

The Propriety of Expert Ethics Testimony in the Courtroom: A Discourse

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Abstract

The propriety of expert ethics testimony in the courtroom is as contentious in academic scholarship as any typical ethical debate could be. Some of the main objections to expert ethics testimony stem partly from fears that it could unduly influence judicial thinking or judgments, or foist prejudicial or idiosyncratic moral views or opinions on judicial decisions. This prospect is perceived as contrary to the tenets of a liberal, pluralistic democratic society, where moral and ethical values should ideally be shared and not dictated. Another crucial argument against expert ethics testimony is the ethicists' propensity to assume the stance of 'moral advocates' bent on pitching clients' agenda, without regards to any merits in the opponents' moral judgments. Yet another anti-expert ethics testimony posits that reliance on it will foster moral laziness. This paper joins the debate by critically analyzing the arguments for and against expert ethics testimony in the context of relevant literature and standard evidentiary rules governing judicial evaluation and admissibility of expert ethics evidence. With a discourse on the nature of moral expertise and the dynamics of expert ethics testimony as a backgrounder, the paper evaluates the validity of the hypothesis that expert ethics testimony could encourage moral tardiness, unduly influence judicial proceedings or imprint narrow, elitist, or prejudicial moral viewpoints on judicial reasoning and judgments.

Introduction

"...I am an expert witness, because I say I am."¹

Who is an expert witness? Should ethicists be adjudged as expert witnesses? If so, what is it in their training that confers moral expertise beyond the grasp of people not schooled in moral philosophy? Can expert ethics testimony really unduly influence judicial reasoning and judgment? Or is there a room for corruptive influence, or are there chances that expert ethics witnesses could morph into 'moral advocates'? These are some of the recurring questions in the topical debate on the propriety and ramifications of expert ethics testimony in the courtroom. This paper aims at contributing to the debate by critically reviewing

the literature, and advancing arguments in support of the imperatives of expert ethics testimony.

A brief non-technical exposition of judicial processing of courtroom witnesses is a necessary prelude to the analysis of the central theme of this paper: the propriety of expert ethics testimony in the courtroom.

A dictionary definition defines a courtroom witness as “someone who appears in a court of law to say what they know about a crime or other event”; or “someone the prosecution or defense lawyers choose as a witness in order to help prove their case”.²

In a courtroom scenario, what a witness says is known in legal parlance as “evidence” or “testimony”. In the United States, the United Kingdom, and most common law jurisdictions, only relevant evidence is admissible.³ However relevant evidence could still be excluded if its probative value could be compromised by unfair prejudice, or if it could mislead the jury or confuse issues.⁴ In trials by Jury, proceedings must be conducted in such a way as to foreclose the foisting of inadmissible evidence on the Jury.⁵

Judicial evidence transcends mere opinion,⁶ and is almost always factual accounts given under oath, rendering witnesses vulnerable to perjury charges on account of false testimony. In the context of the inherently adversarial judicial system, the totality of evidence adduced in the courtroom would necessarily be sifted, evaluated, and weighed for reliability, credibility and relevance by the judge or jury. In civil cases, the judge or jury aggregates the preponderance of credible evidence on either side, weighs the evidence on an imaginary scale, and then chooses the most credible, probable and overwhelming of the competing evidence adduced by the opposing parties. In criminal cases, the onus of proof is higher. The prosecution must prove the suspect’s guilt ‘beyond reasonable doubts’.

There are generally two types of witnesses: expert and non-expert. Traditional expert witnesses range from medical doctors, handwriting analysts, surveyors, draughtsman, psychologists, to engineers.⁷ Non-expert witnesses are called by litigants to give eye-witness account or factual evidence in support of their assertions or claims in court. In the United States for instance, expert witnesses are either appointed by the court *suo motu*, or by the litigants themselves.⁸ However, court-appointed expert witnesses must consent to their appointment, while litigants must also acquiesce to the appointment.⁹ Court-appointed expert witnesses are entitled to reasonable compensation subject to court’s approval.¹⁰ It’s been noted that judicial appointed-expert witnesses could invoke a façade of infallibility.¹¹ However the practice has been welcome as a means of obviating impartiality and unnecessary rivalry and competition that could potentially attend the testimony of litigants-appointed expert witnesses.¹²

Expert witnesses can give an expert opinion or opinion evidence even if it is based on hearsay evidence or data provided by person(s) other than the expert.¹³ This is exemplified by the United Kingdom case of *R v. Abadom*.¹⁴ The British Court of Appeal held admissible, an expert opinion claiming that there was only a four per cent chance that glass found in fragments on accused's shoes would be identical in composition to glass broken at the scene of a burglary, notwithstanding that the statistics on which the expert's opinion was premised, was collated by persons other than the expert.¹⁵

It is axiomatic that expert witnesses are almost always professionals or specialists in certain crafts or trade which require special knowledge or skill. A good example would be a physician or a draughtsman. It would be preposterous to assume that no special skill or knowledge or training is required to attain the necessary degree of professionalism or expertise required of medical surgeons for example.

In fact in the United States as in most common law jurisdictions, expert testimony are required by Rule 702 of the Federal Rules of Evidence to be "scientific, technical or other specialized knowledge" given by witnesses with the requisite skill, experience, education and training.¹⁶ While interpreting Rule 702, the U.S. Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals* held *inter alia* that "[t]he subject of an expert's testimony must be 'scientific knowledge'" and that only evidence arrived at by scientific method would qualify as expert testimony.¹⁷ The court went on to describe scientific methodology as "...based on generating hypotheses and testing them to see if they can be falsified; indeed, this methodology is what distinguishes science from other fields of human inquiry."¹⁸

In the United Kingdom, the traditional test governing admissibility of expert testimony is its relevancy and "helpfulness" to the trier of fact.¹⁹ A body of evidence would be deemed helpful, if it added to the trier of fact's knowledge and understanding of the case.²⁰ If expert evidence would not help the jury or a judge, it would be discountenanced and held inadmissible, notwithstanding its relevancy. This is exemplified by the case of *R v. Turner*.²¹ Turner was on trial for murdering his girl friend with a hammer. He relied on the defense of provocation, and psychiatry's expert testimony that he had a natural predisposition to provocation and murder under his factual circumstances. The girl friend had recounted her affairs with other men and claimed that her pregnancy was not Turner's. The court ruled the evidence inadmissible because it taught the jury nothing about how a jealous or possessive lover, not suffering from a mental illness, might behave in Turner's circumstances. The grounds for rejecting the expert evidence are aptly summed up by Lawton LJ as follows:

We all know that both men and women who are deeply in love can, and sometimes do, have outbursts of blind rage when discovering unexpected wantonness on the part of their loved ones... Jurors do not need psychiatrists to tell them how ordinary folk, who are not

suffering from any mental illness are likely to react to the stress and strains of life.²²

Although the relevancy of the psychiatrist's expert evidence was never questioned, it was found very unhelpful to the jury in their evaluation of Turner's action, and therefore held inadmissible.²³

Expert evidence is meant to aid the judge or jury in the determination of the case before them. Expert evidence is sometimes pedagogical. A good example is an expert ethics testimony offered by Kenneth Kipnis. As an ethicist, he gave testimony in court on the withdrawal of artificially administered nutrition and hydration to an elderly woman with severe brain injuries.²⁴ Kipnis testified on the current work in medical ethics relating to the standards for withdrawing nutrition and hydration from decisionally capacitated and incapacitated patients. Although he was questioned by the attorney and the judge, there was no substantive disagreement on the ethical dimension of the case.²⁵ Consequently the judge ruled that the Hawaiian law in question did not prohibit withdrawing of nutrition and hydration in the case at hand.²⁶ Without such testimony which arguably could only be given by an ethicist, it might have been difficult for the judge to know the relevant applicable medical ethics. This demonstrates the importance of expert ethics testimony as a pedagogical nexus for obscure ethical issues that are patently beyond the comprehension of the law.

Sometimes an expert witness may have no specialized training, but has the requisite knowledge borne out of experience that is not within the knowledge of an average judge or juror. This is exemplified by the *United States v. Johnson*,²⁷ where the expert testimony of an experienced marijuana smoker and dealer, on the source of seized contraband, was admitted in evidence on grounds that it was beyond the knowledge of an average judge or juror.

By extrapolation, any meaningful discussion of ethicists as expert witnesses would necessarily entail a thorough analysis and consideration of the following pertinent questions: (a) Are ethicists professionals cum experts in their own rights? In other words, are ethicists on comparative professional pedestals as physicians, draughtsman, or engineers? (b) If they were, would ethical testimony constitute 'scientific evidence', technical, or specialized knowledge as required by Rule 702 of the Federal Rules of Evidence and validated by the U.S. Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals*? (c) Would the exclusion of ethicists from the courtroom obviate any obvious or inherent dangers to the administration of justice? The following paragraphs will attempt to answer these questions *in seriatim*.

A. Are Ethicists Really Professional cum Experts?

Ethics is a branch of philosophy which deals primarily with how we ought to live our lives?²⁸ It has also been defined as dealing with "...standards of right and wrong that prescribe what humans ought to do, usually in terms of rights, obligations, benefits to society, fairness, or specific virtues."²⁹

The advent of modern technology and the imperatives of its governance, the clamor for transparent corporate accounting and corporate social responsibility, the spiraling global terrorism network cum the protracted war on terror, the palpable, seismic shifts in societal values in our post-modern laissez-faire culture, etc., have rekindled ethical debates both in recent scholarship and amongst the citizenry, on the proprieties or otherwise of the concomitant social, legislative and policy counter-measures to the moral dilemmas of our time.³⁰

Increasingly, policy and law makers are looking to professional ethicists for direction³¹ as ethics committees become ubiquitous.³² Applied ethics is now truly universal with applications spanning a wide range of disciplines from biology (bioethics), economics (business ethics), computer science (computer ethics), environmental science (environmental ethics), to medical science (medical ethics).

It is pertinent therefore to ask: what is it in the knowledge of moral philosophy that would automatically confer expertise on ethicists, in topical moral issues varying from stem cell research, gay marriage, abortion, human cloning, animal experimentation, genetically modified food, environmental planning, to social and economic justice, etc.,? In other words, are ethicists really professionals cum experts? If ethicists were experts, what was it in the nature of their training or the manner of their work that conferred the requisite moral expertise, which transcended non-professional ethicists, or persons not schooled or initiated in moral philosophy, such as lawyers, engineers, physicians, and scientists?

The literature on these questions is highly polemical. While Christopher Cowley scoffs at the very notion of moral expertise³³, Giles Scofield is totally dismissive of the concept.³⁴ Other scholars have even queried the purported expertise of ethicists on moral issues emanating from other disciplines in which ethicists have no formal training, i.e., medicine and engineering.³⁵ For example, Ruth Shalit thinks clinical ethicists are interlopers and have no business meddling in medical practice:

"Clinical ethics" is not medicine, which is to say it is not science, which is to say it is to a very large degree whatever anyone wants it to be [...] The surgeon's recommendation rests on an agreed-upon set of facts and criteria [...] The philosopher's recommendation depends on a set of criteria that is not agreed upon, but varies from culture to culture and, more and more, from individual to individual. One man's categorical imperative is another man's heresy.³⁶

In the same vein, Scofield rejects any notion of moral expertise in bioethicists on grounds *inter alia* that we are “all moral experts and hence need no special testimony” and also that the concept “...is antithetical to the foundational beliefs of a pluralistic democracy” where each individual is “the moral equal of every other”³⁷

On the other side of the debate are Scot Yoder³⁸ and Jan Crosthwaite,³⁹ who contend that ethicists can indeed be experts in their own rights. Straddling the middle course of the debate is Madison Powers who, while acknowledging ethical expertise, highlight its limits and vulnerability to politics.⁴⁰

While contending that ethicists have moral expertise and professionalism, Jan Crosthwaite identifies moral expertise as the only legitimate basis for the ascription of professional status to ethicists, and also as the primary distinguishing factor between moral philosophers, other professions, and the general citizenry.⁴¹

Crosthwaite’s linkage of moral expertise to professionalism arguably mirrors the conventional views of the professions such as medicine, law, science, engineering, etc, where specialized training and skills are the sole tickets to membership. However, grounding of ethicists’ professionalism mainly on moral expertise or moral knowledge could be very problematic since morality itself is an inherently subjective, shifting, nuanced, and relative concept on which every rational adult, irrespective of education and training, would arguably seem to have a notion or two.⁴²

This is arguably why discourses on the morality or otherwise of hot-button issues like gay marriage, euthanasia, abortion, suicide bombings, illegal immigration, affirmative action, genetic screening, stem cell research, human cloning, etc., often invoke highly polemical, subjective and emotive responses. *A fortiori*, if expertise in morality *per se* were to be the sole criterion for ascribing professionalism to ethicists, then every rational, right thinking, objective adult out there would automatically be an ethicist, or have a legitimate claim to ethical or moral expertise, while not necessarily apprized of relevant academic training, philosophical knowledge, analytic skill, or the art of moral reasoning. In other words, anyone could say with the devil in Don Henley’s lyric: “...I am an expert *ethics* witness, because I say I am.”⁴³

However, fortunately for professional ethicists, this is not so, because in addition to moral expertise, it is posited that a moral philosopher must possess the requisite philosophical skill, knowledge and values.⁴⁴ According to Crosthwaite, the requisite philosophical skill would comprise the ability to analyze concepts and problems, as well as to construct arguments and viewpoints.⁴⁵ The author further notes that while philosophical analytic skills are basic to all fields of moral philosophy, the knowledge required for different fields could differ and would range from the knowledge of philosophical problems, questions, positions and

theories, the knowledge of assumptions, consequences, and criticisms of different positions of views, to the knowledge of types of argument, and likely problems.⁴⁶

Crosthwaite further posits that of the three components of ethical expertise: skill, knowledge and values, values is the most potentially contentious because "...values and attitudes mean that the expertise of a moral philosopher will include...a critically examined moral perspective."⁴⁷ This necessarily connotes an inclination to reasoned support and evaluation of beliefs or claims, the willingness to question key assumptions and challenge received wisdom, and interests in finding solutions to philosophical questions and problems.⁴⁸ In other words, according to Crosthwaite, the power of reasons is indispensable to grounding of moral expertise.⁴⁹ Therefore, to the extent that not everyone possesses philosophical analytical skill and the art or power of reasons, I would argue that Scofield is wrong in his proposition that we are all moral experts and that expert ethics is dispensable in our time.⁵⁰

Christopher Cowley however contends to the contrary. He thinks ethical theory is largely impotent, and that the power of reasons as the underlying validating force to moral judgments is greatly exaggerated.⁵¹ He grounds moral experience mainly on intuition and non-rational emotions. He alludes to the basic wrongness of gratuitous killing, and asks whether reasons are needed to persuade anyone of its inherent immorality or evil.⁵² He contends that moral judgments rooted in moral experience need no reasons for validation, and will triumph over ethical theories, principles and assumptions.⁵³

I would argue however that Cowley's moral judgment grounded on intuition, non-rational emotions, or moral experience needs no reasons, principles, or theories for its validation because it is no more than a reflection of 'common morality'. As noted earlier, 'common morality' comprises "... moral norms that bind all persons in all places."⁵⁴ According to Beauchamp and Childress, we are all apprized of 'common morality' as we are thought basic moral standards as we grow up. The authors posit that this would include universally acknowledged basic norms such as the fundamental human rights. Thus we ought to be rightly appalled by gratuitous killings or any acts condoning slavery, and should need no rationalization or reasons to validate our spontaneous, natural repugnance for such obviously dastardly acts.

However, contrary to Cowley's perception, morality in its corporate entirety transcends mere 'common morality', and encompasses "...moral ideals that individuals and groups voluntarily subscribe to, and that only bind the subscribers."⁵⁵ Thus there are "universal morality and community-specific morality."⁵⁶ It is often the case that 'common' or 'universal' morality is confused with 'community-specific' morality as Cowley does.

While common morality is virtually in the public domain and is fed daily by moral experiences, and needs nothing more than intuitions and non-rational emotions for comprehension and expression, the parameters of 'community-specific' morality isn't as clearly defined, and is in need of reasons, ethical theories and principles to distil its real meanings and traverse its intricate labyrinths. These would comprise such topical moral dilemmas such as euthanasia, gay marriage, abortion, stem cell research, etc... Unlike gratuitous killings or acts of slavery, there is no unanimity of moral viewpoints, or spontaneous or intuitive answers to any of the moral dilemmas highlighted above.

Furthermore, to reduce applied ethics to a bundle of intuitions and non-rational emotions bereft of reasons as Cowley does is to fail to grasp the critical mass that distinguishes moral philosophers from rational or non-rational, emotive, and intuitive individuals. I would therefore subscribe to Crosthwaite's view that the art of reasoning is indispensable to grounding of moral expertise. It would not suffice to be seized of 'common morality' or moral knowledge or to be intuitively aware of what is morally right or wrong or what is socially acceptable or not, in order to qualify as an expert or professional ethicist. Analytical reasons are crucial for dispassionate evaluations or distillations of various ethical theories and their applications to particular moral problematic.

Although analytical skill and knowledge requisite for moral expertise are not the prerogative of moral philosophers, I would side with Crosthwaite's hypothesis that moral philosophers are uniquely positioned to, of necessity, receive academic training in these skills and knowledge. In other words, they belong to the profession which explicitly espouses the brand of academic discipline where techniques of reasoning, argumentation, and analysis of moral problems are a critical mass. Consequently, anyone that undergoes such training is no less an expert than people in other professions such as medicine, engineering and the sciences. *A fortiori*, ethicists should not be rated any less than the experts that their peers in comparable skilled professions are.

Without doubts, a lack of consensus will always characterize or dog the nature of ethical expertise, or the degree of knowledge required to claim ethical expertise, or definitional and conceptual parameters of ethical expertise, or whether or not there is anything remotely resembling ethical expertise, etc. I would argue however that such a polemical perception of ethical expertise is typical of the dynamic field of moral philosophy, where there are no definitive answers to moral problems, and where moral views and judgments are as disparate as the number of moral philosophers out there. I agree therefore with Yoder⁵⁷ and Crosthwaite⁵⁸ that ethicists are without a doubt experts, and that there is a notion of ethical expertise.

B. Should the Scope of Expert Ethicists' Testimony be Delimited or Qualified or Circumscribed by Cognate Training or Experience?

Another pertinent question is whether or not the scope of expert ethicists' testimony should be circumscribed by cognate training or experience? In other words, should we concur with Ruth Shalit that clinical ethicists be banned from managing moral issues arising from the practice of medicine due to their lack of medical training?⁵⁹

It has been posited that specialism is required in the field of applied ethics to obviate the problem of "generalization of expertise."⁶⁰ In the same vein, Spielman and Agich in their treatise on bioethics testimony, notes that interdisciplinarity of bioethics, ensures that "...bioethics expert do not testify about the practices of their own profession in the same way as other ethics experts."⁶¹ The authors ponder the often-asked question on what qualifies a non-physician bioethicist over a lay person, to proffer bioethical judgment on matters pertaining to medical practice for example.⁶² In their answer, the authors posit that in addition to having the requisite qualification, it is imperative to inquire:

"...whether the credentials and experience the expert has – whether in medicine, theology, philosophy, or another field - are precisely the right qualifications to provide testimony about a particular bioethical issue. If the particular qualifications are not precisely right, then the "generalization of expertise" problem arises.⁶³

In support of their hypothesis, the authors draw on the Supreme Court of Michigan ruling in *People v. Beckley*,⁶⁴ to the effect that: "Once qualified to give an expert opinion, [Rule] 702 does not limit the scope of the expert's testimony. However, [t]he expert must be an expert in the precise problem as to which he undertakes to testify."⁶⁵

Spielman and Agich ostensibly use the quotation in the Beckley case in support of the proposition that it would not suffice for expert ethicists to have requisite academic qualifications, and that cognate experience or expertise in the particular field of ethics in which an ethicist professes expertise is imperative. In other words, a clinical ethicist may not be qualified to give expert evidence pertaining to gay marriage, or the morality of the allied wars in Iraq, in the absence of relevant antecedent practice or consulting in homosexuality or war-related issues, as this may tantamount to "generalization of expertise".

I would however extrapolate the quotation in the Beckley case to mean that only a physician and not a structural engineer could give forensic expert testimony as to the possible cause of death for example. Even in that broad context, expert ethicists would arguably appear exempt, since their training enables them to function across disciplines. Without doubt, there are those for whom it would not sit right when someone professes expertise in every conceivable moral problematic. There is, it seems, something inherently rankling about perceived

monopoly of moral norms, since, as noted earlier, every right thinking, rational adult is imbued with common or universal morality.⁶⁶

Although specialism in particular moral problematic could, over a period of years deepen the expertise of the ethicists in that area of practice, I would caution against excluding expert ethicists from proffering evidence on moral issues outside of their traditional practice area. Ethicists trained in moral philosophy do routinely give expert testimony in fields as disparate as medicine, environmental science, global justice, rule of law, etc. Arguably the academic training required to be an expert ethicist on morality of wars for example, is no different from the one required to be an expert ethicist on the morality of abortion, gay marriage, or stem cell research. The field of applied ethics is arguably the exclusive prerogative of moral philosophy, and philosophical principles, though varied, are clearly defined, sacrosanct, and applicable across board to all manners of moral problems. The multidisciplinary nature of the subject matter of applied ethics is the quintessential hallmark that marks out expert ethics testimony from others like physicians, engineers, psychiatrists, etc.

Viewed from the foregoing perspectives, I would argue that clinical ethicists do not have to be physicians or medical doctors as opined by Ruth Shalit,⁶⁷ and that the Beckley case cannot be correctly construed that way. Furthermore, clinical ethicists should be able to grapple with moral problems across disciplines other than medicine by virtue of their training. This proposition arguably finds ample support in the following analogous example of the legal profession.

While a divorce attorney might not be as good as a criminal lawyer, it doesn't mean that he lacks the capacity or skill to improve over time, and secure an acquittal in a criminal trial. Arguably, his training imbues him with the basic advocacy skills that can be applied across board to all genres of litigations. Therefore, with a little bit of more research, an intellectual property lawyer could handle personal injury cases. He doesn't have to go back to the law school for that skill. In other words, 'an attorney is an attorney, is an attorney'.

In the same vein, I would argue that 'once an ethicist always an ethicist'. Having been grounded in moral philosophy and analytical skill and reasoning, an ethicist should be able to apply his skill broadly across all brands of moral problematic both as an expert ethicist and a public intellectual. Furthermore, a trained moral philosopher, unlike other professionals, could garner practical knowledge on any field of applied ethics, allowing for multi-disciplinary roles in academia, clinical ethics, as well as expert witnesses in the courtroom. A typical example is Kenneth Kipnis, a trained moral philosopher, who taught and wrote about medical ethics for three decades, did clinical consultations for two decades, and appeared as a courtroom expert witness for over a decade.⁶⁸ Viewed from the foregoing perspective, delimiting the scope of expert ethics testimony for fear of "generalization of expertise" would appear unnecessary and without any basis in law.

However, nothing in the notion of professional ethicists' expertise precludes a challenge to their qualifications, standards, experience or knowledge especially during cross-examination in the courtroom. Challenging the qualifications, experience or competence of expert witnesses is a common and routine advocacy gimmick for discrediting the reliability of expert testimony generally; it is in no way peculiar to expert ethics testimony.

Besides, challenging ethicists' testimony, qualifications, experience, etc., under cross-examination is systemic and helps the judge or jury determine the ethics witness' reliability or helpfulness. After all, ethics testimony would not be automatically admissible in evidence as "...there is nothing in the training of the ethicist that gives him or her *de facto* expertise or authority in deciding what is or was the right and the good thing to do in a particular legal case."⁶⁹

In *Wetherill v. University of Chicago*,⁷⁰ for example, the Federal District Court inquired into whether or not a professor of ethics possessed the right qualifications and experience to testify on the standards of informed consent in research.⁷¹ The University of Chicago, exhibiting Ruth Shalit's sentiments,⁷² had argued that the professor's youth, lack of personal knowledge of physicians' practices and not being a licensed physician, disqualified him.⁷³ The court held that being a faculty in a university department of internal medicine, a member of institutional review board, and having published extensively in the field of medical ethics and experimentation, the professor was "eminently qualified" on the prevailing ethical practices on the standards of informed consent.⁷⁴

C. Should Ethical Testimony Be Admissible in Evidence?

Having posited that ethicists are no less skilled professionals than their peers in medicine, engineering, science, law, etc., the pertinent question is whether or not testimony by ethicists could or should be admissible as expert evidence? This question might appear rhetorical or even academic, given the long history of judicial admission of ethics expert testimony across much of the common law world or Anglo-American jurisprudential spheres.⁷⁵

The question is however pertinent because the debates on the propriety of ethicists' expert testimony in the courtroom remain enduring and topical in contemporary literature on law and ethics.⁷⁶ It is therefore important to scrutinize the legal framework or evidentiary rules that underpin the admissibility of expert ethics testimony. In other words, what is the legality of expert ethics testimony in the courtroom? Or had the admission of expert ethicists' testimony in evidentiary proceedings over the years been erroneous in law?

To answer this question, we must first examine the apposite evidentiary laws. For example, in the United States, as in other common law jurisdictions, expert

testimony must pass both the relevancy and admissibility muster. As noted earlier in the introductory part of this paper, the U.S Federal Rules of Evidence requires that expert testimony must *inter alia*, be “scientific knowledge” or “technical or other specialized knowledge” given by witnesses with the requisite skill, experience, education and training.⁷⁷

This law was given a fillip by the U.S. Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*⁷⁸ The Daubert case centered on claims by the plaintiffs that bendectin, a prescription drug for pregnant women to fight morning sickness, was responsible for birth defects in their children. A key issue for determination was whether or not re-analyses of epidemiological studies conducted by plaintiffs’ expert witnesses were competent. The court found that the re-analyses were never submitted to peer-review or published in scientific journal, but were conducted solely for the purposes of the litigation.

While interpreting Rule 702 of the Federal Rules of Evidence, the U.S. Supreme Court held *inter alia* that the trial judge must ensure the reliability of expert testimony by scrutinizing the underlying methodology and ensuring its proper validation.⁷⁹ The Court went on to set the following four admissibility criteria for expert testimony: testable hypothesis, known or potential error rate, peer review/publication, and general acceptance.⁸⁰ In 1999, the U.S. Supreme Court, in the case of *Kumho v. Tire Co. v. Carmichael*,⁸¹ extrapolated the Daubert’s rule to all genres of expert testimony (“technical or specialized knowledge” inclusive).

The pertinent questions therefore are: how would expert ethicists’ testimony fare under Rule 702 of the Evidence Rules as espoused by the U.S. Supreme Court in Daubert and Kumho cases? In other words, could expert ethicists’ testimony be described as “scientific knowledge” under Daubert or “technical or specialized” under Kumho?

These questions again invite a closer look at the nature of ethical testimony. Unlike biological, physical, and mechanical sciences, the field of applied ethics falls under behavioral sciences.⁸² It has been observed that courts are generally more receptive to expert testimony from physical and medical sciences than behavioral sciences.⁸³

I would argue that in order for expert ethics testimony to fall within the ambit of Rule 702 of the Rule of evidence, and the propositions in Daubert and Kumho, ethics testimony must transcend expert ethicists’ religious, moral, intuitive, emotive, and political idiosyncrasies, and rest squarely on rational, proven or established ethical theories and principles in contemporary scholarship and peer-reviewed literature.

Granted that ethical testimony vary in nature, and that there are disparate and competing schools of thought and ethical principles in moral philosophy, (ranging from teleological, deontological to non-Western belief systems),⁸⁴ it is

nevertheless amply represented in contemporary literature in its entire nuanced disparities and competitiveness. *A fortiori*, any expert ethicist, who operates outside of the confines of peer-reviewed literature or proven set of philosophical principles, would arguably risk acting unprofessionally, and would be outted in no time by the trial judge, who as a 'gate keeper' of all manner of evidence, is obliged to rigorously sift through all evidence for credibility and reliability.⁸⁵

A related question is whether or not expert ethics testimony is scientific? Ruth Shalit and other scholars have contended to the contrary.⁸⁶ The question is however germane to a proper analysis of whether or not expert ethicists' testimony is within the ambit of the "scientific knowledge" requirement in the first leg of Rule 702 of the U.S. Federal Rules of Evidence, as interpreted in Daubert's case.

Spielman and Agich seem to suggest that ethical testimony is a 'non-science' genre.⁸⁷ It is clearly beyond the remit of this paper to join the fray on what 'science' is?⁸⁸ I would however subscribe to the definition of 'science' offered by Collins' Thesaurus thus: "discipline, body of knowledge, branch of knowledge...skill, art, technique."⁸⁹ The same book defines "scientific" as "systematic, accurate, controlled, exact, mathematical, precise."⁹⁰ I would argue that ethical testimony is a branch of behavioral science, and falls within the general conception of 'science'. This is so because, as argued earlier in this paper, ethical expertise transcends mere moral knowledge, and embrace philosophical skill, knowledge, and values, and applied ethics methodology is systematic rather than arbitrary. Furthermore, it is a product of a discipline or art that is analytic and systematic in its application of verifiable hypothesis or theoretical philosophical principles to practical moral problematic. *A fortiori*, ethical testimony falls within the ambit of "scientific knowledge" in the first leg of Rule 702 and Daubert's decision.⁹¹

This proposition is in fact consistent with the Supreme Court's holding in Daubert that only expert evidence arrived at by scientific methodology would be admissible.⁹² The Court then defined scientific methodology as "...based on generating hypotheses and testing them to see if they can be falsified; indeed, this methodology is what distinguishes science from other fields of human inquiry."⁹³ This is in fact what expert ethicists do in practice, when within the purview of peer-reviewed literature, and grounded in reasons, ethical theories, hypothesis, and principles are analyzed and applied to particular moral problematic.

A fortiori, any expert ethicists' dispassionate, objective value judgment, premised on well established ethical principles as validated by reasons and peer-reviewed literature, should easily, scale the "scientific knowledge" barriers of Rule 702 of the Federal Evidence Rule, as espoused in Daubert's four criteria of admissibility by the U.S. Supreme Court.⁹⁴ Viewed from the foregoing analysis, I would argue

that expert ethics testimony qualifies as “scientific knowledge”, and is properly and legally admissible in judicial evidence.

Assuming *aguedo* that expert ethicists’ testimony is not scientific, it would still pass the ‘non-science’ “technical or specialized knowledge” muster under the second leg of Rule 702 of the Federal Rules of Evidence, as interpreted by the U.S. Supreme Court in Kumho case,⁹⁵ where Daubert’s decision was extrapolated to all manner of expert testimony (technical or other specialized knowledge’) genre inclusive. Consequently in my opinion, expert ethical testimony is well within the ambit of ‘scientific knowledge’ or technical or specialized knowledge, and should be admissible in law to the extent that it passes the relevancy test.

Significantly, any question on whether or not expert ethicists’ testimony passes Daubert and Kumho tests or is admissible as expert testimony on its own right, is arguably now moot due to the long history of admission of expert ethical testimony across much of the common law world. This is especially so for bioethical testimony,⁹⁶ as exemplified by cases ranging from ethics testimony regarding partial birth abortion;⁹⁷ ethics testimony on responsibilities of physicians, nurses, hospitals, and their employees;⁹⁸ ethics testimony on standards of human subjects research,⁹⁹ etc.

D. Could Expert Ethicists’ Testimony Unduly Influence or Impose a Narrow, Elitists View on the Court, and thereby Impede the Cause of Justice?

Expert moral testimony deals with “...trial testimony by a person with a claim of expertise, on issues of right, wrong, goodness, badness, wisdom, unwisdom, fairness, and the like, as well as on mixed questions of morals and fact or the application of moral principles to given facts.”¹⁰⁰ Ethicists are routinely in the courtroom either at the instance of the court or the parties to a lawsuit. In certain cases, the ethicist’s testimony will centre on proffering professional value judgments on the resolution of a moral or ethical problem, which is usually beyond the professional grasp of lawyers and judges.¹⁰¹ This is exemplified by the bioethical testimonies cited above.¹⁰²

Antagonists of expert ethics testimony often premise their rejection on grounds *inter alia*, that it robs the trier of fact of duty to make independent difficult moral choices, and therefore fosters moral laziness.¹⁰³ Also, since expert ethics witnesses are neither selected through a political process as judges nor drawn from the community like the jurors, it is hypothesized that any decision based on expert ethics testimony, would usurp the trier of fact’s duty, would be undemocratic, and unrepresentative of the considered judgment of a pluralistic, democratic society.¹⁰⁴ It has also been argued that such decision would tantamount to imposing a narrow, elitist ethical view point on a pluralistic society where moral decision making should ideally be consensual, shared, and not

dictated.¹⁰⁵ Furthermore, given the likelihood of partisanship and vulnerability to corruption by expert ethics witnesses, it's been posited that judicial deference to expert ethics testimony could impede or derail the cause of justice.¹⁰⁶ The negative perception of expert ethical testimony is aptly portrayed by Kenneth Kipnis, who notes that expert ethics witnesses are often pejoratively referred to as "hired guns", "academic prostitutes" or "academic sophists who, for a fee, will make the weaker argument stronger".¹⁰⁷

Any meaningful analysis of these objections would entail scrutinizing the nature of ethics testimony cum evidentiary procedural mechanisms for the evaluation and admission of expert ethics testimony.

Ethics testimony has been categorized into descriptive, metaethical, and normative.¹⁰⁸ According to Delgado and McAllen, descriptive ethics would involve educating the court about the normative beliefs of individuals or groups drawing on empirical data.¹⁰⁹ These could cover any number of subjects (usually evidenced and venerated by a group/s' mores), ranging from a testimony that an act or event is obscene according to a community standard,¹¹⁰ to why Hindus perceived eating meat as immoral.¹¹¹ According to Edward Imwinkelried,¹¹² when an ethicist testifies descriptively, he or she makes an empirical claim about ethical beliefs or practices. This would for example include identifying the practice of infanticide in ancient Greece.¹¹³ The expert ethicist needs not necessarily believe in, or subscribe to the ethical, religious, or philosophical foundations of the descriptive ethics in question.¹¹⁴ Descriptive ethics testimony is said to be less contentious since expert tends to offer objective and factual analysis without making any normative value judgment.¹¹⁵

The second category of ethics testimony is metaethics. It involves explicating "...relationships among ethical concepts and principles without attempting to prescribe particular rules of conducts."¹¹⁶ While scholars differ on definition, Spielman and Agich contend that "metaethics is the study of language, concepts, and theories relevant to ethical theory - for instance, the meaning of ethical language, such as the meaning of the term 'good'..."¹¹⁷ Metaethics testimony could be useful to "...identify a particular belief as moral rather than religious or philosophical or a particular question as moral rather than pedagogical or scientific."¹¹⁸

The third category is normative ethics testimony. It is said to be the most controversial because it poses the question: "What ought to be the practice?"¹¹⁹ It comprises moral rules in general and particular terms, which govern individuals and their societies.¹²⁰ When an expert ethics witness testifies on normative ethics, he declares acts or rules of law under consideration by the court as right or wrong according to the values underlying a legal system.¹²¹ Moreover, normative ethics testimony has been queried on grounds that it is impractical in the face of moral relativism as exemplified in the varied philosophical schools of

thought, ranging from teleological, deontological to the non-Western belief systems.¹²²

Thus normative ethical testimonies from ethicists giving evidence for adversarial parties could potentially lead to polemical views and prescriptions on what ought to be morally or ethically acceptable. An example would be when relatives of a patient in a vegetative state should be allowed to pull the plug from the patient's life support machine.¹²³ Moreover, because normative ethical testimony is almost always couched in obligatory terms, fears have been raised that such opinions could supplant that of the court or unduly influence court judgments especially in constitutional matters,¹²⁴ or when judges are performing legislative or law making functions.¹²⁵

The pertinent questions are should the categorical nature of normative ethical testimony prevent expert ethicists from coming to court? What are the chances that normative ethical testimony would usurp judicial functions, and thereby impose elitist ethical views on a pluralistic and democratic society? Should the fear of corruption or potential for corruption be an excuse for excluding ethicists from the courtroom? There are fears that judges may confer some kind of de facto authority on the testimony of expert ethics witnesses,¹²⁶ how realistic are these fears in the context of the typically adversarial judicial settings, where judicial procedures are invariably designed to ensure that normative judgment is the ultimate prerogative of the judge?

Although the dangers posed by normative ethics testimony are real, I would argue that the inbuilt mechanism in the evidentiary process is a veritable bulwark against any possible usurpation of judicial duty. The primary duty of judges is to interpret the law and not to make the law.¹²⁷ The law in its raw form is the legislation, duly made by the Parliament in a democratic setting. Judges are expected to give meanings to these laws in fact-specific cases. Court testimony, whether from experts or non-experts are invariably factual evidence to be weighed and sifted for credibility by the judge. Only the judge decides which evidence to accept and which evidence to reject based on relevancy and admissibility rules. As noted earlier in the Daubert case, the judge has a "gate-keeping"¹²⁸ role to filter expert testimony for relevancy, reliability, and credibility. It is nothing short of an exaggeration therefore to argue that expert ethicists' evidence could assume a normative order or be ascribed a de facto normative status or authority. If this were so, it would certainly amount to imposing normative ethical views of an elitist minority on pluralistic democratic society. It would be nothing short of usurping the powers of the Parliament in my opinion. However, such a proposition or hypothesis is far from the reality of the typical courtroom scenario.

My proposition that expert ethics testimony cannot unduly influence or usurp judicial functions, is even more so where the ethical expertise sought by the court is in aid of interpreting a constitutional issue. Martha Nussbaum is expressly

opposed to calling ethicists as expert witnesses in cases dealing with “constitutional essentials” and “matters of basic justice” for fear that it gives the impression that such ethicists claim a type of authority, that would require fellow citizens to defer to their views.¹²⁹ For this hypothesis, Nussbaum uses a self-anecdotal example of her involvement as an expert witness for the plaintiff in the Colorado case of *Evans v. Romer*.¹³⁰

The plaintiff in the Romer case had challenged the constitutionality of the Colorado’s law, vis-à-vis the Equal Protection Clause of the U.S Constitution. At the heart of the constitutional dispute was the propriety of the Colorado law, which *inter alia* seeks to preserve the State’s political function from “militant gay aggression”. The pertinent question therefore was whether or not this law was discriminatory against homosexuals, and therefore in violation of the U.S Constitution?

The State of Colorado called an assortment of witnesses including expert ethicists. The plaintiffs also called witnesses, including Nussbaum as an expert ethics witness. This is a classic example of a moral issue where there was no broad ethical consensus as described by Kipnis.¹³¹ The law to be interpreted was the Equal Protection Clause of the U.S Constitution, and whether the Colorado law has impinged this provision. The interpretation of the constitutional provision would invariably be contingent on whether or not the Colorado law was indeed discriminatory against the Colorado gay community. This is in my opinion, is an essentially factual issue. The gay plaintiffs would give factual evidence on how the law changed or transformed their living conditions, their freedom of speech, association, etc. The ethicists on either side would weigh in on the morality or otherwise of the anti-gay Colorado law in its prevailing socio-cultural contexts and not on its constitutionality vis-à-vis the U.S. Constitution per se.

In this context, because they lack legal expertise, ethicists are incompetent to assess the constitutionality of Colorado gay law vis-à-vis the U.S Constitution. However, they do have the requisite expertise to assess the ethical or moral propriety of the Colorado law in the context of its socio-cultural impacts on the Colorado gay community. For instance, in what ways has the law affected their living conditions, job opportunities, social integration, social status, etc.

In this scenario, it is hard to have a broad consensus, and disparate ethical views are inevitable. Whether or not the Colorado law is adjudged immoral or unethical would be a value normative judgment closely linked to the facts of the case as perceived by the ethicists. I mean the facts associated with the circumstances of the plaintiffs’ living conditions since the passage of the Colorado law.

In my opinion, although moral judgments made under the circumstances of the Romer case could amount to propounding normative ethics in the circumstances as claimed by Nussbaum. It cannot usurp the judge’s ultimate prerogative of making normative judgment based on the evaluation of all the evidence adduced

in the case: i.e., whether or not the Colorado law impinged on the Equal Opportunity Clause of the U.S. Constitution, and therefore unconstitutional. In my opinion, the claims by Nussbaum that ethicists' involvement as expert witnesses in core constitutional issues, would amount to ascribing normative authority to them, is highly improbable in the context of standard judicial proceedings.

Another related objection to expert ethics testimony is the propensity for partisanship and corruption by ethicists. In the typically adversarial setting that the courtroom is, expert ethicists' witnesses are prone to take sides with their clients or the party who call them as witnesses. A scenario where two expert ethicists are pitched against each other in support of the respective claims of the feuding litigants, who called and paid their bills, could hardly scale partisanship bar. It is a very volatile scenario where disparate ethical judgments are inevitable, and where opposing expert ethicists could easily morph into 'moral advocates' bent on pitching their clients' agenda. Kipnis himself rightly acknowledges these pitfalls and succinctly articulate them as follows:

“...There is an inherent conflict of interest for all expert witnesses, a conflict that can lead to corruption of the role. At its root is a tension between the obligation of disinterestedness that should characterize all professional judgment and the financial incentive to color judgment to order. Economic arrangement can call one's objectivity to question. There is also the infectious ethos of advocacy, the team-like enthusiasm within which a professional's objectivity and credibility can be lost...”¹³²

The propensity for corruption is indeed one of the numerous arguments against expert ethicists' testimony in the courtroom. The pertinent question is: is it ethically healthy for ethicists to be involved in the courtroom in circumstances that could induce partiality or impair professionalism? I would say yes for the following reasons:

First, moral philosophers almost always disagree on ethical issues in different fora ranging from the academia, scholarship, to public spaces. In fact, diversity of views and a lack of unanimity of viewpoints on the raging moral issues of the day are almost always the hallmarks of moral philosophers. In my opinion, it makes little difference, and it does not raise any ethical problem that moral philosophers could potentially differ in their testimonies in the courtroom. It is what they do all the time albeit in academic literature and other public fora. In the courtroom context, it is the prerogative of the judge to 'pick and choose' from any of the alternative ethical views, using the evidentiary tests of relevancy, admissibility, and reliability.

Second, susceptibility to derogation from disinterestedness or impartiality is a hallmark of all courtroom witnesses, and is always anticipated by the court which has an established systemic mechanism to checkmate such a propensity. As

noted earlier, the Supreme Court in Daubert noted that the judge has a gate keeping role in sifting the evidence adduced for credibility and reliability.¹³³ The process does facilitate the jettisoning of partisan testimony. Additionally, no expert ethics witness could propound an unverifiable theory, principle, or reason, in an adversarial judicial setting and escape peer scrutiny or unrelenting probes of trial lawyers. The system works well to block corruptive or partisan testimony from infiltrating judicial decisions.

A typical courtroom scenario where physicians are called as expert witnesses will better illustrate this point. Let's assume that A sues B for damages for allegedly inflicting bodily injuries on him with a cudgel. To succeed in his lawsuit, A must prove in court that the injuries he sustains were in fact caused by B while battering him with a cudgel. Apart from bringing the cudgel to court as an exhibit, A might call the physician who treated him to give evidence to the effect that the injuries sustained by A were indeed consistent with those that the cudgel in question could cause.

Conversely, B might also call a physician to establish that the injuries were also consistent with other weapons other than the cudgel or even that the injuries could be self-inflicted with weapons other than the cudgel in exhibit. The objective of the second physician would be to cast doubts on the evidence that it was the cudgel in question that was used or to even suggest that A's injuries were self-inflicted. Barring any forensic link (such as DNA) between B and the cudgel, B's expert witness could succeed in disproving that the Cudgel in exhibit caused A's injuries, or B did not use the cudgel or any weapons at all and was not responsible for A's injuries. It is for the judge to evaluate the evidence on both sides and choose the most probable, plausible, or credible in the context of the prevailing factual circumstances. The judge will then arrive at a judgment, after a due consideration of the totality of evidence adduced.

By extrapolation, ethicists' expert testimony, (whether normative, metaethical or descriptive) given especially in the teeth of strong disparate ethical judgments, are no more than ordinary evidence, similar to that of the two physicians cited above. It is for the judge, acting as a gate keeper, to evaluate such evidence and sift them for relevancy, credibility and reliability, and then decides which of the contending testimonies to choose or prefer. This in-built mechanism in the judicial process obviates the dangers of ethicists' giving colored testimony, or testimony tailored to suit their clients' position.

E. Conclusion

This paper takes a critical look at the proprieties of expert ethics testimony in the courtroom. Critics have opposed allowing expert ethics testimony in the courtroom for diverse reasons. These range from the alleged ascription of normative authority to moral judgments, alleged inconsistency of ethics testimony

with the liberal, pluralistic democratic society, to ethics expert testimony as a catalyst for moral laziness, etc...

I argue that these objections are no justification for barring ethicists from the courtroom. All expert witnesses are prone to similar pitfalls, and the system works well nevertheless, because of the in-built mechanism for judicial sifting and evaluation of evidence. Every testimony whether of experts or non-experts are not conclusive on their own rights. They are subject to judicial evaluation, and are weighed for relevancy, credibility, and reliability before reliance could be placed on them. In this context, expert ethics testimony is no exception. The courts and the society at large stand to benefit immensely from continuous reliance on expert ethics testimony in the courtroom. If expert testimony of other professionals could be allowed, there is no justifiable reason for shutting out expert ethics testimony from the courtroom.

¹ See Don Henley. "The Garden of Allah." In *Actual Miles: Henry's Greatest Hits* (1995). 'The Garden of Allah' is amongst the lyrics of the greatest hits album released on the Geffen label by the rock singer/song writer in 1995. See <http://www.wbr.com/donhenley/music.html>

² *Longman Dictionary of Contemporary English*, (Essex: Pearson Education Limited, Fourth Edition, 2005) p. 1897.

³ See for example the U.S. Rule 402 of the U.S. Federal Rules of Evidence (1975) (St. Paul, MN).

⁴ See Rule 403 of the Federal Rule of Evidence, *id.*

⁵ See Rule 103(c), *id.*

⁶ In common law jurisdictions, opinion evidence as a general rule is inadmissible being hearsay evidence. However, exceptions are made in certain cases which include expert testimony based on opinion. See for example the British case of *R v. Abadom* [1983] 1 W.L.R. 126, CA.

⁷ See Samuel R. Gross, "Expert Evidence." *Wisconsin Law Review* (1991), 1113 at 1119. The author mentioned science as one of the numerous fields from where expert witnesses are drawn.

⁸ See Rule 706(d), of the Federal Rules of Evidence, *supra* note 3.

⁹ See Rule 103(c), of the Federal Rules of Evidence, *id.*

¹⁰ See Rule 706(b), of the Federal Rules of Evidence, *id.*

¹¹ See Richard Delgado and Peter McAllen, "The Moralists as Expert Witness", *Boston University Law Review*, vol. 62. No. 4, (July 1982) 869, at 890.

¹² See Lawrence J. Nelson "Is there any Indication for Ethics Evidence? An Argument for the Admissibility of Some Expert Bioethics Testimony." *The Journal of Law, Medicine and Ethics*, vol. 33 (summer 2005), 248 at 257.

¹³ See Rules 703 and 704(a), of the Federal Rules of Evidence, *supra*, note 3.

¹⁴ See *R v. Abadom*, *supra* note 6.

¹⁵ *Id.* See also *H. v. Schering Chemicals* [1983] 1 W.L.R. 143.

¹⁶ See Rule 702 of the Federal Rule of Evidence, *supra* note 3.

¹⁷ See *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993).

¹⁸ *Id.* at 590

¹⁹ See Fiona E. Raitt, "A New Criterion for the Admissibility of Scientific Evidence: The Metamorphosis of Helpfulness." In Helen Reece, ed., *Law and Science: Current Legal Issues Volume 1*, (Oxford: Oxford University Press, 1998), at 153.

²⁰ *Id.* at 155-156.

²¹ See *R. V. Turner* [1975] 1 QB 834.

²² See *R V. Turner*, *id.*, at 841

²³ *Id.*

²⁴ See Kenneth Kipnis, "Confessions of an Expert Witness" *Journal of Medicine and Philosophy* vol. 22, No. 5, (1997), at 325-343.

²⁵ Id.

²⁶ Id.

²⁷ See *United States v. Johnson*, 575 F.2d 1347, 1361 (5th Cir. 1978).

²⁸ See Larry May and Shari Collins Sharratt "What Does Ethics Concern?" in Larry May and Shari Collins Sharratt, *Applied Ethics: A Multicultural Approach*, (New Jersey: Prentice Hall, Inc., 1994) at 4.

²⁹ See Claire Andre and Manuel Velasquez, "What is Ethics?" *Issues in Ethics*, vol. 1 No. 1 (Fall 1987) available at <http://www.scu.edu/ethics/publications/ie/v1n1/homepage.html>.

³⁰ See Marjorie Garber, Beatrice Hanssen, and Rebecca L. Walkowitz, "Introduction: The Turn to Ethics", in Marjorie Garber, Beatrice Hanssen, and Rebecca L. Walkowitz, editors, *The Turn to Ethics*, (New York & London: Routledge, 2000) at vii-xii.

³¹ Id.

³² The United Nations now has a Bioethics Committee which recently advised against human cloning. Similarly, several countries now have ethics committees advising authorities on human research, animal experimentation, and various aspects of medical practice.

³³ Christopher Cowley, "A new Rejection of moral expertise" *Medicine, Health Care and Philosophy* (2005) 8: 273-279. The author pours scorn on any notion of moral expertise; rejecting the theory that a successful academic training in philosophy could confer on beneficiary ethical expertise. He advocates for the banning of the word "ethicist" on grounds of its misleading phonetic associations with genuine experts such as anesthetists, and physicists. He also thinks the word "ethicists" is a disservice to "ideological proponents" such as Communists and Baptists. Id., at 279.

³⁴ Giles R. Scofield, "Ethics Consultation: the Least Dangerous Profession", *Cambridge Quarterly of Healthcare Ethics*, vol. 2, No. 4, (1993) pp. 417-448

³⁵ See for example, Ruth Shalit, "When We Were Philosopher Kings." *The New Republic*, (28 April 1997), at 24.

³⁶ Id.

³⁷ See Giles R. Scofield "Is the Medical Ethicist an Expert?" *Bioethics Bulletin* vol. 3, No. 1 (1994) at 28.

³⁸ Scot D. Yoder, "The Nature of Ethical Expertise". *The Hasting Centre Report*, vol. 28, (1998), at 11-19.

³⁹ Jan Crosthwaite, "Moral Expertise: A Problem in the Professional Ethics of Professional Ethicists", *Bioethics*, vol. 9, Number 5, 1995, 361 at 363.

⁴⁰ Madison Powers, "Bioethics as politics: the limits of moral expertise", *Kennedy Institute of Ethics Journal*, vol. 15, No. 3, (September 2005) at 305-322.

⁴¹ Jan Crosthwaite, "Moral Expertise: A Problem in the Professional Ethics of Professional Ethicists", *supra*, note 39 at 363.

⁴² According to Beauchamp and Childress, we are all apprized of "common morality" as we are thought basic moral standards as we grow up. The authors posit that "common morality" comprises "... moral norms that bind all persons in all places." This would include universally acknowledged basic norms such as the fundamental human rights. They argue further that morality transcends common morality, and encompass "...moral ideals that individuals and groups voluntarily subscribe to, and that only bind the subscribers. Thus there are "universal morality and community-specific morality." See Tom L. Beauchamp and James F. Childress, *Principles of Biomedical Ethics*, 5th edition, (Oxford: Oxford University Press, 2001) at 2-3.

⁴³ The word: 'ethics' in italics is my own addition. See Don Henley, "The Garden of Allah", *supra* note 1.

⁴⁴ See Jan Crosthwaite, "Moral Expertise: A Problem in the Professional Ethics of Professional Ethicists", *supra* note 39, at 363.

⁴⁵ Id.

⁴⁶ Id.

⁴⁷ Id., at 363-364.

⁴⁸ Id., at 364.

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- ⁴⁹ Id.
- ⁵⁰ See Giles R. Scofield “Is the Medical Ethicist an Expert?” *supra*, note 37 at 28.
- ⁵¹ See Christopher Cowley, “A new Rejection of moral expertise” *supra*, note 33 at 277-278.
- ⁵² Id., at 278.
- ⁵³ Id.
- ⁵⁴ See Tom L. Beauchamp and James F. Childress, *Principles of Biomedical Ethics*, 5th edition; *supra*, note 42 at 2-3.
- ⁵⁵ Id.
- ⁵⁶ Id.
- ⁵⁷ See Scot D. Yoder, “The Nature of Ethical Expertise.” *The Hasting Centre Report*, *supra*, note 38 at 11-19.
- ⁵⁸ See Jan Crosthwaite, “Moral Expertise: A Problem in the Professional Ethics of Professional Ethicists”, *supra*, note 39, 361 at 363.
- ⁵⁹ See Ruth Shalit, “When We Were Philosopher Kings.” *Supra* note 35 at 24.
- ⁶⁰ See Robert M. Veatch, “Generalization of Expertise”, 1 *Hasting Centre Studies*, 29, (1973) at 29.
- ⁶¹ See Bethany Spielman and George Agich, “The Future of Bioethics Testimony: Guidelines for Determining Qualifications, Reliability, and Helpfulness.” *San Diego Law Review*, vol. 36, (1999) 1043, at 1048.
- ⁶² Id.
- ⁶³ Id., at 1049.
- ⁶⁴ See *People v. Beckley*, 456 N.W.2d 391, 406 (Mich. 1990).
- ⁶⁵ See *People v. Beckley*, Id; Bethany Spielman and George Agich, “The Future of Bioethics Testimony: Guidelines for Determining Qualifications, Reliability, and Helpfulness.” *Supra* note 61 at 1049.
- ⁶⁶ See Beauchamp and Childress, *Principles of Biomedical Ethics*, *supra*, note 42 at 2-3.
- ⁶⁷ See Ruth Shalit, “When We Were Philosopher Kings.” *Supra* note 35 at 24
- ⁶⁸ See Kenneth Kipnis, “Ethics Expertise in Civil Litigation” *Journal of Law, Medicine & Ethics* (summer 2005) at 274-278.
- ⁶⁹ See Virginia A. Sharpe and Edmund D. Pellegrino, “Medical Ethics in the Courtroom: A Reappraisal, *Journal of Medicine & Philosophy*, vol. 22, (1997), 373 at 378.
- ⁷⁰ See *Wetherill v. University of Chicago*, 565 F. Supp. 1553 (N.D.Ill. 1983). See also Bethany Spielman and George Agich, “The Future of Bioethics Testimony: Guidelines for Determining Qualifications, Reliability, and Helpfulness.” *Supra*, note 61 at 1048.
- ⁷¹ See *Wetherill v. University of Chicago supra*, note 70 at 1563.
- ⁷² See Ruth Shalit, “When We Were Philosopher Kings, *supra* note 35 at 24,
- ⁷³ See *Wetherill v. University of Chicago supra*, note 70 at 1563.
- ⁷⁴ Id., at 1564.
- ⁷⁵ Expert ethicists’ testimonies are most common in biomedical related issues. See for example *Planned Parenthood v. Verniero*, 22 F. Supp. 2d 331, 334 (D.N.J. 1998). The case dealt with ethics testimony regarding partial abortion. For a list of cases in which expert ethicists have testified, see Bethany Spielman and George Agich, “The Future of Bioethics Testimony: Guidelines for Determining Qualifications, Reliability, and Helpfulness.” *Supra*, note 61 at 1044-1046.
- ⁷⁶ See for example Kenneth Kipnis, “Ethics Expertise in Civil Litigation” *Journal of Law, Medicine, & Ethics*, *supra*, note 68; Edward J. Imwinkelried, “Expert Testimony by Ethicists: What Should be the Norm?” *Temple Law Review*, vol. 76, (spring 2003) at 91-128, (The author *inter alia*, raised the query on whether expert testimony by ethicists pass muster under the new admissibility standards in the U.S.) Id., at 95, Bethany Spielman, “The Future of Bioethics Testimony: Guidelines for Qualifications, Reliability, and Helpfulness”, *supra*, note 61 at 1043-1075.
- ⁷⁷ See Rule 702 of the Federal Rules of Evidence, *supra* note 3.
- ⁷⁸ See *Daubert v. Merrell Dow Pharmaceuticals*, *supra* note 17 at 579, 590.
- ⁷⁹ Id.
- ⁸⁰ Id.
- ⁸¹ See *Kumho v. Tire Co. v. Carmichael*, 526 U.S. at 137.

⁸² See Fiona E. Raitt, "A New Criterion for the Admissibility of Scientific Evidence." *Supra*, note 19 at 167. The author argues that social and behavioral sciences are indeed sciences, and that social and behavioral evidence should comply with the rigorous admissibility conditionality in the Daubert case. *Id.*

⁸³ *Id.*, at 155. Unlike physical and medical sciences, the trier of fact is said to be sufficiently informed through personal experiences, about human behavior and conditions. *Id.*

⁸⁴ See Edward Imwinkelried, "Expert Testimony by Ethicists: What Should be the Norm?" *Supra*, note 76 at 106.

⁸⁵ The Supreme Court in Daubert case noted that trial judges have a 'gate keeping' function of vetting expert testimony for reliability. See *Daubert v. Merrell Dow Pharmaceutical*, *supra* note 17 509, at 588.

⁸⁶ See Ruth Shalit, "When We Were Philosophers King." *Supra*, note 35 at 24.

⁸⁷ See Bethany Spielman and George Agich, "The Future of Bioethics Testimony: Guidelines for Determining Qualifications, Reliability, and Helpfulness." *Supra*, note 61, 1043 at 1058-1059. The authors appeared to draw their conclusions on decisions in *United States v. Jones*, 107 F.3d 1147, 1157 (6th Cir. 1997), where the court held that Daubert decision did not apply to a handwriting analysis expert, hand writing analysis being a 'non-science' genre; and *Berry v. City of Detroit*, 25 F.3d 1342, 1348 (6th 1994), where the court held that a sociologist was not qualified to testify that failure to discipline police officers was proximate cause of police shooting.

⁸⁸ There is no single conception of what science is. An internet query would reveal numerous definitions of science and what scientists generally do.

⁸⁹ See Collins Paperback Thesaurus, 4th edition, (Glasgow: Omnia Books Ltd, 2001) at 642.

⁹⁰ *Id.*

⁹¹ See *Daubert v. Merrell Dow Pharmaceutical*, *supra*, note 17 at 590.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ See *Kumho Tire Company, Ltd. v. Carmichael*, *supra* note 81 at 137. The U.S. Supreme Court held *inter alia* that Daubert decision applied not only to 'scientific' testimony, but to all genres expert testimony proffered in Federal courts.

⁹⁶ For a comprehensive list of cases in which bioethicists' testimonies were admitted, see Bethany Spielman and George Agich, "The Future of Bioethics Testimony: Guidelines for Determining Qualifications, Reliability, and Helpfulness." *Supra*, note 61 at 1045-1046.

⁹⁷ See *Planned Parenthood v. Verniero*, 22 F. Supp. 2d 331, 334 (D.N.J. 1998), cited in Bethany Spielman et al., *id.*

⁹⁸ See *Andrade Garcia v. Columbia Med. Ctr.*, 996F. Supp. 617, 626 (E.D. Tex. 1998). Cited in Bethany Spielman et al., *id.*

⁹⁹ See *Zenith Lab. Inc. v. Bristol-Myers Squibb Co.*, 24 U.S.P.Q. 2d (BNA) 1652, 1656, 1664 (DNJ. 1992). Cited in Bethany Spielman et al., *id.*

¹⁰⁰ See Richard Delgado and Peter McAllen, "The Moralist as Expert Witness." *Supra*, note 11, 869, at 875.

¹⁰¹ See Ronald Dworkin, *Taking Rights Seriously*, (London: Gerald Duckworth & Co., 1977) at 1-2. The author opines that lawyers are usually at a loss on how to tackle such non-technical ethical problematic as the justness or fairness of a law. The authors argues that such moral issues certainly "...lie beyond the ordinary techniques of the practicing lawyers." *Id.*, at 1.

¹⁰² See footnotes 97, 98 & 99 above, *supra*.

¹⁰³ See Richard Delgado and Peter McAllen, "The Moralist as Expert Witness." *Supra* note 11 at 898-899.

¹⁰⁴ *Id.*, at 899. See also Giles R. Scofield "Is the Medical Ethicist an Expert?" *Supra*, note 37 at 28.

¹⁰⁵ See Richard Delgado and Peter McAllen, "The Moralist as Expert Witness." *Supra* note 11 at 898-899.

¹⁰⁶ *Id.*

¹⁰⁷ Kenneth Kipnis, "Confessions of an Expert Ethics Witness". *Journal of Medicine and Philosophy*, *supra*, note 24 at 325-343.

¹⁰⁸ See Richard Delgado and Peter McAllen, “The Moralist as Expert Witness.” *Supra* note 11 at 869. Although ethical testimony has been categorized into descriptive, metaethical and normative, the authors acknowledge that the concepts do overlap and are imperfect. *Id.*, at 877 See also Edward Imwinkelried, “Expert Testimony by Ethicists: What Should Be the Norm?” *supra*, note 76, 91 at 95-99. (Citing Delgado and McAllen on the categorization of ethical testimony into descriptive, metaethical and normative, and the weakness of such broad categorization).

¹⁰⁹ See Richard Delgado and Peter McAllen, “The Moralist as Expert Witness.” *Supra* note 11 at 877. (Particularly footnote 20). The authors referred to the New York case of *Friedman v. New York*, 54 Misc. 2d 448, 282 N.Y.S.2d 858 (N.Y. Ct. Cl. 1967), to illustrate an instance of descriptive ethical testimony. A sixteen-year-old New York girl, raised in an ultra-orthodox Hebrew tradition, became hysterical, and jumped from the mountainside chair-lift, in which she had been trapped with a male companion. She sustained facial injuries. The lift had been shut down while they were descending. She had felt morally compelled not to spend the night alone with a man. She sued the State for negligent operation of the lift, and called as a witness, a Rabbi trained in Hebrew law. The witness contended that under the circumstances, the girl was justified in jumping down from the lift, as this was consistent with her religious beliefs.

¹¹⁰ Delgado and McAllen posits that such communal mores are open-ended, and could include the “nature of an act, or a person’s “moral standing” in the community. See Delgado and McAllen, *supra* note 11 at 869.

¹¹¹ See Delgado and McAllen, *supra* note 11 at 877 (footnote 18).

¹¹² See Edward Imwinkelried, “Expert Testimony by Ethicists: What Should Be the Norm?” *Supra*, note 76, at 91.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ See Delgado and McAllen, *supra* note 11 at 879.

¹¹⁶ *Id.*, at 869.

¹¹⁷ Bethany Spielman and George Agich, “The Future of Bioethics Testimony: Guidelines for Determining Qualifications, Reliability, and Helpfulness”, *supra*, note 61, 1043, at 1048.

¹¹⁸ See Richard Delgado and Peter McAllen, “The Moralist as Expert Witness”, *supra* note 11 at 881.

¹¹⁹ See Edward Imwinkelried; *supra* note 76, at 128.

¹²⁰ See Richard Delgado and Peter McAllen, *supra* note 81 at 881.

¹²¹ *Id.*, at 869.

¹²² See Edward J. Imwinkelried, “Expert Testimony by Ethicists: What Should be the Norm?” *Supra*, note 76 at 106.

¹²³ See Edward Imwinkelried; *supra* note 76 at 114-122.

¹²⁴ See Martha C. Nussbaum, “Moral Expertise? Constitutional Narratives and Philosophical Argument”. *Metaphilosophy*, vol. 33, No. 5, October 2002, pp. 502-520.

¹²⁵ Edward J. Imwinkelried, “Expert Testimony by Ethicists: What Should be the Norm?” *Supra*, note 76 at 106.

¹²⁶ *Id.*

¹²⁷ Although their decisions sometimes amount to law making.

¹²⁸ See *Daubert v. Merrell Dow Pharmaceuticals*, *supra* note 17, 509 at 588.

¹²⁹ See Martha C. Nussbaum, “Moral Expertise? Constitutional Narratives and Philosophical Argument”. *Supra*, note 124 at 502-520.

¹³⁰ *Id.*

¹³¹ See Kenneth Kipnis, “Confessions of an Expert Witness” *Journal of Medicine and Philosophy* *supra*, note 24 at 325-343. Kipnis’ ethics testimony on the current work in medical ethics relating to the standards for withdrawing nutrition and hydration from decisionally capacitated and incapacitated patients in Hawaii appears rather straight forward and atypical. It is devoid of the competing ethical views in the inherently adversarial judicial evidentiary paradigm, due to the near consensus in Hawaii on the ethical issues involved at the time. Kenneth Kipnis describes such a case as a “consensus issues” scenario as opposed to a “knife-edge issues” scenario where there is a lack of a broad consensus amongst ethicists on the ethical issues at stake.

¹³² *Id.*

¹³³ See *Daubert v. Merrell Dow Pharmaceuticals*, *supra*, note 17, 509, at 588.