

Episode: Ethics Talk Videocast Transcript – COVID-19 in US Detention Camps

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TIM HOFF: Welcome to *Ethics Talk*, the *American Medical Association Journal of Ethics* podcast on ethics in health and health care. I'm your host, Tim Hoff. This episode is an audio version of a video interview conducted by the journal's editor in chief, Dr Audiey Kao, with Professor Holly Cooper. Professor Cooper is Co-Director of the Immigration Law Clinic at the University of California Davis School of Law. She joined us to talk about the dangerous living conditions for children and adults in U.S. immigration detention facilities. To watch the full video interview, head to our site, JournalofEthics.org, or visit our [YouTube channel](#).

DR AUDIEY KAO: Hello, Professor Cooper. Thank you for being a guest on *Ethics Talk* today. [music fades out]

DR HOLLY COOPER: Thank you for having me. I appreciate being here.

KAO: So, citing spread of the coronavirus, U.S. District Judge Dolly Gee recently ordered that all children in U.S. Immigration and Customs Enforcement, or ICE, custody for more than 20 days must be released by July 17th. This judicial order cited failures by the government to comply with CDC guidelines and provide basic health protections for children and their families amid the COVID-19 pandemic. As one of the lead attorneys representing the plaintiffs in this case, you've been quoted as saying that you, "Hope ICE does the humane thing and not separate any child from their parents because that's what the children want, and that's what the parents want." Can you describe the failures cited by the judge in making her decision? And given this judicial decision, what are the actual and potential consequences for all those currently in detention at U.S. facilities?

COOPER: Right. So, I think it's important to remember that children in the United States are held in three different forms of immigration custody. One of them is Customs Border Patrol. One of them is ICE. ICE can actually maintain custody only of a family unit of children and parents who are together. And then there's the Department of Health and Human Services, which detains the most children, which is run by the Office of Refugee Resettlement. So, Judge Gee's order dealt with one of those entities with respect to the portion you're quoting. We've sued on all three types of conditions for children, but the July 17th order to release children who are together with their parents, that's what you're referring to. And so, Judge Gee in her order has found that those conditions inside of what are called the Family Detention Facilities violate the contract that we defend, which is called the Flores Settlement agreement. You must maintain safe and sanitary conditions, and you also must hold children in the least restrictive environment. And if they're held in a prison-like condition, the maximum time they can be held is 20 days. So, her order specifically targets the children who are held with the parents.

The issue becomes, with the federal government, is they don't want to release the parents. Our settlement agreement only protects the interests of children. So, while we can get an

order saying children must be released by July 17th, we cannot get the same, the flip side of the coin is, we cannot get that order for parents because the settlement agreement does not protect their interests. Even though Judge Gee found two years ago that it did, she was overruled by the appeals court because the federal government fought that ruling. So, she sided with us initially, but unfortunately, she was overruled.

So, the question becomes, ICE can release both parent and child together at any time. They just refuse to do so. So, now we have this order that children must be released, and what we're hoping is that ICE will use its humane powers to release the parent and child together. And so, that's what the big question, the dark cloud of this order is, is that we don't know what the federal government's going to do: if they're going to separate the children again, which nobody wants, or whether they're going to do the humane thing and release the parent and the child together.

KAO: Right. So, as you just noted, the judge's order essentially requires ICE to adhere to the 1997 Flores Settlement agreement that sets standards for the treatment and release of detained immigrant children, a settlement that Trump administration has been trying to terminate in the last two years. As opposed to case law grounded in Flores, it's my understanding that the U.S. is the only member country that has not ratified the UN Convention on the Rights of the Child. Can you help our audience better understand the legal landscape as it relates to the fate of the Flores agreement and ultimately, governmental accountability in how immigrants, children or adults are treated?

COOPER: Yes. I mean, one of the basic tenets of the Convention of the Rights of the child is that no child should be held in a prison-like condition, right? But here in this country, we detain and imprison more people than anywhere else in the world, right? And it's unprecedented, the number of people in non-criminal custody, in immigration custody. So, we have this economic system in some ways, too, is based upon the privatization of this prison industry. And most children are either held in private prisons or in non-governmental contractors, also house and warehouse the children.

So, what the Flores Settlement did was it provided this really basic, minimum standards of care that are required inside of these facilities, and it requires that they be safe and sanitary. So, one of the things the government really does not like is third-party oversight. They have to let me in. Any facility with no notice, they have to let us come in and inspect and speak to the children. And what the government doesn't like about that is that we're able to come to the people, to the courts and bring a truth. Like last summer, for example, we were able to witness children who were on the verge of dying, malnourishment, overcrowded cages, crying, separated from parents. The conditions that we're able to witness as third-party overseers has really, really rubbed the government the wrong way. And so, they've sought to terminate the settlement agreement because they do not like third-party oversight.

KAO: Right.

COOPER: And they also feel like it is a magnet of migration. That if parents and children know that they're going to be housed in safe and sanitary conditions and that they have to be released within 20 days, that it's going to bring migration to the United States. All of the studies that we have done running the data show that there's no, the Flores Settlement agreement, has no effect on migration patterns. What's really drawing migration is human rights and the economic situation in a country. So, the government has sought to terminate this agreement. Judge Gee refused to terminate it, saying that, no, there are no change

circumstances that should allow me to terminate this agreement. In fact, you keep violating it. So, I want to keep it intact.

KAO: Right.

COOPER: So, the government tried to draft rules that would eliminate the need for it. But the rules that they published allow indefinite detention of children and parents together. It would essentially create a second internment camp situation in our country, which we're all legally and morally opposed to, hopefully. And so, now that's on appeal with the Ninth Circuit Court of Appeals. And we're waiting for a decision to this day about whether the Flores Settlement agreement will survive. So, it's interesting times, and we're hopeful that we'll win on appeal.

KAO: Yeah. Now you just mentioned a moment ago that the Flores agreement is not the quote-unquote "magnet" that some people are espousing. And the reasons why people come, one of the reasons why people flee their home countries is because of human rights abuses that they're being subjected to.

So, another court decision, this time from the U.S. Supreme Court, sided with the Trump administration's efforts to speed the deportation of asylum seekers. According to this decision, Congress was entitled to respond to this crisis by enacting a law that limited the role federal courts may play in reviewing summary determinations of whether asylum seekers face a credible fear of persecution would they return to their home countries. What are the ramifications of this court decision on the status of detainees held at U.S. facilities and our country's immigration policy as a whole?

COOPER: Well, it was the decision by the Supreme Court. Thuraissigiam was a Sri Lankan individual who was coming to this country, arrived at our border. And under our laws, when people arrive at the border and they're caught within 100 miles, they're put into a fast-track deportation process called expedited removal. And in this fast-track process, an asylum officer screens you for what's called a credible fear of persecution. If they believe you have a credible fear, then you're allowed to proceed with your asylum case. It's just an initial screening. But if you're not, then you're summarily deported, right? And this could be very dangerous. Because what the Trump administration has essentially done is eliminated asylum. They've attacked all the different bases upon which one can get asylum, whether it be somebody's social group, their family unit, whether it be domestic violence. Many of the claims that we used to defend in court are no longer viable. And so, at the screening phase, most people are not passing anymore. And so, they're summarily deported either to Sri Lanka, Haiti, to Central America, China. And it's very dangerous because this court decision allowed for no external review of that.

And so, what we're seeing is that the Supreme Court, including some of our favorites, like Justice Ginsburg, unfortunately found that people who are arriving at the border are not protected by the U.S. Constitution. And in order to arrive at this very horrible constitutional conclusion, the Supreme Court had to go back into some of the discriminatory cases against Chinese immigrants in this country. So, if you read the decision, it's really a blockbuster blow to the rights of immigrants rooted in discriminatory case law. And so, some of the lawyers I know who worked on the case said that they felt sick reading the case. So, what this case does is it eliminates for our third branch of government, the judicial branch, to review the legality of these decisions at the border. Some of us call it the constitutional free zone, which is where the immigrants arriving at the border have almost no constitutional protections now. So, we were very disappointed in the decision.

And the blowback it's going to have is that immigrants are going to arrive here. And that first adjudicator, who oftentimes can even be a Border Patrol officer, is going to be screening this person on whether they believe their life is in danger or not. It's a very dangerous situation that we put our nation's immigrants in. And unfortunately, it's going to be very difficult to get an actual judge to review that now.

KAO: Yeah, it's interesting reflecting what you just said about the three branches, and the checks and balances that make our government work and function seems to be missing in this situation.

COOPER: Mhmm. Yeah. So, I think, unfortunately, that we're seeing a real regression of rights. And for the most part, the judicial branch has been the one piece of the government that has been able to keep in balance this overreach of executive power. But right now we're seeing with this decision [inaudible] affect immigrants arriving at the border. We're going to see much more limited constitutional protections of those individuals, which unfortunately goes back to a lot of this nation's history, is sort of this otherness, this gradation of constitutional protections.

KAO: Yeah.

COOPER: And the fallout's going to be on people of color and immigrants in creating this otherness that we hopefully historically were climbing out of, but now we're climbing back into some of the Chinese Exclusion Act discriminatory basis. If you read the decision, you'll see that they had to go back in time and pull out those decisions to justify their actions.

KAO: Yeah.

COOPER: So, we're very disappointed in that decision. It wasn't my case. But it impacts...but I care about it. [chuckles]

KAO: Sure. Right. So, switching gears a little bit, in January 2019, the *AMA Journal of Ethics* published an article on an April 2018 Flores Settlement suit where the court found that the federal government breached its obligations by misusing psychotropic medications on children. In July 2019, Acting Inspector General of the Department of Homeland Security, or DHS, issued a report on U.S. Border Patrol facilities and ports of entry across the Rio Grande Valley in Texas. The acting IG was, quote-unquote, "Concerned that overcrowding and prolonged detention represented an immediate risk to the health and safety of DHS agents and officers and to those detained." And that was before the current pandemic hit. According to recent reporting, about 2,500 immigrants in ICE detention have tested positive for the coronavirus. And there have been both detainees as well as people working in these detention facilities who have died from SARS-CoV-2. So, beyond the legal remedies to minimize future harms, what do you think should be the role of health professions, both practitioners and policymakers, in protecting the health and safety of all those in U.S. detention facilities?

COOPER: That's a great question. Some of our biggest allies in this battle have been medical professionals. One of the things that's notable about the Flores Settlement agreement is last summer, during the squalid conditions and overcrowding of children, we had a court appoint Judge Gee, Dolly Gee, appointed a medical monitor. Because I think she was like, well, I can sit here in this court and just hear these cases one after the other. But what really needs to happen is that the Border Patrol and the federal government

needs to sit down with medical professionals who understand the dynamics of disease prevention. Because at that time, we had kids dying of the flu. I think there were eight notable deaths that made the press, very tragic situations, and one near death. So, she, now we have Dr Paul Wise at Stanford University who actually goes into the facilities and inspects them for medical compliance and makes recommendations to the court, which is very useful to us, very useful to the court, to have this sort of external medical review of the conditions. Because when I walk in, I don't know. I'm not a medical expert, so I won't know what is more conducive to a contagion other than the obvious, like there's not access to clean water or hand soap.

But some of, the other part of the question, too, is about our lawsuit with respect to administration of psychotropics. Obviously, when you take a child and you put them into a detention facility and you separate them not only from parents, right, but a lot of children migrate with siblings.

KAO: Right.

COOPER: Some children migrate with cousins. When you take apart that parental unit, you're creating inordinate trauma on the child's development. And so, a lot of children were having mental health breakdowns, and they were therefore being sent off to psychiatric centers and administered very dangerous psychotropic medication when there was no parental oversight to that. So, we challenged that. Judge Gee agreed with us that there have to be safety mechanisms in place when you're looking at like an eight year old, a 14 year old, whatever the age, and you're administering very, very dangerous psychotropic drugs. And so, either has to be a medical guardian brought into the process, or there has to be some type of parental consent if the parent is available.

What can medical professionals do? A lot of times when I speak to medical professionals who are providing the services, sometimes they feel uncomfortable that the child isn't consenting. I've had many conversations, some conversations, with medical providers. They can also become whistleblowers. A lot of the calls, sometimes the calls we receive are from medical professionals who are concerned, whether it be doctors or nurses, are concerned about the practices within some of these detention facilities. And there are whistleblower protections. People can call us. They can call journalists. But there should be some protections.

I think in my mind, just as a lawyer, my duty is to my client first and foremost, unless they want me to do something that's unethical or illegal. And the doctors, it's the same way. When you see something that compromises the health and safety or the mental well-being, then I think you need to speak up, and many doctors have. And you can also, there's other ways. If you're not involved with the children, providing services inside of the facilities, is you can volunteer with a non-profit to be an expert witness. We have different experts from the medical community all the time. And it's probably one of the primary reasons we're able to win the cases, is we're able to document the trauma of detention. And even during the pandemic, we've gotten the release of many detainees because of medical experts who talk about the health and safety being in congregate care detention facilities during a pandemic.

So, there's just so many different ways the medical community and the legal community can work together. And it's been just an indispensable relationship as far as protecting the rights of not just children and immigrants, but all immigrants and even prisoners, for that matter, where we're seeing the cases flare up. Like in San Quentin, I think there's over

1,200 positive COVID-19 cases, right? It impacts our communities, our medical resources when there's just a massive super-spreader outbreak like in the prison system.

KAO: Yeah. So, as we're nearing the end of our interview, I just wanted to follow up some things you just mentioned. You said that there are doctors and nurses who are contracted by the federal government to work in these detention facilities. And ideally, you want them to serve as their patients', in this case, as their primary advocate. And at the same time, these health professionals have to navigate potentially double or dual agency as it relates to promoting the well-being of those in detention, given that the governmental entity that employs them are creating the same conditions, threatening the well-being of those in detention. How can health professionals do better in terms of advocating for and speaking up about the dangerous living conditions at U.S. detention facilities that violate human dignity and rights?

COOPER: I think there's two things. I think with the children who are alone, what we see, what the medical providers—not just doctors, but the nurses, the social workers, the psychologists—is make sure that there's consent. I think one of the things people assume is that the federal government can provide consent on behalf of the child to care for them. That's not, that's up for legal debate right now. We actually filed a lawsuit on that. So, I mean, some lawyers are turning to make complaints against the medical licenses of these individuals for providing services to children without any parental consent.

KAO: Yeah.

COOPER: So, make sure you're checking state law. I'm not saying what the right answer is because I'm in the middle of a lawsuit. But definitely, you want to check with the state law; make sure that you're in compliance with the informed-consent laws in that state. The Flores Settlement agreement requires that children be provided the same care under state law. So, for children. For adults, obviously, it's different. You can get informed consent from an adult, assuming medical competency. So, that's one thing.

The second thing would be that if someone sees that something isn't right, they can always inform our medical monitor. If you don't want to call me, a lawyer, you can actually have great impact by calling Paul Wise at Stanford University. And he can field all of the medical complaints. He can do so anonymously, and then he can then investigate that. You can also call me. [chuckles] But some people, some doctors, medical community, feel more comfortable calling a doctor. And that's fine. As long as you're providing a voice to people inside who may not have that kind of opportunity or that type of communication system, I think it's super helpful. And then we can follow it up with an investigation without ever having to reveal the person's identity.

There's also whistleblower protections. There's a lot of different whistleblower organizations that can take that information. You can also call members of Congress who can investigate. The Congress and the Senate have been wonderful in the sense of when we've gone to them with really large allegations, they've been able to convene hearings, congressional hearings, on the matter. And you should be able to get whistleblower protections. But definitely, you want to, there's whole organizations that have lawyers dedicated to protecting your employment interests, if that's a fear that you have.

KAO: Yeah, I appreciate your last points, because I think they're both moral and practical for health professionals who are in these detention facilities and are witnessing conditions

that threaten the health and welfare of those that they're expected to care for. So, I think that that will be quite helpful for our viewing audience, no doubt.

On that note, I want to thank Professor Holly Cooper for sharing her expertise and her experience in her long-time advocacy for those among us who are living in U.S. detention facilities, both children and adults. Professor Cooper, thank you for being a guest on *Ethics Talk* today.

COOPER: Thank you for having me.

KAO: For more COVID ethics resources, please visit the *AMA Journal of Ethics* at [JournalofEthics.org](https://www.journalofethics.org). And to our viewing audience out there, we'll see you next time on *Ethics Talk*. [bright theme music plays]