

## Episode: Ethics Talk Videocast Transcript – Public Health, Personal Liberties, and COVID-19

Guests: Lawrence Gostin, JD  
Host: Tim Hoff; Audiey Kao, MD, PhD  
Transcript by: Cheryl Green

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[bright theme music]

TIM HOFF: Welcome to another special edition of *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 Lawrence Gostin. Professor Gostin is the founding O'Neill Chair in Global Health Law at Georgetown University and a Professor of Public Health at Johns Hopkins University. He joined us to talk about the challenges of balancing public health ethics and personal civil liberties during the COVID-19 pandemic. To watch the full video interview, head to our site, [JournalofEthics.org](https://www.journalofethics.org), or visit our [YouTube channel](#).

DR AUDIEY KAO: Good afternoon, Larry. Thank you for being a guest on *Ethics Talk* today. [music fades out]

PROF. GOSTIN: Thanks so much for having me. Appreciate it.

KAO: So, Larry, a recent population model from Columbia University estimated that if the U.S. had begun imposing social distancing measures one week earlier in March, about 36,000 fewer people would've died in the pandemic. And if the country had begun locking down cities and limiting social contact on March 1st, two weeks earlier than when most people started staying home, a vast majority of the nation's deaths, about 83 percent, would've been avoided. The study concluded that as states reopen, outbreaks can get easily out of control unless officials closely monitor infections and clamp down on new flare ups. While there's no way to turn the clock back, we can be better prepared going forward. Can you provide our audience with a brief primer on governmental authority during a public health emergency like this pandemic, and more specifically, how compulsory public health powers should be evaluated and justified ethically and legally?

GOSTIN: Well, those are two really great questions. And so, let me just begin with a primer on public health powers. In the United States, the primary public health powers are possessed by the states, and to some extent, cities. So, they have what's known as the police power. Now, I'm often asked, where is this in the Constitution? And some people say, well, it's the 10th Amendment, the so-called reserve powers clause. In truth, it's not even that. States and localities have been exercising public health powers since the colonial era. Well before the Constitution was formed, there were sovereigns. They exercised the police power and everything from slaughterhouses to hygiene, sanitation, contaminated conditions, pests, things like that. And so, when the Constitution was written, it didn't need to give states these powers; it actually possessed them already. And they still possess them. Whereas the Constitution does give the federal government limited public health power.

And so, what is the federal role? So, the federal role is they can exercise powers, if necessary, to prevent infections from coming into the United States.

KAO: Right.

GOSTIN: Or they can do it to prevent infections across state lines. And so, we've seen a lot of political discussion as to, well, can the president just order states to go back to work? Can he order them to lock down? Are stay-at-home orders constitutional? Can you ban church services, is that the case that was just filed to the Supreme Court just yesterday. All of these are prima facie within the states' police powers.

KAO: Right.

GOSTIN: And the federal government has no power to order a governor or a mayor to do any of these things. These are public health powers. And, of course, public health powers have to abide by the Bill of Rights. So, for example, we have a right to freedom of expression and freedom of assembly. But now states are banning large gatherings. Can it do that? The answer is yes. The reason it can do it is because it's not targeting the freedom of assembly or the freedom of speech. It's a generally applicable public health rule that applies to everyone, whether you're protesting or you're not. Same thing with worship of religion. It's not targeting religion or any particular religion. This is a pure, this is a public health measure, pure and simple.

And so, the next question you asked, a really good one, is how do you evaluate all this ethically? For me, I've always had my own very strongly held views about public health ethics. So, notice I say public health ethics rather than bioethics, which a lot of people say. Because bioethics has been very medically-oriented, doctor-patient relationship and so forth. Public health ethics is what is the ethical, right thing to do when you're wanting to prevent injury and disease in the population? How far can you go to balance public health with human rights, civil liberties? So, there isn't a right answer. But my firmly held view is you have to ask a series of questions.

One, is there a major, significant risk to the population? Clearly with COVID-19, it's unquestionably more than a major risk; it's a once in a lifetime event.

KAO: Right.

GOSTIN: Secondly, is the intervention evidence-based? That is, is it likely to significantly reduce that risk? And we found that, from the Columbia study to many others, have shown that, yes, these kinds of shelter-in-place, social distancing orders actually have a major, evidence-based impact. And then thirdly, are there any less restrictive ways we could achieve the public health objectives as well or better? In this case, there doesn't seem to be. Yes, we should be doing testing, contact tracing, isolation, quarantine. But at this stage, where COVID-19 or SARS-CoV-2 virus is so widespread in the community, we do need general principles of masking, social distancing, and a gradual release of stay-at-home orders, but only gradual.

KAO: Yeah, no. I appreciate that primer. I think our audience would as well. As you just alluded, these governmental powers reside at the federal level for national security reasons and at the regional, state, and local level for public health reasons. Given that public health emergencies pose challenges to American federalism with laws at the local, state, tribal, and federal levels that can result in conflicting jurisdictional claims and

confusion about who is responsible for doing what, what are the lessons that we should have learned during the first COVID-19 wave that we should heed if there is a flare up or there are subsequent waves later this year?

GOSTIN: Yeah. That's such an insightful question. You know, America is a federalist society. We divide powers between cities, states, and the federal government, and the tribal governments. This can be a source of great strength and great weakness. It's great strength because in Justice Brandeis's words, states and cities can be laboratories for innovation. That is, you can have a lot of experiments going on, and the best one will survive. And so, federalism can be a great strength of ours. And as we've seen, I think very clearly to almost every American, most of the effective health communication action regulation has been by governors and mayors rather than at the federal level. And so, that can be a strength.

On the other hand, federalism can be a huge weakness, as you've alluded to, because when you have a pandemic, it's affecting the whole nation. It's affecting the whole world. You can't have different jurisdictions going their own way. You can't have one city that's locking down, and then the county right around it is not, or the state right around it, because that's just going to be useless. And so, for that, you need strong federal leadership and guidelines. And so, if this were to happen again, we would still look to the states and the cities to have primary power. But I hope that we would encourage at the federal level the U.S. CDC and other public health experts to make evidence-based guidance and really work in partnership with the states. That's the way it's worked great with CDC and public health in America for so long. But that is broken down, frankly, with COVID-19, because it's become so politicized. Public health has become politics.

KAO: Yeah.

GOSTIN: Public health people, particularly at the national level, always have to look over their shoulder. Can I put out this guideline? Can I not? You know, is this something that the White House should be looking at or a public health agency? And so, you know, for me, we have the best scientists and public health people in the world. Places like the NIH, CDC, the U.S. FDA are incomparable. But we need to unleash that with allowing science to lead and also funding them to the level that they will need to be successful.

KAO: Yeah, no. I appreciate your points about evidence-based public health leadership. Let's hope that we return to that if, as experts say, there will be another wave in the fall and winter.

GOSTIN: Yeah. There will. And I've just written a medical journal article about what the fall will look like, the fall and winter because you're going to have co-circulating pandemic viruses: COVID, SARS-2, COVID-19, and influenza.

KAO: Right.

GOSTIN: And so, there could be a second wave of COVID even more so than the first. There could be, and probably will be, at least a moderate flu year. And so, that's going to be a lot of stress on the health system.

KAO: Yeah, no. I think you make some excellent points. So, as the country and economy slowly open up for the summer, there are bound to be hurdles as we try to figure out how to return to quote-unquote "normal" as safely as possible across a wide swath of social

and economic settings. For example, there have been conflicts between customers who refuse to wear facial masks in a retail establishment that has a policy for everyone entering their premises to be masked. It's my understanding that the five basic freedoms articulated in the First Amendment are not absolute rights, and freedoms such as freedom of speech can apply differently to governmental entities versus private entities. If I'm correct, how do you, as someone who has advised businesses, think we should consider these differences and their implications for exercising personal rights and securing public health as restaurants, gyms, museums, and malls open up? And can you also speak to the relevance, if any, of the equal protection clause in the 14th Amendment as it relates to the private sector in this case?

GOSTIN: Sure. Well, one, let me start with masks, because you started with them. You know, we have to convey a message through health education and mass communication that we're asking everyone to wear a mask when they're in public. And you should do it for your own individual responsibility. You should do it for yourself. But more important, you're doing it for others.

KAO: Right.

GOSTIN: You're doing it for your parents, your grandparents, your neighbors, your family. And so, we need to appeal to our common humanity and our duties to one another. I mean, one of the kind of...one of the areas of ethical thought that I've been associated with for many, many years is, is I've put it this way: we as Americans like to ask the question, what does everyone else, including the government, owe me as a rights-bearing person to consent to freedom, to liberty in so many different ways? And of course, that's important. You know, I understand that, of course. But we have to start asking another question. What duties do I have to my neighbor, to my family, to one to another to ensure the common good? And COVID teaches us that more than anything else: the importance of selflessness, community orientation, collective action and the public good. That's really crucially important. And so, I do think it's absolutely lawful and ethical to ask somebody to wear a mask. Perhaps under the Libertarian traditions of John Stuart Mill and others, that you can't be forced to deprive yourself of autonomy or liberty, but you can if you're posing a risk to others.

KAO: Yeah.

GOSTIN: And so, you have no right to put others at risk. And that's why we require sheltering in place, social distancing, masking, things like that. These are very strong and important measures that governments should be encouraging and even mandating.

The virus, in the United States, we've seen Republicans and Democrats and libertarians and socialists and others fighting with one another. But viruses are not political. There's no Democratic or Republican virus. We all want to be safe no matter what our political ideology is. And so, let's get past the politics and think about our ethical values and our ethical responsibilities as civic, our civic responsibility to ourselves and our community. I think it's critically important.

I don't think there are going to be equal protection problems, per se, because the Supreme Court basically doesn't have a very strict standard of equal protection unless the discrimination is based upon some heightened standard like race or gender, things like that, or religion. And I don't think that public health officials are targeting any particular race, religion, and so forth. But if they did, there would be a huge problem. So, for

example, there was a case back in the early 20th century. It's called Jew Ho. And there was a major cholera epidemic taking place in San Francisco, and there was a massive quarantine that was placed over a large district of San Francisco. The court struck it down, but it didn't strike it down because the public health authorities didn't have the power to quarantine. It struck it down because the quarantine was applied almost exclusively to Asian and Chinese Americans.

KAO: Right.

GOSTIN: And so, the court famously said that public health enacted with an evil eye and an unequal hand. If we ever saw that with COVID, we would immediately react. But what COVID has taught us so vividly and so clearly, if we had any lesson, it would be this: it's highlighted the enormous health inequalities in the United States.

KAO: Yeah. No, I really appreciate many of the points that you've just made about this pandemic, hopefully opening all of our eyes on the importance of both civic responsibility as well as the need to address long-standing social and health inequities among our neighbors and our communities that are disproportionately affected by COVID-19.

GOSTIN: Yeah.

KAO: So, even as we continue to open up in phases, many localities and states are moving slowly to allow larger indoor gatherings, such as in houses of worship. Given what you said earlier, how should clinicians and public health policymakers think about and address those who argue that going to church, temple, or synagogue is a protected constitutional right and essential for their spiritual health?

GOSTIN: You know, I've been thinking about this quite a lot. Let me just begin by a couple of important facts that we need to understand. The first fact is, is that congregations where you worship have been a major amplifier of COVID-19. We saw it in China, we saw it in Korea, we saw it in Iran, and we've seen it in the United States. There are many super spreader events that go on in churches, mosques, temples, and others. And so, to me, if you allow these kinds of services knowing that you could be threatening the life of congregants and the families of congregants and their neighbors, you're actually doing a major disservice to the freedom of religion. You're not aiding the freedom of religion by saying, "Oh, well. It's okay to go back and get gravely ill or even die." It's actually disrespecting of religion.

But what's even worse, and I don't want to get too political here, but I really feel like I must. The President has called on all states and people to begin religious worshipping. At the same time, the CDC put out draft guidelines to say how you could worship in a safer way, and the administration blocked them. So, now you're saying to somebody, "Go back and do this. It's a huge risk, and we're not going to tell you how to mitigate that risk." That's utterly irresponsible. And I cannot think that that is in service of the freedom of religion. I think it's the exact opposite of it because it places a risk, a chill on worship. And so, I believe that people's conscience, their religion, and others are extraordinarily important, and I support them. But to be respectful to those people and to the whole community, we need to explain and even enforce whether it can be done safely, and if so, how it can be done safely and when it can be done safely. So, this is to me, inexcusable. And we know, I mean, it's just going to have a bad outcome if you congregate all of those people together.

KAO: Yeah. So, up to this point in our conversation, Larry, we've been primarily talking about the balancing of civil liberties and public health in the U.S. context. But as we near the end of our interview, I'd also like to tap your international expertise, given that you direct the World Health Organization's Center on National and Global Health Law. As we look at member states of the United Nations and their relationship with the WHO, I wonder if it's useful to draw some comparisons between human agency and national sovereignty. So, confronted with global health threats, how one balances the interdependent authority and responsibility of the WHO and its member states would seem critical for a coordinated and effective global response. I've heard you say that given the devastating toll COVID-19 is taking across the world, it is past time to give the people of the world the WHO they deserve.

GOSTIN: [chuckles] Yeah, I did say that.

KAO: So, what do you think needs to be done to restructure the WHO and its relationship with member states to give humanity what it needs?

GOSTIN: Yeah, I mean, that was very well put. I've often said all the criticism of the World Health Organization, the truth is that countries like the United States, China, and others have the WHO they deserve because they've not supported it politically. They've not given it any power. They haven't funded it. They've threatened to defund it, to withdraw our membership. We saw at the very recent World Health Assembly a political, geopolitical struggle between the two world superpowers when we all should be coming together under a united, strong World Health Organization. So, for me, pandemics are a classic case why we need to work together globally. We need to harmonize. We're in such an interdependent world with travel, trade, mass migrations and refugees, and also zoonotic interchange with wild animals and wet markets and avian migration flights across the world. These are all, we're in it together. And if COVID hasn't taught us that, nothing will, because it's something where you do need a much more coordinated response.

Nobody's asking countries to give up their sovereignty. We want strong sovereign countries to have robust health systems. We want them to follow evidence-based responses. We do understand that COVID-19 affects different localities and countries differently than others. But you need to have evidence-based guidelines and guidance from the WHO. And you also need to have a coordinated approach in terms of how we deal with so many of the pressing issues.

Perhaps I could just sum up with perhaps the most pressing issue there is. I just did a webinar for the World Bank about this today. And it covers so many of the issues you've raised, which is right now, we're in a race for a vaccine.

KAO: Yeah.

GOSTIN: There's never been a Holy Grail holier than trying to get a vaccine. It's the key to unlock all of our woes economically, socially, human health in so many different ways. It can unlock all the loneliness, depression, hospitalizations, death, unemployment. But we're in a big race for it. We need to be working together in that race. We need to share scientific information. Countries shouldn't be at loggerheads. But instead, it's become more like a moonshot, a race to the moon. Who's going to get there first? Remember Russia and the United States fighting with one another to get to the moon, and now we see it with COVID and the vaccines. So, we need that kind of cooperation. But even more important is equity. I do believe we're going to get a vaccine. I can't tell you when, but

probably within the next year to two years. We need to make sure that it's equitably distributed around the world. I can't imagine how international relations and global solidarity would unravel if we saw people in the United States, Europe, or even China being fully protected by the vaccine or mostly protected while countless millions of people died in sub-Saharan Africa, the Indian subcontinent, the Middle East, and places like that. That would be a nightmare. And we need to plan for equity, and we need to plan for it now instead of just unraveling and fighting with one another.

KAO: Yeah. No, I think your concerns are justified. Let's hope that our leaders, our elected leaders or leaders around the world, heed your advice and see this as a global health threat that requires all of us to work together.

GOSTIN: Yeah. That's— No, go ahead. Sorry.

KAO: No, I just wanted to say that I wish, we could probably spend more hours—

GOSTIN: We could.

KAO: —talking to you and tapping your expertise, but we don't. And I want to thank Professor Gostin for being a guest on *Ethics Talk*. Larry, I appreciate you sharing your vast expertise and insights with our audience today.

GOSTIN: Thank you. I mean, the thanks all go to you. You know, what you do and what you've led is incredibly important, thinking about how we confront COVID-19 in a way that's ethical, equitable, and justice the way you've been doing. There's nothing more important. So, thank you on behalf of all of us.

KAO: Yeah. No, we all have to do our part, however big or small that is.

GOSTIN: Yeah.

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, be safe and be smart. We'll see you next time on *Ethics Talk*. [bright theme music plays]