Letters to the Editor

Argument Against Ethicists' Testimony Logically Flawed

Dear Madam: As I understand Giles Scofield's argument against ethicists offering expert testimony (*JLME*, Fall 2000), it rests, in part, on his distinction between knowing and thinking and, in part, on the classification of metaethics, descriptive ethics, and normative ethics. It goes like this: As long as ethicists, in their testimony, confine themselves to meta- and descriptive ethics, they are acting on the basis of knowledge which is not readily available outside the professional training of ethicists. As a result, when ethicists are called upon for expert testimony, they are in a position by virtue of this training to make a distinctive contribution that other professionals could not make. However, once ethicists offer testimony in the form of normative ethics, they have moved from presenting something derived from objective (communicable among several persons) knowledge to presenting something based on subjective (non-communicable) thinking, which is no better and no worse than, for example, the thinking of a dozen people randomly selected from the telephone directory.

If you collapse the two distinctions into one, you find that metaethics, descriptive ethics, and knowing belong on one side; normative ethics and thinking belong on the other. But is this restructured distinction as clean cut as Scofield's argument entails? Consider the knowing-thinking distinction. Clearly, there is a lot of thinking that does not result in knowing, just as there is a pre-reflective knowing that is more instinctual than thoughtful. But it is also the case that much of our knowing is the result of our thinking — that is, knowledge is the direct outcome of a process of logical ordering that is thinking. In other words, thinking and knowing are not such that they are always the discrete processes suggested by Scofield.

Similarly, consider the descriptive, metaethics/normative ethics distinction. That theoretical reasoning (descriptive and metaethics) is different from practical reasoning (normative ethics) is uncontestable. But this does not mean, as Scofield assumes, that they function in isolation from each other. When you stop to think, it is hard to imagine any such thing. For example, the ethicist *qua* ethicist who testifies that a course of action is morally justified because of the ensuing outcomes is doing so, not on the basis of personal opinion but on the basis of a particular metaethics, namely teleology or consequentialism. Under cross-examination, this expert witness would not justify her ethical judgment by saying something like, "You ought to do this or that because I think so as a matter of personal preference," or, "You ought to do this or that because I just think it's the right thing to do." She would, instead, testify to the fact that any course of action will lead directly or indirectly to certain outcomes. As a result, the rightness or wrongness of the outcomes will justify taking or not taking, as the case may be, a particular course of action. The relevant point, and the one that Scofield has utterly ignored, is that there is an epistemological complementarity, for example, between metaethics and normative ethics that protects the latter from being nothing more than the expression of a personal opinion about what ought to be done and provides certain criteria that can reasonably be used to justify the recommended course of action.

Whereas Scofield likes to begin with Socrates, let me end with him. In the *Crito*, Socrates does some normative ethics of his own when he decides he ought not break the law by escaping from prison. How he makes the decision illustrates what has been discussed above. The decision is not based on personal preference, but on three principles: one, not to harm others; two, not to violate agreements; and three, to respect one's teachers. As William Frankena observed, having established the principles, Socrates added a premise

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to each in the form of a statement of fact, only then applying the principle to the matter at hand. In other words, metaethics functions to justify normative judgments.

The issues raised by Scofield are of considerable importance to all as ethics is called upon to engage with an ever more morally complex world. As an ethicist, however, I feel compelled to say to Mr. Scofield, the lawyer, that I wish I could practice law as easily as he purports to practice ethics. And as someone who claims to know something of ethics, he might well recall that a little knowledge can be dangerous.

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Test of Admissibility Should Be Framed Another Way

Dear Madam: The lively debate between Professor Baylis and Mr. Scofield about the admissibility of bioethics expert testimony is a bit off the mark (*JLME*, Fall 2000). Framing the debate about admissibility in terms of normative, descriptive, and metaethical testimony — though common among ethicists — is an evidentiary dead end.

These categories have never been recognized as relevant to the question of admissibility in U.S. courts and, for reasons summarized in Spielman and Agich, "The Future of Bioethics Testimony," *San Diego Law Review*, 36 (1999): 1043, are unlikely to become relevant. Judging from the scant information that Ms. Baylis offers about Canadian standards of admissibility of expert testimony, the normative-descriptive-metaethical labels are not relevant to Canadian evidence law either. Superimposing an (outdated?) philosophical construct onto evidentiary standards does not significantly advance the debate about admissibility. What would advance the debate, at least for many U.S. courts, is whether the method by which Professor Baylis derived each of her assertions is rigorous enough to qualify as knowledge in a legal arena. Mr. Scofield addresses the problem of knowledge versus self-validating beliefs, but his standards for knowledge are, in one respect, a bit narrow, at least for many U.S. courts. Not all expert testimony must be scientific, but testimony does need to be reliable. In order to be reliable, an assertion must be derived by a reliable method, not be riddled with analytical gaps, and not come from a field that is merely self-validating. Depending on how rigorously these criteria are applied, a carelessly derived "descriptive" assertion and most, if not all, "metaethical" assertions could be as inadmissible as any "normative" one.

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Two Courts Rule Against Admissibility of Testimony

Dear Madam: After the publication of the *Journal* which contained a discussion of the admissibility of expert testimony by medical ethicists (JLME, Fall 2000), two courts ruled on this matter in a manner that supports my position.

In *In re Diet Drugs*, 2001 U.S. Dist. LEXIS 1174 (E.D. Pa., February 1, 2001), the court applied the *Daubert* test to determine whether a medical ethicist, John La Puma, M.D., could testify that American Home Products had failed to provide appropriate warnings in connection with its drugs, as a clinical ethicist with expertise in "truth, honesty, and integrity."

The court concluded that Dr. La Puma's proffered testimony could not withstand scrutiny under *Daubert* because, *inter alia*: (1) his experience and expertise in clinical ethics were, at best, marginally relevant to the matters being litigated; (2) his testimony could not assist the trier of fact because "anyone who reads and understands the English language [could] interpret and apply" the relevant codes of conduct; and (3) the court had "serious doubts about the reliability of the methodology employed by Dr. La Puma," which it found to be "inherently susceptible to subjective personal influence and lacking indicia of reliability."

In *Hall v. Anwar*, 774 So. 2d 41 (2000), the Florida Court of Appeals ruled that testimony of a medical ethicist should not have been admitted in a medical malpractice action because the ethicist was not qualified to testify about a medical standard of care nor the legal issue of negligence. As the court said, "The standard of care ... still involves the standard of care owed by a ... health care provider and not that owed by an ethicist." Although the court ruled that the ethicist's expert testimony should not have been admitted, it also concluded that its admission constituted harmless error, in that it was cumulative and not emotional, overtly religious, or sensitive. Indeed, the court observed that the testimony was "very abstract," in that it referred to the metaphysical and epistemological issues of living in a post-Kantian world. As the court observed, "It is not surprising that all of the lawyers essentially ignored this testimony in their closing arguments."

While I doubt that these cases, which represent instances in which the testimony of medical ethicists as experts has been objected to, will lay to rest the controversy over whether such testimony ought to be admitted, they do lay to rest any suggestion that the admissibility of such testimony is somehow indisputable or unquestionable. That being the case, the points of view exchanged between Professor Baylis and myself reflect and will likely contribute to a lively and important debate that is occurring in the courts as well.

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