

## Episode: Ethics Talk - Equal Justice Under Law and Health Equity

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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 Christopher Ogolla, an Assistant Professor of Law at Duane O Andreas School of Law at Barry University. He joined us to talk about equal protection under the US Constitution to advance health equity during this COVID-19 pandemic. To watch the full video interview, head to our site, [JournalOfEthics.org](http://JournalOfEthics.org), or visit our YouTube channel.

DR AUDIEY KAO: Professor Ogolla, thanks for being a guest on *Ethics Talk* today. [music fades out]

CHRISTOPHER OGOLLA: Thanks for having me.

KAO: So, it would seem obvious to apply the 14th Amendment Equal Protection Clause to promote justice, but we don't talk much about remediating health and health care inequity by using the concept of equal protection under US law. Has the 14th Amendment been used to promote health equity? If so, how did it go?

OGOLLA: Well, thanks for that question, Kao. Yes, the 14th Amendment has been used, but the results have been mixed. It hasn't been that successful! And as a matter of fact, one of the reasons for that is because the federal Constitution does not provide a right to health care. We don't have a right to health in the United States Constitution. And it's difficult to succeed on a course of action if the Constitution doesn't provide for it. But there are examples that, historical examples, we can look at to see how the 14th Amendment has been interpreted in terms of promoting health or health equity.

I want to start with an old case from Hawaii, and this was about leprosy. You may have heard about it. And so, Hawaii decided to segregate people with leprosy in the early 1880s, right? So, they took them from the main island and segregated them from people. And obviously, some of the people, including the family members, challenged that segregation. And they challenged it based on the articles of the Hawaiian Constitution, saying that it violated their due process rights, it violated the equal protection rights, it was arbitrary and capricious: the same things we see in the 14th Amendment. And in that case, the Hawaiian Supreme Court actually said no. It essentially said that the government of the state has this unbounded, limitless power when it comes to public health. So, it essentially said that whatever the government does in the name of public health, that's okay.

Now, we know that that was an extremely broad interpretation of equal protection, right? And that was based on the state Constitution. But interestingly, the equal protection came in, in the 1900s in California. There are a couple of cases that happened in San Francisco, and this was during the quarantine of San Francisco. There was a black plague. And what the authorities did there, the Board of Health did, is that they decided to quarantine specific sections of the city, specifically Chinatown, right? And what they did is that they made sure that no one of Asian origin would either

leave or enter the quarantine area. But the Caucasians who were living there were allowed to leave and enter.

So, when the people who were living in Chinatown challenged it, strangely or interestingly, the district judge, the Northern District California, said that the law was applied so and equally to violate the people's equal amendment rights. So there, the people actually prevailed in the sense that the way the Board of Health was trying to enforce the quarantine and isolation order, right? Now, that's 1900.

fast forward to what is going on today, right? States have instituted the mandate, so the bans or the restrictions based on COVID-19. Most of the challenges that have occurred have been based on Establishment Clause. So, a couple of cases just came out this summer from the Supreme Court. And in those cases, the Supreme Court said that the governors—one from New York and the other one is from California—that the governors had exceeded their authority in that they were treating religious communities different from the secular people, right? So, they were saying, look, if you can ban people from going to church because of COVID-19 and you allow people going to grocery stores, going to clubs, it's like that's unequal. So, even though the decision was not based on the 14th Amendment, the rationale seemed to be like you cannot treat religious houses of worship differently from these other businesses when it comes to a pandemic. So, you can see the mixed results.

KAO: Yeah. So, given what you just said, what merits and drawbacks do you see for using constitutional tools for promoting health equity?

OGOLLA: We can use constitutional tools to promote health equity, but at the same time, the constitutional tools can end up hurting public health or health. So, for example, the same laws that may protect certain people, or the same laws that may protect health, may also be limited by the Constitution. So, I'm going to give you a couple of examples. One, if you remember the AIDS crisis in the '80s and the '90s, and the problem was that the state, both the state governments and the federal government, did not want to address HIV/AIDS. Because at that time, AIDS was stigmatized, and so people who had HIV/AIDS were being discriminated against, right, stigmatized. And when they brought the lawsuit, when they would sue on equal protection grounds, the court would apply what we call rational basis standard, which is pretty lost under the review. And most of the patients ended up losing those cases. And when you lose, that becomes the law.

So, in one case that happened in New York State where the patient sued, what they wanted was the commissioner to put HIV/AIDS on the list of communicable diseases so they could get funding, right? And the commissioner said, no, we are not going to do that. And the courts agreed with the commissioner based on rational basis. So, what did that mean? That meant that for a long time, there was no funding for HIV/AIDS programs. In those instances where the court limits what the state can do, that actually ends up hurting health equity.

A second example that it's going on right now in Oregon. So, Oregon, the state of Oregon, set up a fund that they called Oregon CARES Act. And in that fund, they set up a pot of money that was supposed to go to Black businesses who've been affected by COVID-19. What do you think?! People sued discrimination, equal protection grounds. And even though the district court did not grant the plaintiff's injunction, what they said is that that racial categorization would likely be discriminatory. And if it's discriminatory, it will be struck down. So, here is where the state was trying to do something "good," quote unquote, right? But the law says, no! You can't do it because that's discriminatory, right?

KAO: Yeah. So, given what you just said, how should we look at racial and ethnic health inequity through the lens of the Civil Rights Act?

OGOLLA: I actually think that the Civil Rights Act has done more for health and health equity than the Constitution. In other words, the Constitution provides a basic limit. The states can expand those benefits. And the Constitution simply says that you are entitled to health care if you're a ward of the state, right: if you're in prison or if they control you or something. But other than that, the federal government does not have to provide health care. So, what the Civil Rights Act has done is try to remedy what I call the structural inequalities: housing, right, employment, schools. And those things have a direct correlation with people's health, right? If you improve housing, you are probably going to have improved health metrics, right? If you improve education, you're going to have improved health metrics. If you reduce discrimination in employment, Title VI and Title VII in employment, you reduce discrimination in the hospital, segregation, you are probably going to improve, concomitantly, people's health. So, I tend to think that the Civil Rights Act has been more effective in reducing health inequities than even the Constitution. And I know some people might agree, but that's my view.

KAO: Yeah, interesting. So, given that, what do you think legislatures and the courts should consider when applying legal precedents to address present day racial and ethnic health inequity?

OGOLLA: So, I tend to believe in what I call evidence-based law, which is something we really like in the legal field, yeah? In science, we always talk about best practices, evidence-based. We don't seem to follow that in law. Legislature's done. We follow politics, we follow policy, but we don't look at the evidence. And I think that's a problem. And I often say that courts and policy makers might do well if you consider the evidence and the impact, right?

Now, there are examples where the Supreme Court has said you've got to look at the impacts of this decision. So, the recent decision was where the Supreme Court stopped the Trump administration from rescinding DACA. DACA is the Deferred Action for Childhood Arrivals. So, as an example, when the Trump administration was trying to rescind DACA, the petitioners challenged that on the grounds that rescission was arbitrary and capricious. And Chief Justice Roberts said, if you rescind DACA, what's going to happen to the 700,000 DREAMers who already have driver's licenses, are going to school, have loans, all that? And that was one of those unique situations where the court said, we are not saying that you can't stop it. We are saying that consider the impacts. And I think courts should do that. I think courts and legislatures should consider the impacts of their decisions and not only the impacts, but the immediacy or the urgency of the problem.

So, let's look at COVID, what's going on right now, right? We have the mask mandate. We have the restrictions. We have everything else that is going on now. Now, I'm not saying that we should leave the Constitution behind, but I think our leaders and courts should understand that when there is an emergency like right now and the evidence indicates that if we wear a mask, if we social distance, if we wash our hands, if we don't congregate, that's the evidence. Now, people say let's follow science. Well, it doesn't seem to me like the legislatures and the courts are following science.

KAO: Yeah. So, as we near the end of our interview, can you comment on what health professionals and organizations should consider when motivating their roles in advancing health justice, regardless of which tools are used, whether they're grounded in the legal system or not?

OGOLLA: So, I think one of the things that we health practitioners, including myself there, should always look at, we should acknowledge the structural inequalities in our society because those things undergird help, they undergird education, they undergird employment. I mean, where you

live, what you do, what you earn is determined by these structural inequalities that we have. And I think acknowledging that will be a first step for public health practitioners or medical practitioners to try to remedy the health inequities.

The second thing, and this may be a little bit political, but I'm just I'm going to say: People in the medical field and public health field usually are not at the table when these decisions are being made. And it's time that we have people from the AMA, APHA, other public agencies, you've got to be at the table, right? Because when policymakers make their policies and they don't have public health people, they don't have medical people, they don't have, you know, they don't have people who are in charge of health, then those policies tend to hurt or be inimical. So, I would really say that perhaps it's time that we have public health people at the table.

And two quick examples I give you. So, during the AIDS crisis in the '80s and '90s, we had a surgeon general, C. Everett Koop, who was really, really strong in advocating public health policies that at that time were so unpopular, like needle exchange program, harm reduction. But Everett Koop really fought, and eventually he got the Reagan administration to actually acknowledge that HIV/AIDS was a serious problem. Now, in the last administration, we saw what Dr Fauci did, whether you agree or you don't agree with him. But he was right there at the forefront. I think we need more of that.

KAO: Yeah. Well, on that note, I want to thank Professor Chris Ogolla for sharing his expertise and insights with our audience today. Chris, thanks again for being a guest on *Ethics Talk*.

OGOLLA: Thank you so much for inviting me.

KAO: For more COVID ethics resources, please visit the *AMA Journal of Ethics* at [JournalOfEthics.org](http://JournalOfEthics.org). Thank you for joining us today. We'll see you next time on *Ethics Talk*.  
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