra* note 79 at 141-142.

"remains too low a priority among research funders."[108] The topic of funding and leading the changes required for justice epidemiology will be dealt with near the end of this paper, but the next section considers some of the norms that should pervade justice epidemiology.

3. *Norms of justice epidemiology*

What are the norms that should inhere in justice epidemiology? This question is important, and this importance is reinforced by considering public health. The norms of public health have not always been benign and have resulted in significant harm. To illustrate this point, Martin Pernick has traced the twin histories of public health and eugenics in the United States, noting that "American public health and eugenics had much in common," though the "complex relationship between them has not often been studied."[109] Pernick attributes this troubling overlap between public health and eugenics to a problem of "bad values," noting that "[p]ast eugenics and public health included values most thoughtful people now consider anathema."[110]

As Robyn Martin has written, in the 19th and early 20th centuries public health embraced values of utilitarianism and communitarianism without significant regard to individual outcomes:

> Public health was utilitarian in that it operated to achieve the greatest good for the greatest number, and was not particularly concerned with the health consequences for individuals. It was communitarian in that it assumed that rights and privileges of the individual could be sacrificed if it was necessary to do so for the public good.[111]

These values owed in no small part to the focus, in both public health and eugenics, on population-level concerns instead of individual patients.[112] While ethics in clinical medical practice have been "primarily based in a Kantian-influenced respect-for-persons view, in which principles like autonomy, truth-telling, confidentiality, informed consent, and other individual-centred, individual-respecting principles are central," public health has been rooted in "a far more utilitarian, population-based, 'good-of-the-whole' ethical view."[113]

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108. *Ibid* at 143.
109. MS Pernick, "Eugenics and Public Health in American History" (1997) 87:11 American J Public Health 1767 at 1767.
110. *Ibid* at 1770.
111. Robyn Martin, "The Role of Law in Public Health" in Dawson, *supra* note 35 at 13.
112. Paul Lombardo, "Eugenics and Public Health: Historical Connections and Ethical Implications" in Anna C Mastroianna, Jeffrey P Kahn & Nancy E Kass, eds, *The Oxford Handbook of Public Health Ethics* (New York: Oxford University Press, 2019) 642 at 644.
113. Leslie P Francis et al, "Closing the Book on Infectious Disease: The Mischievous Consequences

The effects of these early normative commitments cannot be disregarded and consigned to the past. Untrammeled and misguided utilitarian values pervaded many health laws passed in the 19th and early 20th centuries, such as laws requiring testing before marriage, proscribing interracial marriage, and authorizing forced sterilization.[114] As such, they cast a long shadow, which continues to the present.[115] Even more insidiously, some of the values which animated eugenics and early public health approaches continue to play a role in contemporary discourse. As Paul Lombardo has argued, many in public health still accept some of the basic premises underlying the eugenics movement:

> While many people involved with genetic science or public health eventually rejected the class and racial bigotry and the repressive state measures that came to characterize the public eugenics movement in the United States, most did not reject the basic premise of eugenics: that efficient prevention of social problems was a necessary condition for social progress.[116]

These examples of connections between public health and eugenics point to the importance of being both explicit and careful in defining a discipline's normative commitments. Accordingly, the recent increased focus on the ethics of public health is welcome.[117] Lombardo notes how the discipline is still susceptible to prejudicial thinking:

> …we have not outgrown interethnic bigotry, and we still see regular evidence that contempt for the poor, the sick, or those with disabilities is part of our public moral landscape. We would be well advised also to remember that the same sentiments exist today that motivated people earlier in the twentieth century to use science and the power of public health to segregate themselves from the diseased and the different, and

for Bioethics and for Public Health" in Dawson, *supra* note 35at 164.

114. Lombardo, *supra* note 112 at 646.

115. See Canada, Standing Senate Committee on Human Rights, *Forced and Coerced Sterilization of Persons in Canada* (June 2021) (The Honourable Salma Ataullahjan), online (pdf): <publications.gc.ca/collections/collection_2021/sen/yc32-0/YC32-0-432-3-eng.pdf> [perma.cc/Y59N-VXHE]. The committee noted that "the horrific practice of forced and coerced sterilization continues to occur, underreported, and disproportionately affecting Indigenous women and other vulnerable and marginalized groups in Canada" (*ibid* at 8).

116. Lombardo, *supra* note 112 at 644.

117. Canadian Institutes of Health Research – Institute of Population and Public Health, *Population and Public Health Ethics: Cases from Research, Policy, and Practice* (Toronto: University of Toronto Joint Centre for Bioethics, 2012); "Public Health Ethics Framework: A Guide for Use in Response to the COVID-19 Pandemic in Canada" (last modified 16 February 2021), online: *Government of Canada* <www.canada.ca/en/public-health/services/diseases/2019-novel-coronavirus-infection/canadas-reponse/ethics-framework-guide-use-response-covid-19-pandemic.html> [perma.cc/MP6G-RWPT].

> to argue that such separation would improve the lot of human beings.[118]

This reminder is especially important when seeking to set out a new field or discipline, such as justice epidemiology. A complete normative framework cannot be fully crafted within the confines of this single paper, if at all. But identifying some high-level norms will help to define how I conceive of justice epidemiology. In particular, I suggest three norms that should form a core part of justice epidemiology: (1) respect for human dignity; (2) emphasis on person-centred justice; and (3) the grandmother perspective for data gathering and use.

Jeremy Waldron has described a norm inherent in the common law system that is an effective countervailing power to utilitarian tendencies. Waldron notes that, at least in common law systems, law (in the form of court decisions) is particularly concerned with the parties to a particular dispute, and with resolving that dispute by reference to the relevant context of those particular parties, rather than in an abstract or general manner. As Waldron puts it, the adversarial system is inherently individualistic:

> we do think it scrupulously important in law to get the issue focused in a way that is particularly attentive to what the parties…have at stake in the matter. It is not enough to get the choice right as between policy X and policy Y: we must get it right so far as its distinctive bearing on these two litigants concerned.[119]

Waldron has elsewhere linked contemporary notions of law with the concept of universal human dignity, which in itself can amount to a buttress against utilitarian tendencies.[120] Some recognition of this notion, that law necessarily has regard to the dignity and context of the people particularly before it, seems an important norm to include in justice epidemiology, in order to ensure that steps taken in the name of justice epidemiology do not have the effect of diminishing law's particular concern for the specific people who interact with it.

Drawing on this concern, justice epidemiology should also embrace a norm of pursing person-centred justice. This norm has been described elsewhere, and so its implications for justice epidemiology will be described

118. Lombardo, *supra* note 112 at 651.

119. Jeremy Waldon, "Does Law Promise Justice?" (2001) 17 Ga St U L Rev 759 at 777-778.

120. See Waldron et al, *Dignity, Rank, and Rights* (Oxford: Oxford University Press, 2012). At 57, Waldron writes: "I think it is part of our modern notion of law that almost all such gross status differences have been abandoned (though there are relics here and there). We have adopted the idea of a single-status system, evolving a more or less universal status—a more or less universal legal dignity—that entitles everyone to something like the treatment before law that was previously confined to high-status individuals."

only briefly here.[121] A norm of person-centred justice entails ensuring that the focus of all enquiries are on the people who actually experience justice problems, rather than on the system itself. System-oriented data and analysis may be appropriate, but only where that data and analysis is itself directly aimed at improving the experiences of people who interact with the justice system. In that sense, system-oriented investigations are inevitably second-order studies that should be engaged in either when person-oriented investigations are impossible or inappropriate, or when those second-order studies contribute to improving person-centred justice. It may also imply shifting the unit of analysis for access to justice studies away from legal cases wherever possible, and making the default unit of analysis the person.

A third norm that should inform justice epidemiology, and one that is consonant with the two already mentioned, relates to how data should be gathered and used. The "grandmother perspective" is described by Gwen Phillips of the Ktunaxa Nation in a 2020 report of the British Columbia Human Rights Commissioner[122] as "centred on the importance of relationship: a reimagining of the community relationships within which data collection occurs and a primacy given to those relationships as both process and product as governments and organizations move toward data collection to address systemic inequities."[123] The principle draws on ideas of "care not control" over others, and has been summarized as embodying the notion that "[w]e need to know because we care."[124] In this way, data gathering and use is understood as relational, with the process of gathering and using data defined as a "[r]espectful relationship grounded in community governance."[125]

While other norms will undoubtedly inform justice epidemiology, these three—respect for human dignity, emphasis on person-centred justice, and the grandmother principle for data gathering and use—provide a counter-utilitarian bulwark to ensure that justice epidemiology proceeds in a socially acceptable manner. Other norms that should be discussed include those currently found in public health, such as beneficence, nonmaleficence, respect for autonomy, and justice. Further, the relationship between the norms of justice epidemiology and some of the norms of

121. See Andrew Pilliar, "Filling the Normative Hole at the Centre of Access to Justice: Toward a Person-Centred Conception" (2022) 55:1 UBC L Rev 149.
122. BCHRC, *The Grandmother Perspective*, *supra* note 103.
123. *Ibid* at 14.
124. *Ibid* at 14, 24.
125. *Ibid* at 24.

the legal system, such as the importance of the rule of law and judicial independence, should most certainly be considered.

Conclusion

This paper has presented a path to the future for the legal system. The concept of justice epidemiology offers a coherent framework within which to cultivate a series of new approaches to justice problems, in hopes of providing a robust field of research and evidence from which to generate policy and policy reform initiatives related to law and justice.

While this paper has provided an overview of justice epidemiology, more work is certainly needed to elaborate the norms of the field and to move ahead by using some of the tools described above. This is important further work, but there are no obvious conceptual reasons why this work should not go ahead. That is, there appear to be no "tricky issues" to figure out before moving ahead with the work itself.

The major obstacle for justice epidemiology, as with many new initiatives, is finding some one or some institution to champion this idea and move it ahead. This requires more than belief: it requires resources, commitment, and organizing. And of course, the absence of such support is often where good ideas die.

In closing, I make a plea for where that support could come from. Responsibility for justice epidemiology could rest in academia, with researchers from law schools and other disciplines coming together, convincing funders that there are useful research questions to ask, and trying to develop capacity and connections within universities to realize the promise of justice epidemiology. This is certainly a plausible path forward. But there is another, more radical, though arguably more promising path. Justice epidemiology could be taken up and championed by the judicial branch. To the extent that the judiciary is properly concerned with the mechanisms of the legal system, how the system functions, and ensuring that the system is not abused or allowed to atrophy, members of the judiciary should be and are rightly concerned about the state of access to justice in Canada.[126] Yet the judicial branch of government, unique among the three classic branches, has almost no capacity to assess and measure its place in society and to generate evidence regarding how the public

126. See e.g. The Right Honourable Richard Wagner, "Access to Justice: A Societal Imperative" (Address delivered at the 7th Annual Pro Bono Conference, Vancouver, 4 October 2018), online: *Supreme Court of Canada* <www.scc-csc.ca/judges-juges/spe-dis/rw-2018-10-04-eng.aspx> [perma.cc/EG38-JABL]; The Right Honourable Beverley McLachlin, "The Challenges We Face" (Address delivered at the Empire Club of Canada, Toronto, 8 March 2007), online: *Supreme Court of Canada* <www.scc-csc.ca/judges-juges/spe-dis/bm-2007-03-08-eng.aspx> [perma.cc/3VB2-T8PJ].

regards the legal system. As custodians of the justice system, the judicial branch is arguably uniquely placed to design and implement a type of non-political civil service dedicated to the safekeeping and continuous improvement of the legal system. If understood as part of the judicial role, funding for such measures could be realized as a necessary correlate of judicial independence.

This suggestion may seem ambitious. But having seen the indispensable nature of public health and epidemiology writ large around the world during the COVID-19 pandemic, there are strong reasons to desire something similar in the fields of justice in order to improve problems of access to justice. Looking back from 50 years in the future, will justice epidemiology be part of the legal landscape?